

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
601 New Jersey Avenue, N.W. Suite 9500  
Washington, DC 20001-2021

December 2, 2005

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. 720387; 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.,	:	American Eagle Mine
Respondent.	:	Mine ID: 46-05437

**DECISION**

Appearances: Robert S. Wilson, U.S. Department of Labor, Office of the Solicitor, West, Arlington, Virginia, for the Respondent/Petitioner.  
Daniel W. Wolff, Crowell & Moring, Washington, D.C. for the Contestant/Respondent;

Before: Judge Weisberger

These consolidated proceedings are before me based on Notices of Contest filed by Speed Mining Inc. (“Speed”) challenging the issuance to it of various citations alleging violations of certain mandatory safety standards set forth in Title 30 of the Code of Federal Regulations. In addition, the Secretary of Labor (“Secretary”) filed a Petition for Assessment of Civil Penalty seeking the imposition of civil penalties for the alleged violation by Speed of these mandatory standards.

## **I. INTRODUCTION**

Speed is the Operator of the American Eagle Mine, an underground coal mine, located in Dry Branch, West Virginia. In 2004, Speed contracted with Cowin & Company Inc., (“Cowin”) to conduct an elevator shaft sinking operation at the Eagle Mine. Cowin began constructing the elevator shaft in August, 2004. On September 29, 2004 an accident occurred on the site involving a link-belt crane used to conduct the shaft sinking operation. As a result, the Secretary issued five citations to Speed, relating to the condition of the crane, and one citation alleging failure to train the crane operator. Additionally, six citations and/or orders were issued to Cowin, and these are not at issue in the instant proceeding. The citations issued to Speed were for the same violations alleged in the citations issued to Cowin.

The parties agreed that the violative conditions alleged in the citations issued to Speed are not at issue. Additionally, 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. Subsequent to the hearing, the parties filed proposed findings of fact along with a brief, and replies thereto.

## **II. THE AUTHORITY OF THE COMMISSION TO REVIEW THE SECRETARY’S DECISION TO CITE SPEED FOR VIOLATIONS INVOLVING COWIN, ITS INDEPENDENT CONTRACTOR WORKING ON THE PROPERTY**

In essence, it is the Secretary’s position that, based on prosecutorial discretion, her decision to cite an operator and/or an independent contractor is not reviewable by the Commission. However, in a recent decision, *Twentymile Coal*, 27 FMSHRC 260 (March, 2005), the Commission considered and rejected this position. The Commission took cognizance of the Secretary’s reliance upon *Heckler v. Chaney*, 470 US 821, 830-32 (1985), and its progeny, also relied on by the Secretary herein, which preclude review under Section 701, (a)(2) of the Administrative Procedure Act. The Commission found such authority to be inapplicable. The Commission, 21 FMSHRC supra, at 265-266 set forth its holding as follows:

As the Commission has previously recognized, Section 507 of the Mine Act<sup>7</sup> expressly provides that Section 701 of the APA does not apply to Commission proceedings. *Old Ben*, 1 FMSHRC at 1483-84. Thus, we find such authority cited by the Secretary to be inapplicable.

Furthermore, the Mine Act does not contemplate that the Secretary's enforcement decisions are unreviewable by the Commission. Section 113 of the Mine Act, 30 U.S.C. § 823, contains no limits on the Commission's review on questions pertaining to the exercise of the Secretary's enforcement discretion.<sup>8</sup> To the contrary, the breadth of the Commission's review is broad. The Commission, in its discretion, may grant review if a "substantial question of law, policy or discretion is involved" (30 U.S.C. § 823(d)(2)(A)(ii)(IV)), and the Commission's review authority extends to cases in which no party has filed a petition for review (30 U.S.C. § 823(d)(2)(B)).<sup>9</sup>

The Commission has explained that these powers were given to the Commission as the "'ultimate administrative review body'" under the Act in order to "enable [the Commission] to 'develop a uniform and comprehensive interpretation of the law,' providing 'guidance to the Secretary in enforcing the Act and to the mining industry and miners in appreciating their responsibilities under the law.'" *Old Ben*, 1 FMSHRC at 1484 (citations omitted). As the Commission has reasoned, these "provisions demonstrate that the Commission was intended to play a major role under the [Mine] Act by reviewing the Secretary's enforcement actions and formulating mine safety and health policy on a national basis." *Id.* Given the Commission's unique and independent role under the Mine Act, we reaffirm our prior holdings and conclude that the Commission's review of the Secretary's action in citing an operator is appropriate to guard against an abuse of discretion. *Id.*; W-P, 16 FMSHRC at 1411.

