

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 27, 2007

SPEED MINING, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. WEVA 2005-20-R
	:	Citation No. 7208383; 10/18/04
	:	
	:	Docket No. WEVA 2005-21-R
	:	Citation No. 7208384; 10/18/04
	:	
	:	Docket No. WEVA 2005-22-R
	:	Citation No. 7208385; 10/18/04
	:	
	:	Docket No. WEVA 2005-23-R
	:	Citation No. 7208386; 10/18/04
	:	
	:	Docket No. WEVA 2005-24-R
	:	Citation No. 720388; 10/18/04
	:	
SECRETARY OF LABOR,	:	Docket No. WEVA 2005-25-R
MINE SAFETY AND HEALTH	:	Citation No. 7208388; 10/18/04
ADMINISTRATION (MSHA)	:	
Respondent	:	Mine: American Eagle Mine
	:	Mine ID: 46-05437
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2005-97
Petitioner	:	A.C. No. 46-05437-52979
v.	:	
	:	
SPEED MINING, INC.,	:	
Respondent.	:	American Eagle Mine
	:	Mine ID: 46-05437

**ORDER GRANTING THE SECRETARY'S
MOTION FOR SUMMARY JUDGMENT**

Introduction

This consolidated proceeding relates to citations issued to Speed Mining Inc. ("Speed"), the operator of the American Eagle Mine. Speed had contracted with Cowin & Company

(“Cowin”) to conduct an elevator shaft sinking operation at the Eagle Mine. Cowin commenced construction of the elevator shaft. As a result of an accident involving a crane used to conduct the shaft sinking operation, the Secretary issued five citations to Speed relating to the condition of the crane and one citation alleging failure to train the crane operator.¹

After the issues had been joined, the parties agreed to bifurcate the proceedings and to initially litigate only the threshold issue of whether the Secretary abused her discretion in citing Speed. A hearing in this matter was held in Charleston, West Virginia on August 16 and 17, 2005. On December 2, 2005, a decision in this matter was issued. *Speed Mining Inc.*, 27 FMSHRC 935 (Dec. 2005) (“*Speed I*”).

The decision set forth the issue as to whether the Secretary abused her discretion in citing Speed for the violations of its contractor. The decision applied four basic principles set forth by the Commission in *Twentymile Coal Co.*, 27 FMSHRC 260 (Mar. 2005), in determining if the citation of an operator was consistent with the purpose and policies of the Mine Act.² The decision concluded that it had not been established that Speed was properly cited by the Secretary, that the Secretary’s decision to cite Speed was an abuse of discretion, and that the notices of contest at issue should be sustained.

The Secretary filed a petition for discretionary review, which was granted. Subsequently, the Commission, 28 FMSHRC 773 (Sept. 2006), issued an order in which it noted that the Court of Appeals for the D.C. Circuit, *Secretary of Labor v. Twentymile Coal Company* 456 F.3d 151 (D.C. Circuit, 2006), reversed the decision of the Commission in *Twentymile Coal*, *supra*, holding that the Secretary’s decision to cite the owner-operator of a mine as well as its independent contractor, is an exercise of her prosecutorial discretion that is unreviewable. The Commission directed as follows: “[i]n light of the court’s decision, we remand the case to the judge for reconsideration of dismissal of the citations and the civil penalty proceeding.” 28 FMSHRC, *supra*, 773-774.

Subsequent to the remand by the Commission, Speed filed a Motion for Summary Decision, in which it argued that the Secretary lacks authority under the Mine Act to cite one operator for violations committed by another operator. This Motion was denied in an Order issued March 7, 2007.

On March 7, 2007, a Pre-hearing Order was issued which ordered the parties to file 1) a statement setting forth proposed findings of fact relating to the alleged volative conditions and each of the penalty factors set forth in Section 110(i) of the Act, and 2) objections to their

¹These citations were for the same violations alleged in citations the Secretary had issued to Cowin.

²*Twentymile*, *supra*, was then on appeal before the Court of Appeals, but a decision had not yet been rendered.

adversary's proposed findings.³ Both parties filed responses to the Pre-Hearing Order, and Speed filed objections to the Secretary's response. Subsequently, the Secretary filed a Motion to Deem Requests for Admissions Admitted, and Speed filed a response.

The Secretary's Motion

On June 28, 2007 the Secretary filed a Motion for Summary Decision "on each of the issues before the Commission." On July 18, 2007, Speed filed a response in opposition to the motion.⁴

The facts set forth by the Secretary in her motion are as follows:

1. The Federal Mine Safety and Health Review Commission and the Administrative Law Judge assigned to this matter have jurisdiction to hear and decide these consolidated proceedings pursuant to Section 105 of the Federal Mine Safety and Health Act of 1977 (hereinafter "the Act").(Stipulation 1)⁵
2. Speed Mining, Inc., ("SMI") is the operator of the American Eagle Mine, an underground coal mine located in Dry Branch, West Virginia. (Stipulation 2)
3. Operations of the American Eagle Mine are subject to the jurisdiction of the Act.(Stipulation 3)
4. In 2004, SMI contracted with Cowin & Company, Inc. ("Cowin") to conduct an elevator shaft sinking operation at the American Eagle Mine. (Stipulation 4)

³The pre-hearing order also required the parties to confer to attempt to settle the outstanding issues, and, if a settlement was not reached, the parties were allowed until March 19, 2007, to file a motion requesting an evidentiary hearing relating to issues raised in the original pleadings. Neither party filed a motion to adduce additional evidence.

