

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001
January 26, 2010

UNITED TACONITE, LLC,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 2008-93-RM
	:	Citation No. 6154850; 11/20/2007
	:	
SECRETARY OF LABOR,	:	Docket No. LAKE 2008-94-RM
MINE SAFETY AND HEALTH	:	Citation No. 6154851; 11/20/2007
ADMINISTRATION (MSHA),	:	
Respondent	:	United Mine
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. LAKE 2008-501-M
Petitioner	:	A.C. No. 21-03403-154315
v.	:	
	:	
UNITED TACONITE, LLC,	:	United Mine
Respondent	:	

DECISION APPROVING SETTLEMENT
AND
ORDER DENYING INTERVENTION

Before: Judge Feldman

These contest and civil penalty proceedings are before me based upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act), 30 U.S.C. § 815(d). These proceedings concern the April 18, 2007, fatality of a United Taconite LLC (“UTAC”) drill operator. The accident occurred when the drill operator attempted to level a large Pit Viper 351 drill that was positioned on a steep grade. The leveling jacks on the drill failed to maintain adequate contact with the ground causing the drill to tip on its side fatally injuring the operator. The drill was manufactured by Atlas Copco.

After conducting an accident investigation, the Mine Safety and Health Administration (“MSHA”) issued two citations for alleged violations of mandatory safety standards. Citation No. 6154850 alleges a violation of the mandatory safety standard in 30 C.F.R. § 56.14205 that prohibits machinery and equipment from being used beyond the design capacity intended by the manufacturer where such use creates a hazard to persons. There is pending civil litigation involving UTAC and Atlas Copco concerning the proper use of the Pit Viper 351 drill at the time of the accident.

Citation No. 6154851 alleges a violation of 30 C.F.R. § 48.27(a)(3) of the Secretary's regulations that requires equipment operators to be instructed in safe operating procedures applicable to the installation or use of new equipment, particularly when such installation or use involves new or different operating procedures. The Secretary initially proposed a total civil penalty of \$32,500.00 for each citation totaling \$65,000.00 in civil penalties.

These matters were scheduled for hearing on October 20, 2009. Shortly prior to the scheduled hearing, the Secretary and UTAC advised that they had settled all matters in issue. Before me is the parties' Motion for the Approval of Settlement. The Secretary now proposes to reduce the civil penalty from \$65,000.00 to \$1,000.00. The substantial reduction in proposed penalty is based on the Secretary vacating Citation No. 6154850 because of the apparent uncertainty of litigation. The Secretary's discretion to withdraw a citation is not subject to review. *RBK Construction, Inc.*, 15 FMSHRC 2099, 2101.

In addition, the Secretary moves to modify Citation No. 6154851 to reflect the cited violation is 30 C.F.R. § 48.29(a) rather than 30 C.F.R. § 48.27(a)(3). Section 48.29(a) provides, in pertinent part, that upon a miner's completion of each MSHA approved training program, the operator shall record and certify on MSHA form 5000-23 that the miner has received the specified training. The standard was modified after information learned in discovery suggested that miners were trained, but that such training was not recorded. Consequently, the Secretary moves to delete the significant and substantial (S&S) designation in Citation No. 6154851, and she proposes a significant reduction in civil penalty from \$32,500.00 to \$1,000.00. The Secretary's motion to amend Citation No. 6154851 to reflect 30 C.F.R. § 48.29(a) as the alleged violated mandatory safety standard shall be granted.

Also before me is a Motion to Intervene filed on behalf of William W. Walker and Steven W. Beck. The motion asserts that Walker and Beck are "affected miners" as contemplated by Commission Rule 4(b)(1), 29 C.F.R. § 2700.4(b)(1). Although Walker and Beck were not present at the time of the accident, as employees of a contractor, they participated, over a period of time, in the setup of the PV 351 drill involved the accident, as well as in the training of UTAC mine personnel in the use of the drill. Commission Rule 4(b)(1) provides, in pertinent part, that affected miners may intervene and participate in hearing proceedings. However, intervention is not a matter of right. Rather, the right to intervene is committed to the sound discretion of the Judge. 29 C.F.R. § 2700.4(b)(2)(C)(ii). UTAC opposes the intervention motion based on its assertion that Walker and Beck are not "miners."

Without addressing the issue of whether Walker and Beck are "affected miners," the Motion to Intervene shall be denied because these contest and civil penalty matters between the Secretary and UTAC have settled obviating the need for a hearing. However, the settlement terms must be strictly construed for the purpose of settlement only. The approval of this settlement is not a finding on liability with regard to any civil litigation arising out of the April 18, 2007, drill accident with respect to United Taconite LLC, Atlas Copco, William W. Walker, Steven W. Beck, and/or any other person or entity that may be a party in relevant civil litigation.

I have considered the representations and documentation submitted in these matters and

I conclude that the proffered settlement is appropriate under the criteria set forth in Section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**, and **IT IS ORDERED** Citation No. 6154850 **IS VACATED**.

IT IS FURTHER ORDERED that, consistent with the parties' settlement agreement, the Secretary's motion to amend Citation No. 6154851 **IS GRANTED**.

IT IS FURTHER ORDERED that the respondent pay a civil penalty of \$1,000.00 within 30 days of this order in satisfaction of the two citations in issue. Upon receipt of timely payment, the captioned contest and civil penalty cases **ARE DISMISSED**.

IT IS FURTHER ORDERED that the Motion to Intervene filed on behalf of William W. Walker and Steven W. Beck **IS DENIED**.

Jerold Feldman
Administrative Law Judge

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