

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 26, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-79
Petitioner	:	A.C. No. 05-02820-03774
	:	
v.	:	Docket No. WEST 96-125
	:	A.C. No. 05-02820-03778
	:	
BASIN RESOURCES, INC.,	:	Golden Eagle Mine
Respondent	:	

DECISION

Appearances: Edward B. Ritchie, Conference and Litigation Representative, Mine Safety and Health Administration, U.S. Department of Labor, Vincennes, Indiana, and Edward Falkowski, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
 Andrew Volin, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Manning

These cases are before me on petitions for assessment of penalties filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (AMSHA), 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 38 violations of the Secretary's safety regulations. A hearing was held in Denver, Colorado. The parties presented testimony and documentary evidence, and Basin Resources filed a post-hearing brief.

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. Citation No. 4057626

On September 11, 1995, MSHA Inspector Melvin Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.220(a)(1). In the citation, the inspector alleged that Basin Resources was not complying with its roof control plan. The citation states that an amendment to the plan dated June 21, 1995, requires the use of truss bolts in certain areas of the entry No. 3 of the 4 left section. The citation alleges that truss bolts had not been installed in the cited area and that vertical yield control supports (VYC) had been installed as supplemental support. The inspector determined that the violation was not of a significant and substantial (AS&S) nature and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,019 for the alleged violation.

Inspector Shiveley testified that Basin Resources sought an amendment to its roof control plan so that it could use truss bolts in lieu of cribs for supplemental roof support in a test area. (Tr. 14-18; Ex. R-B). The amendment was approved by MSHA on June 21, 1995. *Id.* The amendment applies only to a specified section of the No. 3 entry in the 4 left section (the test area). Inspector Shiveley testified that truss bolting was not present when he inspected the test area on September 11. (Tr. 19-20). Instead, supplemental support was provided by VYC supports. VYCs are a type of supplemental roof support that is approved for use at the Golden Eagle Mine. (Tr. 20). The No. 3 entry was a travelway to the bleeders and the roof was under pressure because the longwall machine had retreated outby. Inspector Shiveley testified that roof bolts had been installed in the cited area. (Tr. 52). He also stated that if the operator had not amended its roof control plan to establish the test area, the VYC supports would not have violated the plan. (Tr. 53). It was his position that because the operator had amended the plan to use truss bolts, it could no longer use VYCs or other cribbing material in the test area.

Kay Hallows, the former safety director for the Golden Eagle Mine, testified that it was his understanding that the mine could continue to use any approved supplemental support in the test area and that the plan amendment also authorized the use of truss bolts. (Tr. 141-42). He did not believe that the mine was required to use truss bolts in the test area. *Id.* He testified that MSHA had not advised mine officials of its more restrictive interpretation of the plan amendment prior to the issuance of the citation. It appears that truss bolts were never used in the test area. (Tr. 151).

Basin Resources argues that the citation should be vacated because the plan was amended to allow the use of truss bolts as an alternative to cribs or other types of supplemental supports. Basin Resources states that the Secretary's restrictive interpretation of the plan amendment is unreasonable and that Basin Resources was not given notice of this interpretation. *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (August 1995). It argues that the citation should be vacated.

Basin Resources requested permission to use truss bolts *in lieu of* cribs for supplemental support in the test area. (Ex. R-B pp. 2 and 6). The diagram accompanying the request states that a truss system will be installed. *Id.* at 3. The term *in lieu of* means *instead of* or *in the place of*. *Webster's New Collegiate Dictionary 657 (1979)*. Thus, given the language in Basin Resources' request to amend the roof control plan, I find that the Secretary's interpretation of the amendment is reasonable. The request clearly states that Basin Resources *will* install truss bolts *instead of* cribs. The request does not indicate that the amended plan would permit Basin Resources to install truss bolts in the test area if it subsequently decided to do so. I also find that Basin Resources was provided sufficient notice of the Secretary's interpretation because the Secretary merely relied upon the language contained in Basin Resources' request. Accordingly, the citation is affirmed.

I find that the violation was not serious because supplemental support had been installed. I also find that Basin Resources' negligence was less than moderate. Although it amended the plan to use truss bolts, it installed an approved supplemental roof support system in the test area. A penalty of \$100 is appropriate.

B. Citation No. 4057638

On September 18, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.364(a)(1). In the citation, the inspector alleged that a weekly examination for hazardous conditions was not conducted for the week of 9-10-95 through 9-16-95 in the 4 left section, No. 3 entry. The citation states that conditions in the entry prevented personnel from entering the area to conduct the examination. The citation also states that a monitoring system was in the area to measure methane and carbon monoxide levels in the area. The inspector determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard provides, in part, that a certified person shall examine unsealed worked-out areas to the area of deepest penetration at least once every seven days.

