

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 4, 2014

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

HECLA LIMITED,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2012-760-M-A
A.C. No. 10-00088-283636-02

Docket No. WEST 2012-986-M
A.C. No. 10-00088-289913

Lucky Friday Mine

ORDER DENYING MICHAEL MAREK’S REQUEST TO INTERVENE

These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”), against Hecla Limited, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the “Mine Act”). Michael Marek, through counsel, filed a letter seeking to intervene in the cases as an “affected miner” as that term is used in Commission Procedural Rule 4(b)(1). 29 C.F.R. § 2700.4(b)(1). For the reasons that follow, his request is denied.

On April 15, 2011, there was a fall of ground at the Lucky Friday Mine. Marek was injured by the accident and his brother, Larry Marek, was killed. After completing its investigation, MSHA issued a citation under section 104(d)(1) of the Mine Act and three orders under that same section. The citation and orders all reference the fall of ground and were presumably issued as a result of the fall of ground. These matters were duly contested by Hecla in the present cases. A hearing is scheduled to commence on November 18, 2014.

Marek is represented by Edward B. Havas in a civil action brought against Hecla as a result of the accident. Marek would like Havas to represent him in the present cases. In his letter seeking intervention, dated October 16, 2014, Marek contends that he is entitled to intervene as a matter of right under Commission Rule 4(b)(1) because he is an “affected miner.” Marek states that he was present when the accident occurred and was injured by the fall of ground. Marek further argues that these cases are “quite important to [him]; there can be little doubt that [he] is an affected miner entitled to exercise his rights.” (Letter Requesting Intervention at 1).

Hecla filed a response in opposition to the notice of intervention. Hecla argues that Marek is not an affected miner. Section 3(g) of the Mine Act defines a miner as “any individual working in a coal or other mine.” 30 U.S.C. § 802(g). Although Marek worked at the Lucky Friday Mine at the time of the accident, he is no longer employed at the mine. As a consequence, he is not entitled to intervene as a matter of right because a person “seeking to intervene must be working as a miner at the time a Notice of Intervention is filed.” (Hecla Resp.

at 3). It points to Commission case law concerning the walkaround rights of miners. Hecla contends that an affected miner must be working in a mine, exposed to the hazards of mining, and employed by a mine operator. Marek is not working at the Lucky Friday Mine so he is not exposed to the potential hazards at the mine.¹ Hecla also argues that Marek's interests will be adequately protected by counsel for the Secretary, who has the same interests as Marek, citing *Dana Mining*, 29 FMSHRC 1102 (Dec. 2007) (ALJ).

Marek filed a response to Hecla's opposition. Although Marek is no longer employed at the Lucky Friday Mine, he is employed as a full-time miner at another mine. Marek also argues that "as the lone survivor of the mine collapse at issue in these proceedings, and suffering permanent effects from that collapse, it would be ludicrous to the point of incredulity to claim that [he] is not now and was not then affected by the events, and will not be affected by these proceedings." (Response at 3). Marek also notes that he will be a witness at the hearing. In the alternative, Marek seeks to intervene under Rule 4(b)(2) "Intervention by Other Persons."

The parties presented further argument during a conference call. The Secretary did not file any written response to the request for intervention, but the Secretary's counsel stated during the call that she supports Marek's request to intervene.

Commission case law is silent on this issue. Although the Commission considered who is a miner in the context of walkaround representation and training requirements, it has not discussed Rule 4(b)(1). Marek stated that he does not seek to intervene as a "representative of miners," but rather as an affected miner and he would like Havas to act as his counsel. The preamble to the Commission's Rule 4 focuses on Rule 4(b)(2) but it also sheds some light on the intent behind Rule 4(b).²

¹ In *Cyprus Empire Corp.*, 15 FMSHRC 10, 14 (Jan. 1993), the Commission held that striking miners were not entitled to a walkaround representative during MSHA inspections because they were not working in a mine during the strike.

² The preamble states:

The proposed rule added new procedures dealing with intervention and amicus curiae participation at the trial level. The Commission received a number of comments on these proposals and has modified the proposals. Paragraph (b)(2) provides that motions to intervene made by persons other than affected miners or their representatives shall be filed before the start of a hearing on the merits, unless the judge, for good cause shown, permits later filing.