⁴In support of its motion, the Secretary attached Speed's responses to the Secretary's First Request for Admissions on Remand, (Attachment A), Speed's Responses to the Secretary's Second Request of discovery requests (Attachment B), and Speed's Response in Opposition to the Secretary's Motion to Deem Requests Admitted, which contains various admissions (Attachment C, p. 7). The Secretary also relies on documentary evidence and testimony adduced at the initial hearing, *Speed I*, on the threshold issue of whether the Secretary abused her discretion in citing Speed.

⁵The stipulations are those set forth in Joint Stipulations filed in *Speed I*, *supra*, on August 16, 2005.

5. Government Exhibit 28⁶ is an authentic copy of the contract ("Construction Agreement") between SMI and Cowin concerning, *inter alia*, the construction of the elevator shaft, and may be admitted into evidence. (Stipulation 5)
6. Gx. 7 is an authentic copy of the shaft sinking plan submitted by Cowin to MSHA on July 1, 2004 for the construction of the aforementioned elevator shaft at the American Eagle Mine, and may be admitted into evidence. (Stipulation 6)
7. Cowin began constructing the elevator shaft in August 2004. (Stipulation 7)
8. On September 29, 2004, the accident as alleged in Citation Nos. 7208383, 7208384, 7208385, 7208386, 7208387 and 7208388 occurred at the shaft sinking site. Authentic copies of those citations are marked Gx. 1-6, respectfully, and have been admitted into evidence, inclusive of all modifications, for purposes of establishing their issuance. (Stipulation 8)
9. Following an investigation of the accident referenced above, MSHA issued six citations and/or orders to Cowin. Those citations and/or orders are not at issue in these consolidated proceedings. (Stipulation 9)
10. MSHA Inspector Dennis Holbrook also issued six corresponding 104(a) citations to SMI for the same alleged violations (i.e., Citation Nos. 7208383, 7208384, 7208385, 7208386, 7208387 and 7208388). (Stipulation 10)
11. These consolidated proceedings involve the six citations ("contested citations") that were issued to SMI. (Stipulation 11)
12. MSHA Inspector Dennis Holbrook was acting in his official capacity and as an authorized representative of the Secretary of Labor when he issued the contested citations. (Stipulation 12)
13. True copies of the contested citations, along with all continuation forms and modifications, were served on SMI or its agent as required by the Act. (Stipulation 13)
14. The statement, "This violation is an unwarrantable failure to comply with a mandatory standard," which is included in Citation Nos. 7208385 (Gx. 3), 7208386 (Gx. 4), and 7208388 (Gx. 6) was carried over from the citations and/or orders issued to Cowin and is not applicable to SMI. (Stipulation 14)
15. The statement, "This is a contributing factor of the non-injury accident which occurred on 9/30/2004," which is included in Citation No. 7208383 (Gx. 1), should read as follows: "This is a contributing factor of the non-injury accident which occurred on 9/29/2004." (Stipulation 15)
16. No employees of SMI were working in the shaft or in the immediate vicinity

⁶The Secretary's exhibits admitted at the hearing in *Speed I*, *supra* are hereinafter referred to as Gx.

- of the shaft when the referenced accident occurred. (Stipulation 16)
17. No one was seriously injured as a result of the referenced accident. (Stipulation 17, T-43, 164)⁷
 18. On September 29, 2004, a Link-Belt crane, model no. HTC860, was being used by Cowin & Company as part of the shaft sinking operation at a shaft sinking site at the American Eagle Mine. (T-39,152, Gx. 17)
 19. The crane was being used to hoist out of the shaft concrete buckets ("muck buckets") which were filled with mucked materials (rock and dirt being removed from the shaft). (T-41-42)
 20. On September 29; 2094, between 1:00 p.m. and 1:30 p.m., the crane hoist failed and the bucket being hoisted out of the shaft free fell and landed next to the shaft opening. (T-41, 152)
 21. Government Exhibits 17 through 21 are photographs which accurately depict the shaft, the crane and the concrete bucket that were involved in this accident that occurred on September 29, 2004. (T-39, 45, 151)
 22. The buckets being used were approximately 60 inches in diameter and 60 in height. (T-43)
 23. Five employees of Cowin were working in the shaft when the above accident occurred. (T-42, 152).
 24. Had the bucket fallen a few feet more over the shaft, serious injuries, including possible fatalities, were likely to have occurred. (T-44)
 25. The buckets were also being used to transport men in and out of the shaft. (T-44, 179)
 26. The shaft being constructed was approximately 26 by 28 feet in diameter. (T-170)
 27. The shaft was approximately 25 feet in depth at the time that the accident occurred on September 29, 2004. (T-153)
 28. Pete Hendrick was the President of Speed Mining at the time of the accident (T-185)
 29. Morris Niday was employed by Speed Mining as an outside purchasing agent/supply man at the time of the accident. (T-330, 344)
 30. James Smith was employed by Speed Mining as an engineer at the time of the accident. (T-167, 168)
 31. Earl Brendel was employed by Cowin & Company as a project manager at the shaft sinking site. (T-38)

