

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 2, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 96-272
Petitioner	:	A.C. No. 05-04461-03528
	:	
v.	:	
	:	New Elk Preparation Plant
BASIN RESOURCES, INC.,	:	
Respondent	:	

DECISION

Appearances: Edward Falkowski, Esq., Office of the Solicitor, U. S. Department of Labor, Denver, Colorado, for Petitioner;
Andrew Volin, Esq., Sherman & Howard, Denver, Colorado, for Respondent.

Before: Judge Manning

This case is before me on a petition for assessment of penalty 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 petition alleges two violations of the Secretary's safety regulations. The hearing in this and nine other Basin Resources cases was held in Denver, Colorado, on August 5 - 6, 1997.

The Secretary filed a motion to amend the petition 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.

At the hearing, Basin Resources stated that it was not contesting the fact of violation in these citations or the other determinations made by the inspector in the citations. (Tr. 579-80). It only contests the amount of the penalty proposed by the Secretary for each of the two citations. It contends that the Secretary's penalties are too high taking into consideration the civil penalty criteria set forth in section 110(i) of the Mine Act.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Citation No. 4057358, issued on December 29, 1995, alleges a violation of 30 C.F.R. ' 77.502. The citation states that a power cord was damaged, but that an injury was unlikely. The inspector determined that the violation was not of a significant and substantial nature (AS&S@) and that Basin Resources= negligence was moderate. The Secretary proposes a penalty of \$288.00 for the violation.

Citation No. 4057359, issued on December 29, 1995, alleges a violation of 30 C.F.R. ' 77.205(b). The citation states that safe access was not provided for a 480-volt control box because mud and refuse was allowed to accumulate around the box, but that an injury was unlikely. The inspector determined that the violation was not S&S and that Basin Resources = negligence was moderate. The Secretary proposes a penalty of \$288.00 for the violation.

Section 110(i) of the Mine Act sets out six criteria to be considered in determining appropriate civil penalties. I find that about 102 citations were issued at the New Elk Preparation Plant in the 24 months preceding December 29, 1995. (Exs. P-1 & P-2). I also find that Basin Resources was a medium to large mine operator. (Ex. J-1). Basin Resources shut down its Golden Eagle Mine and New Elk Preparation Plant at the end of December 1995. The mine and preparation plant are no longer producing coal. Basin Resources has been unable to sell the Golden Eagle Mine. Its unaudited balance sheet for April 30, 1996, shows that shareholders' equity was minus about 23 million dollars and its income statement for the year ending April 30, 1995, shows a net loss of \$325,000. 18 FMSHRC 1846, 1847 (October 1996). I have taken Basin Resources' financial condition into consideration and find that the civil penalty assessed in this decision would not have affected its ability to continue in business. Basin Resources demonstrated good faith in abating all of the violations. (Ex. J-1). Both violations were serious. Based on the penalty criteria, I find that a penalty of \$175.00 for each citation is appropriate.

II. ORDER

The Secretary's motion to amend the petition for assessment of penalty is **DENIED**, the citations listed above are hereby **AFFIRMED**, and Basin Resources, Inc., is **ORDERED TO PAY** the Secretary of Labor the sum of \$350.00 within 40 days of the date of this decision.

Richard W. Manning
Administrative Law Judge

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