

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001

December 14, 2007

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2007-662
Petitioner	:	A.C. No. 46-04387-121572
v.	:	
	:	
DANA MINING COMPANY, INC.,	:	
Respondent	:	Prime No. 1 Mine

ORDER DENYING LEAVE TO INTERVENE

This case is before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). It concerns an alleged violation of section 75.202 of the Secretary's rules, 30 C.F.R. § 75.202. Gena Elliot, Administratrix of the Estate of John Elliot, who was killed in a roof fall at the Respondent's mine, seeks to intervene in this civil penalty proceeding. For the reasons set for the below, the motion for intervention is denied.

On October 29, 2007, Mrs. Elliot, filed a motion pursuant to Commission Procedural Rule 4, 29 C.F.R. § 2700.4, to achieve party status by seeking to intervene in this proceeding. In the motion, Mrs. Elliot argues that she has a legally protectable interest directly relating to the events that are the subject of any review of this citation. Both the Secretary and the Respondent oppose the motion.

In her motion, Mrs. Elliot does not specify whether she is seeking intervention pursuant to Rule 4(b)(1), 29 C.F.R. § 2700.4(b)(1), or Rule 4(b)(2), 29 C.F.R. § 2700.4(b)(2). However, entitling her motion "Notice of Intervention" and referring to herself as the "representative of an affected miner pursuant to 29 C.F.R. § 2700.4" "suggests that she is relying on the language of Rule 4(b)(1).¹ Nonetheless, she is neither a "miner" nor "a representative of an affected miner." The act defines a "miner" as "any individual working in a coal or other mine." 30 U.S.C. § 802(g). Mrs. Elliot is not working in a coal mine and she is not representing anyone working in a coal mine. Furthermore, the term "representative of miners" is a term of art which means "[a]ny person or organization which represents two or more miners at a coal or other mine for the purposes of the Act." 30 C.F.R. § 40.1(b)(1). She clearly does not come within this definition. As a result, Mrs. Elliot may not proceed under Rule 4(b)(1).

¹ Rule 4(b)(1) provides, in pertinent part, that: "Before a case has been assigned to a Judge, affected miners and their representatives shall be permitted to intervene upon filing a written notice of intervention. . . ."

Rule 4(b)(2) provides that a motion for intervention by other persons shall set forth:

(A) The interest in the movant relating to the property or events that are the subject of the proceeding;

(B) The reasons why such interest is not otherwise adequately represented by the parties already involved in the proceeding; and

(C) A showing that intervention will not unduly delay or prejudice the adjudication of the issues.

Although, according to her motion, Mrs. Elliot's pending civil action against Dana Mining Company alleges a violation of federal mining regulations as an element of her claim, she has not set forth any reasons why her interests will not be adequately represented by the parties. The issues in this proceeding are whether the alleged violation occurred, and, if so, whether it is properly characterized as "significant and substantial." If her interest is in having it determined that the Respondent violated the regulation, that interest can be adequately addressed by the Secretary, who not only has the same interest, but also has an expertise in prosecuting these cases which Mrs. Elliot or her representative lacks. Furthermore, permitting her party status may result in unforeseen delay or prejudice, as the victim's interest concerning resolution of an issue may conflict with the interests of the Respondent and/or the Secretary.

Finally, Rule 4(b)(2) provides that, "[i]ntervention is not a matter of right but of the sound discretion of the Judge." In addition to not qualifying under Rule 4(b)(1) or Rule 4(b)(2), there is nothing in the legislative history of the Act, the rule or the case law which indicates that the rule contemplates the conferment of party status on the estates of victims of accidents. Thus, there is no basis on which the motion can be granted.

Accordingly, the request for intervention **IS DENIED**.

T. Todd Hodgdon
Administrative Law Judge
(202) 434-9973

Distribution:

J. Matthew McCracken, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209-2247

David J. Hardy, Esq., Spilman, Thomas & Battle, PLLC, 300 Kanawha Blvd. East, P.O. Box 273, Charleston, WV 25321

Timothy C. Bailey, Esq., Bucci, Bailey & Javins, L.C., 213 Hale Street, P.O. Box 3712, Charleston, WV 25337