⁷This reference cites the transcript in *Speed I, supra.*

32. Dwight Smith was employed by Cowin & Company as a crane operator at the shaft sinking site. (T-I51)
33. Don Fink was employed by the Mine Safety and Health Administration as a coal mine inspector. (T-32)
34. As President of Speed Mining, Pete Hendrick made the decision to contract with Cowin & Company to construct the shaft. (T-191)
35. As a condition of the contract, Speed Mining, through its President Pete Hendrick, required that Earl Brendel be the foreman in charge of the project. (T-194)
36. Before entering into the contract with Cowin & Company to construct the shaft at issue in this proceeding, Speed Mining did not determine or verify Cowin's history of violations under the Mine Act or its history of reportable injuries or accidents. (T-202)
37. During the two year period preceding September 29, 2004, Cowin & Company was issued 3 citations by MSHA. (Gx. 34)
38. For the four year period preceding September 29, 2004, Cowin had 79 reportable accidents, injuries or illnesses. (Gx. 35)
39. For the years from 1995 through 2003, Cowin's NFDL Incidence Rate was from four to ten times greater than the National NFDL Incidence rate. (Gx. 36)
40. Cowin's violation and accident history was readily available via MSHA's internet home page. (Gx. 36)
41. Speed Mining personnel were involved in designing the plans for the shaft and were setting center lines and offsets for the shaft. (T-169, 171, 200)
42. Speed Mining did not provide any safety related materials to Cowin. (T-213)
43. Once Cowin commenced work on the shaft sinking project, Speed Mining took no action to ensure that Cowin was working in a safe manner or in compliance with MSHA's safety standards. (T-182, 201)
44. Speed Mining took no action to ensure that Cowin was making required examinations of the worksite or the equipment being used. (T-211)
45. Before Cowin commenced work on the shaft, James Smith, a Speed Mining Engineer, went to the site to stake out the center lines for the shaft. (T-169)
46. James Smith went to the shaft site after the collar was poured and on a regular basis thereafter to ensure that the shaft was being constructed properly. (T-171, 113, 177, 181)
47. On the various occasions that James Smith went to the shaft site he did not conduct any type of safety examination. (T-182)
48. A Speed Mining employee operated a dozer in the vicinity of the shaft to

- spread out the mucked material that was being removed from the shaft. (T-201)
49. Since the time of the accident, Speed employees have been present at the shaft site on a regular basis performing engineering duties related to the shaft construction. (T-173)
 50. When performing such engineering duties, Speed's employees have been lowered into the shaft by use of a hoist. (T-179)
 51. Speed Mining has conducted no safety inspections of the shaft sinking site prior to the accident that occurred on September 29, 2004. (T-182, 201, 211)
 52. Speed Mining had no plans to conduct any safety inspections of Cowin's work site at any time before or after the accident that occurred on September 29, 2004. (T-212)
 53. No effort was made by management of Speed Mining to ensure that Cowin & Company was working in a safe manner or was working in compliance with MSHA's safety standards. (T-201)
 54. Don Fink was an MSHA inspector and electrical specialist whose job duties included performing monthly inspections of all new slope and shaft development sites, all major construction sites and all elevators and slope hoists in MSHA's District 4. (T-34)
 55. As part of his duties, Inspector Fink inspected the shaft sinking site at the American Eagle mine on August 31 and September 2 and 13, 2004. (T45, 46, Gx. 33(a))
 56. During his inspections on those dates, Inspector Fink issued several citations involving the work being performed by Cowin and other contractors at the shaft sinking site and at a nearby electrical substation. (T-55, 56, 63, 64, 71, 77, 78, 80, 81 and 90; Gx. 10, 11, 12, 13, 14, 15 and 16)
 57. The shaft was approximately 620 to 640 feet from the electrical substation and both were on Speed Mining's property and under the same property permit. (T-53, 316 and 338)
 58. A copy of Citation No. 7229798 (Gx. 11) had been served on an agent of Speed Mining prior to September 29, 2004, thus placing Speed Mining on notice of safety related problems at the shaft site. (T-64)
 59. A copy of Order No. 7229802 (Gx. 15) had been served on an agent of Speed Mining prior to September 29, 2004, thus placing Speed Mining on notice of safety related problems at the shaft site. (T-83)
 60. On September 2, 2004, Inspector Fink had a discussion with Morris Niday at the Speed office at which time he expressed to Mr. Niday his concerns about contractors working in an unsafe manner at the shaft sinking site and the substation. (T-85 - 86, Gx. 33(a))