Inspector Shiveley examined Basin Resources' record books and determined that the cited area had not been examined. (Tr. 28, 33). He testified that the examiner did not examine an area that was in by crosscut 44 into and throughout the bleeder system on the backside of these longwall panels. (Tr. 29). The No. 3 entry in the 4 left section was a bleeder entry. *Id.* He further testified that the examination was not performed because he previously issued an imminent danger order in the area due to unstable roof conditions. (Tr. 30; Ex. R-D). The order prevented persons from entering the No. 3 entry. (Tr. 31-32). The inspector further stated that the methane and carbon monoxide monitoring system was in use on the day he issued the citation. (Tr. 35-36). The monitoring system does not indicate oxygen levels, air currents or other hazards. *Id.* Given the history of roof problems at the mine, he believed that Basin Resources should have taken greater measures to control the roof in the entry. (Tr. 39).

The basic facts are not in dispute. Basin Resources argues that the imminent danger order prohibited miners from entering the No. 3 entry to conduct the required examination.

Accordingly, it maintains that the citation must be vacated. It contends that safety standards must be interpreted also as to harmonize with and further and not to conflict with the objective of the Mine Act. *Secretary of Labor v. Western-Fuels Utah*, 900 F.2d 318, 320 (D.C. Cir. 1990) (citation omitted). Basin Resources states that the requirements of section 75.364(a)(1) should have been suspended during the pendency of the section 107(a) order.

I reject Basin Resources' arguments and affirm the citation. First, the Commission and the courts have uniformly held that the Mine Act is a strict liability statute. *See, e.g. Asarco v. FMSHRC*, 868 F.2d 1195 (10th Cir. 1989). "[W]hen a violation of a mandatory safety standard occurs in a mine, the operator is automatically assessed a civil penalty." *Id.* at 1197. The negligence of the operator and the degree of the hazard created by the violation are taken into consideration in assessing a civil penalty under section 110(i), 30 U.S.C. § 820(i). Second, the imminent danger order was issued due to the poor condition of the roof in the entry. I credit the testimony of Inspector Shiveley that Basin Resources could have done more to support the roof in the area. In addition, Basin Resources did not provide for an alternate means to reach the area that was required to be examined. Thus, this case does not present a situation in which a section of a mine is inaccessible due to circumstances beyond the control of the mine operator.

I find that the violation was not serious because the imminent danger order prevented anyone from entering the area and being exposed to any hazards. In addition, the monitoring system allowed Basin Resources to determine whether dangerous quantities of methane were accumulating in the bleeders. I also find that Basin Resources' negligence was less than moderate. Its examiner was unable to enter the cited area and the withdrawal order prevented it from making the examination. A penalty of \$100 is appropriate.

C. Citation No. 4057610

On September 20, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. § 77.1605(k). In the citation, the inspector alleged that a berm or guard was not provided on the outer bank of the elevated roadway between the raw coal pile and the old coal storage bin, for a distance of 60 feet. The citation states that equipment used the roadway during the working shift and that a 20-foot deep ditch was along the edge of the roadway. The inspector determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard provides that berms or guards shall be provided on the outer banks of elevated roadways.

Inspector Shiveley testified that it appeared that Basin Resources had dug a big trench beside the roadway that increased the drop-off along the roadway. (Tr. 42). He stated that the drop-off was nearly vertical. (Tr. 43). Inspector Shiveley determined that the violation was not S&S because, at the time he issued the citation, the roadway was not heavily used. (Tr. 46). He believed that there had once been a berm in the cited area but that it had been removed to perform work in the area. (Tr. 46-48, 56).

Basin Resources contends that there had never been a berm in the cited area. Mr. Hallows testified that no berm was ever in the cited area since he joined Basin Resources in April 1994. (Tr. 144). He testified that no citation had ever been issued for the condition. He stated that the ditch mentioned by the inspector had been present for some time but that he did not know if the ditch had been recently cleaned out or whether there had been fresh digging along the roadway. (Tr. 154-55).

I find that the Secretary established a violation. There is no dispute that there was a drop-off on the outer back of the roadway. I also find that the violation was not serious, based on the inspector's testimony. Basin Resources maintains that its negligence was low because the roadway had never had a berm at the cited location. If I assume that a berm was never present, I am still faced with the fact the Inspector Shiveley testified that the area below the roadway had been dug deeper. Basin Resources' argument that it was faced with inconsistent enforcement fails if, in fact, a deeper ditch created a more serious drop-off. I credit Mr. Hallows' testimony that there was never a berm present, but I also find that digging in the area below the roadway created a more hazardous condition. I find that Basin Resources' negligence was slightly less than moderate based on the testimony of Mr. Hallows. A penalty of \$400 is appropriate.

D. Citation No. 4057634

On September 12, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.1101-9(a)(1). In the citation, the inspector alleged that the nozzle on the fire suppression system on a shuttle car in the 5 left section was not protected against the entrance of moisture, dust, or dirt. The citation states that the protective cover was missing. The inspector determined that the violation was not S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard provides that dry chemical fire extinguishing systems on underground equipment shall be protected against the entrance of moisture, dust, or dirt.

