

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 26, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-179
Petitioner	:	A.C. No. 05-04461-03526
	:	
	:	Docket No. WEST 96-241
	:	A.C. No. 05-02820-03786
	:	
	:	Docket No. WEST 96-248
v.	:	A.C. No. 05-02820-03787
	:	
	:	Docket No. WEST 96-249
	:	A.C. No. 05-02820-03788
	:	
BASIN RESOURCES, INCORPORATED,	:	Docket No. WEST 96-250
Respondent	:	A.C. No. 05-02820-03789
	:	
	:	Docket No. WEST 96-251
	:	A.C. No. 05-02820-03790
	:	
	:	Docket No. WEST 96-271
	:	A.C. No. 05-04461-03527
	:	
	:	Docket No. WEST 96-285
	:	A.C. No. 05-02820-03791
	:	
	:	Docket No. WEST 97-51
	:	A.C. No. 05-02820-03792
	:	
	:	Golden Eagle Mine/New Elk
	:	Preparation Plant

DECISION

Appearances: Edward Falkowski, 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 penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (MSHA@), against Basin Resources, Inc. (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 112 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.

The Secretary filed a motion to amend the petitions for penalty to add Entech, Inc., and Montana Power Company as respondents in these and other Basin Resources cases. For the reasons set forth in *Basin Resources, Inc.*, 19 FMSHRC 699, 699-704 (April 1997), the Secretary=s motion is denied.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Docket No. WEST 96-179, New Elk Preparation Plant

1. Citation No. 4057430

On January 18, 1995, MSHA Inspector Earl Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 77.1606(c). In the citation, the inspector alleged that the off-side bottom step on a refuse haulage truck was broken off. The citation states that the off-side steps are used to fuel the truck, clean the windows, and to check the air conditioner. He determined that the violation was not significant and substantial (AS&S@) and that Basin Resources= negligence was moderate. The Secretary proposes a penalty of \$288 for the alleged violation. The safety standard states that equipment defects affecting safety shall be corrected before the equipment is used.

Inspector Simmons testified that he was concerned that someone could suffer an injury when fueling the truck. (Tr. 36). The steps were not used to enter or exit the cab of the truck. Tom Sciacca, the mine=s former accident prevention coordinator, testified that the mine used a fuel truck when putting fuel into the cited truck. As a consequence, he stated that the off-side steps were never used to fuel the refuse truck. (Tr. 43). He also testified that the off-side steps were not used for any of the other purposes.

Basin Resources contends that it did not violate the safety standard because the alleged defect did not affect safety. I disagree and I find that the broken step was a defect affecting safety. Although I credit the testimony of Mr. Sciacca, I find that an employee could attempt to use the steps to fuel the truck or to perform some sort of maintenance function, even though that was not the typical practice. The interpretation of safety standards under the Mine Act cannot ignore the vagaries of human conduct. @ *Thompson Brothers Coal Co.*, 6 FMSHRC 2094, 2097 (September 1984)(citations omitted). Without thinking about the risks, an employee could attempt to use the off-side steps to perform a task. I find that the Secretary established a violation, but that the violation was not serious. A penalty of \$75 is appropriate for this violation.

2. Citation No. 4057433

On January 18, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 77.215-1. In the citation, the inspector alleged that the permanent identification markers for a refuse pile did not set forth the name associated with the refuse pile or the name of the owner of the refuse pile. He determined that the violation was not S&S and that Basin Resources=negligence was moderate. The Secretary proposes a penalty of \$204 for the alleged violation. The safety standard states, in part, that a permanent identification marker must be located at all refuse piles that shows the identification number, the name associated with the pile, and the person owning, operating, or controlling the pile.

Inspector Simmons testified that there was a sign at the entrance to the preparation plant marked ANew Elk Mine,@but there was no separate identification marker for the refuse pile. (Tr. 48-49; Ex. R-A). He stated that the sign adjacent to the refuse pile contained the identification number for the pile but that the name of the owner was not legible. He also stated that the refuse pile was used to dump mine refuse. Mr. Sciacca testified that there was a sign near the refuse pile at the entrance to the mine that gave the name of the mine operator and the mine ≈ I.D. number. (Tr. 56-57; Ex. R-A). He also testified that there was a sign on the public highway a short distance away that provided the name of the mine and the mine operator. *Id.* Basin Resources argues that the citation should be vacated because all of the required information was provided, albeit not on the same sign.

I find that the Secretary established a violation, but that the violation was of a technical nature only. All of the required information was provided in the immediate vicinity of the refuse pile. It was readily obvious who owned the refuse pile. Nevertheless, the designated marker was not complete as set forth by Inspector Simmons. I find that the violation was not serious and that Basin Resources was not negligent. A penalty of \$20 is appropriate.

3. Citation No. 4057435

On January 23, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 77.400(c). In the citation, the inspector alleged that the guard for the inside belt press conveyor drive roller did not extend a sufficient distance to protect persons from coming in contact with the belt and roller. The citation states that openings were present on both

sides of the drive roller directly in front of the belt pinch-points. He determined that the violation was S&S and that Basin Resources=negligence was moderate. The Secretary proposes a penalty of \$431 for the alleged violation. The safety standard states, in part, that guards at conveyor-drive pulleys shall extend a distance sufficient to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley.

Inspector Simmons testified that the opening on the right side was one by six feet and that the opening on the left side was eight inches by six feet. (Tr. 61). He stated that he observed two people working in the area. He believed that they could reach in or fall into the cited pinch points and sustain a serious injury. (Tr. 62-63). Mr. Sciacca testified that there was a steel structure around the belt that supported the rollers. (Tr. 66-67). He stated that the rollers were at least 16 to 20 inches inside this steel structure so that an employee could not reach the pinch points unless he were deliberately trying to do so.

The safety standard provides that guards shall extend a sufficient distance to prevent a person from reaching behind the guard and becoming caught between the belt and the pulley. I credit the testimony of Mr. Sciacca that the pinch-points were protected by the steel structure of the belt. Nevertheless, there is little dispute that contact was possible. Accordingly, I affirm the violation, but I find that it was not S&S. The record shows that it was not reasonably likely that anyone would come into contact with the pinch-points. A penalty of \$75 is appropriate.

4. Citation No. 4057436

On January 23, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 77.400(c). In the citation, the inspector alleged that the guard for the silo transfer belt was not extended a sufficient distance to prevent a person from reaching over the top of the side guards and contacting the belt and tail pulley on both sides. He determined that the violation was not S&S and that Basin Resources =negligence was moderate. The Secretary proposes a penalty of \$288 for the alleged violation.

Inspector Simmons testified that the guarding was sufficient around the sides but that he was concerned that someone could reach over the guards and come in contact with the pinch-points. (Tr. 77). He stated that a miner would have to intentionally reach over the guard to come into contact with the pinch-point, which he agreed was unlikely. Mr. Sciacca testified that there was no reason why a miner would reach over the guarding at the cited location. (Tr. 81-82). He testified that this condition had existed for about two years and had never been cited by MSHA. He stated that the area has been inspected by MSHA about twice a year.

I find that the Secretary established a violation since someone could reach around the guard and come into contact with the pinch-point. I find that the violation was not serious and that Basin Resources=negligence was less than moderate because of the nature of the violation and the fact that it had never been cited. A penalty of \$50 is appropriate.

5. Other Citations

Basin Resources also contested 11 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

B. Docket No. WEST 96-241, Golden Eagle Mine

1. Citation No. 3590049

On October 24, 1995, MSHA Inspector Jeffery Fleshman issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.1100-2(e)(2). In the citation, the inspector alleged that a portable fire extinguisher and 240 pounds of rock dust were not provided at the electric trickle duster in the 5th left development section in entry No. 3, between crosscut Nos. 17 and 18. He determined that the violation was not S&S and was caused by Basin Resources =moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides that a portable fire extinguisher and rock dust shall be provided at each temporary electrical installation.

