

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 11, 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH:

ADMINISTRATION (MSHA), : Docket No. WEST 96-25

Petitioner: A.C. No. 05-02820-03772

:

v.: Docket No. WEST 96-124

: A.C. No. 05-02820-03777

:

BASIN RESOURCES, INC., : Docket No. WEST 96-158

Respondent: A.C. No. 05-02820-03783

:

: Golden Eagle Mine

DECISION

Appearances: William W. Hulvey and Peter D. Campbell, Conference and Litigation Representatives, Mine Safety and Health Administration, U.S. Department of Labor, Morgantown, West Virginia, and 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 39 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. Docket No. WEST 96-25

1. Citation No. 4057791

On May 31, 1995, Inspector Jeffery Fleshman issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.370(a)(1). In the citation, the inspector alleged that the ventilation plan was not being followed in that excessive air leakage, 44,743 cfm, was allowed to flow outby between the airlock doors in entry No. 5 of the 3 north section between crosscut Nos. 22 and 24. The citation states that the airlock doors were not being maintained in a workmanlike manner because the bottom of the door was too short for the opening. 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 \$2,606 for the alleged violation.

Inspector Fleshman testified that the ventilation plan requires that all ventilating devices, including doors, be installed in a workmanlike manner and maintained in a condition to serve the purpose for which they were installed. (Tr. 14; Ex. G-1). He stated that an airlock door is designed to allow equipment to pass through an area without short-circuiting the air courses. He stated that at the airlock door in question, Basin Resources had cleaned the roadway underneath the doors and failed to lower the skirting under the doors. (Tr. 15-16). He stated that there was about six inches of clearance between the bottom of the skirt on each door and the mine floor. He determined that about 44,700 cfm of air was passing between the airlock doors. Kay Hallows, the former safety director for the mine, testified that the space under the doors was created over time due to traffic through the doors and efforts to keep the area clean. (Tr. 258).

Basin Resources contends that it did not violate the ventilation plan because the ventilation requirements in the section were still being met. I disagree. The Secretary is not contending that insufficient air was reaching various areas in the section, but is arguing that the doors were not being maintained in a workmanlike manner. Basin Resources=arguments relate to the gravity of the violation, which the Secretary does not dispute. The Secretary agrees that the violation was neither serious nor S&S and that the section had Aplenty of air.@ (Tr. 32). I find that the Secretary established a violation. A penalty of \$200 is appropriate for this violation.

2. Citation No. 4057468

On June 20, 1995, Inspector Fleshman issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.370(a)(1). In the citation, the inspector alleged that the ventilation plan was not being followed in that a Joy continuous mining machine was being operated on the 3 north section with only 10 of the 15 bottom head sprays present. 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.

Inspector Fleshman testified that the ventilation plan requires five sprays on each of three blocks of bottom sprays. (Tr. 18; Ex. G-2). He stated that the cited continuous miner was equipped with only two blocks of sprays on the bottom with five sprays each. Thus, the

continuous miner was equipped with only 10 bottom sprays rather than 15. He also testified that the citation was abated, not by adding five more sprays, but by changing the ventilation plan to indicate that the continuous miner was required to have only ten sprays. (Tr. 41). The inspector admitted that Basin Resources had contacted MSHA's ventilation group before he issued the citation about amending the plan to provide for only ten sprays on the bottom of continuous miners. (Tr. 42). Inspector Fleshman testified that he issued the citation because he was directed to do so by his field office supervisor. (Tr. 41). He indicated that the difference between the plan and the continuous miner was a "typical oversight" that is generally corrected by amending the plan. (Tr. 42). Basin Resources' testimony is consistent with the inspector's.

I find that the Secretary established a violation, but that the violation was of a technical nature only. The continuous miner was designed to have ten sprays on the bottom and neither party considered that the design presented a safety or health hazard. I find that the violation was not serious and that Basin Resources was not negligent. A penalty of \$1 is appropriate.

3. Citation No. 4057472

On June 21, 1995, Inspector Fleshman issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 77.400(c). In the citation, the inspector alleged that adequate guarding was not provided in the main slope belt-transfer building where a person could come in contact with the east side of the No. 3 belt-drive pulley. The citation states that the distance between the partial guard and the belt-drive pulley was 1.7 feet. He determined that the violation was S&S and that Basin Resources' negligence was moderate. The Secretary proposes a penalty of \$1,450 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 Fleshman testified that Basin Resources had placed danger tape across the area. (Tr. 46). He stated that the operator was using danger tape in lieu of guarding and that such tape does not comply with the regulation. The guard was on the ground about four feet away. He determined that the violation was S&S because there was a potential that someone would be seriously injured by the violation. (Tr. 48-51).