The Secretary argues, in essence, that Twentymile, supra, should not be followed, as it "runs counter to several established legal principles" (Secretary's brief, pages 16-23 and cases cited therein). The Commission's decision in Twentymile is currently on appeal before the Court of Appeals. *Secretary of Labor v. Twentymile Coal Company and FMSHRC*, D.C. Cir. No. 05-1124 (D.C. Cir. docketed Apr. 15, 2005). To date, a decision has not been rendered. Thus, in the absence of a Court of Appeals decision reversing the Commission's decision in Twentymile, supra, the latter is binding on Commission Judges.

Accordingly, applying binding Commission precedent set forth in Twentymile, supra, I reject the Secretary's argument that its decision to cite Speed for violations committed by its independent contractor working on the property is not reviewable by the Commission.

### III. WHETHER THE SECRETARY ABUSED HER DISCRETION IN CITING SPEED FOR VIOLATIONS INVOLVING COWIN, ITS INDEPENDENT CONTRACTOR

#### A. Principles Set Forth in Twentymile, supra

In Twentymile, supra at 266, the Commission set forth the general test to be applied in determining whether an operator has been improperly cited for violations of its contractor, as follows:

The Commission has held that the general test to be used in determining whether a production-operator has improperly been cited for violations committed by its independent contractor is whether the Secretary has committed an "abuse of discretion" in issuing such citations.<sup>10</sup> *Mingo Logan*, 19 FMSHRC at 249; *Extra Energy, Inc.*, 20 FMSHRC 1, 5 (Jan. 1998). In applying this general test, the Commission must determine whether the Secretary's decision to cite the production-operator for violations committed by its independent contractor "was made for reasons consistent with the purpose and policies" of the Mine Act. *Old Ben*, 1 FMSHRC at 1485; *Phillips Uranium Corp.*, 4 FMSHRC 549, 551 (Apr. 1982); *Extra Energy*, 20 FMSHRC at 5.

After setting forth the general test to be used to determine whether the Secretary abused her discretion in citing an operator for the violations of its contractor, the Commission went on to summarize four basic principles previously considered by the Commission in determining if the citation of the operator was consistent with the purpose and policies of the Mine Act. The Commission set forth as follows:

Over the years, the Commission has considered a number of factors on a case-by-case basis in determining whether the Secretary's citation of a production-operator is "consistent with the purpose and policies" of the Mine Act. The principal factors are summarized below:

- (1) Whether the production-operator, the independent contractor, or another party was in the best position to affect safety matters. E.g., *Phillips*, 4 FMSHRC at 553; *Bulk*, 13 FMSHRC at 1360-61; *Extra Energy*, 20 FMSHRC at 5. In this regard, one of the key questions is whether the independent contractor has adequate size and mining experience to address safety concerns. *Calvin Black Enter.*, 7 FMSHRC 1151, 1155 (Aug. 1985);
- (2) Whether, and to what extent, the production-operator had a day-to-day involvement in the activities in question. E.g., *Extra Energy*, 20 FMSHRC at 5-6. A closely related factor is "the nature of the task performed by the contractor." *Calvin Black*, 7 FMSHRC at 1155;

- (3) Whether the production-operator contributed to the violations committed by the independent contractor. E.g., *Calvin Black*, 7 FMSHRC at 1155; and
- (4) Whether the production-operator's actions satisfy any of the criteria set forth in the Secretary's Enforcement Guidelines.<sup>1</sup> "In addition [to the factors above], the Commission has considered whether any of the criteria of the Secretary's Guidelines for proceeding against an operator have been satisfied." *Extra Energy*, 20 FMSHRC at 5. The guidelines provide that enforcement action may be taken against a production operator for violations committed by its independent contractor in any of the following four situations: "(1) when the production-operator has contributed by either an act or an omission to the occurrence of the violation in the course of the independent contractor's work, or (2) when the production-operator has contributed by either an act or omission to the continued existence of a violation committed by an independent contractor, or (3) when the production-operator's miners are exposed to the hazard, or (4) when the production-operator has control over the condition that needs abatement." 45 Fed. Reg. at 44,497. As explained below, the four criteria overlap in certain respects with the factors separately applied by the Commission in such cases.