Inspector Fleshman testified that there was rock dust and a fire extinguisher about 20 feet away but that these materials were for a different electrical installation. (Tr. 10-11, 13). Jeffery Salerno, a former safety inspector with Basin Resources, testified that there was a fire extinguisher at the auxiliary fan about ten feet away. (Tr. 22; Ex. R-B). Kay Hallows, Basin Resources=former safety director, testified that it is not safe to have rock dust and an extinguisher right at an electrical installation because it might not be available in case of a fire. (Tr. 24). If an extinguisher is too close the heat and flame will prevent it from being used. He admitted that there was only one fire extinguisher for the fan and the trickle duster. Inspector Fleshman considered the fan and trickle duster to be two electrical installations that require two extinguishers. (Tr. 29).

Inspector Fleshman issued the citation because the electric trickle duster, a temporary electrical installation, was not provided with a fire extinguisher or rock dust. He did not dispute Mr. Hallows= testimony that it is appropriate to have these materials some distance away so that they are accessible in the event of a fire. Since the fan was a separate temporary electrical installation, Basin Resources could not rely on the extinguisher or rock dust provided for that installation. I affirm the violation, but I find that it was not serious and that Basin Resources = negligence was low. Firefighting supplies were readily available. A penalty of \$50 is appropriate.

2. Citation No. 4057356

On December 28, 1995, MSHA Inspector Melvin Shiveley issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.1100(2)(f). In the citation, the inspector alleged that fire protection was not provided where five-gallon cans of hydraulic oil and automatic transmission fluid were stored in crosscut No. 1, off entry No. 9, in the west mains. He determined that the violation was not S&S and that Basin Resources = negligence was moderate. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides, in part, that two portable fire extinguishers and 240 pounds of rock dust shall be provided at each permanent underground oil storage station.

Inspector Shiveley testified that it appeared to him that Basin Resources had established an oil storage area and failed to provide the required fire protection. (Tr. 85). It appeared that the oil cans had been in the area for some time. There were six five-gallon containers present and they were not all full. The cited area was not in a working section (Tr. 87). Mr. Hallows testified that the cited area was not a permanent oil-storage station. (Tr. 93). Someone had simply set down six cans temporarily. James Peterson, a former safety inspector for Basin Resources, testified that the mine had several areas designated as oil-storage stations and that the cited area was not one of them. (Tr. 389).

I find that the Secretary did not establish a violation. There is no indication that the cited area was a permanent oil-storage station and it did not qualify as a temporary storage station in a working section. I credit the testimony of Messrs. Hallows and Peterson that the cans were temporarily in the cited area. Accordingly, the citation is vacated.

3. Citation No. 4057237

On February 12, 1996, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.351(f)(3). At the hearing, the parties stipulated that a violation occurred, but that Basin Resources = negligence was low. (Tr. 98). The inspector determined that the violation was not S&S and that Basin Resources = negligence was moderate. The Secretary proposes a penalty of \$903 for the alleged violation. Based on the stipulation, I find that a penalty of \$50 is appropriate for this violation.

4. Citation No. 4057397

On March 28, 1996, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.364(g). In the citation, the inspector alleged that the weekly examiner failed to certify the SE 7 seal in the east mains by his date, time, and initials that the seal had been examined every seven days. The citation states that the last recorded date was March 18, 1996. He determined that the violation was not S&S and that Basin Resources = negligence was moderate. The Secretary proposes a penalty of \$431 for the alleged violation. The safety standard provides, in part, that the person making weekly examinations indicate, by his initials, the date and time of the examination.

Inspector Simmons testified that Mr. Sciacca believed that the examiner put an incorrect date on the board. (Tr. 99). Because the board showed two sets of initials with the same date,

the inspector believed that it was quite possible that the examination had been made but that the date of the most recent examination was incorrect. (Tr. 101). The inspector is not disputing that the examination was made. (Tr. 102). Mr. Salerno testified that he performed the weekly examination within seven days but that he accidentally put down the date of his prior examination. (Tr. 103; Ex. R-E).

I credit the testimony of Mr. Salerno. Basin Resources contends that the citation should be vacated because the examination had been made. The cited safety standard, however, requires that examinations be recorded. This case can be distinguished from *LJS Corp.*, 14 FMSHRC 1278 (August 1992) cited by Basin Resources. In that case the operator was charged with a failure to make a required examination. I find that the Secretary established a technical violation of the safety standard, but that the evidence established that the examination had in fact been made. I find that the violation was not serious and that any negligence was very low. A penalty of \$20 is appropriate.

5. Other Citations

Basin Resources also contested six other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

C. Docket No. WEST 96-248, Golden Eagle Mine

1. Citation No. 4058009

On October 6, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.400(a). In the citation, the inspector alleged that the guard for the Amerigear on both sides of the rope drum shaft were not adequate to prevent a person from reaching over or under the railings and contacting the moving shaft gear. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources = moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides, in part, that gears, sprockets, pulleys, shafts, and similar moving parts which may be contacted by persons and which may cause injury to persons shall be guarded.

Inspector Simmons testified that he was concerned that someone could reach over the railing that was present and come in contact with bolt heads that protruded from the drive shaft. (Tr. 110; Ex. R-F). He admitted that the hoistman is the only person normally in the area and that his controls are not in the cited area. Mr. Hallows testified that the cited drum shaft rotates at a slow rate of speed and that it can be stopped instantaneously. (Tr. 116-17).

The evidence establishes that the cable drum drive shaft was not fully guarded to prevent persons from contacting it. A persons =s clothing could become entangled and an injury could result. I find that the violation was not serious because of the location of the moving parts. The record shows that it was not reasonably likely that anyone would be injured as a result of this violation. A penalty of \$200 is appropriate.

2. Citation No. 4058010

On October 10, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.512. In the citation, the inspector alleged that a complete weekly electrical examination had not been conducted on all electrical equipment. The citation states that the I.S. (intrinsically safe) circuit in the bleeders from N.W. 1 through N.W. 6 had not been examined since August 30, 1995. He determined that the violation was not S&S and was caused by Basin Resources=low negligence. The Secretary proposes a penalty of \$431 for the alleged violation. Section 75.512 provides, at 512-2, that all electric equipment be examined on a weekly basis.

Inspector Simmons testified that the AMS monitoring system was operating and that the operator could not inspect the entire circuit because of a previously issued imminent danger order. (Tr. 123-24). He stated that because the operator built only one entry into the area and that entry was closed off, the examinations had not been performed. He believed that the violation created a hazard. (Tr. 125-26). Mr. Hallows testified that the AMS monitoring system provided information about the conditions in the area, including methane and oxygen levels, to a computer on the surface, so that one did not need to fully examine the circuit underground. (Tr. 129-30).

Basin Resources argues that the citation should be vacated because it could not examine the circuit as a result of the imminent danger order that prevented miners from entering the area. For the reasons set forth in another Basin Resources case, I find that the Secretary established a violation. 19 FMSHRC 1391, 1405 (August 1997). I have taken into consideration the fact that the entry was blocked and subject to an imminent danger order when evaluating the operator =s negligence. A penalty of \$50 is appropriate.

3. Citation No. 4058011

On October 10, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.202(a). In the citation, the inspector alleged that loose coal ribs were present in the intake travelway of the 4th left No. 2 entry between crosscuts 28 and 30 and between crosscuts 36 and 37. The citation states that the loose rib was on the left side of the entry and varied in size. It states that the loose ribs were up to six feet high and seven feet wide and six inches thick. He determined that the violation was S&S and was caused by Basin Resources=moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation. Section 75.202(a) provides, in part, that the roof and ribs of Aareas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls@of roof or ribs.