Basin Resources argues that the danger tape satisfied the requirement of the standard and that the standard provides an exception for testing. I reject these defenses. First, it is clear that danger tape would not prevent anyone from "reaching behind" and "becoming caught between the belt and the pulley." Second, there is no indication that testing was being performed at the time the citation was issued. I hold that the testing exception in subsection (d) of the standard is, in essence, an affirmative defense. The mine operator has the burden to come forward with evidence that testing was taking place because it would have greater access to such evidence.

I also find that the violation was S&S. While the danger tape made it less likely that anyone would purposefully reach around the guard and come in contact with the moving parts, someone could trip or stumble while walking down the walkway that was a few feet away. The inspector testified that the pinch point would be "easy" to contact, if someone walking in the area

stumbled or fell. (Tr. 49). The unguarded area was within a few feet of a walkway. I credit his testimony in this regard. The fact that he also stated that the condition was a potential accident waiting to happen does not disprove the third element of the Commission's four part *Mathies* S&S test, as contended by Basin Resources. A penalty of \$1,000 is appropriate.

4. 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.

B. Docket No. WEST 96-124

1. Citation No. 4058130

On August 15, Inspector Melvin Shiveley issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.333(c). In the citation, the inspector alleged that a man door in the 3 left section at crosscut No. 1 was not maintained to provide access through the door. The citation states that an MSHA required report prepared by Basin Resources indicated that an employee was injured when he tried to pass through the door because the high volume of air knocked him off balance. He determined that the violation was S&S and was caused by Basin Resources' moderate negligence. The Secretary proposes a penalty of \$1,450 for the alleged violation.

Inspector Shiveley testified that it was difficult to open the door because of the high volume of air pushing against the door. (Tr. 71). He stated that he did not go through the door because the air could pull you through. He believed that if a miner let go of the door as he passed through, the door could slam against him causing a serious injury. (Tr. 73). He also stated that he discussed the condition with the miner who had been injured while traveling through the man door. (Tr. 88).

Tom Sciacca, a former accident-prevention coordinator at the mine, testified that Inspector Shiveley did not observe the cited condition prior to issuing the citation. (Tr. 228, 234; Ex. R-H). He stated that the inspector handed him the citation on the surface before they went underground. Mr. Hallows testified that the reported injury was the first and only injury that occurred at the mine while a miner was passing through a man door. (Tr. 262).

Inspector Shiveley was not sure if he examined the door before issuing the citation. (Tr. 85, 87). He based the citation on his review of the injury report (MSHA Form 7001). The safety standard provides, in part, that personnel doors shall be of sufficient strength to serve their intended purpose of maintaining separation and permitting travel between air courses... I find

that the Secretary did not establish a violation of this standard. The fact that the door was difficult to open and travel through does not establish that it was not of sufficient strength to separate air courses or permit travel between the air courses. In addition, the fact that one miner was injured while traveling through the door does not establish that the door was unsafe to travel through. This mine contained many similar doors between intake and return air. Proving that one man was injured does not establish that the door was unsafe to travel through. Accordingly, the citation is vacated.

2. Citation No. 4058064

On August 21, 1995, Inspector Shiveley issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.380(d)(1). In the citation, the inspector alleged that the alternate escapeway in entry No. 3 of the 3 north mains was not maintained in safe condition at crosscut No. 27 because water was allowed to accumulate in the area. He determined that the water was between 1 and 18 inches deep in an area that was 30 feet long and as wide as the entry. The citation states that there was a pump in the area but that it was not operating. He determined that the violation was S&S and that Basin Resources= negligence was moderate. The Secretary proposes a penalty of \$1,971 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 Shiveley testified that Basin Resources had constructed a bridge over the water but that it was floating and that you could not see the floor of the entry through the water. (Tr. 59). He said that the pump was clogged with debris. (Tr. 66). Jeffery Salerno, a former safety inspector at the mine, testified that there were two pumps operating to remove the water at the time the citation was issued. (Tr. 253; Ex. R-I). He further testified that the water was present because the PVC pipe that brought water into the section was broken in four locations. (Tr. 254). He stated that the pipe was under high pressure, in part, because it dropped 500 feet as it descended into the mine.