61. Inspector Fink informed Mr. Niday of a citation that he had previously issued to Cowin for men working under unconsolidated walls. (T-85, Gx. 12)
62. Inspector Fink informed Mr. Niday of MSHA's policy for issuing overlapping violations to production operators because they had a responsibility for the health and safety of contractors on their property. (T- 85)
63. Inspector Fink informed Mr. Niday that Speed Mining should have "some type of program or some type of proactive action that they would conduct at the shaft site to ensure the health and safety of the contractors working on their property." (T- 85)
64. Inspector Fink requested that a Speed Mining official accompany him to the shaft sinking site. (T-85, 90)
65. No one from Speed Mining accompanied Inspector Fink on any of his inspections of the shaft sinking site. (T-93)
66. As an outside purchasing agent for Speed Mining, Morris Niday was frequently the only Speed Mining employee available on the surface of the mine to accept physical service of MSHA citations and did so on numerous occasions. (T-66, 67, 78, 225, 257 and 258)
67. Mr. Niday had the authority to order the evacuation of the mine in the event of an emergency, (T-231)
68. Mr. Niday provided hazard training to persons coming into mine property acting on behalf of Speed Mining. (T-230, 352)
69. Mr. Niday conducted weekly electrical examinations and filled out and signed reports of those examinations on behalf of Speed Mining. (T-352)
70. Inspector Dennis Holbrook was the lead MSHA investigator into the accident that occurred at the shaft sinking site on September 24, 2004. (T-249)
71. Inspector Holbrook decided to cite Speed Mining, in addition to Cowin & Company, for the violations at issue in this proceeding. (T-255)
72. In deciding to issue citations to Speed Mining, Inspector Holbrook conferred with MSHA Assistant District Managers Link Self and Luther Marrs and with the Department of Labor's Solicitor's Office. (T-255)
73. Inspector Holbrook's decision to issue to Speed Mining the citations at issue in this proceeding was based upon the following factors:
 - a. Speed Mining had been placed on notice - through conversations between Inspector Fink and Morris Niday and prior citations that had been issued to Speed Mining - that Speed Mining needed to pay more attention to the work being performed by Cowin & Company;
 - b. Despite this notice, Speed Mining had taken no action to oversee the work being performed by Cowin or ensure that Cowin was in compliance

- with MSHA's safety standards;
- c. The violations at issue were obvious;
- d. Speed Mining personnel were making regular trips to the shaft to ensure compliance with the contract specifications but made no safety inspection and thus were exposed to the worksite and any hazards. (T-254 - 264)
74. With respect to Citation No. 7208383 at issue in this proceeding, a violation of 30 C.F.R. §77.1606(c) occurred in that the conditions listed in the body of the citation as affecting the Link-Belt crane did exist at the time that the accident that occurred on September 29, 2004 and constituted defects that affected safety. (RFA 1, T-95, 96, 97, 108, 110, 128, 155, 157, 158, 160-61, 262-63; Gx. 1, 29, 30, 31, 32)⁸
75. The Link-Belt crane that was involved in the accident that occurred on September 29, 2004 constituted mobile loading or haulage equipment as that term is used in §77.1606(c). (RFA 2, T-278, 296)
76. The Link-Belt crane that was being used at the shaft sinking site at the time of the accident arrived on mine property on September 28, the day prior to the accident. (RFA 3, T-128, 155)
77. The crane was equipped with a computer that monitored safety features on the crane. (RFA 4, T-95)
78. The computer was in by-pass mode at the time of the accident. (RFA 5, T-96)
79. A red flashing light and an audible alarm in the cab of the crane indicated that the computer was in the bypass mode. (RFA 6, T-97, 160-61)
80. The crane had been modified in order to eliminate the free fall capability with which the crane had been manufactured. (RFA 7, T-41)
81. The modification to eliminate the free fall capability of the crane referenced above involved installing eight 1/4-inch bolts through the hoist brake shoes and into the brake drum. (RFA 8, T-4 1)
82. The eight bolts referenced above broke, resulting in the accident that occurred on September 29, 2004 and causing the hoist to fail and the bucket to fall to where it landed next to the shaft opening. (RFA 9, T-41, Gx. 17 through 21)
83. The hoist rope being used on the Link-Belt mobile crane was damaged from heat caused by welding. (RFA 10, T-97)
84. Government Exhibits 30, 31 and 32 are photographs that accurately depict the damaged sections of the hoist rope. (RFA 11, T-97)
85. The damaged section of the hoist rope was approximately 8 feet from the end of the rope that was attached to the hook, (RFA 12, T-262-63)

⁸“RFA” refers to Speed’s response to the Secretary’s requests for admissions.

86. The crane was equipped with an anti two block mechanism, which was a safety device designed to prevent the conveyance from being lifted too far into the boom of the crane. (RFA 13, T-108, 158)
87. At the time of the accident, the anti two block mechanism on the crane was not functioning. (RFA 14T-110,157, Gx. 29)
88. The accident that occurred on September 29, 2004 was highly likely to result in a fatal injury to at least five people. (T-44, Gx. 17 through 21)
89. The conditions cited in Citation No. 7208383 were obvious to casual observation of the crane. (T-100, 261)
90. With respect to Citation No. 7208384, a violation of 30 C.F.R. §77.404(b) occurred in that the operator of the Link-Belt crane at the time of the accident was not properly trained in the use of the crane including the safety features of the crane. (RFA 17, T-151, 152, 155, 161, 163,278)
91. Dwight Smith was employed by Cowin & Company and was working as a crane operator on September 29, 2004. (RFA 18, T-151)
92. Mr. Smith was operating the crane when the accident occurred on September 29, 2004 and had operated the crane on the previous day. (RFA 19, T-152, 155)
93. Dwight Smith received no training on the proper operation of the crane. (RFA 20, T-155)
94. Dwight Smith had never previously operated the specific crane model that was being operated at the time of the accident. (RFA 21, T-155)
95. Dwight Smith did not review the operator's manual for the crane that he was operating. (RFA 22, T-161)
96. Mr. Smith did not know the purpose of a flashing light and audible alarm that were going off during operation of the crane. (RFA 23, T-161)
97. Dwight Smith did not review the shaft construction plan applicable to the work being performed. (RFA 24, T-161)
98. Dwight Smith was not aware of the maximum allowable load for the crane set forth in the shaft construction plan. (RFA 25, T-163)
99. With respect to Citation No. 7208385, the citation correctly alleges a violation of 30 C.F.R. §77.1900-1 in that the approved shaft sinking plan for the American Eagle Mine was not being complied with when the accident occurred on September 29, 2004. (RFA 26, T-101, 103, 106-07, 162, 277; Gx. 7)
100. The approved shaft construction plan provided that the hoist rope being used on the crane would be "two parted (or greater) to double the breaking strength." (Gx. 7, p. 9; RFA 27)

