

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**  
1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

August 11, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-80
Petitioner	:	A.C. No. 05-02820-03775
	:	
v.	:	Docket No. WEST 96-126
	:	A.C. No. 05-02820-03779
	:	
BASIN RESOURCES, INC.,	:	Docket No. WEST 96-127
Respondent	:	A.C. No. 05-02820-03780
	:	
	:	Golden Eagle Mine

**DECISION**

Appearances:           Kristi L. Floyd, Esq. and Edward Falkowski, Esq., Office of the Solicitor, and Ned Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, 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 45 violations of the Secretary's safety and health 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. Roof and Rib Support**

### **1. Order No. 4058110**

On August 16, 1995, MSHA Inspector Earl Simmons issued a section 104(d)(2) order alleging a violation of 30 C.F.R. ' 75.220(a)(1). In the order, the inspector alleged that Basin Resources failed to follow its roof control plan. The order alleges that there was 24 feet of unsupported roof between the last row of roof bolts and the face in the No. 2 right entry crosscut of the 011-0 MMU in the 3<sup>rd</sup> North section. The order alleges that the foreman was aware that the cut was too deep, but did not correct the condition or notify the crew. He determined that the violation was significant and substantial (AS&S@) and was caused by Basin Resources= unwarrantable failure. The Secretary proposes a penalty of \$9,000 for the alleged violation. The mine=s roof control plan provides for a maximum cut of 20 feet. (Ex. G-2).

Inspector Simmons testified that the condition was serious because of the history of roof falls at the mine and the fact that water was running from the area, indicating that cracks were present in the roof. (Tr. 12). He believed that the condition had existed for about three hours. He determined that the violation was the result of Basin Resources= unwarrantable failure because the foreman was aware of the condition but Atook no action to protect the men@ who would be entering the area to bolt the roof. (Tr. 14). The inspector believed that the foreman had a duty to warn the bolters of the deep cut so that they could take extra precautions. The deep cut was made on the previous shift. (Tr. 20).

Basin Resources does not contest the fact of violation, but contends that the violation was neither S&S nor the result of its unwarrantable failure. It contends that the record does not support an inference that the 24-foot deep cut made a roof fall reasonably likely. In addition, it argues that the fact that the area was dangered off made it unlikely that anyone would enter the area, except the roof-bolting crew, who would be protected by the ATRS system on the bolting machine. Basin Resources contends that the violation was not caused by its unwarrantable failure because the inspector=s allegation is based on two invalid assumptions: that the foreman had definite knowledge that there was a deep cut and that the crew would enter the area of the deep cut without having been warned that there had been a deep cut.

The deep cut had been made on the previous shift and there is no evidence as to how or why it occurred. When David Oxford, the section foreman on the swing shift, observed the area, he thought that the area looked deep, but was not sure if it was a deep cut, or if part of the roof had fallen. (Tr. 529-30). There is no question that the area was dangered off. The three-member crew and the equipment in the section were in a different area. Mr. Oxford testified that he did not immediately tell the crew about the cited condition because he was not certain that it was deep and the crew was working in an area a great distance away. (Tr. 533). He stated that he was going to tell the miners about the possible deep cut when the crew traveled to the area to begin work there. (Tr. 534). He stated he would not have left the section, as feared by the

inspector, without first talking to the crew about the No. 2 entry. (Tr. 535). I credit Mr. Oxford's testimony.

I find that the Secretary did not establish the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element of the test is important in this case: whether it was reasonably likely that the hazard contributed to would result in an injury. This element does not require the Secretary to establish that it was more probable than not that an injury would result from the hazard contributed to by the violation. *U.S. Steel Mining Co.*, 18 FMSHRC 862, 865 (June 1996). The test is whether an injury is reasonably likely. The hazard is falling roof. It is not clear if any of the previous roof falls in the mine occurred because of deep cuts. The affected area was dangered off. The deep cut would only pose a hazard if the roof-bolting crew entered the area without being told that the cut was deep or if they failed to notice that the cut was deep. While it is possible that the roof bolting crew could enter the cited area without Mr. Oxford's knowledge, such an event was unlikely. In addition, it is likely that the crew would have noticed the deep cut once they arrived in the area. I find that the Secretary failed to establish the third element of the *Mathies* S&S test.

I find that the Secretary did not establish that the violation was the result of Basin Resources' unwarrantable failure. 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 inspector was concerned because the oncoming foreman failed to warn the crew about the condition. (Tr. 25-26, 35). The foreman's actions did not demonstrate aggravated conduct. He was aware that the area looked deep and that extra precautions would have to be taken. The only way to correct the violation was to have the area roof bolted. The bolting machine and his crew were working elsewhere. The bolting crew was not scheduled to enter the area with the deep cut until later in the shift. The foreman's failure to immediately warn the roof bolters did not demonstrate reckless disregard, indifference, or even a serious lack of reasonable care. The record shows that he frequently communicated with the members of his crew and there is no indication that he would have ignored the deep cut when it came time for the roof bolters to enter the area. The order is modified to a section 104(a) citation.

## 2. Citation No. 3298166

On October 26, 1995, Inspector Mike Stanton issued a citation alleging a violation of section 75.202(a). In the citation, the inspector alleges that the roadway in the five left section contained cracked and broken ribs that created a hazard. The citation also states that the roof was loose near the intersection of the No. 19 crosscut and near the face areas of the Nos. 1 through 3 entries. Finally, the citation states that the ribs and roof in all three entries and crosscuts off the No. 2 entry were spalling. Inspector Stanton determined that the violation was S&S. The Secretary proposes a penalty of \$2,800 for the alleged violation. Section 202(a)

provides, in part, that roof and ribs of areas where persons work or travel shall be supported or otherwise controlled to protect persons from hazards related to falls of the roof or ribs.

Inspector Jeffrey Fleshman, who accompanied Inspector Stanton, testified that the cited area was taking weight and some of the ribs were cracking open on the corners and sloughing off. (Tr. 330). He stated that a rib fell at the intersection of the No. 19 crosscut and the No. 2 entry while the inspectors were in the area. (Tr. 331; Ex. G-12). He stated that preshift examiners were exposed to the hazard of this particular rib. (Tr. 333). He testified that Basin Resources had been cutting into the roof and floor in this area, which put weight on the ribs. (Tr. 335). He determined that ribs were loose based on a visual examination. (Tr. 343). Inspector Stanton testified that the roof and ribs were loose in the areas that he inspected. (Tr. 350; Ex. G-12). It appeared to him that the roof was settling down and putting pressure on the ribs. (Tr. 352).

Basin Resources contests the violation for two basic reasons. First, it contends that the area was subject to a section 103(k) order following a fatal accident that occurred the day before and that its employees had not been allowed into the area to maintain the ribs and roof while the order was in place. Second, it argues that the evidence shows that the ribs and roof were not loose.