I find that the Secretary established a violation. I credit Inspector Shiveley's description of the conditions in the area. I also find that the violation was S&S. The Secretary established that it was reasonably likely that the hazard contributed to would result in an injury of a reasonably serious nature. I find that Basin Resources= negligence was somewhat less than moderate because it was in the process of building a bridge and trying to remove the water. A penalty of \$800 is appropriate.

3. Other Citations

Basin Resources also contested 17 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.

C. Docket No. WEST 96-158

1. Order No. 4058129

On August 15, 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 float coal dust were allowed to exist in the belt entry for the 3 north mains between crosscut Nos. 56 and 62, for a distance of 840 feet. The order states that the float coal dust covered the mine floor from rib-to-rib. It states that the area was black, the belt was operating, and the dust was dry. Inspector Shiveley determined that the violation was S&S and was caused by Basin Resources' unwarrantable failure. The Secretary proposes a penalty of \$8,500 for the alleged violation. Section 75.400 provides, in part, that coal dust, including float coal dust deposited on rock-dusted surfaces, shall be cleaned up and not be allowed to accumulate in active workings.

Inspector Shiveley testified that the float coal dust accumulations were extensive. He stated that there was coal dust on the belt structure, the ribs, and the floor. (Tr. 92; Ex. G-4). He testified that the coal dust extended into the crosscuts. The belt was carrying coal and there was coal dust in suspension. He observed three people in the area. Some of the miners were shoveling around the tailpiece at crosscut No. 62. (Tr. 93). He believed that the belt system could act as an ignition source for the coal dust. For example, the belt could rub against the belt structure, or rollers could become stuck or get hot. (Tr. 96, 103). He compared the coal dust to gun powder in terms of its tendency to explode easily. He believed that there was enough float coal dust in the area to cause a pretty good-sized explosion. (Tr. 98).

Before he went underground, Inspector Shiveley reviewed the mine's belt record book. He believed that the record book showed that float coal dust had been present in the entry for several days. He testified that these records noted the presence of float coal dust between August 10 and August 14 and did not indicate that the accumulation had been cleaned up. (Tr. 101-111; Ex. R-J). He determined that an unwarrantable failure order should be issued, in large part, because of these records. Inspector Shiveley recommended that the order be specially assessed because the condition was reported in the record book from 8-10-95 to 8-14-95, [and] no action was taken to correct condition. (Special Assessment Review Form). He further testified that an operator is required to record whether a hazardous condition has been corrected in the record books. (Tr. 123-24). He also relied on his experience inspecting the Golden Eagle Mine. (Tr. 142, 147-51). The condition was terminated in about one hour by rock dusting the cited area. (Tr. 120).

Derrel Curtis, the former mine superintendent, testified that float coal dust can be deposited quickly along a belt line at the Golden Eagle Mine. He stated that because the mine liberates high levels of methane, a blowing ventilation system was used which caused air to move

at high velocities. (Tr. 296-97). As this air passes by a point in a belt system that tends to pulverize coal, the air will pick up the fine coal dust and spread it down the entry in a very short period of time. (Tr. 297). Mr. Curtis testified that if you have a spillage along the belt, float coal dust will be dispersed in the area in a matter of minutes. He stated that the mine uses an automated rock dusting system as well as trickle dusters to control float coal dust. He further testified that the belt had been recently moved to the cited entry and the automated rock dusting system had not yet been installed. (Tr. 301).

Mr. Curtis further testified that Inspector Shiveley reached an incorrect conclusion from the belt record book. He testified that a particular page may not show that an accumulation had been cleaned up and that the absence of a notation about accumulations on the next few shifts indicates that the accumulation was cleaned up. He countersigned the belt record book and testified that the book shows that on August 12 and 13 the accumulation had been cleaned up and that the accumulation cited by the inspector must have been created on August 14. (Tr. 303-17; Ex. R-J). Mr. Curtis testified that the presence of float coal dust in the crosscuts and along the belt line did not indicate that the condition had existed for a long period of time. He stated that such conditions can be created in a short period of time. He believed that the fact that it only took about an hour to abate the condition shows that the condition had not existed for a long period of time because more rock dust has to be applied to long-standing accumulations. (Tr. 328-29).