Inspector Simmons estimated that the loose rib extended for a distance of about 300 feet. (Tr. 132). He stated that the loose ribs were along the intake travelway. He believed that a miner could be seriously injured if a rib fell and hit him and that the loose areas were leaning towards the travelway. (Tr. 133). He did not know how long the condition existed and he did not observe anyone pulling down the ribs. Mr. Salerno testified that one cannot determine whether a rib in the Golden Eagle Mine is loose without testing it with a rod or other device. (Tr. 138, 144). He stated that you usually cannot determine whether a rib is loose by merely looking at the rib. A cracked rib could be tied into the seam at the side or the bottom. (Tr. 139). He stated that after the citation was issued, the condition was abated by barring down the ribs. Mr. Salerno testified that it took a considerable amount of effort to get the ribs down. (Tr. 141; Ex. R-K). He also testified that a Basin Resources employee was in the process of barring down some of the ribs at the time of the inspection. *Id.* Mr. Hallows testified that he spoke with the employee who was barring down the area. Mr. Hallows stated that some of the ribs caused concern to the employee and that he barred them down. (Tr. 145). Thus, the employee removed all of the loose ribs that were of concern to him.

I find that the Secretary established a violation, but that the violation was not S&S. I credit the testimony of the inspector and find that at least some of the cited ribs were loose or in danger of falling. It is not always necessary to test a rib to determine whether it is loose. Inspector Simmons was experienced in examining ribs at coal mines. (Tr. 173). The Secretary did not establish that it was reasonably likely that anyone would be injured by the violation. I credit the testimony of Basin Resources witnesses that an employee had barred down the areas where the ribs were most likely to fall. At least some of the cited ribs were loose but they did not present a hazard of immediate collapse. There has been no showing that Basin Resources failed to regularly examine the ribs. Thus, the hazard was not great because Basin Resources would have barred down any of the cited areas if they became so loose as to create a direct hazard. I also find that Basin Resources' negligence was low because a miner had barred down the area and removed those ribs that were in most danger of falling. A penalty of \$200 is appropriate for this violation.

4. Citation No. 4058015

On October 16, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. § 75.400. In the citation, the inspector alleged that loose coal and coal fines had accumulated in the Nos. 1 and 3 entries and in the crosscut to the No. 2 entry at crosscut No. 17 in the 012-0 mmu. The citation states that the coal was dry and was up to 16 inches deep. It also states that energized electrical equipment was operating in the area. He determined that the violation was S&S and was caused by Basin Resources moderate negligence. The Secretary proposes a penalty of \$2,173 for the alleged violation. Section 75.400 provides, in part, that coal dust, including float coal dust, and loose coal shall be cleaned up and not be allowed to accumulate in active workings.

Inspector Simmons testified that he measured the depth of the accumulations at seven locations and took a sample of the coal. (Tr. 150; Ex. P-8 & P-10). The sample he took indicates that the material in the accumulations was 58 percent combustible. He stated that the accumulations were a concern because electrical equipment was operating in the area. (Tr. 151). He believed that the accumulations created a fire and explosion hazard. Mr. Salerno testified that the company had been mining in entry No. 1 with a continuous mining machine. (Tr. 160). The mining machine was moved to the area of the No. 3 entry because that is the next area where mining was to take place. A roof bolter was in the No. 1 entry to secure the roof so that clean-up operations could take place. Mr. Salerno testified that the accumulations in the No. 1 entry were left over from mining and that they could not be cleaned up with a scoop until the roof was bolted. He stated that the continuous mining machine does not do a thorough job of cleaning up loose coal. He testified that the continuous mining machine would have cleaned up most of the accumulations in the No. 3 entry when it started mining. Mr. Salerno testified that the inspector issued the citation in the middle of the clean-up cycle and that the accumulations had not been present for very long. (Tr. 166). He said that there is no way to remove the accumulations any faster without endangering the safety of miners.

I find that the Secretary established a violation. There is no question that the accumulations existed, as described by Inspector Simmons. Mr. Salerno's explanation for the accumulations is mostly conjecture. His testimony is based on the position of the equipment at the time of the inspection. He made a lot of assumptions based on what he believed to be happening in the entries. He did not have actual knowledge of the circumstances that gave rise to the citations. Accordingly, I have not given much weight to his testimony.

I also find that the violation was S&S. The Secretary established the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). I find that the Secretary established the third and fourth elements of this test. Assuming continued normal mining operations, it was reasonably likely that the hazard contributed to by the violation would result in a serious injury. The accumulations were extensive and combustible, ignition sources were present, and miners were working in the area. A penalty of \$1,200 is appropriate for this violation.

5. Citation No. 4057945

On October 17, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.202(a). In the citation, the inspector alleged that ribs were loose in the last open crosscut on the 011-0 mmu between the Nos. 1 and 3 entries. The citation states that the loose ribs varied in size up to seven feet high, twelve feet wide, and twelve inches thick. It also states that the loose ribs had pulled away from the coal pillars about four inches on the top and two inches on the sides. He determined that the violation was S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation.

Inspector Simmons testified that he determined that the ribs were loose because they were broken away on both sides and the top and were leaning out towards the walkways. (Tr. 172). He stated that he did not need to sound the ribs because they had broken away from the pillars and were not tied to anything. He estimated that each area he cited was about 80 feet long. He stated that the last open crosscut is frequently used as a travelway during a working shift. Mr. Salerno testified that the ribs were cracked but that they were not loose. (Tr. 179). He stated that the ribs required watching because they would become loose eventually but that they were not loose on October 17. Mr. Salerno testified Basin Resources =employees, including the section foreman, did not consider the ribs to be loose.

I find that the Secretary established a violation. I credit the testimony of Inspector Simmons as to the condition of the ribs. Mr. Salerno did not seriously dispute the inspector =description of the condition of the ribs. (Tr. 181). I find that the cited ribs were loose.

I also find that the Secretary established that the violation was S&S. Basin Resources = position is that there was no evidence that the ribs were about to fall. *Id.* The evidence establishes that there was a reasonable likelihood that the ribs would fall, assuming continued mining operations, and that someone would sustain a serious injury. The ribs had broken away from the pillars and were leaning towards the travelway. These ribs could have fallen within a short period of time and caused a serious injury. A penalty of \$1,000 is appropriate.

6. Other Citations

Basin Resources also contested 14 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector =determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section of this decision.

D. Docket No. WEST 96-249, Golden Eagle Mine

1. Citation No. 4057959 and Order No. 4057968

On November 11, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 75.400. In the citation, the inspector alleged that loose coal and coal fines had been allowed to accumulate on the 012-0 mmu in the No. 1 entry beginning at crosscut No. 23 and extending inby 120 feet and in the crosscut between the Nos. 1 and 2 entries for a distance to 108 feet. The citation states that the accumulations were on along both ribs up to a depth of 29 inches and were up to a width of three feet. The citation states that the accumulations were present because the ribs were not pushed up after cuts were taken from the coal. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources = moderate negligence.

Inspector Simmons testified that he took two spot samples of the accumulations that showed that the accumulations were 77.8 and 68.8 percent combustible at the tested areas. (Tr. 184; Ex. P-11). He testified that he believed that the accumulations had been present for several shifts but that he was not sure if there were any ignition sources in the area. (Tr. 185-87). The inspector issued a section 104(b) order of withdrawal on November 20 because Basin Resources failed to remove the cited accumulations within the time allowed for abatement. (Tr. 187-88). He stated that the accumulations appeared to be first cuttings because they had not been disturbed by mining equipment. He testified that, although Basin Resources may have cleaned up accumulations in the middle of the entries, the cited accumulations along the ribs were not cleaned up between November 11 and November 20. (Tr. 200-01).

Mr. Hallows testified that the bottom of the entries consisted of soft coal that deteriorates and becomes loose when equipment runs over it. (Tr. 204). He further testified that the accumulations observed by the inspector on November 20 were not the same accumulations that were there on November 11, but were new accumulations. (Tr. 207-11). He relied on his review of the company's preshift and onshift reports. (Ex. R-Y and R-Y1).

I credit the testimony of Mr. Hallows and the exhibits he relied upon and I find that the accumulations were not the same. The preshift and onshift reports between November 11 and November 20 show that the cited accumulations had been cleaned up and that accumulations did not exist in the cited area for several days. The coal along the bottom of the entries at the mine is soft and I credit Mr. Hallows' testimony that mining equipment running through the area could have created the accumulations.