101. When the crane arrived on Speed Mining's property, it was equipped with a six part line. (RFA 28, T-162)
102. When the accident occurred on September 29, 2004, the hoist rope being used to lift the muck bucket was a single part rope. (RFA 29, T-101, 162)
103. Earl Brendle, Johnnie Daniels and Daugie Hagar, Cowin employees, were involved in changing the hoist to a single rope line. (T-162)
104. Use of a two part rope would have made the accident less likely to have occurred. (T-106-07)
105. The use of a one part rope in violation of the approved shaft sinking plan would have been obvious to casual observation. (T-103, 277)
106. Government Exhibit 8 is an authentic copy of a letter dated August 17, 2004 from MSHA District Manager Jesse Cole to Richard M. Hendrick. (RFA 32, T-232)
107. Government Exhibit 9 is an authentic copy of a letter dated November 8, 2004 signed by Richard M. "Pete" Hendrick concerning Cowin & Company. (RFA 33, T-232)
108. Government Exhibits 8 and 9 establish that Speed Mining had been informed by MSHA that the shaft construction plan had to be submitted and approved under Speed Mining's mine identification number. (RFA 34, T-232, Gx. 8)
109. No effort was made by Speed Mining to ensure that Cowin & Company was complying with the approved shaft construction plan. (T-211)
110. With respect to Citation No. 7208386, the citation correctly alleges a violation of 30 C.F.R. §77.404(a) in that the Link-Belt mobile crane was not removed from service when an unsafe condition, the anti two block safety switches not being functional, was discovered during preoperational checks. (RFA 36, T-110, 253; Gx. 29)
111. The Link Belt crane that was being utilized at the shaft sinking project was equipped with anti two block safety switches which would prevent inadvertent pulling of the conveyance into the hoist boom. (RFA 37, T-108, 158)
112. When the accident occurred on September 29, 2004, the anti two block safety switches were not functional. (RFA 38, T-41)
113. The crane was not safe to operate without functional anti two block safety switches. (RFA 39, T-109, 253)
114. The condition of the anti two block safety switches was discovered during preoperational checks and the condition was recorded in a Daily Inspection Log on September 28 and September 29. (RFA 40, Gx. 29)
115. The failure to remove from service the Link-Belt crane when it was discovered that the anti two block safety switches were not functional was a

- contributing factor to the hoist failure that occurred on September 29, 2004. (T-41)
116. A review of the preoperational examination report would have revealed that the anti two block safety switches were not functional. (T-276; Gx. 29)
 117. With respect to Citation No. 7208387, the citation correctly alleges a violation of 30 C.F.R. §77.1606(a) in that an inadequate preoperational examination was performed on the Link-Belt mobile crane that was being used at the shaft sinking project. (RFA 43)
 118. Dwight Smith conducted preoperational examinations of the crane on September 28 and 29, 2004. (RFA 44, T-156)
 119. Government Exhibit 29 is an accurate copy of the daily preoperational examination report for the crane. (RFA 45, T-109, 157)
 120. The preoperational examination did not note the damaged section of the hoist rope. (RFA 46, GX. 29)
 121. The preoperational examination did not include an evaluation of the operation of the free fall function of the hoist. (RFA 47, Gx. 29)
 122. With respect to Citation No. 72083 88, the citation correctly alleges a violation of 30 C.F.R. §77.1900-1 in that the approved shaft sinking plan was not being followed as alleged in the citation. (RFA 49, T-43; Gx. 7)
 123. The approved shaft sinking plan provided that the maximum allowable load weight for the Link-Belt crane was 10,000 pounds, including the bucket and materials therein. (Gx. 7, page 9, RFA 50)
 124. At the time that the accident occurred on September 29, 2004, the weight of the load being lifted by the Link-Belt crane, including the bucket and materials therein, was 12,180 pounds. (RFA 51, T-43)
 125. Speed Mining's history of violations and production history are accurately set forth in MSHA's Violator Data Sheet which was included with the Secretary's petition for assessment of civil penalty. (RFA 52)
 126. The proposed assessments for the citations involved in these proceedings are appropriate with respect to Speed Mining's violation history and size. (RFA 53)
 127. The violations at issue in these proceedings were abated in good faith. (RFA 54)
 128. Payment of the proposed penalties involved herein would not adversely affect Speed Mining's ability to continue in business. (RFA 55)

Discussion

Speed's Response in Opposition to the Secretary's Motion, does not set forth any objection to the facts set forth in the motion.⁹ On July 26, 2007, Speed filed a statement which asserts that the parties have agreed that "... the cases are ripe for a final decision on both the merits of the alleged violations and any appropriate penalties." Accordingly, the issues presented for resolution are whether the Secretary has established that Speed violated the various mandatory safety standards alleged in the citations at issue, and if so, whether the violations were significant and substantial, and the amount of penalty to be assessed for each violation.