## 1. Whether Speed or Cowin was in the Best Position to Affect Safety Matters

### a. The Secretary's Initial Argument

Initially, I note the Secretary's argument relating to the first factor summarized in Twentymile, supra, at 267, that Speed was in "as good" a position as Cowin to prevent the

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<sup>1</sup>The Enforcement Guidelines were issued by the Secretary in 1980 as an appendix to regulations requiring that independent contractors provide certain information to production-operator's before beginning work and establishing procedures under which independent contractors could obtain MSHA identification numbers. 45 Fed. Reg. at 44,494, 44,497. The Enforcement Guidelines set forth four criteria to be used by MSHA inspectors in determining whether to cite a production-operator for the violations of its independent contractor. The Commission has repeatedly recognized that the Enforcement Guidelines are policy statements that are not binding on the Secretary and do not alter the compliance responsibilities of production operator's or independent contractors. E.g., *Mingo Logan*, 19 FMSHRC at 250-251.

violations (Secretary's brief, p. 32). However, in Twentymile, supra, at 267, the Commission clearly set forth that the proper analysis is whether the production-operator, the independent contractor "... was in the best position to affect safety matters". (Emphasis added.) Hence, to prevail herein, I find that the Secretary must establish that Speed was in the best position to have prevented the violative conditions that were cited.

b. Further Discussion

In support of its position, that Speed was in as good a position to prevent the violation at issue as Cowin, the Secretary refers to the testimony of Pete Hendrick, Speed's President, who admitted that Speed had the authority to require Cowin to correct safety conditions, and to enforce the provisions of the contract. Further, it is maintained that the violations were obvious and only a minimal level of oversight would have revealed many of the cited conditions.<sup>2</sup>

On the other hand, according to Hendrick, whose testimony in this regard was not contradicted or impeached, Speed does not have any expertise in sinking a shaft, whereas Cowin and its supervisor are considered very experienced in shaft sinking operations. Further, according to Hendrick, the equipment at the site was not owned by Speed. Indeed, according to the contract between Cowin and Speed the former is to furnish all equipment. (GX 28, par.1.1). Lastly, there is no evidence that Speed had any authority to direct Cowin's day-to-day activities.

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In essence, according to Dennis Joe Holbrook, an MSHA Inspector, who was the lead Accident Investigator of the accident at issue, among the violative conditions cited in Citation No. 7208383, both the defective rope and bypass of a computer to monitor safety features were obvious. According to Holbrook and MSHA Inspector, Donald William Fink, who also observed these conditions, the defect in the rope was located in a portion of the rope only eight feet from where a worker would be when connecting the rope to a bucket. Also, the computer bypass would be indicated by a red light and an audible warning in the cab of the crane. In addition, the violative condition described in Citation No. 7208385 the use of one rope during hoisting operations in violation of the approved plan, was readily observable. Similarly, according to Fink and Holbrook the violative condition cited in Citation No. 7208388, the operation of the crane with a maximum load in excess of twelve thousand pounds, was obvious as it would have been noted in a computer digital read out located in the cab in front of the crane operator. Also, the violative conditions cited in Citation No. 7208386, were obvious, i.e., the failure to remove the crane from operation in spite of pre-operational reports which showed that the crane and two-block safety switch was not functional.

In Twentymile, supra, the Commission concluded that the independent contractor rather than the operator was in the “best” position to prevent the violations in question. The Commission found, *inter alia*, the following factors supported citing the contractor: the violations all involved equipment owned and maintained solely by the contractor, the contractor carried out its work without direct or continuing supervision from the operator, and, that under the terms of the contract between the contractor and the operator, the former was required to comply with all MSHA safety and health standards. Twentymile, supra, at 268.