Accordingly, Citation No. 4057959 is affirmed, but Order No. 4057968 is vacated. I find that the violation was not S&S and was caused by Basin Resources' moderate negligence. A penalty of \$400 is appropriate.

2. Citation No. 4057965

On November 20, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 75.380(d)(4). In the citation, the inspector alleged that the alternate escapeway for the No. 4 belt conveyor entry was less than six feet wide in several locations. The citation also states that the escapeway was not four feet wide where supplemental support was installed. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$2,384 for the alleged violation.

Inspector Simmons measured the width of the escapeway at a number of locations and referenced his measurements in the citation. (Tr. 213). Basin Resources does not dispute the violation but contends that its negligence was low because the escapeway had been inspected by MSHA in this condition for years and no citations had ever been issued. Inspector Simmons testified that neither the escapeway nor the cribbing were new. (Tr. 217-18). Mr. Salerno

testified that the escapeway had been in the same condition for a number of years, that it had been inspected by MSHA inspectors, and that it had never been cited. (Tr. 219-20; Ex. R-M). I credit the testimony of Mr. Salerno and find that the negligence of the operator should be reduced somewhat because it believed, based on the actions of MSHA, that the cited escapeway met or exceeded all regulatory requirements. The citation is affirmed as modified. A penalty of \$200 is appropriate.

3. Citation No. 4057966

On November 20, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 75.380(d)(1). In the citation, the inspector alleged that the same alternate escapeway was not being maintained in a safe condition because of a tripping hazard presented by the bottom rollers of the belt, 2.5-inch hoses, cables, and omega blocks located in several areas. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources=moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation.

Inspector Simmons testified that a person would have to watch where he stepped when walking down the escapeway due to the material that was in the walkway. (Tr. 222). He determined that the violation was not S&S because of the height of the entry and the fact that it was an alternate escapeway. He felt that a person using the escapeway would not experience any significant difficulties walking through the area. He testified that in the unlikely event that the alternate escapeway was used to transport a miner out of the mine on a stretcher, the people carrying the stretcher could trip and fall over the materials.

Basin Resources argues that the Secretary did not establish that the escapeway was in an unsafe condition. It argues that the tripping hazard was minimal because the hoses were parallel with the entry. It relies, in part, on the testimony of Inspector Simmons that miners could walk through the area without tripping or stumbling. I reject Basin Resources =arguments. An escapeway, including the alternate escapeway, must be kept in a safe condition so that miners can be evacuated from the working section. Miners may be compelled to leave in a hurry and stretchers may be necessary. In emergency situations, the cited obstacles could present a hazard. The citation is affirmed. A penalty of \$400 is appropriate.

4. Other Citations

Basin Resources also contested 16 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector=s determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

E. Docket No. WEST 96-250, Golden Eagle Mine

1. Citation No. 4057215

On December 4, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.215(g). In the citation, the inspector alleged that extraneous combustible material consisting of wood, paper, and plastic was deposited in a refuse pile. The citation states that the pieces of wood are up to three feet in length and that the material is present throughout the refuse pile. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources=moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides that no extraneous combustible material may be deposited on refuse piles.

Inspector Simmons testified that he was concerned that if there were a fire in the refuse pile, the material could burn and cause the pile to become less stable. (Tr. 234). He stated that the refuse pile is designed to contain rock, mud, and coal. He was concerned that a slide could occur as a result of the cited condition. Mr. Sciacca testified that the refuse pile was about five acres in size and that less than one percent of the material in the pile could be classified as extraneous combustible material. (Tr. 241). The material that was removed to abate the citation was placed in a single pickup truck. (Tr. 242; Ex. R-O). He also testified that the material entered the refuse pile because, during its normal operation, the longwall breaks up cribs in the tailgate entry and the belt carries the material to the transfer building. (Tr. 243-44). He said that waste from the transfer building is taken by truck to the refuse pile. Thus, he testified that the miscellaneous waste was not deposited on the refuse pile but was transported to the pile during ordinary operations along with rock and coal.

Basin Resources argues that the cited material was not extraneous combustible material and that it was not deposited on the refuse pile. The term refuse as used with respect to coal mining refers to waste material in the coal that is removed during the preparation process. A *Dictionary of Mining, Mineral, and Related Terms*, 908 (1968). Thus, material which is removed from the coal, such as rock, at a preparation plant is transported to a refuse pile. This pile may contain combustible coal waste and the Secretary has promulgated regulations governing such piles. I was unable to find any cases interpreting section 77.215(g).

I find that Basin Resources did not violate the safety standard. It appears to me that the cited standard is designed to prohibit an operator from dumping other combustible material into its refuse pile. For example, it cannot use the refuse pile as a general garbage dump to get rid of such items as rock dust bags, pallets, and cardboard boxes. In this case, the vast majority of the cited material was wood. (Ex. R-O). I credit the testimony of Messrs. Sciacca and Hallows that the wood came out of the mine on the belt with the coal and was removed during the preparation process. It was transported to the refuse pile along with other refuse, as that term is used in the standard. The wood was not extraneous and it was not deposited on the refuse pile. It was part of the refuse. Accordingly, the citation is vacated.

2. Citation No. 4057217

On December 4, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.1103(d). In the citation, the inspector alleged that combustible dry grass, weeds, and brush were present within 25 feet of the main energized substation near the mine office building. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources=moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides, in part, that areas surrounding electric substations and transformers shall be kept free from grass (dry), weeds, underbrush, and other combustible material for at least 25 feet in all directions.

Inspector Simmons testified that there was snow in the area but it was melting. (Tr. 248). Dry grass and brush were sticking out of the snow. The fact that the grass was about two feet high indicated to him that it had been present for a considerable length of time. He felt that when the snow melted, the grass and brush presented a fire hazard. (Tr. 248-49). Tom Sciacca testified that only sunflower stalks were sticking out of the snow. (Tr. 261-62). Kay Hallows testified that he took a small propane torch and tried to ignite one of the sunflower stalks. He testified that the stalk disintegrated but did not catch fire. (Tr. 265-66).

I find that the Secretary established a violation. I credit the testimony of Inspector Simmons with respect to the conditions he observed, in part, because the witnesses for Basin Resources were somewhat confused as to which substations he inspected. In any event, assuming continued normal mining operations, the cited area would have dried out and presented a fire hazard. The violation was not serious. A penalty of \$100.00 is appropriate.

3. Citation No. 4057218

On December 4, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.1103(d). In the citation, the inspector alleged that combustible dry grass, weeds, and brush were present within 25 feet of the energized substation near the 3rd North emergency escapeway hoist. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources=moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation.

The testimony with respect to this citation was consistent with the testimony for the previous citation. For the reasons set forth above, the citation is affirmed. The violation is not serious and a penalty of \$100.00 is assessed.

4. Citation No. 4057219

On December 4, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 75.202(a). In the citation, the inspector alleged that a loose brow, about 12 inches thick, 7 feet wide, and 4 feet long, was not supported or otherwise controlled on the 011-0 mmu in the outby corner of the No. 1 entry at crosscut No. 68. Inspector Simmons determined that the violation was S&S and was caused by Basin Resources = moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation.

Inspector Simmons testified that when he saw a crack around the brow, he was concerned that the brow could fall and seriously injure a miner. (Tr. 275, 277). The inspector stated that the brow was not sufficiently supported or taken down. He further stated that the brow could have fallen at any time and injured a miner. Because the rib beneath the brow had sloughed off, the roof bolts adjacent to the brow were about eight feet from the rib line. He believed that broken bones were the most likely injury. Mr. Sciacca testified that the Basin Resources employee had examined the area and did not report that the brow was loose. (Tr. 286). The examiner had extensive experience. Mr. Sciacca also testified that when the condition was abated, timbers were placed under the brow because it could not be barred down. He stated that the brow was not loose nor in danger of falling.