The evidence indicates that only a portion of the area cited by Inspector Stanton was covered by a section 103(k) order. (Tr. 332; Ex. G-12). Entry No. 2 was blocked-off in by Crosscut No. 19. *Id.* Most of the areas cited by the inspector were out by that area. Miners were required to be in the area to check for methane and to perform other functions. The Secretary established that at least some of the areas cited by Inspector Stanton were loose. I credit the testimony of Basin Resources witnesses that some of the cited areas could not be easily barred down. Nevertheless, I find that some of the areas cited were loose. Indeed, one section of the rib in the No. 2 entry out by crosscut No. 19 fell during the inspection. I find that the Secretary established an S&S violation of section 75.202(a).

### 3. Citation No. 4057725

On October 31, 1995, Inspector Melvin Shiveley issued a citation alleging a violation of section 75.202(a). In the citation, the inspector alleges that the mine roof in entry No. 4, east mains, was not adequately supported or controlled in that rib cutters were present on both sides of the entry for a distance of about 80 feet. He alleges that the mine roof in the area was taking weight. Inspector Shiveley determined that the violation was S&S. The Secretary proposes a penalty of \$1,400 for the alleged violation.

Inspector Shiveley testified that a rib cutter is a deep crack in the roof adjacent to the rib where material has fallen out. (Tr. 166). He measured the cited cutters and some were 20 to 24 inches deep while others were 8 to 12 inches deep. *Id.* The cutters were in the belt entry and were about 80 feet long. He stated that loose material was present in the cutters. (Tr. 167, 174). He believes that the presence of roof cutters indicates that additional support is required. (Tr. 170). He testified that the area was roof-bolted but that J-channels were not present. (Tr. 172).

Basin Resources contends that the cited area was fully supported with J-channels. In addition, it maintains the cutters were caused by floor heave, rather than roof support problems. Kay Hallows, the former safety director for the mine, testified that the primary cause of rib cutters at the mine is floor heave, which pushes the soft coal pillar into the overburden. (Tr. 473). He testified that if the roof were taking weight in the area, the roof would have been sagging in the middle of the entry. *Id.* Jim Peterson, a former safety inspector with Basin Resources, was present when the citation was issued. He testified that he examined the roof in the area for signs of stress. (Tr. 510-11). He stated that he did not observe any indications that the roof was taking weight in the area. The roof-bolt plates did not show signs of stress, for example. *Id.* He further testified that the area did not need additional roof support, because the area was fully roof-bolted and J-channels were present in the area. (Tr. 510, 512; Ex. R-O). He also felt that the cutters did not represent a slippage of the roof, but were caused by the fact that the pillars were cutting into the roof as a result of floor heave and a change in atmospheric conditions. (Tr. 511, 518).

Inspector Shiveley testified that loose material was present in the cutters. (Tr. 174). Mr. Peterson testified that there was some fallen material in the area that varied between a quarter of an inch to a few inches in diameter. (Tr. 517). I credit the testimony that loose material was present in the cutters that could fall on miners in the area. I credit the testimony of Messrs. Hallows and Peterson, however, that the roof itself was not in danger of falling. Accordingly, I affirm the citation but find that it was not S&S. I find that the evidence establishes there was loose material in the roof, but that it was not reasonably likely that, if any material fell, it would seriously injure anyone. I credit Basin Resources' evidence that the roof and ribs were generally stable, but I find that additional support was necessary to protect miners in the area.

#### 4. Citation No. 4057961

On November 8, 1995, Inspector Simmons issued a citation alleging a violation of section 75.220(a)(1). In the citation, the inspector alleged that Basin Resources failed to follow its roof-control plan. It states that the No. 3 entry crosscut of the 011-0 MMU was cut to exceed the 20-foot maximum width set forth in the plan. The area was 21<sup>2</sup> feet wide at one end and 23<sup>2</sup> feet wide at the other end. The area was about 15 feet long. The citation alleges that additional support was not provided in the wide areas and that there was unsupported roof in the cited area. He determined that the violation was S&S. The Secretary proposes a penalty of \$1,400 for the alleged violation.

Inspector Simmons testified that the area of the wide cut was supported with roof bolts. (Tr. 109, 116). The widest area was 23<sup>2</sup> feet wide. (Tr. 110; Ex. G-7A). The roof in the area in by this wide area was not supported because it had just been cut. *Id.* He also testified that water was running from the roof in the wide area. He believed that the violation was S&S because the water would weaken the roof and, without supplemental support, the roof was reasonably likely to fall and injure a miner. (Tr. 111-12, 117). He determined that the unsupported area adjacent to the face contributed to the hazard. He testified that a roof-bolting machine was parked in the area. (Tr. 112).

The roof-control plan provides that where an entry is wider than 20 feet, roof bolts and supplemental support must be installed. (Tr. 116). Mr. Hallows testified that supporting the roof in an area where the continuous mining machine operator accidentally cut the entry too wide is a two-step process. First, the wide area must be roof bolted. (Tr. 468). Second, timbers or other supplementary supports must be put into place. *Id.* He stated that it is not safe to carry out step two before step one is completed. (Tr. 469). This testimony was supported by Mr. Peterson. (Tr. 521-22). He testified that the mine had completed step one when the inspector issued the citation and that the area would have been timbered in the near future. (Tr. 522; Ex. R-R). Basin Resources contends that the inspector improperly wrote the citation in the middle of the mining cycle.

I find that the Secretary established a violation. Roof bolts had been installed in the wide area, but supplemental supports had not. I find that the Secretary did not establish the third element of the Commission's S&S test. I credit the evidence presented by Basin Resources that timbers were going to be installed in the area. Although the condition presented a hazard, it was not reasonably likely that the hazard would result in a serious injury, assuming continued mining operations. Supplemental support would have been installed in the normal course of mining. In addition, the area adjacent to the face would have been bolted.

5. Citation Nos. 4057722 and 4057672

Citation No. 4057722, issued by Inspector Shiveley on October 25, 1995, alleges an S&S violation of section 75.202(a). Citation No. 4057672, issued by Inspector Simmons on November 2, 1995, alleges a non-S&S violation of section 75.212. Basin Resources does not contest the violations or the inspectors' other determinations. It only contests the amount of the penalty. Based on the description of the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria, I assess the penalties set forth in section III of this decision.

