

Decision to reject a WHS undertaking given by Endeavour Coal Pty Ltd

| | |
|----------------|---|
| Entity | Endeavour Coal Pty Ltd (ACN 099 830 476) |
| Issue | Whether to accept or reject a WHS undertaking given by Endeavour Coal Pty Ltd |
| Legislation | Part 11 of the <i>Work Health and Safety Act 2011</i> |
| Decision maker | Peter Day Executive Director, NSW Resources Regulator Regional NSW |

Section 216 decision

Under section 216 of the *Work Health and Safety Act 2011*, I, Peter Day, having a delegated authority from the Secretary of Regional NSW, have decided to **reject** the WHS undertaking given by Endeavour Coal that is attached to this decision.

Reasons for decision

Legislation

- Section 216 of the WHS Act provides that:
 - The regulator may accept a written undertaking (a **WHS undertaking**) given by a person in connection with a matter relating to a contravention or alleged contravention by the person of the WHS Act.
 - A WHS undertaking cannot be accepted for a contravention or alleged contravention that is a Category 1 offence.
 - The giving of a WHS undertaking does not constitute an admission of guilt by the person giving it in relation to the contravention or alleged contravention to which the undertaking relates.
- Section 217 requires the regulator to give the person seeking to make an enforceable undertaking written notice of the regulator's decision to accept or reject the enforceable undertaking and the reasons for the decision. The regulator will also publish on its website any WHS undertaking and decision to accept or reject an enforceable undertaking.
- The regulator may delegate any functions conferred under the WHS Act to another person. The Secretary of Regional NSW (Secretary) is the 'regulator' for the purposes of the WHS Act and has delegated the function to accept or reject a WHS undertaking under section 216 of the WHS Act to the Executive Director, Resources Regulator.

Reasons for decision

4. The regulator has issued, and published on the Resources Regulator's website, [guidelines](#) relevant to the acceptance of WHS undertakings as required by section 230 of the WHS Act.

Background

1. The Appin North Mine is operated by Endeavour Coal Pty Ltd (**Endeavour Coal**) and is located near Appin, NSW. The mine is a workplace within the meaning of section 8 of the WHS Act.
2. On 8 June 2019 a 58-year-old labour-hire worker suffered serious injuries to his toes and foot when it became trapped in a scraper conveyor while working underground at Appin North Mine of the Appin Colliery near Appin NSW.
3. A final [investigation report](#) into the incident was published in October 2020.
4. On 22 April 2021, the regulator commenced prosecution proceedings in the District Court in relation to the above event, alleging that Endeavour Coal had contravened section 32 of the *Work Health and Safety Act 2011*, by failing to comply with a health and safety duty under section 19 of the Act (Category 2).

WHS undertaking given by Endeavour Coal Pty Ltd

5. On 3 December 2021, Endeavour Coal submitted a draft WHS undertaking proposal to the regulator. Consistent with the [guidelines](#) the undertaking was developed using the pre-proposal advisory service offered by the regulator which provided 'without prejudice' feedback on the proposed terms of the undertaking.
6. In summary, the WHS undertaking proposed would impose obligations on Endeavour Coal to:
 - a. commit that the behaviour that lead to the alleged contravention has ceased and provide an assurance that steps have been taken to prevent a recurrence of the incident.
 - b. publish a public notice in the Illawarra Mercury and surrounding local papers.
 - c. disseminate information about the undertaking to Appin Colliery workers.
 - d. reimburse the regulator's costs associated with the investigation, legal advice and administration of \$179,370 and with monitoring of the undertaking, a total cost of **\$189,370**.
 - e. develop the "Workplace and Home Safety" program (WPHS Program) which will provide workers with the awareness and safety tools to better identify, manage and enact decision making and safety behavioural techniques, both at work and at home. Minimum spend **\$250,000**
 - f. engage Coal Services (Virtual Reality Team) to develop a training program for Endeavour Coal by integrating its current engineering standards, safety procedures and photographs of current plant and equipment into Coal Services' Virtual Reality "Free Roam" Entanglement / Crush Hazard Training Program (VRFR Program). The training program will be available to industry through coal services at various locations across the State and developed in software formats that will allow the modules to be accessible to workers via the internet. Minimum spend **\$125,000**