The Secretary is not required to establish that a brow is so loose that it is in danger of immediate collapse. The safety standard is preventive to ensure that mine operators adequately support roof and ribs so that they do not fall. In this case, part of the rib had sloughed off leaving a brow of rock. The roof-control plan requires that roof bolts be installed on 5-foot centers but roof bolts were eight feet from the rib as a result of the sloughage. I credit the testimony of the inspector that a crack was present and that the brow could fall and injure a miner. He admitted that the brow might not fall immediately but that he was concerned that it could fall at any time. I find that the Secretary established a violation.

The Secretary did not establish that the violation was S&S. The inspector testified that the brow could fall and injure someone, but he did not know how often miners traveled through the area or how many miners would be in the area. Assuming continued normal mining operations, the Secretary did not show that it was reasonably likely that the hazard contributed to by the violation would result in a serious injury. A penalty of \$400 is appropriate for this violation.

5. Citation No. 4057220

On December 4, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.410(c). In the citation, the inspector alleged that a forklift was used at the mine without an operative back-up alarm. The citation states that persons were observed in the immediate area where the forklift was being operated. Inspector Simmons determined that the violation was S&S and was caused by Basin Resources = moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation. The safety standard provides that warning devices on mobile equipment shall be maintained in functional condition.

Inspector Simmons testified that a back-up alarm had been installed on the forklift but that it was not working at the time the citation was issued. (Tr. 308). He stated that a number of miners were in the area. He further testified that it was reasonably likely that someone could be seriously injured as a result of the violation. Mr. Sciacca testified that the view from the operator's compartment of the forklift was unobstructed. (Tr. 313). He also stated that because the equipment was a very loud diesel forklift, a miner in the area would know if it was getting close to him. He testified that it was unlikely that anyone would be injured as a result of the condition.

Basin Resources does not contest the violation but contends that it was not S&S because the operator's view to the rear was not obstructed and the noise of the forklift would alert a pedestrian of its presence. I disagree. The issue is not whether the lack of an operable back-up alarm makes it more likely than not that a serious injury will occur, but whether such an injury is reasonably likely assuming continued normal mining operations. I credit the testimony of Inspector Simmons and find that the Secretary established that it was reasonably likely that the hazard contributed to by the violation would result in a serious injury. A penalty of \$1,000 is appropriate for this violation.

6. Citation No. 4057682

On December 6, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 75.400. In the citation, the inspector alleged that loose coal and coal fines were present on the 011-0 mmu in crosscut 68 between the Nos. 3 and 4 entries. The citation states that the accumulations were up to 14 inches deep for a distance of 80 feet and that they were about 18 feet wide. The citation also alleges that a shuttle car was observed traveling over the accumulations, trailing cables were in the area, and no rock dust had been applied. Inspector Simmons determined that the violation was S&S and was caused by Basin Resources = moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation.

Inspector Simmons took a sample of the accumulations. MSHA determined that the material was 77.3 percent combustible. (Tr. 321). The inspector believed that anyone in the crosscut could be severely injured in the event of a fire. He determined that the violation was S&S because of the ignition sources in the area: energized equipment and trailing cables. (Tr. 323). The inspector did not observe any defects in the cables or equipment in the area. He believes that the accumulations should have been cleaned up on the regular mining cycle.

Mr. Peterson testified that the cited area was wet and muddy. A roof-bolter became stuck in the mud in this crosscut because of the extremely wet conditions. (Tr. 394). Basin Resources left some of the bottom coal in the crosscut to keep equipment from getting bogged down. He testified that the coal was so wet and muddy that there was little chance of it burning. (Tr. 398). He also testified that once the roof-bolter had been removed from the area, the area would have been cleaned up. The loose coal in the area was not first cuttings but had sloughed off the ribs and had been churned up from the bottom.

I find that the Secretary established a violation, but that it was not S&S. There was no evidence that the electrical equipment in the area would ignite the coal. Methane was not present in this area. The coal was extremely wet. I credit Mr. Peterson's testimony that after the roof-bolter was removed from the area, the loose coal would have been removed. Assuming continued normal mining operations, it has not been shown that it was reasonably likely that anyone would be injured as a result of the violation. A penalty of \$400 is appropriate.

7. Citation No. 4057689

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.1710(i). In the citation, the inspector alleged that seatbelts were not provided for an excavator that had been used at the mine. The citation states that the excavator had been on mine property for about one year. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources = moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard states that seatbelts must be worn in a vehicle where there is a danger of overturning and where roll protection is provided.

Inspector Simmons testified that the excavator was owned by a contractor and was not equipped with a seatbelt. (Tr. 332-33). He believes that the vehicle was not equipped with a seatbelt when it was brought to the mine and had been used for about a year in that condition. He based his conclusion, in part, on discussions with the foreman for the contractor. (Tr.335). He stated that there was a danger of overturning the vehicle and that it was provided with roll protection. The vehicle was tagged-out at the time the citation was issued. (Tr. 338).

Mr. Salerno testified that in his 21 years of mining experience an MSHA inspector had never inspected tagged-out equipment. (Tr. 341). He stated that when he discussed this matter with the inspector and his supervisor, they questioned whether the equipment was really tagged-out. Although I agree with Basin Resources that equipment that has been tagged-out cannot generally be cited for safety defects, there is little question that this equipment had been operated without seatbelts before it was removed from service. (Tr. 350-51). Accordingly, I affirm the citation because the excavator had been used without seatbelts. I find that Basin Resources = negligence was low because this was a truck operated by the contractor's employees. A penalty of \$100 is appropriate.

8. Citation No. 4057690

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.205(b). In the citation, the inspector alleged that stumbling and tripping hazards were present in the walkway provided for the second floor of the warehouse. The citation states that 250 feet of power cable and 10 fan belts were present. Inspector Simmons determined that the violation was S&S and that the violation was caused by Basin Resources = moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation. The safety standard provides that travelways and platforms or other means of access to areas where

persons are required to travel or work shall be clear of all extraneous material and other stumbling or slipping hazards.

Inspector Simmons testified that the cited material presented a tripping hazard. (Tr. 360). Mr. Hallows testified that the cited material was present because of an inventory reorganization. (Tr. 363). The material had been removed from shelves during this inventory and had not yet been restocked. He did not believe that an injury was reasonably likely because the only individuals that would be in the area were those involved in the inventory reorganization, who were aware of any hazards. No other persons were allowed in the area. (Tr. 364). The inspector believed that an injury was reasonably likely because the loops in the extraneous material made it easy to trip. (Tr. 361).

I find that the Secretary established a violation but that it was not S&S. The material was deliberately placed there while inventory was shifted around. I credit the testimony of Mr. Hallows that miners would not be in the cited area. Basin Resources = negligence was low. A penalty of \$100.00 is appropriate.

9. Other Citations

Basin Resources also contested 11 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

F. Docket No. WEST 96-251, Golden Eagle Mine

1. Citation No. 4058085

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 49.2(h). In the citation, the inspector alleged that the operator had not submitted to the MSHA District Manager a statement describing the mine's method of compliance with 30 C.F.R. Part 49. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources=low negligence. The citation further states that the mine had lost service of an independently provided mine-rescue coverage on approximately 11-28-95. The Secretary proposes a penalty of \$252 for the alleged violation. Section 49.2(h) provides, in part, that each operator of an underground mine who provides rescue teams shall send the district manager a statement of the mine's method of compliance with the rescue-team requirement.

Inspector Simmons testified that the mine was covered by the rescue team for another mine and that Basin Resources failed to notify MSHA when that team no longer existed. (Tr. 367). Mr. Hallows testified that a change was made in the mine's rescue team when the Cimarron

Mine, operated by Pittsburg & Midway Coal Mining Company, advised Basin Resources that it was closing down. (Tr. 374). This mine provided a second team support for the Golden Eagle Mine. Because Cimarron Mine would no longer be able to provide this support, the Golden Eagle Mine had to reestablish a second team with its own miners.