**B. Ventilation**

1. Order No. 4057482

On May 2, 1995, Inspector Fleshman issued a section 104(d)(2) order alleging a violation of 30 C.F.R. ' 75.323(c)(1). In the order, the inspector alleged that effective changes or adjustments were not made to the ventilation system to reduce methane concentrations in the four left section, No. 3 return entry to less than one percent. He obtained methane reading of 1.4% and 1.2% in that entry. He determined that the violation was S&S and was caused by Basin Resources' unwarrantable failure. The Secretary proposes a penalty of \$9,000 for the alleged violation. Section 323(c)(1) provides, in part, that when 1.0% or more methane is present in a return air split between the last working place on a working section and where that split of air meets another split of air, Achanges or adjustments shall be made at once to the ventilation system to reduce the concentration of methane in the return air to less than 1%.@

Inspector Fleshman used a hand-held methane detector. Bottle samples indicated methane levels of 1.2%. (Tr. 225; Ex. G-8). Inspector Fleshman determined that there was a violation based on a number of factors. He reviewed the weekly examination books. These records indicated that the cited area had been experiencing levels of methane over one percent off and on for a few weeks.@ (Tr. 227). Methane readings of up to 1.3% were recorded in the weekly examination book during the previous month. (Tr. 228; Ex. G-9). He testified that he issued the order because Basin Resources was not making adequate changes to eliminate [the methane].@ (Tr. 228). The inspector believed that the company was not doing enough to correct the problem. *Id.* He determined that the violation was the result of the operator's unwarrantable failure because of the history of methane in the area and the failure of the operator to reduce the level of methane. (Tr. 232-35). Basin Resources contends that it was making changes in the ventilation in an attempt to reduce the level below one percent and that it did not violate section 75.323(c)(1).

It is clear that the discovery of methane at a level of 1.0 percent or more in a split of air returning from a working section does not establish a violation of the safety standard. The essence of a violation is the failure to make changes or adjustments to reduce the concentration of methane in the return air to below one percent. *See Jim Walter Resources*, 9 FMSHRC 533, 534 (March 1987)(ALJ). In order to understand this case, it is important to put the facts in context. The area cited was in an entry that was being developed for a longwall section. The methane readings were taken at the outby end of the entry some 4,000 feet from the working section. (Tr. 239; Ex. R-C2 map). In fact, the location where the inspector took his methane readings was 50 inby the area where the split exited the 4 left section. (Tr. 239-40). At all pertinent times, the methane levels in the area just outby the working section were below one percent. (Tr. 239).

In the weeks preceding May 2, the methane level in the returns varied considerably. Readings ranged between 0.3% and 1.3%. (Ex. R-G). Inspector Fleshman took the methane readings set forth in the order on May 1 at about 7:25 p.m. (Tr. 252; Ex. R-C2 p.3). Basin Resources immediately began taking steps to reduce the methane below one percent. (Tr.253). At about 8:00 p.m., Basin Resources installed a partial curtain in the belt entry to try to take air off the belt entry and direct it down the return.@(Tr. 253; Ex. R-C2 p.3). Another reading was taken at about 9:00 p.m., which showed that the methane was still too high. During the next hour, Basin Resources made changes at the third north regulator in an attempt to reduce the level of methane. (*Id.* at 254). This change redirected about 8,600 cfm of air. At about 11:35 p.m., the mine made another air change at this regulator to reduce the level of methane in the entries.

At about 2:10 a.m. on May 2, the inspector took another methane reading in the return. The hand held methane detector showed a methane reading of 1.2% while bottle sample showed 1.04% methane. (Tr. 256; Ex. R-C2 p.3). At that time, Inspector Fleshman issued a non-S&S citation under section 104(a) of the Mine Act for the alleged violation that included a high negligence finding. Shortly thereafter, the mine made adjustments to a curtain in the face area. At about 3:30 a.m., readings of about .8% and .9% methane were taken by Dave Pagnotta, the shift supervisor. (Tr. 413-14; Ex. R-C2 pp. 2-3). It appears that Inspector Fleshman was advised of these readings before he left the mine. *Id.* Later on May 2, other adjustments were made to the third north No. 1 entry regulator and the third left intake. (Tr. ; Ex. R-C2 p.3). Readings

between .7% and .8% were obtained after these changes were made. At about 4:10 p.m. on May 2, Inspector Fleshman called to advise the mine that he was modifying the citation to a section 104(d)(2) order with S&S findings. (Tr. 260). Inspector Fleshman testified that he modified the citation at the direction of his field office supervisor, Larry Ramey. (Tr. 250). The inspector testified that he told the general mine foreman, Derrel Curtis, that he disagreed with the modification. *Id.* Derrel Curtis confirmed this conversation. (Tr. 379-80).

Inspector Fleshman testified that the reason why he issued the citation was because the changes that were made at the mine between 7:25 p.m. on May 1 and 2:10 a.m. on May 2 were not effective in reducing the methane. (Tr. 260). He believed that the quantity of air being directed to the return entry to dilute the methane did not increase with these changes with the result that the concentration of methane did not decrease. (Tr. 262). He felt that the initial changes made were temporary expedients rather than permanent changes. (Tr. 268). He believed that the methane problem was caused by a short circuit in the ventilation system. (Tr. 270). Inspector Fleshman interprets the safety standard to mean that if an operator is given a reasonable time to make changes and the changes it makes are not satisfactory to reduce the methane, [an inspector has] no choice but to issue the citation. (Tr. 263). In this instance he believed that five hours was a reasonable time to comply with the standard. *Id.* He does not dispute that mine officials were acting in good faith to comply with the standard when making the changes. (Tr. 264, 266-67).

I find that the Secretary did not establish a violation of the standard. It is clear that Basin Resources started making changes and adjustments to the ventilation system in the 4 left returns to try to reduce the concentration of methane as soon as the high reading was reported. Derrel Curtis testified that the company made extensive adjustments to the ventilation system to reduce the methane on the day the citation was written. (Tr. 387). Although Inspector Fleshman believed that the methane problem was caused by a short circuit in the ventilation system, he agreed that the company was making good faith attempts to bring down the concentration of methane. He issued the citation at 2:10 a.m. on May 2 because the company's attempts were not successful. There may come a point when a mine operator has exhausted its options or has been given sufficient time to reduce the level of methane. But in this case, the evidence shows that Basin Resources was proceeding as quickly as it could to make effective changes in the ventilation system. There is no allegation that it was not paying sufficient attention to the problem or that it had not devoted sufficient resources to it. Accordingly, the order is vacated.

## 2. Order No. 4057464

On June 13, 1995, Inspector Fleshman issued a section 104(d)(2) order alleging a violation of 30 C.F.R. ' 75.370(a)(1). In the order, the inspector alleged that the ventilation plan was not being followed in that several ventilation devices were not being maintained in a manner to serve their intended purpose. The order states that a 22 foot square man door was blocked open in the 3 north section, No. 3 entry, between crosscuts 49 and 50, which allowed 48,431 cfm of intake air to be short-circuited into the return. In addition, the order alleges that the stopping in the same entry between crosscut Nos. 53 and 54 was blown out. He determined that the



violation was not S&S but was caused by Basin Resources=unwarrantable failure. The Secretary proposes a penalty of \$6,500 for the alleged violation.