I find that the Secretary established a violation. Although Inspector Shiveley did not take a sample of the dust, he was unequivocal in his opinion that the accumulation could propagate a fire or explosion. An accumulation exists under section 75.400 if the Secretary establishes that the quantity of the combustible materials is such that ... it likely could cause or propagate a fire or explosion if an ignition source were present. *Old Ben Coal Co.*, 2 FMSHRC 2806, 2808 (October 1980). I credit Inspector Shiveley's testimony on this issue. I also credit his testimony concerning the presence of ignition sources.

I also find that the violation was S&S. I find that the Secretary established the four elements of the Commission's S&S test. *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984). The third element of the test is 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. There were several ignition sources along the belt, as described by Inspector Shiveley, and it was reasonably likely that the float coal dust would be ignited given continuing mining operations.

The more difficult issue is whether the violation was caused by Basin Resources' unwarrantable failure to comply with the safety standard. Basin Resources argues that Inspector Shiveley's reliance upon the belt record book is misplaced. It contends that a fair reading of the entries in the record book establishes that any hazardous conditions that existed prior to August 14 had been corrected and that the conditions cited by the inspector had just occurred. Second, it argues that the fact that the float coal dust covered a large area, does not justify an unwarrantable failure finding because the record establishes that the float coal dust can be dispersed at the mine

in only a few minutes. Third, it argues that management's reaction to the dust was reasonable, as there were miners shoveling loose coal in the area in preparation for applying rock dust. Finally, it argues that the mine was in the process of implementing steps to improve its dust control systems.

I find that the Secretary established 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 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).

I agree that the belt record book does not establish that this particular condition had continuously existed since August 10. I also agree that the record establishes that it is possible for float coal dust to be deposited on the entry and belt structure in a relatively short period of time. But I disagree that Basin Resources was exercising reasonable care in addressing the float coal dust problem that existed at the mine. Basin Resources moved the belt to a new location and operated it without extending the automatic rock dusting system into the area. It knew that it had a problem with float coal dust because a high volume of air was necessary to disburse methane yet it continued to allow float coal dust to accumulate along the belt on a regular basis. Although Basin Resources apparently cleaned up accumulations or applied rock dust fairly regularly, accumulations would reoccur just as regularly. I credit Inspector Shiveley's testimony that belts are frequently "dirty" at the mine and that miners often simply spot clean "little areas." (Tr. 145-47). The mine has a significant history of violations of section 75.400. The Special Assessment Review Form accompanying Order No. 4057625, discussed below, indicates that the mine had been issued about 14 orders and 47 citations for violations of section 75.400 in the previous year. (Ex. G-8). The history of previous violations for the mine indicates that 130 citations and orders were issued for violations of section 75.400 between August 30, 1993 and August 29, 1995. (Ex. G-3).

Thus, in reviewing the evidence as a whole, I find that Basin Resources was not adequately addressing the problems associated with float control dust at the mine. Rather, as demonstrated by the order at issue, it would allow accumulations to develop and then abate the condition when it was convenient. Basin Resources had been put on notice that greater efforts were necessary to comply with the standard and its response was inadequate. Its efforts were particularly inadequate because of the high degree of danger posed by accumulations of float coal dust. Accordingly, I conclude that the degree of negligence demonstrated by this violation was high and that the violation was a result of Basin Resources' aggravated conduct. A penalty of \$5,000 is appropriate.

2. Citation No. 4057622

On September 5, 1995, MSHA Inspector Shiveley issued a section 104(a) citation alleging a violation of 30 C.F.R. ' 75.202(a)(1). In the citation, the inspector alleged that the mine roof in entry No. 3, inby crosscut No. 44, in the 4 left section was not adequately controlled to prevent roof material from falling. The citation states that vertical yield control supports (AVYC®) were used as supplemental support in the area and that these supports failed to control the roof. He determined that the violation was S&S and was caused by Basin Resources=moderate negligence. Inspector Shiveley issued Order No. 4057621 at about the same time alleging that these conditions created an imminent danger. The Secretary proposes a penalty of \$5,000 for the alleged violation. Section 202(a) provides, in part, that roof and ribs in 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 Shiveley testified that the VYC supports were so badly crushed and broken that they did not control the roof. (Tr. 154). The area cited was a bleeder entry and the bad top started about one crosscut beyond the longwall machine. He stated that some of the VYCs were bowed out, some were lying on their side, and others were bent. (Tr. 156). He stated that the entry was under heavy pressure because the longwall had mined past the area. Inspector Shiveley testified that the roof was severely broken and loose rock was present. He considered the condition to be so dangerous that he issued an imminent danger order.