MSHA modified the citation on February 2, 1996. In the modification, MSHA stated that the mine was in the process of developing a new second team at the time the citation was issued and that the eight working days between the date that it lost secondary coverage from the Cimarron rescue team and the date that the citation was issued was not an extensive amount of time. Basin Resources argues that the citation should be vacated because section 49.2(h) does not set forth any time limits and MSHA acknowledged in the modification that the eight working days was not excessive.

I agree with the arguments of Basin Resources and vacate the citation. The cited regulation does not contain a requirement to alert MSHA whenever there is a change in rescue team status. In any event, the citation was issued eight working days after the secondary coverage terminated. Basin Resources was organizing its own in-house secondary rescue team. At a minimum, Basin Resources should have been afforded a reasonable amount of time to provide any notification to MSHA. The Secretary did not establish a violation.

2. Citation No. 4058088

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.516. In the citation, the inspector alleged that an electrical extension cord used in a warehouse did not comply with the National Electrical Code (NEC). The cord had been in use for about two months and was supplying power to a battery charger inside a metal cabinet. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation. Section 77.516 provides, in part, that wiring and electrical equipment must meet the requirements of the NEC in effect at the time of the installation.

Inspector Simmons testified that the cited condition violated Article 400-4 of the 1968 NEC. (Tr. 469). That provision provides, in part, that flexible cord shall not be used (1) as a substitute for the fixed wiring of a structure; (2) where run through holes in walls, ceilings, or floors; (3) where run through doorways, windows, or similar openings; (4) where attached to building surfaces; or (4) where concealed behind building walls, ceilings, or floors. (Ex. P-17). Inspector Simmons testified that Basin Resources violated subsection (2) of this provision because the wire ran through a hole in a cabinet. (Tr. 470). He stated that the extension cord was not damaged. He believes that because subsection (5) uses the term behind building walls the term walls in subsection (2) refers to any wall, including the wall of a cabinet.

I find that the inspector's interpretation of the standard is contrary to the plain language of the standard. Subsection (2) provides that flexible cord shall not be used as a substitute for fixed wiring of a *structure* where the cord runs through holes in *walls*, ceilings or floors. This cord was

not used as a substitute for fixing wiring in the warehouse and did not run through a wall, ceiling, or a floor. The wording of the NEC provision does not support the inspector's interpretation that it also applies to an extension cord entering a cabinet. One end of the cord was plugged into a wall socket and the battery charger for a two-way radio was plugged into the other end of the cord. Because the charger was in a cabinet, the cord ran through a hole in the back of the cabinet. Article 400-4 of the NEC simply does not cover this situation and the inspector's interpretation is unreasonable. The citation is vacated.

3. Citation No. 4058089

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.516. In the citation, the inspector alleged that a clear working space of at least 30 inches was not provided in front of the breaker box in the accounting office in violation of the NEC. The citation states that a desk was under the breaker box and computers were on top of the desk. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources=moderate negligence. The Secretary proposes a penalty of \$903.

Inspector Simmons testified that the presence of the desk violated Article 110-16(a) of the NEC. (Tr. 481). This provision provides, in part, that sufficient access and working space shall be provided and maintained about all electric equipment to permit ready and safe operation and maintenance of such equipment. (Ex. P-17). The provision states that the dimension of the working space in the direction of access to live parts shall not be less than two and one half feet (30 inches). The provision further states that distances are to be measured from the ... enclosure front or opening of the electrical equipment when the equipment is enclosed.

The breaker box was enclosed and nothing prevented anyone from opening the door to the box to reach the breakers. (Ex. R-T). The desk in front of the box was 32 inches wide and 20 inches deep. A person could open the box and switch the breakers by standing in front of the desk. The inspector interpreted the NEC provision to require 30 inches of clearance all the way to the floor of the office for the width of the breaker box. (Tr. 487). The NEC provision states that access and working space is required to permit ready and safe operation and maintenance of the equipment. In particular, working space in the direction of access to live parts must be at least 30 inches, measured from the door of the box. Access is to the front of the box, not the bottom or the floor. One needs to open the cited breaker box in the accounting office to switch off the power in the event of an emergency. The Secretary did not show that this desk would prevent anyone from performing that task. In his interpretation of this provision of the NEC, Inspector Simmons relied on another book that is three inches thick, which more fully describes the provisions of the NEC. (Tr. 489). The inspector had consulted this other electrical book at some time in the past when arriving at his interpretation. The plain language of Article 110-16 does not indicate that there can be no furniture below a breaker box in an office.

I find that the Secretary did not establish a violation. The language of the NEC states that measurements are to be made from the front or opening of the equipment. There has been no showing that there was not 30 inches of clearance in front of the breaker box, or even straight

down from the box. The language of the cited provision in the NEC does not support the inspector's interpretation. The citation is vacated.

4. Citation No. 4058090

On December 12, 1995, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.208(d). In the citation, the inspector alleged that six compressed nitrogen bottles and two acetylene bottles observed near the warehouse were not secured. The citation states that the tanks were standing upright on a platform without a strap to keep them from falling. The Secretary proposes a penalty of \$903 for the alleged violation. Section 77.208(d) provides that compressed and liquid gas cylinders shall be secured in a safe manner.

Inspector Simmons testified that the cylinders were in a bin designated for the storage of such bottles but that the chain across the front of the bin was not securely fastened. (Tr. 377). One end of the chain was not tightly secured. (Tr. 379, 382). Mr. Salerno testified that a chain was in place but had slid down. (Tr. 383; Ex. R-W).

I find that the Secretary established a violation, but that the violation was not serious. The cylinders were in a bin designed for storing such items. There was a chain present at the front of this bin but it was a little too loose to keep the cylinders secure. Basin Resources' negligence was low. A penalty of \$100 is appropriate for this violation.

5. Other Citations

Basin Resources also contested two other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

G. Docket No. WEST 96-271, New Elk Preparation Plant

1. Citation No. 4057141

On November 20, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.215-2(c). In the citation, the inspector alleged that the operator failed to report conditions of the refuse pile to the MSHA District Manager. The date of the last report was November 1, 1994. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$288 for the alleged violation. The standard states that specified information about certain refuse piles must be reported to the district manager every twelfth month from the date of the original submission. @

Basin Resources does not contest the fact that a report had to be filed, but argues that the report had to be filed before the end of November 1995. I agree. The regulation requires such reports to be filed every twelfth month from the date of the original report. Even if the original report was filed in early November of a previous year, the operator would have until the end of the twelfth month to file its report. The inspector interpreted the regulation to require the report to be filed within 365 days of the previous report, but that is not what the regulation states. (Tr. 419). Accordingly, the citation is vacated.

2. Citation No. 4057735

On November 20, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.1607. In the citation, the inspector alleged that the unguarded conveyor walkway was not provided with an emergency stop cord for a distance of 80 feet along the raw coal belt at the truck loadout. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources=moderate negligence. The Secretary proposes a penalty of \$288 for the alleged violation. The standard states that unguarded conveyors with walkways shall be equipped with stop cords along their full length.

Basin Resources alleges that the condition had existed for years and had been inspected by MSHA several times but had never been cited. Basin Resources argues that its negligence is low. Mr. Hallows testified that MSHA inspectors had inspected the walkway in the past and had never mentioned the fact that a stop cord was required in the cited area. (Tr. 426-27). I disagree. Although MSHA's failure to cite a condition can be used to reduce the negligence attributable to an operator, I do not believe that such a reduction is warranted in this case. The safety standard is clear on its face. There can be no doubt that a stop cord must be present along an unguarded conveyor walkway for its entire length. Thus, the fact that MSHA inspectors did not notice this condition in the past should not serve to reduce the negligence. I find that the violation was not S&S and was the result of Basin Resources =moderate negligence. A penalty of \$100 is appropriate.

3. Citation No. 4057736

On November 20, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.207. In the citation, the inspector alleged that sufficient illumination was not provided in the oil storage room. The citation states that oil filters and equipment were stored in the room and there was no lighting for the room. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources =moderate negligence. The Secretary proposes a penalty of \$288 for the alleged violation. The standard states, in part, that illumination sufficient to provide safe working conditions shall be provided in and on all surface structures, walkways and working areas.