Basin Resources does not contest the fact of violation, but contends that the violation was not the result of its unwarrantable failure. Inspector Fleshman testified that he considered the violation to be unwarrantable because the mine had a history of methane problems, the stopping had been blown out for quite some time, the date-board indicated that the area had been examined by the weekly examiner, and the examiner told the inspector that the stopping had been blown out for a long time. (Tr. 289-91, 294; Ex. G-10B). The inspector believes that the short circuit created by this violation was responsible for the methane problems in the return described in Order No. 4057482 above. (Tr. 302). He stated that about 48,000 cfm of air was coursing through the stopping. (Tr. 298). He testified that he talked about the blown-out stopping with Ed Dominguez, the UMWA fireboss, who advised him that the condition had existed for several months. (Tr. 294, 297, 302). The inspector said that he became upset with Mr. Dominguez because he had not taken any steps to correct the problem or report it to management. *Id.*

Mr. Hallows spoke with Mr. Dominguez the day after the order was issued. Mr. Dominguez told Mr. Hallows that he did not understand why the inspector issued the order. (Tr. 437). He told Hallows that, except for some minor leakage, the stopping was intact the day before the order was issued. (Tr. 437-38). Mr. Dominguez, who is no longer employed by Basin Resources, testified that he was a UMWA fire boss with 20 years of underground coal mining experience. He was on the UMWA safety committee. He testified that he examined the area the day before the citation was issued and the stopping was intact. (Tr. 482-83). He denied that he told the inspector that the condition had existed for several months. (Tr. 486). On rebuttal, Inspector Fleshman stated that he had several conversations with Mr. Dominguez on June 13 and that he may have misunderstood what Mr. Dominguez was trying to tell him. (Tr. 568-70).

The principal reason for Inspector Fleshman's unwarrantable failure finding is the length of time that the condition existed with the knowledge of the fire boss. I credit the testimony of Mr. Dominguez that the condition had not existed for as long a period of time as the inspector believed. Accordingly, I vacate the inspector's unwarrantable failure determination, and affirm the violation as a section 104(a) citation.

### 3. Order No. 4057466

On June 15, 1995, Inspector Fleshman issued a section 104(d)(2) order alleging a violation of 30 C.F.R. ' 75.370(a)(1). In the order, the inspector alleged that the ventilation plan was not being followed because the third north roadway, entry No. 5, between crosscut Nos. 49 and 57, was extremely dry and dusty. He determined that the violation was not S&S but was caused by Basin Resources=unwarrantable failure. The Secretary proposes a penalty of \$6,500 for the alleged violation.

The provision of the ventilation plan that Inspector Fleshman contends was violated provides that dust on haulage ways shall be controlled by water wetting or calcium/magnesium

chloride applications or other dust suppressants as needed to maintain respirable dust on intake at or below 1.0 mg/m<sup>3</sup>.@ (Tr. 312; Ex. G-11). He stated that dusty roadways present three hazards: (1) a risk of a fire or explosion, (2) reduced visibility, (3) respirable dust. (Tr. 312-13). The inspector testified that the air velocity in the area was high and one could see suspended dust whenever a vehicle passed. (Tr. 314). He said the condition was obvious and the operator's negligence was high. He testified that the area dries out so quickly that the entry requires a continuous application of water. (Tr. 315). He stated that he did not mark the order as S&S because he did not take a sample of the dust to see if respirable dust exceeded 1.0 mg/m<sup>3</sup>. *Id.* He determined that the violation was unwarrantable because the roadway had been cited many times. (Tr. 316). Inspector Fleshman was advised that the road had been watered earlier that shift. (Tr. 317-18).

The cited provision of the ventilation control plan is unambiguous. Dust on roadways must be controlled to maintain respirable dust on intake at or below 1.0 mg/m<sup>3</sup>.@ (Ex. G-11). The Secretary did not establish that respirable dust was greater than 1.0 mg/m<sup>3</sup>. Accordingly, the Secretary did not meet its burden of proof. *Energy Fuels Coal Co., Inc.*, 12 FMSHRC 698, 703-04 (April 1990)(ALJ). For the reasons set forth in that decision, the order is vacated.

#### 4. Citation No. 4057727

On October 31, 1995, Inspector Shiveley issued a citation alleging a violation of section 75.370(a)(1). In the citation, the inspector alleges that Basin Resources was not complying with the ventilation plan in the 5 left section, entry Nos. 2 and 3, because dry haul roads existed for a distance of 110 feet starting at crosscut No. 19. Inspector Shiveley determined that the violation was not S&S. The Secretary proposes a penalty of \$1,019 for the alleged violation.

The Secretary relies on the same provision of the ventilation plan as Order No. 4057466 above. The Secretary did not establish that the respirable dust was greater than 1.0 mg/m<sup>3</sup>. For the reasons discussed above, the citation is vacated.

#### 5. Citation No. 4057742

On October 4, 1995, Inspector Shiveley issued a citation alleging a violation of section 75.351(f). In the citation, the inspector alleges that the atmospheric monitoring system (AAMS)@ for the bleeder system in NW-1 through NW-6 had not been calibrated at least once every 31 days. The citation states that it was last calibrated on September 1, 1995. Inspector Shiveley determined that the violation was not S&S. The Secretary proposes a penalty of \$1,019 for the alleged violation.

Inspector Shiveley determined that there was a violation based on his review of the company's records. (Tr. 162). Mr. Hallows testified that Basin Resources could not calibrate the AMS because the area was subject to a section 107(a) order of withdrawal. (Tr. 450; Ex. R-L). The record reveals that a section 107(a) order was issued by Inspector Shiveley on September 5, 1995, and that the order was not terminated until October 10, 1995. (Ex. R-L). The order states

that it covered the No. 3 entry of the four left longwall starting inby crosscut No. 44 and continued for a distance of 50 feet. *Id.* There is no dispute that the calibration could not be made in the area covered by the imminent danger order. Nevertheless, the Mine Act imposes strict liability and the citation is affirmed as a non-serious violation with low negligence.

6. Citation No. 4057673

On November 2, 1995, Inspector Simmons issued a citation alleging a violation of section 75.364(a)(2)(iii). In the citation, the inspector alleges that the four left bleeder entry was not examined in its entirety at least every seven days. The citation states that the bleeder had not been examined beyond crosscut No. 38 because the entry was blocked by a roof fall or floor heave. The last examination was conducted on October 25, 1995. Inspector Simmons determined that the violation was not S&S. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard requires a weekly examination of at least one entry of each set of bleeder entries used as part of a bleeder system.