Thomas Morris, a former shift supervisor at the mine, testified that the mine had been having problems with traditional wooden cribs. (Tr. 277). He further stated that the VYCs were not performing as well as he had hoped. He stated that the mine was in the process of getting chicken wire and steel beams to support the roof. (Tr. 278, 289). He also stated that Hercules cribs were going to be installed in certain areas. Mr. Curtis testified that the cited area was experiencing severe floor heaving. (Tr. 332). He stated that miners had been in the area to begin installing additional cribs to support the roof. He described the measures that were being taken to address the problem. (333-36). Finally, Mr. Hallows testified that the mine had started rehabilitation work before the citation was issued. (Tr. 352; Ex. R-K).

I find that the Secretary established a violation. I credit Inspector Shiveley's description of the roof condition. I also find that the violation was S&S. The Secretary established that it was reasonably likely that the hazard contributed to would result in an injury of a reasonably serious nature. I find that Basin Resources=negligence was less than moderate. I credit the testimony of its witnesses that it was aware of the problem and was taking steps to address it. A penalty of \$1,500 is appropriate.

3. Order No. 4057625

On September 9, 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 loose coal and fine coal were allowed to exist in the belt entry in the 4 left section from the tail roller outby crosscut No. 43 to crosscut No. 23. The order states that the accumulations were in contact with

the bottom belt and rollers at several locations. It also states that piles of loose coal were under the belt that were between six and nine inches high. It also states that float coal dust was along the rib on the off-side of the belt in several locations. Inspector Shiveley determined that the violation was S&S and was caused by Basin Resources=unwarrantable failure. The Secretary proposes a penalty of \$9,500 for the alleged violation.

Inspector Shiveley testified that he observed piles of loose coal between 6 and 12 inches deep under the belt. (Tr. 177). He saw coal in contact with the belt where a rib had sloughed off and fallen against the belt. Coal was also in contact with the belt rollers. (Tr. 181). He also observed float coal dust along the lower rib on the offside of the belt between crosscut Nos. 2 and 43, almost the entire length of the belt. The accumulations were dry. He testified that coal was being transported on the belt at the time he observed the condition. He did not see anyone cleaning in the area. (Tr. 179). He took samples of the accumulations and the combustible content ranged between 67.4% and 36.6%. (Ex. G-7).

Inspector Shiveley was concerned that miners working inby the accumulations could be endangered because of the presence of ignition sources. (Tr. 185). The belt and rollers were rubbing against the coal in a number of areas. He testified that the belt record book indicated that the area needed to be cleaned up. (Tr. 187; Ex. R-O). He did not observe any miners cleaning along the belt. (Tr. 188). He stated that it took Basin Resources about 24 hours to terminate the order. (Tr. 190-91). He determined that the violation was the result of Basin Resources=aggravated conduct based on the fact that the record book indicated that the area needed to be cleaned up. He conceded that it is possible that the rib fell against the belt earlier in the shift which could cause the belt to become misaligned and spill the coal and coal dust he observed. (Tr. 200).

Mr. Morris testified that the cited entry was subject to rib rash. (Tr. 272). Large sections of the rib sometimes fail and fall onto the belt. He further stated that the belt entry could be clean and within an hour you could have accumulations caused by the rib falling onto the belt. *Id.* The belt would become misaligned after the fall and material would spill into the entry rather quickly. Mr. Morris stated that coal dust and float coal dust would be created as well.

Mr. Curtis testified that the accumulation that Inspector Shiveley relied upon to show aggravated conduct in the belt record book had, in fact, been cleaned up. (Tr. 339-40). The pre-shift mine examiner=s report for the day shift on September 6 states: "Cleaning 4L belt from tail to 36XC both sides." (Ex. R-0 p. 11). The on-shift examiner=s report for the same shift states: "Cleaned from tail to 36XC on both sides and from 9 to 10 XC both sides." *Id.* at 12. Mr. Shiveley issued the order at 5:30 p.m. on September 6, after the examinations had been made. Mr. Curtis explained that the entry was on a downhill slope and the tail piece slid down, throwing the belt "off train," causing a spillage. (Tr. 341). He testified that mine personnel were aware of the situation and that miners had been working on the graveyard and day shifts to correct the condition. *Id.* He stated that miners were not cleaning at the time of the MSHA inspection because the No. 11 belt was experiencing difficulties that needed immediate attention and miners were assigned to correct that problem. He also testified that a rib had become loose and fallen down immediately prior to the MSHA inspection. (Tr. 344-45). Mr. Curtis stated that if the rib

had fallen earlier, the condition would have been noted in the belt record book.