Basin Resources contends that the oil storage room was provided with two windows and that illumination was sufficient during the day. At night, it contends that a miner could use a cap lamp on those infrequent occasions he would need to be in the room at night. I find that the evidence establishes that the area was sufficiently illuminated during the daylight hours. I find,

however, that the room was not sufficiently illuminated at night. I affirm the citation, but I find that the violation was not serious and that Basin Resources = negligence was low. A penalty of \$75 is appropriate.

4. Citation No. 4057147

On November 22, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.1103(d). In the citation, the inspector alleged that the area surrounding the No. 1 electric substation and transformer was not kept free from dry grass and weeds for at least 25 feet. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources = moderate negligence. The Secretary proposes a penalty of \$288 for the alleged violation.

For the reasons set forth above with respect to Citation Nos. 4057217 and 4057218 in Docket No. WEST 96-250, the citation is affirmed. The violation was not serious. A penalty of \$75 is appropriate.

5. Citation No. 4057148

On November 22, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.1607(c). In the citation, the inspector alleged operating speeds and visibility on the haul road at the north end of the refuse pile were not consistent with the conditions on the road. The citation states the road contains blind curves and that the speed of the haulage truck was in excess of the conditions present. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources = moderate negligence. The Secretary proposes a penalty of \$309 for the alleged violation. The standard states, in part, that equipment operating speeds shall be prudent and consistent with the conditions of the roadway, grades, clearance, and visibility.

Inspector Shiveley stated that there was only one truck operating on the haul road. (Tr. 451). He testified that when the pickup truck that he was in drove up the road, the haul truck came down the hill and almost collided with the pickup. He stated that he was surprised to see the haul truck. (Tr. 455). The haul truck is not for use on public highways and the cab is high off the ground. Mr. Sciacca drove the pickup truck in which the inspector was riding. Mr. Sciacca testified that he saw the haul truck coming down the road and that the haul truck driver saw the pickup. (Tr. 460). Both vehicles stopped without skidding. Mr. Sciacca backed out of the way so that the haul truck could pass. *Id.* Mr. Sciacca testified that the inspector stopped the haul truck and told the driver to slow down.

Although this is a close issue, I find that the Secretary did not establish a violation. The inspector based his conclusion that the haul truck was going too fast on the fact that he was surprised to see the haul truck. Inspector Shiveley was not driving the pickup and did not expect to stop to avoid the truck. There is no proof that the haul truck was driving too fast. Accordingly, the citation is vacated.

6. Other Citations

Basin Resources also contested 14 other section 104(a) citations in this case. At the hearing, Basin Resources agreed that it would not contest the fact of violation in these citations or the other determinations made by the inspector in the citations. It only contests the penalties proposed by the Secretary, which it contends are too high. Based on the description of the violations in the citations, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalties set forth in section III of this decision.

H. Docket No. WEST 96-285, Golden Eagle Mine

1. Order No. 4057950

On October 19, 1995, Inspector Simmons issued a section 104(d)(2) order of withdrawal alleging a violation of section 77.202. In the order, the inspector alleged that accumulations of dry loose coal, coal dust, and float-coal dust were present on the first floor of the tippie breaker building under the truck loadout belt. The order states that the accumulations under the belt were up to 9 inches deep for a distance of about 70 feet. It also states that belt rollers were rubbing against the accumulations. The order states that dry coal dust and float coal dust covered the entire first floor of the breaker building and the tops of electrical panels and control boxes. It alleges that an employee made some effort to clean by pushing a broom through the area. Inspector Simmons determined that the violation was S&S and was caused by Basin Resources = high negligence. The Secretary proposes a penalty of \$4,000 for the alleged violation.

Basin Resources does not contest the fact of violation or the inspector's S&S determination. It contends that the violation was not the result of its unwarrantable failure. Inspector Simmons determined that the violation was the result of Basin Resources = unwarrantable failure because an employee knew of the accumulations, as evidenced by the fact that some of the accumulations had been swept up, and the foreman's admission that he had taken methane readings in the building. (Tr. 513-14). Thus, the inspector concluded that Basin Resources knew about the accumulations but did little to nothing to remove them. The inspector believed that it would have taken two to four working shifts for that much coal and coal dust to accumulate. Inspector Shiveley testified that he has cited the breaker building on many occasions for excessive accumulations of coal and coal dust. (Tr. 521). He testified that such accumulations occurred in the building on a regular basis because of the design of the ventilation and that the area required frequent cleaning. Accumulations would build up every few shifts if the area was not cleaned.

Mr. Hallows testified that MSHA conducted an investigation under section 110(c) of the Mine Act and concluded that the foreman, Robert Trujillo, should not be charged with a violation. (Tr. 527-33). Mr. Hallows stated that the investigation revealed that the foreman did not take a methane reading on the day that the citation was issued and that he did not know about the accumulations. (Tr. 533-36). Mr. Hallows testified that Mr. Trujillo advised the special

investigator that he was in the building on October 18 and that there were very few accumulations because he washed the area down that morning. (Tr. 536-37; Ex. R-BB). He further testified that no management employees had been in the breaker building on October 19. Mr. Hallows stated that the belt was damaged, which allowed a significant amount of spillage of coal and coal dust. (Tr. 539-40). Mr. Hallows believes that management had no knowledge of the existence of the accumulations until the order was issued. (Tr. 544).

I credit the testimony of Mr. Hallows, as well as Basin Resources' exhibits, that the foreman was not in the area on the day the order was issued and that he believed that the area was clean when he left on October 18. Nevertheless, I find that the Secretary established that the violation was caused by Basin Resources' unwarrantable failure. The Commission has held that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (December 1987). Unwarrantable failure is characterized by such conduct as reckless disregard, intentional misconduct, indifference, or a serious lack of reasonable care. *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 193-94 (February 1991). The Commission has held that a number of factors are relevant in determining whether a violation is the result of an operator's unwarrantable failure, such as the extensiveness of the violation, the length of time that the violative condition has existed, the operator's efforts to eliminate the violative condition, and whether an operator has been placed on notice that greater efforts are necessary for compliance. *Mullins and Sons Coal Co., Inc.*, 16 FMSHRC 192, 195 (February 1994)(citation omitted).

Basin Resources has received a number of citations and orders concerning accumulations in the breaker building. Accumulations were a recurring problem. Apparently, the company was working on engineering solutions for the problem. In the meantime, Basin Resources had an obligation to make greater efforts to keep the area clean. The area should have been continuously monitored to ensure that extensive accumulations did not build up. I find that the accumulations were extensive and at least some of the accumulations had existed for two to four shifts. I also find that Basin Resources was put on notice that greater efforts were necessary to eliminate such accumulations. Basin Resources' conduct exhibited a serious lack of reasonable care. A penalty of \$4,000 is appropriate.

2. Citation No. 4057442

On January 5, 1996, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 77.502-2. In the citation, Inspector Shiveley alleged that the monthly electrical examination of surface areas for December 1995 was not recorded in the record book. He determined that the violation was not S&S and that the violation was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$595 for the alleged violation.

Basin Resources does not deny that the examinations were not recorded. The miners at the mine were laid off at the end of December 1995 and mine management did not have any advance notice of this lay-off. (Tr. 549-60). As a consequence, Basin Resources argues that the

violation was not serious and that its negligence was low. I agree and I have lowered the penalty. A penalty of \$100 is appropriate.

3. Citation No. 4057456

On February 1, 1996, Inspector Shiveley issued a section 104(a) citation alleging a violation of section 75.202(a). In the citation, Inspector Shiveley alleged that the mine roof in entry No. 1 of the East Mains at Crosscut No. 23 was not supported or controlled. The citation states that timber had been set in an area where a small roof fall had occurred to allow the examiner to travel through the area. The citation alleges that three of these timbers had loosened and fallen. Inspector Shiveley determined that the violation was S&S and that the violation was caused by Basin Resources=moderate negligence. The Secretary proposes a penalty of \$1,298 for the alleged violation.