There is no dispute that the weekly examination was not performed beyond crosscut No. 38. The standard requires that the examiner travel the entry in its entirety. Basin Resources could not get into the area to perform the examination because of the conditions in the area. The inspector admitted that a person could not get through the entry beyond that crosscut. (Tr. 71). The standard provides that a primary purpose of the examination is to measure methane and oxygen concentrations, and to determine if a sufficient quantity of air is moving in the proper direction. The inspector was concerned that methane could build up in the bleeder or water could accumulate. (Tr. 72).

Basin Resources argues that the citation should be vacated because unsafe conditions made an examination impossible. It points to section 75.364(d), which requires that hazardous conditions be corrected immediately and miners withdrawn from the area until the conditions are corrected. I find that the Secretary established a violation. Basin Resources did not perform a sufficient examination of the bleeder entry to comply with the requirements of the standard. The fact that it was blocked may be taken into consideration when evaluating negligence. Basin Resources was required to correct the hazardous condition immediately. Accordingly, the citation is affirmed as a non-serious violation with low negligence.

7. Citation No. 4057680

On November 8, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.380(d)(1). In the citation, the inspector alleged that the primary escapeway in the No. Four entry of the 3<sup>rd</sup> North section was not being maintained to assure safe passage of miners because water in excess of 20 inches was present between crosscuts 66 and 67. He determined that the violation was not S&S. The Secretary proposes a penalty of \$1,450 for the alleged violation. The safety standard requires escapeways to be maintained in a safe condition to always assure passage of anyone, including disabled persons. @

Inspector Simmons testified that he was concerned that someone traveling through the water could fall and become seriously injured. (Tr. 100). He assumed that miners would take an alternate route that was not affected by the water. (Tr. 101-02). Mr. Hallows testified that the mine was in the process of pumping out the water in the area and that the escapeway had been rerouted to avoid the water. (Tr. 464-65; Ex. R-S). I find that the Secretary established a violation. Basin Resources=argument that the citation should be vacated because the escape had been rerouted is rejected. Accordingly, the citation is affirmed as a non-serious violation.

8. Citation Nos. 4057506 and 4057962

Citation No. 4057506, issued by Inspector Fleshman on May 24, 1995, alleges an S&S violation of section 75.380(d)(4). It was originally issued as a section 104(d)(2) order, but the parties agreed to reduce the level of negligence, delete the unwarrantable failure designation, and modify it to a section 104(a) citation. (Tr. 4, 285-86). Citation No. 4057962, issued by Inspector Simmons on November 9, 1995, alleges a non-S&S violation of section 75.364(b)(2). Basin Resources does not contest the violations or the inspectors=other determinations. It only contests the amount of the penalty. Based on the description of the violations in the citations, the inspectors=determinations with respect to gravity and negligence, and the civil penalty criteria, I assess the penalties set forth in section III of this decision.

**C. Combustible Materials**

1. Order No. 3849793

On April 7, 1995, Inspector Shiveley issued a section 104(d)(2) order alleging a violation of section 75.400. In the order, the inspector alleges that accumulations of paper, empty oil cans, and broken wooden pallets were allowed to be stored in a trash wagon in crosscut 39 of 4 Left section. The order states that miners have been putting trash in the wagon for two days. It also states that the practice of storing trash in open trash wagons was previously discussed with management. Inspector Shiveley determined that the violation was not S&S and was caused by Basin Resources=unwarrantable failure. The Secretary proposes a penalty of \$6,000 for the alleged violation. Section 75.400 provides, in part, that coal dust and other combustible materials shall be cleaned up and not be allowed to accumulate in active workings.

Inspector Shiveley testified that when he saw the trash wagon, he asked Joe Whalen, a miner, how long it had been there. He testified that the miner replied that the wagon had been there at least a day and half. (Tr. 124). He also believed that the amount of trash in the wagon indicated that it had been there for some time. (Tr. 131). The inspector immediately issued the order. *Id.* He determined that the violation was unwarrantable because the issue of trash wagons had been previously discussed with mine management. (Tr. 125-28). In addition, the condition was obvious and management should have realized that the wagon needed to be emptied. *Id.*

Tom Sciacca, a former accident-prevention coordinator at the mine, testified that the amount of trash in the wagon could have accumulated in a shift. (Tr. 403, 405-07). He stated that the procedure at the mine was to dump the trash onto a rail car whenever it became full. (Tr.

404). He stated that the trash wagon was scheduled to be removed from the section the morning of April 7. *Id.*

It is clear that the trash wagon had been in crosscut 39 for a day and a half, but it is not clear how long the trash had been there. (Tr. 132). It could have been emptied during that period without the knowledge of Mr. Whalen. (Tr. 137). I credit the testimony of Mr. Sciacca that trash can accumulate quickly. When a trash wagon is taken to be emptied, another trash wagon is put in its place. (Tr. 407). Thus, the fact that a trash wagon was in an area for several days does not establish that the trash had been there for the same length of time.

A mine operator is required to immediately remove accumulations of coal dust. Trash is another matter, however. Under the standard, a mine operator must have a regular program to clean up trash. Whether there is a violation must be considered on a case-by-case basis. Basin Resources collects its trash in trash wagons and removes them when they are full. I find that the Secretary did not establish a violation. Inspector Shiveley relied on the statement of Mr. Whalen to establish a violation. He did not ask Mr. Whalen if he knew how long the trash had been in the crosscut, he asked how long the wagon had been there. Thus, the Secretary did not establish that the trash had been allowed to accumulate in the crosscut for an unreasonable length of time. *See Basin Resources, Inc.*, 19 FMSHRC 711, 717-18 (April 1997)(ALJ). Accordingly, the order is vacated.

## 2. Order No. 4057499

On May 24, 1995, Inspector Fleshman issued a section 104(d)(2) order alleging a violation of section 75.400. In the order, the inspector alleges that about 30 empty rock-dust bags, cardboard, empty plastic containers, and rags were allowed to exist in 4 left section along Crosscut 41 between entry Nos. 2 and 3. Inspector Fleshman determined that the violation was not S&S and was caused by Basin Resources' unwarrantable failure. The Secretary proposes a penalty of \$7,000 for the alleged violation.

Inspector Fleshman testified that the violation was unwarrantable because he observed the trash on the previous day and told Mr. Sciacca that it needed to be cleaned up. (Tr. 276; Ex. R-D2). Mr. Sciacca testified that a trash wagon had been hooked up to a scoop and was traveling around the mine picking up trash when the order was issued. (Tr. 417). He stated that the cited accumulation had not been cleaned up because the trash wagon had not arrived at that location at the time of the inspection. (Tr. 418). He testified that the wagon arrived about 10 minutes after the order was issued. Inspector Fleshman warned Mr. Sciacca about the trash at 2:50 a.m. on May 23 and issued the order at 12:50 a.m. on May 24.