1. Citation No. 7208383 (Violation of 30 C.F.R. § 77.1606 (c)).

violation of Section 77.1606(c), *supra*

Section 77.1606(c), provides, as follows: "[e]quipment defects affecting safety shall be corrected before the equipment is used." The record indicates that on September 29, 2004, a section of the hoist rope on a crane being operated at the shaft sinking site was damaged. Donald William Fink, an MSHA inspector testified¹⁰ that the damage to the hoist rope weakened its integrity and that the crane should have been taken out of service. This testimony was not contradicted or impeached. In responses to the Secretary's requests for admissions, Speed indicated that it did not have any basis for contesting the substantive facts alleged in each of the citations at issue.

Based on all of the above, I find that it has been established that Speed violated Section 77.1606(c), *supra*.

significant and substantial

A "significant and substantial" violation is described in Section 104(d)(1) of the Mine Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated significant and substantial "if based upon the particular facts surrounding the violation there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*,

⁹In its Response, Speed argues that the Secretary's Motion should be denied "on the negligence factor." This issue is addressed in this order at pages 15-16, In addition, Speed seeks the denial of the Secretary's Motion in its entirety for the reasons it had previously set forth in its Motion for Summary Decision filed November 17, 2006, which was denied in a Decision issued on March 7, 2007. This decision was not appealed and has become the law of the case regarding the issues raised by Speed's Motion, and thus any argument by Speed reiterating its position set forth in its previous motion, is rejected.

¹⁰"Testimony" refers to that adduced at the initial hearing in *Speed I, supra*.

3 FMSHRC 825 (April 1981).

In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained its interpretation of the term "significant and substantial" as follows:

In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum* the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

In *United States Steel Mining Company, Inc.*, 7 FMSHRC 1125, 1129 (August 1985), the Commission stated further as follows:

We have explained further that the third element of the *Mathies* formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." *U. S. Steel Mining Co.*, 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1866, 1868 (August 1984); *U. S. Steel Mining Company, Inc.*, 6 FMSHRC 1573, 1574-75 (July 1984).

As set forth above, the Secretary has established a violation of a mandatory safety standard i.e. Section 77.1606(c), *supra*.

It is alleged in the citation at issue that the safety computer for the crane was "bypassed", that one rope was defective, and that eight bolts that were installed to disable the free-fall function of the hoist broke, causing the loaded muck bucket to fall. In responses to the Secretary's requests for admissions, Speed indicated that it did not have any basis for contesting the substantive facts alleged in each of these citations at issue. Also, MSHA Inspector Fink, testified at the initial hearing (*Speed I, supra*) regarding these conditions and the hazards associated with them. Speed does not contest any of this testimony. I thus find that the volative conditions contributed to a measure of danger to safety. Further, since the volative conditions resulted in the bucket falling, I find that it has been established that there was a reasonable likelihood that the hazard contributed to will result in an injury. Moreover, considering that in normal operations the bucket is loaded with muck,¹¹ and men work in the area, I find that it was established that there was a reasonable likelihood that the hazard of the loaded bucket falling would result in an injury of a reasonably serious nature. Accordingly, I find that it has been

¹¹According to the approved plan for the construction of the shaft, the bucket can carry a maximum load of 10,000 pounds.

established that the violation was significant and substantial.

penalty

The Secretary conceded that each of the violations were abated in good faith. Neither party has adduced any evidence tending to establish that Speed's history of violations and size are the basis for either an increase, or decrease in penalty. Speed does not assert that a penalty will have an adverse effect on its ability to continue in business.

Speed admitted that aside from negligence, it does not dispute the statutory findings on which the Secretary's proposed penalty is based. Based on this admission, and for the reasons set forth above, (pp. 14-15, *infra*), I find that the level of gravity of the violation was relatively high.

The Secretary asserts that its determination that the violation was as a result of Speed's moderate negligence is based on testimony of Dennis J. Holbrook, an MSHA inspector, who also serves as an accident investigator. Holbrook testified, based on his investigation, that he determined that Speed had been put on notice that they had a contractor "... that may be needing of guidance." (Tr. 259). In this connection, Fink, testified that on August 31, he informed Speed's employee, Morris Niday, who was working in the mine office at the time, that there were untrained miners on the shaft construction site. According to Fink, Niday informed him that Speed did not have any person at the construction site to ensure the safety of the contractors working on its property. Also, Pete Hendrick, who was Speed's President from July 2001, until June 2005, admitted that Speed did not take any action to ensure that Cowin, its contractor, was working in a manner consistent with MSHA safety standards, that Speed did not review Cowin's history of violations or accidents, and that Speed had not conducted any safety inspections of the shaft sinking site prior to the accident. Further, according to Holbrook, it was obvious that the hoist rope was defective, and that a flashing red light and an audible alarm indicated that the crane computer was in by-pass mode.