Inspector Shiveley testified that he was concerned that the weekly examiner was required to travel through the area and that the unsupported roof could fall on him. (Tr. 553-54). Mr. Salerno testified that he was the weekly examiner for the area and that he had last examined the area on January 29, 1996. (Tr. 557). He testified that the timbers supporting the roof were in place on that date and that he did not believe that the area needed any additional support at that time. The mine was shut down on or about December 31, 1996, so only a few employees were present to maintain the mine.

I find that the Secretary established a violation but that the violation was not S&S and Basin Resources=negligence was low. The roof was not adequately supported, but it was not reasonably likely that the hazard contributed to by the violation would result in an injury of a reasonably serious nature. The mine was shut down and only the weekly examiner passed through the area. I credit the testimony of Mr. Salerno that the cited condition did not exist at the time of his examination. A penalty of \$200 is appropriate.

I. Docket No. WEST 97-51, Golden Eagle Mine

1. Citation No. 3850007

On July 2, 1996, Inspector Simmons issued a section 104(a) citation alleging a violation of section 77.410(a)(1). In the citation, the inspector alleged that a sandblasting truck used at the mine was not equipped with a back-up alarm. Inspector Simmons determined that the violation was not S&S and was caused by Basin Resources =moderate negligence. The Secretary proposes a penalty of \$903 for the alleged violation.

Inspector Simmons testified the vehicle was not provided with a back-up alarm. (Tr. 570). The vehicle was owned by an independent contractor. He admitted that the mine was closed and there were only a few people at the mine. (Tr. 572). Mr. Hallows testified that there were seven people employed at the mine in July 1996. (Tr. 575). The mine was in the process of cleaning up its mobile equipment for sale. He testified that the sandblaster was not put into reverse gear because it was being used as stationary equipment. He stated that it was stationary

while it was at the mine, except when it was brought onto the property and taken off the property. All of the diesel equipment was driven to the sandblaster for cleaning prior to being sold.

I find that the Secretary established a violation. The sandblaster was mobile equipment, even if it was not moved while at the mine. I credit the testimony of Mr. Hallows, however, and find that the condition did not create a hazard to miners. Basin Resources' negligence was low. A penalty of \$100 is appropriate.

2. Citation No.3850006

Basin Resources also contested this citation. At the hearing, Basin Resources agreed that it would not contest the fact of violation in this citation or the other determinations made by the inspector. It only contests the penalty proposed by the Secretary, which it contends is too high. Based on the description of the violation in the citation, the inspector's determinations with respect to gravity and negligence, and the civil penalty criteria discussed below, I assess the penalty set forth in section III of this decision.

II. 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 about 977 citations and orders were issued at the Golden Eagle Mine in the 24 months preceding December 11, 1995, and about 102 citations and orders were issued at the New Elk Preparation Plant in the 24 months preceding October 21, 1995. (Exs. P-1 & P-4). I also find that Basin Resources was a medium to large mine operator. (Ex. J-1). The Golden Eagle Mine and the preparation plant 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, except for Citation No. 4057959 in WEST 96-249. Unless otherwise noted above, all of the violations were serious and the result of Basin Resources' moderate negligence. Based on the penalty criteria, I find that the penalties set forth below are appropriate for the violations.

III. 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:

<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
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WEST 96-179, New Elk Preparation Plant

4057692	77.400(a)	\$75.00
4057421	77.1110	75.00
4057422	77.208(d)	75.00
4057423	77.1605(d)	75.00
4057424	77.1104	100.00
4057700	77.1109(e)(1)	75.00
4058097	77.400(a)	75.00
4058098	77.208(e)	75.00
4058099	77.1109(d)	75.00
4058100	77.516	75.00
4057430	77.1606(c)	75.00
4057431	77.1104	400.00
4057433	77.215-1	20.00
4057435	77.400(c)	75.00
4057436	77.400(c)	50.00

WEST 96-241, Golden Eagle Mine

3590046	75.202(a)	400.00
3590047	75.370(a)(1)	400.00
3590048	75.370(a)(1)	1,000.00
3590049	75.1100-2(e)(2)	50.00
4057354	75.1001-1(b)	200.00
4057355	75.1001-1(b)	200.00
4057356	75.1100-2(f)	Vacated
4057357	75.370(a)(1)	400.00
4057237	75.351(f)(3)	50.00
4057397	75.364(g)	20.00

WEST 96-248, Golden Eagle Mine

4058005	75.400	400.00
4058006	75.1100-3	400.00
4058007	75.1100-2(f)	400.00
4058008	75.1722(b)	1,000.00
<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
4058009	77.400(a)	200.00
4058010	75.512	50.00
4058011	75.202(a)	200.00
4058012	77.208(d)	200.00

4058013	75.1722(c)	1,000.00
4058014	75.1722(b)	400.00
4058015	75.400	1,200.00
4058016	75.370(a)(1)	400.00
4058017	75.1722(a)	1,000.00
4058018	75.400	400.00
4058019	75.809	200.00
4057941	77.1110	200.00
4057942	77.1109(d)	400.00
4057943	75.809	200.00
4057945	75.202(a)	1,000.00

WEST 96-249, Golden Eagle Mine

4057946	75.370(a)(1)	400.00
4058020	77.205(e)	200.00
4057948	75.503	400.00
4057949	77.400(d)	400.00
4057951	77.512	400.00
4057952	77.1605(d)	400.00
4057954	75.208	400.00
4057955	75.503	400.00
4057956	75.400	400.00
4057957	75.809	200.00
4057959	75.400	400.00
4057960	75.1725(a)	400.00
4057965	75.380(d)(4)	200.00
4057966	75.380(d)(1)	400.00
4057967	75.380(d)(4)(ii)	400.00
4057969	75.400	1,200.00
4057204	75.360(g)	200.00
4057209	77.1110	400.00
4057211	77.1110	400.00

WEST 96-250, Golden Eagle Mine

4057212	77.208(d)	400.00
4057213	77.1110	400.00
<u>Citation/Order No.</u>	<u>30 C.F.R. *</u>	<u>Penalty</u>
4057214	77.1109(e)(1)	400.00
4057215	77.215(g)	Vacated
4057216	77.1110	400.00
4057217	77.1103(d)	100.00

4057218	77.1103(d)	100.00
4057219	75.202(a)	400.00
4057220	77.410(c)	1,000.00
4057681	75.403	400.00
4057682	75.400	400.00
4057683	77.1110	400.00
4057684	75.400	1,000.00
4057685	77.215-1	200.00
4057686	77.1110	400.00
4057687	77.208(d)	400.00
4057689	77.1710(i)	100.00
4057690	77.206(b)	100.00
4057691	77.1110	400.00

WEST 96-251, Golden Eagle Mine

4058085	49.2(h)	Vacated
4058086	45.4(b)	100.00
4058088	77.516	Vacated
4058089	77.516	Vacated
4058090	77.208(d)	100.00
4058091	77.1606(c)	400.00

WEST 96-271, New Elk Preparation Plant

4047756	77.502	75.00
4057758	75.1711-1	75.00
4057141	77.215-2(c)	Vacated
4057732	77.701	100.00
4057733	77.1104	100.00
4057734	77.502	75.00
4057735	77.1607(cc)	100.00
4057736	77.207	75.00
4057737	77.205(b)	75.00
4057738	77.205(b)	75.00
4057739	77.513	75.00
4057740	77.502-2	75.00
4057142	77.502	75.00
<u>Citation/Order No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
4057143	77.516	200.00
4057144	77.502	75.00
4057145	77.202	200.00
4057146	77.502	200.00

4057147	77.1103(d)	75.00
4057148	77.1607(c)	Vacated

WEST 96-285, Golden Eagle Mine

4057950	77.202(a)	4,000.00
4057442	77.502-2	100.00
4057456	75.202(a)	200.00

WEST 97-51, Golden Eagle Mine

3850006	77.403(a)(1)	400.00
3850007	77.410(a)(1)	100.00

Total Penalty	\$35,090.00
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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 \$35,090.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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