Basin Resources does not contest the violation but contends that it was not caused by its unwarrantable failure. Unwarrantable failure is aggravated conduct constituting more than ordinary negligence. It is characterized by such conduct as **Areckless disregard,** **Aintentional misconduct,** **Aindifference,** **or a Aserious lack of reasonable care.** The Commission has held that **Aa 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).

In this case, the violative condition had existed for at least a day and Basin Resources was put on notice that greater efforts were necessary to come into compliance. On the other hand, the violation was not particularly extensive and operator had begun efforts to come into compliance. Taking these factors into consideration, I find that the Secretary established that the violation was the result of Basin Resources' unwarrantable failure. The failure to remove the trash in a more expeditious manner was the result of a serious lack of reasonable care.

3. Citation No. 4057613

On September 20, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 77.202. In the citation, the inspector alleged that fine coal dust was allowed to accumulate on electrical control boxes in the control room of the coal tipple building. The citation states that the fine coal dust was on top of all of the control boxes and was one-sixteenth to one-eighth of an inch thick. He determined that the violation was not S&S. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard states, in part, that coal dust shall not be allowed to accumulate in dangerous amounts on the surfaces of structures, enclosures, or other facilities.

Inspector Shiveley testified that when he entered the electrical control room, he observed a layer of fine coal dust on the surfaces of electrical equipment. (Tr. 147). He determined that it was unlikely that anyone would be injured as a result of the violation, but that coal dust was present in a combustible amount. (Tr. 148). He stated that even a small film of coal dust is combustible and would be a violation of the standard. He testified that arcing occurs when electrical control boxes are turned on or off creating an ignition source for the fine coal dust. (Tr. 151).

Basin Resources argues that the mere presence of coal dust is not a violation of the standard. Rather, the Secretary must show that the amount of dust is sufficient to propagate a fire. I find that the Secretary met her burden of proof. Whether an accumulation of fine coal dust is dangerous depends on the amount of the accumulation and the existence and location of sources of ignition. See *Rochester and Pittsburgh Coal Co.*, 12 FMSHRC 220, 231-32 (February 1990)(ALJ). The inspector determined that the accumulation was one-eighth of an inch thick in many areas and that it covered all surfaces. There were sources of ignition in the immediate vicinity. Although it was unlikely that the accumulation would ignite and cause a serious injury, the fine coal dust was allowed to accumulate in dangerous amounts. Accordingly, the violation is affirmed.

4. Citation Nos. 4057647, 4057726, 4057674, and 4057963

Citation No. 4057647, issued by Inspector Simmons on September 29, 1995, alleges a non S&S violation of section 75.400. Citation No. 4057726, issued by Inspector Shiveley on October 31, 1995, alleges a non-S&S violation of section 75.402. Citation No. 4057674, issued by Inspector Simmons on November 3, 1995, alleges a non S&S violation of section 75.403. Citation No. 4057963, issued by Inspector Simmons on November 14, 1995, alleges an S&S violation of section 75.400. Basin Resources does not contest the violations or the inspectors' other determinations. It only contests the amount of the penalty. Based on the description of the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria, I assess the penalties set forth in section III of this decision.

#### **D. Electrical Equipment**

##### **1. Citation No. 4057676**

On November 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.512. In the citation, the inspector alleged that a complete weekly examination had not been conducted on all electrical equipment for the week of October 29 through November 4, 1995. The citation states that the circuits in the monitoring system for the bleeders from NW-1 through NW-6 were last examined on October 25. He determined that the violation was not S&S. The Secretary proposes a penalty of \$1,019 for the alleged violation. The safety standard requires that all electrical equipment be examined on a weekly basis, at section 75.512-2.

There is no dispute that a complete weekly examination was not performed. Basin Resources contends that its personnel could not get into the area to perform the examination because of the conditions in the area. The inspector admitted that a person could not get to the cited circuits because the area was blocked by the same roof fall discussed with respect to Citation No. 4057673. (Tr. 88-89, 91). Mr. Hallows testified that, due to unsafe roof conditions, the examination could not be made. (Tr. 462; Ex. R-Q).

Basin Resources argues that the citation should be vacated because unsafe conditions made an examination impossible. I find that the Secretary established a violation. Basin Resources did not perform the examination of the cited equipment. The Mine Act imposes strict liability on mine operators. The fact that the area was blocked may be taken into consideration when evaluating negligence. Accordingly, the citation is affirmed as a non-serious violation, with low negligence.

2. Citation No. 4057612

On September 20, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 77.516. In the citation, the inspector alleged that the : -inch metal conduit for the 480-volt power circuit to the vibrator screen motor in the coal tipple was not supported as required by the National Electrical Code. The citation states that the conduit was required to be supported within four feet of each box, cabinet, or other termination point. He determined that the violation was not S&S. The Secretary proposes a penalty of \$903 for the alleged violation. The safety standard provides, in part, that all wiring and electrical equipment shall meet the requirements of the National Electrical Code.

Basin Resources does not dispute that the condition violated the standard. It argues that the condition had existed for some time and had never been cited by an MSHA inspector. Mr. Hallows testified that the conduit had never been supported at the location cited by the inspector. (Tr. 448; Ex. R-K). He further testified that MSHA inspectors had inspected the area many times. Mr. Salerno confirmed this testimony. (Tr. 544-47). I credit this testimony.

While it is true that MSHA inspectors had traveled through the area many times during previous inspections and had never issued any citations for the condition, it is also true that Basin Resources managers had traveled through the area on numerous occasions. It is a mine operators responsibility to take steps to comply with safety standards, not MSHA inspectors. I affirm the citation as a non-serious violation and reduce the negligence slightly.

3. Citation Nos. 4057723, 3590053, 4057611, and 4057677

Citation No. 4057723, issued by Inspector Shiveley on October 25, 1995, alleges a non-S&S violation of section 75.503. Citation No. 3590053, issued by Inspector Fleshman on October 26, 1995, alleges a non-S&S violation of section 75.503. Citation No. 4057611, issued by Inspector Shiveley on September 20, 1995, alleges a non-S&S violation of section 77.502. Citation No. 4057677, issued by Inspector Simmons on November 6, 1995, alleges a non-S&S violation of section 75.507. Basin Resources does not contest the violations or the inspectors= other determinations. It only contests the amount of the penalty. Based on the description of the violations in the citations, the inspectors= determinations with respect to gravity and negligence, and the civil penalty criteria, I assess the penalties set forth in section III of this decision.

