FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536
303-844-3577 FAX 303-844-5268

December 2, 2014

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS Docket No. WEST 2013-781-M A.C. No. 10-00088-318512-01
v.	Docket No. WEST 2013-782-M A.C. No. 10-00088-318512-02
HECLA LIMITED, Respondent	Lucky Friday Mine

ORDER GRANTING INTERVENTION REQUEST

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"). These cases are set for hearing on February 24, 2015, in Coeur d'Alene, Idaho. On October 3, 2014, attorney Eric S. Rossman filed a letter stating that he represents Ron Barrett, Greg Hammerberg, Eric Tester, and Matt Williams (the "injured miners") who were injured by a rock burst that occurred at Hecla Limited's Lucky Friday Mine on December 14, 2011. Rossman stated that he sent the letter to inform the court that the injured miners seek to intervene in these cases pursuant to Commission Procedural Rule 4(b)(1). 29 C.F.R. § 2700.4(b)(1). The cases involve, in part, orders of withdrawal issued by MSHA following its investigation of the rock burst.

On October 9, 2014, at my request, the injured miners filed a more detailed letter setting forth the reasons why they wish to intervene in these cases and why they believe that they are entitled to intervene under the cited procedural rule. Attached to this letter was a statement signed by the four injured miners stating that they were miners on December 14, 2011, at the Lucky Friday Mine and that they suffered injuries from the subject rock burst.

By order dated November 5, 2014, I asked the Secretary, Hecla, and the injured miners to file a short brief or statement setting forth their positions on the intervention request. I asked them to take into account my order in other Hecla cases (WEST 2012-760-M-A and WEST 2012-986-M) in which I denied the request of a different miner to intervene.

The Secretary and the injured miners filed responses in support of the intervention and Hecla filed a response opposing the intervention request. I grant the request of the injured miners to intervene in these cases subject to the conditions and limitations set forth below.

As stated above, I denied the request of another miner to intervene in different Hecla cases. *Hecla Limited,* 36 FMSHRC____, No. WEST 2012-760-M-A et al. (November 4, 2014). That miner was injured by a rock fall at the Lucky Friday Mine on April 15, 2011. My November 4, 2014, order is incorporated herein by reference.

Rossman does not seek to intervene on behalf of the injured miners as a "representative of miners" as that term is used in the Mine Act and the Secretary's regulations. Rather the injured miners seek to intervene in these Commission cases with Rossman as their representative. Commission Rule 4(b)(1) provides in pertinent part that "affected miners or their representatives shall be permitted to intervene [in Commission cases] upon filing a written notice of intervention . . . with the judge." 29 C.F.R. § 2700.4(b)(1). 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). The term "affected miner" has not been defined by Commission case law. The only guidance provided by the Commission is the preamble to Rule 4. Although it focuses upon Rule 4(b)(2), it clarifies the intent behind rule 4(b) as a whole.[1]

In my prior order, I relied upon a number of factors to deny the intervention request but I principally focused upon the fact that the miner seeking intervention was no longer employed by Hecla. As a consequence, he was no longer a miner exposed to the hazards of falling rock at the Lucky Friday Mine. The adjudication of the issues would not affect the safety and health of that miner. As stated in the preamble, an interest in the issues is an insufficient reason to intervene.

---

[1] 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 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).

In the present cases, I find that the injured miners must be classified as "affected miners." All the injured miners were employed by Hecla at the time of the roof fall and were allegedly injured by the roof fall. Three of four of the injured miners are currently employed as miners by Hecla. The Secretary contends that they are all affected miners. Under Rule 4(b)(1) affected miners "shall be permitted to intervene." Although the fourth miner, Matt Williams, may not qualify as an affected miner on his own, given that Rossman represents him and he was injured in the same accident, I will permit him to intervene.