On the other hand, Speed adduced evidence of various factors tending to mitigate the level of its negligence. According to Hendrick, the equipment at the site was not owned by Speed. He testified that Speed did not have any expertise regarding the construction of shafts, and it relied on Cowin and its supervisor whom it considered very experienced in shaft sinking operations. There is not any evidence that Speed had any authority to direct Cowin's day-to-day activities. Further, Speed's contract with Cowin required the latter to provide and maintain necessary equipment, and comply with safety regulations. Moreover, there was not any evidence adduced that Speed ignored any defects, or was directly involved with creating any volative conditions. Further, there was not any evidence adduced that the scope of the duties of any of the employees of Speed who were present on the site required any of them to check Cowin's equipment for safety defects.

In *Speed I*, *supra*, I found that Speed did not directly contribute to the violations at issue, and that any omission on its part was not significant. (27 FMSHRC, *supra*, at 944-946, 947). I reiterate the findings and rationale set forth in *Speed I*, *supra*. I also, reiterate finding set forth in *Speed I*, *supra*, that Speed's employees were not threatened by any of the hazards created by the

volative conditions and that Speed did not have significant control over the conditions of the crane. (27 FMSHRC, *supra*, at 947-948).

Based on the various significant mitigating factors set forth above, I find that the level of Speed's negligence was less than moderate.

Taking into account all of the factors set forth in Section 110(i) of the Act, I find that a penalty of **\$640** is appropriate for this violation.

2. Citation No. 7208384 (violation of 30 C.F.R. § 77.404(b)).

Section 77.404(b), provides that “[m]achinery and equipment shall be operated only by persons trained in the use of and authorized to operate such machinery or equipment.”

Dwight Douglas Smith was employed by Cowin and was working as a crane operator on the site on September 29, 2004, operating the truck crane at issue. According to Smith's uncontradicted testimony he had never operated this specific model prior to working on the site, and had did not received any training or instruction regarding the operation of the crane. Speed did not adduce any evidence to the contrary, and admitted that it does not have any basis for contesting these facts. Accordingly, I find that the Secretary has established that Speed violated Section 77.404(a), *supra*.

Citation No 7208384 was issued as a non-significant and substantial violation, and it noted that an injury was unlikely. I thus find that the level of gravity of this violation was low. The citation indicated that the level of negligence was considered to be low. The Secretary did not adduce any evidence attending to establish that the level of negligence of this violation was more than low. I thus find that the negligence of Speed was low. The remaining factors set forth in Section 110(i) of the Act were discussed above, (p. 15-16, *infra*), and this discussion and the findings contained therein are incorporated herein.

Considering all the factors set forth in Section 110(i), of the Act, I find that a penalty of **\$60** dollars is appropriate for this violation.

3. Citation No. 7208385 (Violation of 30 C.F.R. § 1900-1)

Section 77.1900-1, *supra*, provides as follows: “[u]pon approval by the Coal Mine Health and Safety District Manager of a slope or shaft sinking plan, the operator shall adopt and comply with such plan.”

The shaft construction plan stipulates that the link belt crane be equipped with two ropes (Gx. 7, p.11). According to the uncontradicted testimony of Smith, when he was lifting the muck bucket out of the shaft, only a single line was attached from the crane to the bucket. Speed did not adduce any evidence to contradict Smith's testimony. Speed subsequently admitted that it does not have any basis to deny the facts alleged in the citations at issue. Accordingly, I find that the Secretary has established a violation of Section 77.1900-1, *supra*.

According to the uncontradicted testimony of Fink, in essence, the volative condition herein, the use of one rope rather than two as mandated in the plan, would increase the likelihood of an accident occurring. He explained that shear pressure would be doubled which might lead to the shearing of the bolts on the crane. Speed did not adduce any evidence to contradict this testimony, and has not requested an opportunity to present additional evidence. Accordingly, for all the above reasons, I find that the violation was significant and substantial.

Essentially, for the reasons set forth above regarding the finding of significant and substantial, I find that the level of gravity was relatively high. According to Fink, it would not have been difficult for a person observing or inspecting the crane in the rope to detect that there was only one rope attached to the bucket. In this connection, Smith indicated that he did not review the shaft sinking plan, and did not know the maximum allowable load that was set forth in the plan. On the other hand, there are various mitigating factors as discussed above (pp. 15-16, *infra*). For the reasons set forth therein, I find that the level of Speed's negligence to have been less than moderate. I reiterate the findings made above (*id. infra*), regarding the remaining factors set forth in Section 110(i) of the Act.

Taking into account all the factors set forth in Section 110(i) of the Act, I find that a penalty of **\$640** is appropriate for this violation.

4. Citation No. 7208386 (Violation of Section 77.404(a), *supra*)

Citation No. 7208386 alleges that Speed violated Section 77.404(a) because it “... did not remove the Link Belt mobile crane from service when unsafe conditions were found during pre-operational checks performed on 9/28/2004 and 9/29/2004. The pre-operational reports showed that the anti two block safety switches which prevents inadvertent pulling of the conveyance into the hoist boom was not functional.” (*sic*) In this connection, Speed admitted that it does not have any basis for contesting the substantive facts alleged in all of the citations. Further, the daily inspection log (Gx. 29) corroborates the condition cited in the citation. According to the uncontradicted testimony of Fink as a consequence of this condition shear pressure would be increased, which could possibly damage equipment, or break the rope which would result in the conveyance falling back to the ground. Accordingly, I find that the Secretary has established a violation of Section 77.404(a). Based on the testimony of Fink, and considering the fact that an accident did occur, I find that the violation was significant and substantial.