Basin Resources does not dispute that the dry chemical fire extinguisher nozzle on the shuttle car was not equipped with a protective cover. Rather, it maintains that the shuttle car was being repaired and that the cited condition would have been corrected before the shuttle car was placed into service. Inspector Shiveley testified that the shuttle car was parked in a crosscut on the 5 left section, just off the entry, in an intake air course. (Tr. 59-60). The 5 left section was an active working section. He testified that the shuttle car was not tagged out and there was no other indication that it was not in service. *Id.* He did not see any mechanics working on the shuttle car. (Tr. 61). It did not appear to Inspector Shiveley that the shuttle car was under repair at the time of his inspection. (Tr. 69, 72). He also stated that even if the shuttle car were being repaired for a mechanical problem unrelated to the fire suppression system, he would have still issued the citation. (Tr. 61). He stated that fire suppression devices are needed when repairs are being made on equipment because of the risk of a fire. (Tr. 61-62). He stated that the nozzle was clean. (Tr. 71).

Mr. Hallows testified that the cited shuttle car was torn down for repair and was not in operating condition. (Tr. 146; Ex. R-G). He said that it should have been apparent that the shuttle car was not operable. (Tr. 147). He believes that the mechanic would have replaced the protective cover before the shuttle car was put back into service. *Id.*

I find that the Secretary established a violation. The safety standard, as cited here, is designed to protect the nozzle from the harmful effects of moisture, dust, and dirt. Dust and dirt may enter the nozzle when repairs are being made on the shuttle car. (Tr. 61). A fire could break out while repairs are being made. Thus, the protective purposes of the standard apply even when the equipment is out of service. In contrast, mobile equipment does not need to have operative brakes when it is under repair until it is moved to be placed into service. Thus, even if the shuttle was under repair, as asserted by Basin Resources, the requirements of the standard applied.

I find that the violation was not serious, based on the testimony of Inspector Shiveley. I find that Basin Resources' negligence was somewhat less than moderate because the equipment was not in use. A penalty of \$100 is appropriate.

E. Other Citations

Basin Resources also contested 34 other section 104(a) citations in these cases. 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. (Tr. 5). It only contests the amount of the penalty proposed by the Secretary for each of these citations. It contends that the Secretary's penalties 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.

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 Basin Resources was issued 918 citations and orders in the 24 months preceding September 25, 1995, and that Basin Resources paid penalties for 736 of these citations and orders during the same period. (Ex. P-1). I also find that Basin Resources was a rather large mine operator with 23,505,829 tons of production in 1994. (Stipulation). The Golden Eagle Mine shut down in December 1995 and is no longer producing coal. Basin Resources has been unable to sell the mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of \$325,000. 18 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. Basin Resources demonstrated good faith in abating all of the violations. (Stipulation). 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 No.</u>	<u>30 C.F.R. §</u>	<u>Penalty</u>
<u>WEST 96-79</u>		
4058071	75.202(a)	\$1,200.00
4058072	75.400	400.00
4058073	75.402	400.00
4057692	75.202(a)	1,200.00
4057630	75.202(a)	1,200.00
4057631	75.400	400.00
4057632	75.512	400.00
4057633	75.400	400.00
4057634	75.1107-9(a)(1)	100.00
4057635	75.1725(a)	200.00
4057603	77.1104	400.00
4057604	75.400	400.00
4057605	75.402	400.00
4057606	75.1725(a)	1,200.00
4057607	75.1403-10(i)	200.00
4057608	75.202(a)	400.00
4057609	75.503	200.00
4057614	75.904	200.00
4057615	75.1107-1(a)(3)(ii)	200.00
<u>WEST 96-125</u>		
4058067	75.400	1,200.00
4058068	75.1100-3	400.00
4058069	75.402	400.00
4058070	75.220(a)(1)	400.00
4058079	75.1403-10(i)	1,200.00
4058080	75.370(a)(1)	200.00
4057623	75.400	400.00
4057624	75.380(d)(1)	1,200.00
4057626	75.220(a)(1)	100.00
4057627	75.370(a)(1)	200.00
4057628	75.370(a)(1)	200.00
4057636	75.380(d)(1)	200.00
4057637	75.400	400.00

<u>Citation No.</u>	<u>30 C.F.R. '</u>	<u>Penalty</u>
4057601	77.1104	400.00
4057602	77.205(b)	1,200.00
4057638	75.364(a)(1)	100.00
4057639	77.205(b)	200.00
4057640	77.205(b)	200.00
4057610	77.1605(k)	400.00
	Total Penalty	\$18,500.00

Accordingly, the Secretary's motion to amend the petitions for assessment of penalty is **DENIED**, the citations listed above are hereby **AFFIRMED** or **MODIFIED** as set forth above, and Basin Resources, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$18,500.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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