Rossman represents all four miners in a state tort action brought against Hecla as a result of the accident. In the present cases, the Secretary's counsel is experienced in representing the interests of miners in cases brought before the Commission under the Mine Act. The injured miners stated in their brief filed by Rossman on the intervention issue that the "information and testimony developed in the course of these proceedings are vital to pursuing the civil litigation." Brief at 3. The injured miners and their representative must understand that the scope of these proceedings is narrow. The primary issues are whether Hecla violated the cited safety standards and, if so, the amount of the assessed civil penalty. Factors that I must consider in assessing a civil penalty include the "gravity" of the violations and the "negligence" of Hecla, as those terms are used in the Mine Act. I must also determine whether any violations were the result of Hecla's "unwarrantable failure" to comply with the cited safety standards, as that term is used in the Mine Act. I am not directly charged with the responsibility of determining the cause of the rock fall or whether Hecla is accountable for the rock fall.

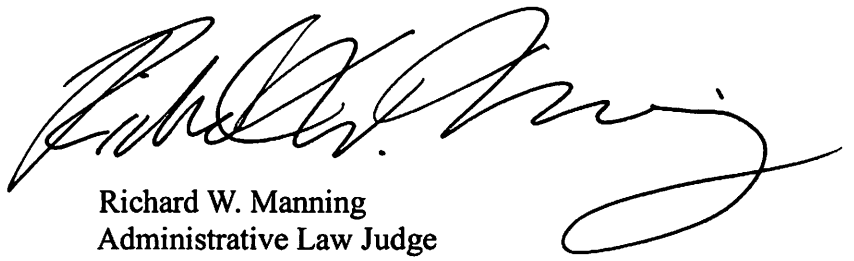
Under Commission Procedural Rule 55, I am responsible for regulating the course of these proceedings. 29 C.F.R. § 2700.55. In the letter of October 9, 2014, the injured miners stated that they "will honor the procedures relating to these proceedings and any ruling of this court." Letter at 2. In accordance with Rule 55, I am entering certain conditions and limitations on the participation of the injured miners, as follows:

(1) Discovery – The injured miners, in their letter of October 9, 2014, state that they wish to intervene "in order to participate in and oversee the proceedings, discovery and submission of evidence and testimony." Letter at 2. It is not clear how the injured miners will "participate" in discovery. Because they are intervenors, their representative will be entitled to a copy of written discovery responses served by Hecla in response to discovery submitted by the Secretary and copies of the responses served by the Secretary in response to discovery submitted by Hecla. Any participation in discovery beyond that will require my prior approval and will not be favored.

(2) Sequestration – I require the sequestration of witnesses at my hearings because I must enter findings of fact. Sequestration is crucial because I must assess the credibility of witness testimony, which I cannot do if witnesses sit in the courtroom and listen to the testimony of other witnesses or discuss this testimony. As a consequence, if any party plans to call an injured miner to testify at the hearing, that miner will be subject to my usual rules of sequestration. He will not be permitted in the courtroom until he testifies, no other witnesses will be permitted to discuss their testimony with him until after the hearing is over, and he will not be permitted to discuss his testimony with anyone until the hearing is over. Counsel will be subject to the same restrictions concerning the discussion of testimony.

(3) Other Conditions – The injured miners state that they "have no intention of causing any unnecessary interference with the proceedings, but do wish to exercise their right to intervene and assist counsel for the United States and ensure the protection of their interests during the proceedings." Letter at 2. In that spirit, I may find it necessary to enter other conditions upon the participation of the injured miners as these proceedings progress.

For the reasons set forth above, Ron Barrett, Greg Hammerberg, Eric Tester, and Matt Williams are hereby **PERMITTED TO INTERVENE** in these cases. The injured miners and their representative must adhere to the Commission's procedural rules.



Richard W. Manning
Administrative Law Judge

Distribution:

Laura Bremer, Esq., Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA 94103-6704

Laura E. Beverage, Esq., and Karen L. Johnston, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202-1958

Eric S. Rossman, Esq., Rossman Law Group, PLLC, 737 N. 7th Street, Boise, ID 83702

RWM