Similarly, in the case at bar, aside from one citation regarding the failure to train the crane operator, all the citations at issue relate to conditions on equipment that was not owned by Speed, but was to be furnished and maintained by Cowin. Also, Cowin was contractually required to comply with applicable federal regulations. Additionally, Cowin was required to provide supervision of work performed under the contract. Lastly, in the case at bar, as in Twentymile, supra, there was not any evidence adduced that Speed had any authority to direct the day-to-day activities of Cowin.

I find that the relationship between Cowin and Speed relating to the provision of equipment and its maintenance, and supervision of day-to-day operations are essentially the same as those noted in Twentymile, supra, as supporting the citation of the contractor, and not the operator. Hence, I conclude, applying the authority of Twentymile, supra, that between Cowin and Speed, it has not been established that the latter was in the best position to have prevented the violations at issue herein.

## 2. The Extent of Speed’s Involvement in Relevant Activities

### a. The Secretary’s Position

In arguing that Speed had significant involvement in activities at the shaft sinking site, the Secretary relies on the testimony of Hendrick that he required, as a condition of contracting with Cowin for the performance of the work at issue, that it hire Earl Brindel as the supervisor on the job. The Secretary further relies on evidence that Hendrick worked with Cowin to develop the specifications for the shaft, and that Speed’s employee James Smith, was at the site on a regular basis “... to insure that the shaft was being constructed properly.” (Secretary’s brief, p. 33). Lastly, the Secretary cites the presence of Speed’s employee, Doug Shorter, who operated a bull dozer to spread muck material that had been removed from the shaft.

### b. Twentymile, supra

In Twentymile, 27 FMSHRC *supra* at 270, the Commission held that the operator “... did not have a significant, continuing involvement in the work being performed [at the cited area]”.(Ephasis added.) The Commission noted the following as the basis for its holding: that the Contractor was hired because of its expertise with the work at issue and was

responsible for providing the equipment to be used at the work site and operating it; that no operator employees worked at or near the work site except for a Supervisor who checked the contractor's practice once a day to a day and one-half; that the contract between the parties provided that the contractor was responsible for complying with safety requirements; and the lack of evidence that the operator ignored the safety defects or actively created them.

The Commission, next concluded as follows:

In the context of the relationship between the parties, [the operator's] involvement appears to be nothing more than prudent oversight of the contractor's compliance with the contract for services at the refuse pile, including the safety and health provisions of the contract. Punishing a production operator for such steps taken to "ensure" contractor compliance is contrary to the intent of the Mine Act and our precedent in these cases. *See, e.g., Phillips*, 4 FMSHRC at 553. The Secretary asserts that [the operator] should be liable for failing to either inspect the equipment or ensure that Precision would do so. Oral. Arg. Tr. 35-38. But there is no standard requiring production operator's to inspect each piece of equipment every time it enters a mine site, and as will be further discussed under factor 3, *infra*, [the operator] did, through the contract, require that Precision inspect the equipment. Given [the operator's] limited involvement in the activities at the refuse pile, we cannot say that this factor supports the decision to cite the [operator] in this case. *id.*

c. Twentymile supra, as Applied to Speed's Involvement in Cowin's Activities

In the case at bar, as in Twentymile, supra, the operator hired a contractor because of its expertise and the contractor was required by contract to provide necessary equipment and comply with safety regulations. Further, in the case at bar the contractor was contractually required to maintain the equipment. Additionally, in the case at bar and in Twentymile, supra, there was no evidence that the operator ignored defects<sup>3</sup> or was directly involved in creating violative conditions.

In Twentymile, supra, the Commission, in concluding that the operator did not have a significant continuing involvement in the contractor's work, noted that none of the contractor's employees worked at or near the site at issue except for a supervisor who checked the contractor's progress once a day to a day and a half. In the case at bar, the degree of involvement of Speed's employees in Cowin's activities was even less. None of Speed's

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<sup>3</sup>This issue is discussed in more detail, III (a)(c) *infra*.



supervisors were present every day to a day and a half to check on Cowin's progress on the project. Smith, a surveyor, was present not as a supervisor to check the projects progress, but only to ensure that the shaft was being sunk in a straight line. He did not have supervisory responsibility. A bulldozer operator was present, but his activities were limited to the removal of muck that had been taken from the sinking of the shaft. However, there is not any evidence as to where he worked in relation to the crane at issue, or that it was within the scope of his duties to check Cowin's equipment for safety defects. There is not any evidence that these employees checked on the progress of any of Cowin's project activities or inspected any of its equipment.