**E. Machinery and Equipment**

1. Citation No. 4057648

On September 29, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1722(a). In the citation, the inspector alleged that a guard was not provided for the right side of the take-up roller on the No. 8 belt conveyor. The guard was leaning against the coal rib. The citation states that the belt and rear take-up roller could easily be contacted. He determined that the violation was S&S and Basin Resources= negligence was moderate. The



Secretary proposes a penalty of \$1,450 for the alleged violation. The safety standard requires, in part, that guards be provided for gears; drive, head, tail, and take-up pulleys; flywheels; and similar moving machine parts that may be contacted by and cause injury to persons.

Basin Resources stipulated that the violation occurred and that the violation was S&S, but contends that its negligence was low. (Tr. 38). Inspector Simmons testified that the guard was taken off at some point and was leaning against the rib. (Tr. 40; Ex. G-4). He believes that the person who took off the guard was inattentive and that a finding of moderate negligence is appropriate. *Id.* The belt was running when he issued the citation. He said that anyone could see that the guard was leaning against the rib and had not been replaced. (Tr. 42, 42). He believed that a miner should have been able to see this condition and correct it. *Id.*

Basin Resources argues that the condition was so obvious and easy to remedy that the hourly employee who took off the guard should have replaced it before starting the belt. It believes that the negligence of the miner who took off the guard should not be imputed to the operator in this instance, citing *Fort Scott Fertilizer-Cullor, Inc.*<sup>17</sup> FMSHRC 1112, 1115-16 (July 1995).

The conduct of a rank-and-file miner is not imputable to the operator in determining negligence for penalty purposes. *Id.* The Secretary bears the burden of proof on the issue of negligence. I agree with Basin Resources that the Secretary did not establish that the company's negligence was moderate. I find that Basin Resources' negligence was less than moderate and reduce the penalty accordingly.

## 2. Citation No. 4057741

On October 4, 1995, Inspector Shiveley issued a citation alleging a violation of 30 C.F.R. ' 75.1722(a). In the citation, the inspector alleged that a guard was not extended a sufficient distance to prevent a person from reaching into fan blades and belts on a loader/forklift. The citation states that a 3-by 18-inch opening was present in the engine compartment around the generator pulley, a belt, and the fan blade. He determined that the violation was S&S and Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$1,450 for the alleged violation.

Inspector Shiveley testified that a number of people work on and around the forklift. (Tr. 154). The area of exposure was about waist high and was within the area where people could expose their hands. *Id.* He considered the violation to be S&S because of the activity and exposure. (Tr. 155). He believed that it was reasonably likely that somebody would contact the moving machine parts and sustain a serious injury. *Id.* Mr. Sciacca testified that it would be impossible for the operator of the forklift to place his hands into the cited opening. (Tr. 419). He testified that other miners could not get their hands into the opening because the mine uses pallets to transport items. (Tr. 420-21). Thus, he did not believe that anyone would be close to the opening when the forklift was operating.

Basin Resources contests the inspector's S&S and negligence determinations. I find that the Secretary met her burden of proof with respect to both determinations. Assuming continuing normal mining operations, it was reasonably likely that someone would inadvertently come into contact with the moving machine parts. The Secretary is not required to establish that it was more probable than not that an injury would result. I find that it is reasonably likely that a miner working around the forklift will slip or otherwise accidentally come into contact with the moving machine parts. The Secretary also established that Basin Resources was negligent with respect to the violation.

3. Citation No. 4057675

On November 3, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1722(c). In the citation, the inspector alleged that the guard provided for the slope belt tail roller was not secured in place while the belt conveyor was running. He determined that an opening 22 feet wide and 6 feet high was present that exposed the pinch points of the belt and tail roller. He determined that the violation was S&S and Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$1,450 for the alleged violation. The safety standard requires, in part, that guards shall be securely in place while machinery is being operated, except when the machinery is being tested.

Inspector Simmons testified that a section of the guard was removed and not replaced. (Tr. 81; Ex. G-6). He further testified that he has issued two citations in the past for the same condition at this location. (Tr. 82). Basin Resources does not contest the violation or the S&S determination. It contends that the Secretary did not establish that its negligence was moderate, as discussed above with respect to Citation No. 4057648. I find that the Secretary met her burden of proof. On prior inspections, Inspector Simmons issued similar citations at the same location. Management is responsible for taking adequate steps to ensure that its workforce adheres to MSHA's safety standards. The citation is affirmed as written.

4. Citation No. 4057678

On November 6, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1722(c). In the citation, the inspector alleged that the guard provided for the fan pulley and belts on a continuous mining machine was not secured in place. The guard had slid forward leaving a six-inch by six-inch opening directly in front of the fan pulley and belts. He determined that the violation was not S&S and Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$1,019 for the alleged violation.

Inspector Simmons testified that the mining machine operator should have made sure that the guards were in place. (Tr. 94). The machine operator should have taken steps to make sure that the guard would not slide forward while the machinery was operating.

Basin Resources contends that it should be assessed a low penalty for this violation because its negligence was low. It argues that the negligence of the mining machine operator in

not correcting the problem should not be imputed to it. There is no dispute that the sliding problem was easy to fix. I agree with Basin Resources that the Secretary did not establish that the company's negligence was moderate. I find that Basin Resources' negligence was less than moderate and reduce the penalty accordingly.

5. Citation No. 4057944 and Order No. 4057671

On October 17, 1995, Inspector Simmons issued a citation alleging a violation of 30 C.F.R. ' 75.1403-5(j). In the citation, the inspector alleged that no guard or crossover was provided in by the No. 5 left belt drive where a beltman was observed crossing under the belt about ten feet in by the head drive. He determined that the violation was S&S and Basin Resources' negligence was moderate. Section 1403-5(j) is a safeguard criterion that provides that persons shall not cross moving belt conveyors except where suitable crossing facilities are provided.

Inspector Simmons issued the citation because he observed a beltman crossing under the moving belt. (Tr. 45). He stated that a safeguard was issued at the mine on February 24, 1994, requiring crossovers or guards where persons travel under the belt. (Tr. 46). The safeguard required the installation of a guard to prevent material from falling and to prevent persons and equipment from contacting the belt conveyor at all locations where personnel and equipment pass under moving belt conveyors. (Ex. G-5 p. 2). When the inspector arrived in the area, he observed a beltman on the other side of the drive. Inspector Simmons asked him how he got over there, because the inspector wanted to go over there too. (Tr. 48-49). Instead of answering him, the beltman apparently walked over to the inspector by going under the moving belt. *Id.* The inspector then issued the citation. The belt was about five feet high at that location. The inspector did not see any crossovers or guarded locations along the belt. (Tr. 52).

On November 1, 1995, Inspector Simmons issued Order No. 4057671, under section 104(b) of the Mine Act. The order states that no effort was made to install a guard or crossover in by the No. 5 belt drive where a beltman traveled under the belt. Inspector Simmons testified that when he returned to the area two weeks later, no guard had been installed. (Tr. 52-53). He also did not observe any material in the area to indicate that the operator had begun work on the guard. The Secretary proposes a penalty of \$4,600 for the alleged violation.