Basin Resources does not seriously contest the violation or the inspector's S&S determination. (BR Br. at 19-20). It argues that the Secretary did not establish that the violation was the result of Basin Resources' aggravated conduct. Although many of the findings that I made in analyzing the unwarrantable failure issue with respect to Order No. 4058129 are also applicable here, I find that the present violation was not caused by Basin Resources' aggravated conduct. Because of extenuating circumstances, I reduce the level of negligence to moderate. I credit the testimony of Messrs. Morris and Curtis that Basin Resources had cleaned up or mostly cleaned up the accumulations along the belt that had been recorded in the belt record books. A section of rib fell prior to the inspector's arrival on the section. Thus, most or all of the accumulations were new. Miners were at the No. 11 belt at the time of Inspector Shiveley's inspection because of reports of several bad splices along that belt, which had the potential of causing the belt to break. (Tr. 342-43). Management was aware of the spillage and were sending miners to the area once the situation at the No. 11 belt was stabilized. While the failure to immediately clean up the belt demonstrates negligence, it does not constitute aggravated conduct. I credit the inspector's testimony that the mine's belt entries were often dirty and that Basin Resources had been put on notice that greater efforts were necessary. Nevertheless, I find that the mitigating circumstances described above warrant a reduction in the degree of negligence. The order is modified to a section 104(a) citation. A penalty of \$2,500 is appropriate for this violation.

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 862 citations and orders in the 24 months preceding October 17, 1995, and that Basin Resources paid penalties for 734 of these citations and orders during the same period. (Ex. G-3). I also find that Basin Resources was a rather large mine operator. (Ex. R-Q). The Golden Eagle Mine shut down in December 1995 and is no longer producing coal. Basin Resources has been unable to sell the mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of \$325,000. 18 FMSHRC 1846, 1847 (October 1996). I have taken Basin Resources' financial condition into consideration and find that the civil penalty assessed in this decision would not have affected its ability to continue in business. The Secretary has not alleged that Basin Resources failed to timely abate the citations and orders. 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 96-25

4057802	75.333(d)(2)	\$200.00
4057803	75.1107	200.00
4057788	75.1100-2(f)	200.00
4057789	75.202(a)	400.00
4057790	75.351(f)(1)	200.00
4057791	75.370(a)(1)	200.00
4057792	75.202(a)	400.00
4057796	75.1202-1(b)(3)	200.00
4057797	75.370(a)(1)	200.00
4057462	75.503	400.00
4057463	75.370(a)(1)	200.00
4057468	75.370(a)(1)	1.00
4057470	75.1202-1(b)(3)	200.00
4057471	77.1605(a)	200.00
4057472	77.400(c)	1,000.00
4057474	77.400(a)	800.00
4058076	75.202(a)	1,200.00

WEST 96-124

4057274	75.400	400.00
4057275	75.1725(a)	400.00
4058121	75.904	200.00
4058122	75.1722(b)	1,200.00
4058123	75.1722(a)	1,200.00
4058124	75.400	400.00
4058125	75.333(c)(3)	200.00
4058126	75.333(c)(3)	200.00
4058127	75.400	400.00
4058128	75.362(a)(2)	400.00
<u>Citation/Order No.</u>	<u>30 C.F.R. *</u>	<u>Penalty</u>
4058130	75.333(c)	Vacated
4058061	75.512	200.00
4058062	75.202(a)	1,200.00
4058063	75.335(a)(1)(iv)	200.00
4058064	75.380(d)(1)	800.00
4058139	75.1702	200.00
4058140	75.400	400.00
4058065	75.1405	1,200.00
4058066	75.1725(a)	1,200.00

WEST 96-158

4058129	75.400	5,000.00
4057622	75.202(a)	1,500.00
4057625	75.400	2,500.00
	Total Penalty	\$25,601.00 .

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 \$25,601.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

Distribution:

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