Some commenters suggested that the proposed criteria for intervention were too restrictive, and urged the Commission to permit intervention on the basis of an interest in the issues involved in a proceeding. The Commission has determined that interest in issues is too broad a criterion for intervention. Such a standard could serve to deprive the parties of control over the litigation and could encumber the Commission's simple administrative trial process. *See Mid-Continent Resources, Inc.*, 11 FMSHRC 2399 (December 1989)(discussing

As discussed below, I find that Marek is not an affected miner as that term is used in Commission Rule 4(b)(1). An “affected miner” may intervene in a Commission proceeding, but the meaning of “affected miner” is not clear. Miners who are currently employed at the mine where the citations or orders were issued and who will be exposed to potential hazards of mining at that mine could potentially be affected by the proceeding.³ In the preamble to Rule 4, the Commission made clear that a person having an “interest in issues is too broad a criterion for intervention.” 58 Fed. Reg. at 12160. The Commission further stated that such a broad “standard could serve to deprive the parties of control over the litigation and could encumber the Commission's simple administrative trial process.” *Id.* Although this statement was directed at Rule 4(b)(2), it demonstrates the Commission’s intention that intervention should not disrupt the hearing process.

Marek argues that he is an affected miner because (1) he survived the fall of ground and is “suffering permanent effects from the accident” and (2) he is employed at a mine and is therefore a miner. Marek is employed as a miner but he is no longer employed by Hecla and he does not work at the Lucky Friday Mine in any capacity. He is no longer exposed to any hazards of falling rock or roof falls at the mine and these proceedings cannot affect his future employment or safety. As a consequence, my adjudication of the issues will not affect Marek. Under Marek’s logic, any miner who suffers a serious injury at a mine and continues to work in any mine could intervene as a matter of right in a Commission proceeding involving MSHA enforcement actions arising from the injurious accident. I do not believe that was the intent of Rule 4(b)(1). The roof fall underlying these proceedings affected Marek, but he is not an “affected miner” under Rule 4(b)(1).

I also find that Marek is not entitled to intervene under Rule 4(b)(2). Although Marek has an interest in the events that are the subject of the proceeding, he has not demonstrated “why such interest is not otherwise adequately represented by” counsel for the Secretary. 29 C.F.R. § 4(b)(2)(B). The Secretary is represented by two attorneys in the Office of the Solicitor with experience litigating cases under the Mine Act. In addition, I find that Marek’s presence as an intervenor will “unduly delay or prejudice the adjudication of the issues.” 29 C.F.R. § 4(b)(2)(C). His counsel indicated that he was planning to question witnesses at the hearing, which would likely delay the completion of the hearing. Marek’s only demonstrated interest in this proceeding not otherwise represented by the Secretary relates to the civil suit he has brought against Hecla as a result of his injuries. This interest does not concern the Mine Act and can only unnecessarily interrupt the completion of the hearing. If Marek is an intervenor, moreover, he

criteria for non-party standing to appeal a Commission judge's decision to the Commission). In denying a motion to intervene, however, a Commission judge may alternatively permit the movant to participate in the proceeding as *amicus curiae* (§ 2700.4(c)).

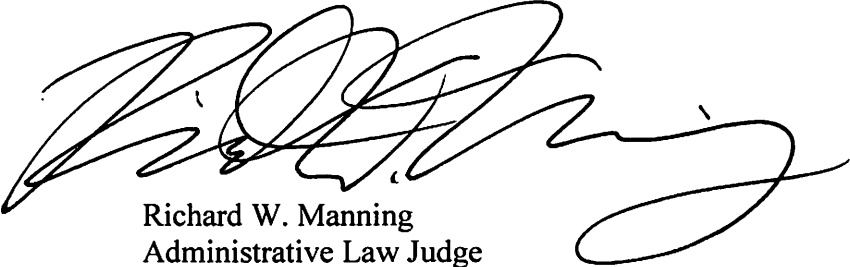
58 Fed. Reg. 12158, 12160 (Mar. 3, 1993).

³ I do not hold that every miner currently employed at the Lucky Friday Mine is an affected miner under Rule 4(b)(1). I only state that a miner whose future safety could be affected by the proceeding is more likely to be an affected miner than Marek.

will be entitled to remain in the courtroom during the entire hearing. I sequester witnesses until after they testify to avoid the risk that their testimony will be tainted.

The Secretary supports Marek's request to intervene. The Secretary's position on this issue is due some consideration. During the conference call, counsel for the Secretary stated that Marek and his counsel helped her develop the Secretary's case and that Marek's presence as an intervenor at the hearing will assist her. It is important to understand, however, that Marek will be a witness at the hearing and Marek's counsel is free to attend and confer with counsel for the Secretary whether Marek is an intervenor or not. If invited, Marek's counsel as well as Marek after he testifies may sit with counsel for the Secretary at the hearing and suggest questions to ask witnesses. If he desires, I will also permit Marek to file a post-hearing amicus brief or memorandum of law following the hearing.

For the foregoing reasons, Michael Marek's request to intervene in these cases is **DENIED**.



Richard W. Manning
Administrative Law Judge

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