Within the context of the facts in this case, I conclude, based on the holding and analyses in Twentymile, supra, that Speed did not have any "significant continuing involvement" in Cowin's activities. (Twentymile, supra, at 270)

### 3. Whether Speed Contributed to the Violations

#### a. The Secretary' Position

The Secretary argues that Speed contributed to the violations herein, because it failed "... to act in a reasonably prudent manner." (The Secretary's brief, p. 33). The Secretary asserts that Speed had been put on notice that Cowin and another contractor at the adjoining substation site, were in need of greater oversight and guidance. In this connection, MSHA Inspector, Donald Fink testified that when he cited Speed on September 29, for the violations at issue, he had previously cited Speed for failure to provide hazard training to employees of contractors working at the site in issue and at a substation construction site. Additionally, according to Fink, on September 2, he had told Speed's employees, Morris Niday and Heath Beichner that he continued to observe hazardous conditions at the Cowin shaft site, and that Speed "...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." (Tr. 85) He also told them that he had issued a citation to Cowin which alleges a violative condition of men working under unconsolidated shaft wall. However, I note the uncontradicted and unimpeached testimony of Hendrick, that Niday was a purchasing agent and did not have any managerial responsibility. Also, I accept Hendrick's testimony that was not impeached or contradicted that Beichner, a bulldozer operator employed by Speed, was not considered management, and was not in a position to direct other Speed employees in any fashion.

In further arguing that Speed did not exercise due oversight of Cowin, the Secretary relies on Hendrick's testimony on cross-examination that it did not make any effort to determine Cowin's history of citations or reportable accidents and injuries. According to Fink, these are contained in MSHA records, and are available on its computer site. These reports indicate that Cowin received 31 citations in the two-year period from September 29, 2002 through September 28, 2004, and in the four year period preceding September 29, 2004,

Cowin had 79 reportable accidents, injuries or illnesses. Fink opined that Cowin's non-fatal days lost incident rate was much greater than the national rate. The Secretary argues that Cowin had a significant history of citations and accidents which Speed did not make any effort to determine. Also, that Speed did not provide any written safety materials to Cowin, and did not perform any safety audit or inspection of Cowin's work.

Thus, the gravamen of the Secretary's position that Speed contributed to the violations herein is that it did not provide adequate oversight and guidance over Cowin.

b. Twentymile, supra, and its Applicability to the Case at Bar

In Twentymile, supra, the Commission considered the issue of whether the production operator therein contributed to the violations at issue. The Commission commenced its discussion of this issue, by first considering the operator's activities as follows:

“The record establishes, foremost, that Twentymile did not directly contribute to the violations that are involved in these citations. The violations involved Precision's equipment at the refuse pile, and no Twentymile employees were involved in any way in operating or maintaining that equipment. Tr. 85-86. There is no other evidence that Twentymile took any action that directly contributed to the violations.

Moreover, the record does not establish that Twentymile contributed to the violations through any significant omission on its part.” (Emphasis added.) (29 FMSHRC supra, at 270-271).

Thus it is clear that based on the above language in Twentymile, supra, that 1) in order for an operator to contribute to a violation, the contribution must be a direct one; and 2) if the contribution is based on the operator's omission, then the omission must be significant.

In the case at bar, as in Twentymile, supra, five of the citations at issue involve violative conditions relating to the equipment furnished and operated by the contractor.<sup>4</sup> As in Twentymile, supra, none of Speed's employees were involved in either operating or maintaining the cited equipment. Also, as in Twentymile, supra, there is not any evidence that Speed took any action that “directly contributed to the violations” (Twentymile, supra, at 271).

The Commission, in Twentymile, supra, id, continued its discussion of the operator's

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<sup>4</sup>One additional citation cites a failure to have properly trained the operator of the crane at issue.

contribution to the violations as follows:

Moreover,<sup>5</sup> the record does not establish that [the operator] contributed to the violations through any significant omission on its part. In order for a production operator to contribute to a violation through an omission, that omission must be a significant one. Whenever an independent contractor commits a violation, there is almost always some action that a production operator could theoretically have taken that might have prevented the violation. Without a "significant" threshold, the production operator could be found to have contributed to the violation in virtually every situation, and this contribution factor essentially would be a meaningless test. (Emphasis added. id.) (27 FMSHRC supra, at 271). (Emphasis added.)