I find, for all of the reasons set forth above, that the level of gravity was relatively high. Essentially, in arguing that it had established moderate negligence on behalf of the Respondent the Secretary argues that the notation “no two block” was entered by Smith in the daily inspection log on both September 28 and 29, 2004, and that reviewing the log would have revealed the defect. (Secretary's Motion, p. 28). On the other hand, the record contains numerous mitigating factors (pp. 15-16, *infra*), which are incorporated herein. I also incorporate my findings regarding the remaining Section 110(i) factors. (*id.*)

Considering all the factors set forth in Section 110(i) of the Act, I find that a penalty of \$640 dollars is appropriate.

5. Citation No 7208387 (Violation of 30 C.F.R. § 77.1606(a))

Section 77.1606(a), *supra*, provides as follows: “Mobile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation. Equipment defects affecting safety shall be recorded and reported to the mine operator.”

Citation No. 7208387 alleges that an inadequate pre-operational examination was performed on the crane at issue, because a damaged rope should have been discovered. Also, that the operational function of the free fall hoist was not examined. Speed admitted that it does not have any basis for contesting the substantive facts alleged in the citations at issue. Photographs taken after the accident clearly depict the damaged section of the rope. Fink testified that it would not be difficult to detect this condition. This testimony was not contradicted or impeached. Accordingly, I find that the Secretary has established that Speed violated Section 77.1606(a), *supra*.

As noted above, Fink testified to the hazards of the use of only one rope. (p. 17, *infra*) This testimony was not impeached or contradicted. Hence, I find that a single damaged rope clearly contributed to a hazard. Failure to note this condition in a pre-operational examination and take it out of service clearly contributed to the hazard of the bucket falling. Further, for essentially the same reasons set forth above, which are incorporated herein (*id.*), I find that the third and fourth elements of the *Mathies* criteria have been met. I conclude that it has been established that the violation was significant and substantial.

Essentially for the reasons set forth above, I find that the level of gravity was relatively high. The Secretary asserts that the hazardous conditions which were not noted in a pre-operational examination were readily observable. However, as noted above, the record contains various factors tending to mitigate the level of Speed’s negligence (pp. 15-16, *infra*). The remaining factors set forth in Section 110(i) of the Act were discussed above, and are incorporated herein.

Considering all of the factors set forth in Section 110(i) of the Act, I find that a penalty of \$640 is appropriate.

6. Citation No. 7208388 (Violation of Section 77.1900-1)

Citation No. 7208388 alleges that the approved shaft sinking plan was not being followed in that the plan stipulates that the maximum load weight will be 10,000 pounds, and an investigation of the accident at issue revealed that the load being lifted at the time of the hoist failure was 12,180 pounds. Speed admitted that it does not have any basis to contest these substantive facts.

The plan clearly indicates that the link belt crane should have a maximum weight load of 10,000 pounds. (Gx. 7, p. 11). According to the uncontradicted and unimpeached testimony of Fink, during the investigation the bucket was weighed with a calibrated scale which indicated that it weighed 2,180 pounds when it fell. For all these reasons, I conclude that it has been established that Speed violated Section 77.1900-1, *supra*.

significant and substantial

Citation No. 7208388 was issued as a significant and substantial violation. Since Speed's admissions indicate that it is not contesting the finding of significant and substantial (Secretary's Motion, Attachment A), I find that the violation was significant and substantial.

penalty

For the reasons set forth above, I find that the gravity of the violation was relatively high. In support of its argument that Speed's negligence was moderate, the Secretary relies on testimony by Smith, that he had not read the approved shaft construction plan, and did not know the maximum allowable load.¹² However, as noted above, the record contains various factors tending to mitigate the level of Speed's negligence (pp.15-16, *infra*). The remaining factors set forth in Section 110(i) of the Act have been discussed above (*id, infra*), and that discussion is incorporated herein.

Considering all of the statutory factors set forth in Section 110(i) of the Act, I find that a penalty of **\$640** is appropriate.

¹²The Secretary also argues that Speed had "been specifically put on notice by MSHA that it was responsible for compliance with the shaft sinking plan." (The Secretary's Motion, p. 28, citing page 211 of the transcript and Gx. 8). However, neither support the Secretary's assertion. Page 211 of the transcript does not contain any testimony regarding Speed having been put on notice that it was responsible for compliance with the plan. In the same fashion, Gx. 8, a letter from the District Manager, District 4, Mine Safety Health Administration to Hendrick, states merely that the shaft construction plan was reviewed and approved, and that prior approval must be received from MSHA should revisions become necessary. This letter is not sufficient to have put Speed on notice that it was responsible for compliance with the plan.

ORDER

It is **Ordered** that Speed pay a total civil penalty of **\$3,260** within 30 days of this **Order**, and that these cases be **Dismissed**.

Avram Weisberger
Administrative Law Judge

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