Basin Resources contends that the only reason that the beltman traveled under the moving belt is because he thought Inspector Simmons was directing him to do so. Inspector Simmons admitted that it was possible that the beltman crossed under the belt because the beltman thought that the inspector wanted to talk to him. (Tr. 58). He testified, however, that this beltman told him that he had crossed under the moving belt earlier in the shift. (Tr. 59). The inspector also testified that there was no other way to get from one side of the belt to the other in the vicinity of the belt drive.

Mr. Salerno testified when the inspection party arrived at the belt, Inspector Simmons hollered something to the beltman and the beltman walked under the belt to the inspector. (Tr.

550). He testified that there was a cross-under in the vicinity, but he did not know how far away it was. He also testified that between the time the original citation was issued and the section 104(b) order was issued, a guard was installed at the cited location. (Tr. 548-49; Ex. R-M). He testified that the guard must have been removed in the interim.

I find that the Secretary established an S&S violation of the safeguard. It is undisputed that the beltman walked under the moving conveyor while Inspector Simmons was there. More importantly, the beltman told the inspector that he had walked under the conveyor in the past. Based on the record, I find that a beltman would need to be on both sides of the belt during a shift and that there was no area in the vicinity where he could safely travel under the belt. The violation was S&S because it was reasonably likely that a miner would be seriously injured, assuming continued normal mining operations. Coal or other material could fall off the belt and strike a miner, or a miner's clothing could become entangled in the moving parts and he could be seriously injured as a result.

I credit the testimony of Inspector Simmons that the condition had not been abated when he revisited the area on November 1, 1995. He originally determined that the condition could be abated in about three hours. Mr. Salerno testified that, depending on the availability of materials, the guard could have been fabricated and installed in about three hours. (Tr. 552-54). He further testified that the outby foreman told him that a guard had been put up after the citation was issued. I find that the condition had not been abated on November 1. It is highly unlikely that a guard would have been put up and then completely removed from the area. Basin Resources did not present any testimony explaining why such an action would have taken place. Inspector Simmons testified that there were no indications at the belt that a guard had once been in place or that the company was in the process of installing a guard.

I find that the Secretary established a *prima facie* case that the violation described in the underlying citation existed at the time the section 104(b) order was issued. @ *Mid-Continent Resources, Inc.*, 11 FMSHRC 505, 509 (April 1989). I also find that Basin Resources did not rebut the *prima facie* case by showing that the violative condition described in the section 104(a) citation had been abated within the time period fixed in the citation, but had recurred. @ *Id.* Accordingly, 104(b) order No. 4057671 is affirmed.

#### **F. Other Citations**

1. Citation Nos. 4057616, 4057617, 4057618, 4057619, 4057620, 4057649, 4057650, 4057651, 4057652, and 4057653.

On October 3, 1995, Inspectors Shiveley and Simmons issued citations alleging violations of the Secretary's part 50 regulations. Citation No. 4057616 alleges a non-S&S violation of 30 C.F.R. ' 50.30(a). The remaining nine citations allege non-S&S violations of section 50.20-1. Basin Resources does not contest the violations or the inspectors' other determinations. It only contests the amount of the penalty. The violations were not serious. Based on the description of

the violations in the citations, the inspectors' determinations with respect to gravity and negligence, and the civil penalty criteria, I assess the penalties set forth in section III below.

2. Citation No. 4057755

On October 18, 1995, Inspector Shiveley issued a citation alleging an S&S violation of section 77.1710(g). Basin Resources does not contest the violation or the inspector's other determinations. It only contests the amount of the penalty. 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, I assess the penalty set forth in section III of this decision.

3. Citation No. 9894927

At the hearing, the Secretary agreed to vacate this citation. (Tr. 3-4).

## **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 925 citations and orders in the 24 months preceding October 17, 1995, and that Basin Resources paid penalties for 736 of these citations and orders during the same period. (Ex. G-1B). I also find that Basin Resources was a rather large mine operator. 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. With one exception, the Secretary has not alleged that Basin Resources failed to timely abate the citations and order. 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>
<u>WEST 96-80</u>		
3849793	75.400	vacated
4057482	75.323(c)(1)	vacated
4057499	75.400	\$4,000.00
4057506	75.380(d)(4)	1,200.00
4057464	75.370(a)(1)	400.00
4057466	75.370(a)(1)	vacated
4058110	75.220(a)(1)	400.00
<u>WEST 96-126</u>		
4057611	77.502	400.00
4057612	77.516	100.00
4057613	77.202	400.00
4057647	75.400	400.00
4057648	75.1722(a)	600.00
4057616	50.30(a)	100.00
4057617	50.20-1	100.00
4057618	50.20-1	100.00
4057619	50.20-1	100.00
4057620	50.20-1	100.00
4057649	50.20-1	100.00
4057650	50.20-1	100.00
4057651	50.20-1	100.00
4057652	50.20-1	100.00
4057653	50.20-1	100.00
4057741	75.1722(a)	1,200.00
4057742	75.315(f)	200.00
4057944	75.1403-(5)(j)	4,500.00
4057755	77.1710(g)	1,200.00
<u>WEST 96-127</u>		
4057722	75.202(a)	1,200.00
4057723	75.503	200.00
3298166	75.202(a)	1,200.00
3590053	75.503	200.00
4057725	75.202(a)	400.00
4057726	75.402	200.00
4057727	75.370(a)(1)	vacated
4057672	75.212(c)	400.00

<u>Citation/Order No.</u>	<u>30 C.F.R. '</u>	<u>Penalty</u>
4057673	75.364(a)(2)(iii)	100.00
4057674	75.403	400.00
4057675	75.1722(c)	1,200.00
4057676	75.512	100.00
4057677	75.507	200.00
4057678	75.1722(c)	100.00
4057680	75.380(d)(1)	200.00
4057961	75.220(a)(1)	400.00
4057962	75.364(b)(2)	200.00
9894927	70.207	vacated
4057963	75.400	1,200.00
	Total Penalty	\$23,900.00

Accordingly, the Secretary's motion to amend the petitions for assessment of penalty is **DENIED**, the citations and order 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 \$23,900.00 within 40 days of the date of this decision.

Richard W. Manning  
Administrative Law Judge

Distribution:

Kristi Floyd, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716 (Certified Mail)

Ned D. Zamarripa, Conference and Litigation Representative, Mine Safety and Health Administration, P.O. Box 25367, Denver, CO 80225-0367 (Regular Mail)

Andrew Volin, Esq., SHERMAN & HOWARD, L.L.C., 633 17th Street, Suite 3000, Denver,  
CO 80202 (Certified Mail)