Thus, Twentymile, supra, clearly establishes that in order to find that an operator contributed to a contractor's violation through omission, the omission must be significant. The Commission concluded that the operator's failure to inspect the contractor's equipment before it entered the mine site, or subsequently, did not constitute a significant omission (id.).

As an initial matter, the Commission noted that the regulations do not require such inspections (i.d.). The Commission indicated that it was "... reluctant to impose [such a requirement]" (i.d.).

The Commission set forth the following test it applied in evaluating an operator's contribution through omission.

... we believe that the appropriate test in such a case is whether the production operator took reasonable steps under the circumstances to ensure that the independent contractor's equipment is safe, either by inspecting the equipment itself or by requiring that the independent contractor conduct inspections of the equipment. (Twentymile, supra, at 271-272).

In Twentymile, supra, the Commission concluded that the operator had taken reasonable measures to ensure that the contractor inspected its equipment by requiring in its contract that the latter comply with MSHA's safety standards, giving the contractor a safety guide which required it to conduct pre-shift examinations and correct any safety defects, and by having mine management regularly check on the contractor's project. Similarly, in the case at bar, I find it significant that Speed provided in its contract with Cowin that the latter was required to furnish and maintain the crane at issue, and abide by all federal standards. Within this context, I find that the failure of Speed to provide Cowin with a safety guide, was

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<sup>5</sup>It thus appears that in analyzing the factor of an operator's contribution to the contractor's violations, the prime issue is whether its activities were a direct contribution, and that whether there were any significant omissions on its part is only a secondary issue.

not a significant omission. I note that the provision of a guide is not mandated by any regulations, and I am reluctant to impose such a requirement. (See, Twentymile, supra, at 271)

Lastly, I reject the Secretary's argument that Speed contributed to the violations herein through omission by not making any effort to determine Cowins' history of citations, reportable accidents and injuries. The regulations do not impose such a duty upon an operator who has hired an independent contractor, and I do not have any authority to impose such a requirement. (See, Twentymile, supra, at 271).

For all the above reasons, I find that under the criteria and rationale set forth in Twentymile, supra, it has not been established that Speed contributed to the violations at issue.

#### 4. Whether any Criteria in the Secretary's Enforcement Guidelines Were Satisfied.

In analyzing whether the criteria have been met it is critical to consider the following language from the Commission as set forth in Twentymile, supra, at 273.

Before discussing the four individual criteria in the Enforcement Guidelines, we reiterate that a particular criterion should be found to be satisfied only if a significant threshold has been reached. In other words, a criterion is not satisfied unless the production Operator's involvement in the violation extends beyond the minimal level that would be found with regard to virtually every independent contractor violation. For example, as discussed above, in virtually every case it would be possible to find some action that the production operator could have taken that might have prevented the independent contractor's violation, thereby arguably showing that the production operator contributed to the violation through omission. Similarly, the fourth criterion is whether the production operator had "control" over the actions of the independent contractor. Because virtually every agreement between a production operator and independent contractor will give the production operator some minimal control over the independent contractor's activities, e.g., the ability to order the independent contractor to leave the production Operator's property, the degree of control must also be significant in order to satisfy that criterion.<sup>20</sup> If the guidelines were construed so broadly as to be satisfied with regard to essentially every independent contractor violation, the test based on the four criteria would be meaningless. Accordingly, we conclude that a particular criterion is satisfied only if the production Operator's involvement is in some way "significant," i.e., it exceeds the minimal level that would be present with regard to virtually every

independent contractor violation.

a. Whether Speed Contributed Either to the Violations in Question or to Their Continued Existence

In support of its argument regarding the contributions of Speed to the violations in question, the Secretary relies on arguments it made in discussing the first criteria set forth by the Commission in Twentymile, supra, (III (A), *infra*). As such, these arguments are rejected for the reasons set forth above, (III (A)*infra*).

