

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

August 2, 2000

DARWIN STRATTON & SON INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2000-371-RM
	:	Order No. 7966584; 4/24/2000
	:	
	:	Docket No. WEST 2000-372-RM
	:	Citation No. 7966585; 4/22/2000
	:	
	:	Docket No. WEST 2000-373-RM
	:	Order No. 7966587; 4/22/2000
v.	:	
	:	Docket No. WEST 2000-374-RM
	:	Citation No. 7941252; 4/26/2000
	:	
	:	Docket No. WEST 2000-375-RM
	:	Order No. 7941253; 4/26/2000
	:	
	:	Docket No. WEST 2000-376-RM
	:	Order No. 7941254; 4/26/2000
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2000-377-RM
ADMINISTRATION (MSHA),	:	Order No. 7941255; 4/26/2000
Respondent	:	
	:	Docket No. WEST 2000-378-RM
	:	Order No. 7941256; 4/26/2000
	:	
	:	Docket No. WEST 2000-379-RM
	:	Order No. 7941257; 4/26/2000
	:	
	:	Docket No. WEST 2000-380-RM
	:	Order No. 7941258; 4/26/2000
	:	
	:	Docket No. WEST 2000-381-RM
	:	Order No. 7941259; 4/26/2000
	:	
	:	Docket No. WEST 2000-382-RM
	:	Order No. 7941260; 4/26/2000

: Docket No. WEST 2000-383-RM  
: Citation No. 7941261; 4/26/2000  
:  
: Docket No. WEST 2000-384-RM  
: Citation No. 7941262; 4/26/2000  
:  
: Docket No. WEST 2000-385-RM  
: Order No. 7941263; 4/26/2000  
:  
: Docket No. WEST 2000-386-RM  
: Order No. 7941264; 4/26/2000  
:  
: Docket No. WEST 2000-387-RM  
: Order No. 7941265; 4/27/2000  
:  
: Docket No. WEST 2000-388-RM  
: Order No. 7941266; 4/26/2000  
:  
: Docket No. WEST 2000-389-RM  
: Order No. 7941267; 4/26/2000  
:  
: Docket No. WEST 2000-390-RM  
: Order No. 7941268; 4/26/2000  
:  
: Docket No. WEST 2000-391-RM  
: Citation No. 7941269; 4/27/2000  
:  
: Docket No. WEST 2000-392-RM  
: Citation No. 7941270; 4/27/2000  
:  
: Docket No. WEST 2000-393-RM  
: Order No. 7941271; 4/27/2000  
:  
: Docket No. WEST 2000-394-RM  
: Order No. 7941272; 4/27/2000  
:  
: Docket No. WEST 2000-395-RM  
: Citation No. 7941273; 4/27/2000  
:  
: Docket No. WEST 2000-396-RM  
: Citation No. 7941274; 4/27/2000

: Docket No. WEST 2000-397-RM  
: Order No. 7941275; 4/27/2000  
:  
: Docket No. WEST 2000-398-RM  
: Citation No. 7941276; 4/27/2000  
:  
: Docket No. WEST 2000-443-RM  
: Order No. 7966588; 4/22/2000  
:  
: Rattlesnake Pit  
: Mine ID 42-02283

**ORDER TO RESPOND TO SECRETARY OF LABOR'S  
MOTION FOR SUMMARY DECISION**

The Secretary of Labor filed a motion for summary decision on the issue of whether the Department of Labor's Mine Safety and Health Administration ("MSHA") has jurisdiction over the Rattlesnake Pit. Under the Commission's Procedural Rules, Darwin Stratton & Son, Inc., has 10 days to respond to the Secretary's motion. 29 C.F.R. § 2700.10. Darwin Stratton must mail its response to the Secretary's motion to me on or before **August 15, 2000**.

The Commission's summary decision rule provides that a "motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits shows: (1) that there is no genuine issue as to any materials facts; and (2) that the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). The Commission's procedural rule further states that a motion for summary decision must be supported. The Secretary of Labor attached an affidavit of MSHA Inspector Dennis Harsh in support of its motion. In the affidavit, Inspector Harsh sets forth facts, based on his personal knowledge, to support the Secretary's position that the Rattlesnake Pit is a mine subject to the jurisdiction of MSHA.

The Commission's procedural rule provides that "when a motion for summary decision is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for a hearing." 29 C.F.R. § 2700.67(c). It also states that "if a party does not respond, summary decision, if appropriate, shall be entered against him." *Id.*

As applied in these cases, this procedural rule requires Dawson Stratton to respond to the Secretary's motion if it continues to believe that MSHA is without jurisdiction to inspect the Rattlesnake Pit and issue citations for violations of safety standards. Its response must set forth specific facts to show that MSHA is without jurisdiction. Simply arguing that MSHA does not or should not have jurisdiction over the Rattlesnake Pit is not sufficient.

As I have stated in the past, these cases involve a fatality and the Secretary may subsequently propose high monetary penalties. Because the issues raised in the cases may have significant implications for Darwin Stratton & Son, Inc, it should seriously consider hiring an attorney to represent it in these cases. Darwin Stratton's conduct in these cases indicates to me that it does not understand the importance of these cases. For example, using a rubber stamp, it stamped "Not Accepted" six times on correspondence it received from counsel for the Secretary of Labor on July 27<sup>th</sup> and mailed a copy to me. It also stamped "Without Dishonor U.C.C. 3-505" on this same document. Using rubber stamps on documents will not have any bearing on the results in these cases. In addition, the Uniform Commercial Code is not applicable to these proceedings, including section 3-505.

As I have previously stated, MSHA has not proposed monetary penalties for the citations and orders it issued at the Rattlesnake Pit. Until these penalties are proposed, settlement is more difficult. If Darwin Stratton continues to treat these cases in a frivolous manner, I may cancel the hearing set for October 3<sup>rd</sup> and stay the cases until civil penalty cases have been filed. At that time, Darwin Stratton will know what its potential monetary liability is and the parties will be in a better position to discuss settlement. Darwin Stratton should understand that it will not be able to challenge any citations a second time in a civil penalty case that I affirm following a pre-penalty hearing. If the cases are stayed, on the other hand, all issues can be considered at one hearing.

Richard W. Manning  
Administrative Law Judge

Distribution:

Mr. Pat Morgan, Darwin Stratton & Son, Inc., P.O. Box 1089, St. George, UT 84771

John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, 1999 Broadway, Suite 1600, Denver, CO 80202-5716

RWM