The Secretary's argument that Speed contributed to the continued existence of the violations is based solely upon Holbrook's testimony. He was asked to explain how the cited conditions "... could have been in continued existence" (Tr. 299) if the violations did not occur until September 29. He testified as follows: "Because the pre-op record showed that it was in existence for two days, the day before the accident and the day of the accident." (Tr. 299).

Thus, it appears to be the Secretary's position that Speed's contribution to the continued existence of the violative conditions is predicated upon its failure to examine the pre-op reports and ensure that Cowin had corrected the noted conditions. However, the regulations do not require that an operator examine its independent contractor's pre-op reports. Hence, the failure of Speed to have inspected these reports, by itself, does not constitute a significant omission contributing to the continuing existence of any violative condition. (See, Twentymile, supra, at 271).

b. Whether Speed's Employees Were Threatened by the Hazards.

In discussing this criteria, the Secretary asserts that Smith was exposed to conditions at the shaft site on numerous occasions.

The violations at issue relate to the conditions of the crane and the training of its operator. The crane was used to remove material from the shaft. Clearly, Smith had to work in close proximity to the shaft when he lowered a plumb line to ensure it was being aligned in a straight line as provided in the construction plans. However, there is not any evidence that when Smith performed this work, the crane was positioned in close proximity to him as to expose him to any of its hazardous conditions. Indeed, there is not any evidence indicating the position of the crane relative to Smith when he checked on the alignment of the shaft. Nor is there any evidence that he performed other duties that would have exposed him to hazards created by the safety defects in the crane. Further, there is not any specific evidence that any other of Speed's employees were exposed to and threatened by the hazards of the crane. Thus, I find that it has not been established that Speeds' employees were threatened by the hazards.

c. Whether Speed had Significant Control over the Conditions of the Crane.

The cited conditions all relate to the crane and lack of training of its operator. The crane was not owned by Speed. According to its contract with Cowin, the latter was required to furnish the equipment. Further, Speed did not have any responsibility to inspect or maintain the crane. To the contrary, Cowin by contract was required to maintain, in good condition, equipment used on the project. Also, Cowin was required to provide supervision of work performed under the contract, and to comply with all applicable federal regulations. Significantly, Speed was not contractually obligated to take steps to ensure that Cowin properly maintained the crane.

I note that under the contract, if Speed determined that Cowin's performance of work on the project would result in unsafe conditions, violation of any applicable law, or damage to persons or property, it had the right to immediately stop Cowin's work. Also, under the contract, Speed had the right to terminate its agreement with Cowin should Cowin disregard any governmental regulations.

In Twentymile, supra, the Commission noted that in *Cathedral Bluffs Shale Oil Co.* (6 FMSHRC 1871 August 1, 1984), rev'd 796 F 2<sup>nd</sup> 533 (D.C. Cir., 1986), it had concluded that "...standard contract language (reserving the right to monitor work and terminate the contract if an independent contractor disregarded applicable law) was not sufficient to satisfy the control criterion in the Secretary's Enforcement Guidelines." (Twentymile, supra, at 274-275).

Hence, based on Twentymile, supra, I find that Speed's contractual right to terminate Cowin's contract, is not sufficient to satisfy the control criterion in the Secretary's Guidelines.

For all the above reasons, applying Commission precedent as established in Twentymile, supra, I find that it has not been established that Speed was properly cited by the Secretary. Specifically based on Twentymile, supra, I find that the Secretary's decision to cite Speed was an abuse of discretion, and that it was not consistent with the purpose and policies of the act,<sup>6</sup>

**ORDER**

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<sup>6</sup>Accordingly, because the decision herein is based on Twentymile, supra, which is binding precedent, I reject all of the Secretary's arguments that rely on Appendix A to Part 45 regulations and the Secretary's Program Policy Manual as these are inconsistent with Twentymile, supra.

It is **ORDERED** that the Notices of Contest filed by Speed, Docket No.s WEVA 2005-20-R, 2005-21-R, 2005-22-R, 2005-23-R, 2005-24-R and 2005- 25-R, are **SUSTAINED**.

It is further **ORDERED** that Docket No. WEST 2005-97 is **DISMISSED**.

Avram Weisberger  
Administrative Law Judge

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