- g. develop, in consultation with Coal Services and the regulator, a short-animated video presentation of the incident, causal findings, investigation recommendations and the safety lessons learnt that will be made available to industry subject to the approval of the regulator. Minimum spend **\$25,000**
- h. provide NSW Health (the Sydney Children's Hospital Network (Limb Management)) funds to purchase or upgrade identified plant and/or equipment that will assist in specialist support for children/young person's needs. Minimum spend **\$150,000**
- i. complete the undertaking on or before 24 months from acceptance of the undertaking by the regulator, with a total minimum spend of **\$739,370**

Consideration and findings

- 7. In the particular circumstances of this case, having regard the number and nature of the failings that contributed to or constituted the offence charged and the period of time over which they prevailed (refer Statement of Facts filed in the District Court on 21 April 2021 – Case No. 2021 / 112051), the WHS undertaking does not satisfactorily reflect the objective seriousness of the alleged WHS offence nor does it bring with it both general and specific deterrence commensurate with that objective seriousness as prosecution proceedings would.
- 8. The injured worker was exposed to a risk of serious injury or death – he in fact sustained serious injury but was exposed to the risk of even more serious injury or death consequent upon moving parts of the conveyor dragging him further into the conveyor but for him being able to extricate his foot from his gumboot.
- 9. The impacts of the alleged contravention upon the injured worker are significant. He suffered serious injury to his right foot, including a complete laceration of the sole, multiple fractures, degloving of the great toe and degloving of the plantar fat pad, that resulted in surgery to amputate the right great toe, partial amputation of the fourth toe and over 30 sutures to re-attach the plantar fat pad. He continues to suffer physical and psychological injury including pain and blood clots, has not returned to work in any capacity and is not expected to ever return to work as an underground mine worker. The injuries sustained during the incident will have a lifelong impact upon the injured worker including ongoing medical complications.
- 10. Endeavour Coal, even allowing for its only conviction for an offence under the former Occupational Health and Safety Act 2000 (NSW) being ten years old (refer c. below), has a poor compliance history:
 - a. Endeavour Coal has been issued 170 notices by the regulator over the past 7 years:
 - i. 37 prohibition notices
 - ii. 129 improvement notices
 - iii. 4 non-disturbance notices
 - b. On 22 June 2018, Endeavour Coal was issued an official caution for a breach of its duty to notify the regulator of certain incidents in accordance with clause 128 of the Work Health and Safety (Mines and Petroleum Sites) Regulation 2014. The incidents that gave rise to the duty to notify the regulator occurred at Appin Colliery between March and June 2017. An investigation identified sufficient evidence to establish that Endeavour Coal breached its duty to notify the regulator of certain incidents on 16 occasions
 - c. Endeavour Coal was convicted of contravening section 8(2) of the *Occupational Health and Safety Act 2000* (NSW) in circumstances where, like the incident involving

the injured worker, a supplementary labour worker supplied to it was injured at the Appin Colliery.

Prosecution: Regan v Endeavour Coal Pty Ltd [2011] NSWIRComm 141

Date of Decision: 28 October 2011

Date of Incident: 7 July 2006

Orders: Endeavour Coal was fined \$65,000 and required to pay the prosecutor's costs as well as \$3,000 investigation costs

11. Endeavour Coal demonstrated significant and ongoing systemic failures prior to, and at the time of, the incident.
12. Having regard to the above, I am of the view that the alleged failures are objectively serious. Therefore, there is a strong need for specific and general deterrence.
13. While I note that the total value of the undertaking is commensurate with the regulator's accepted undertakings for similar alleged contraventions, and the projects under the WHS undertaking proposal have merit, overall I am not satisfied that acceptance of the WHS undertaking will result in the most appropriate and effective enforcement outcome for the reasons set out above. I consider that the continued prosecution of the matter is the most appropriate and effective enforcement option.
14. Accordingly, I have decided to reject the WHS undertaking proposal.

Date of decision: **28 January 2022**



Peter Day
Executive Director
Resources Regulator
Regional NSW

NOTE

In accordance with the NSW Resources Regulator's Enforceable Undertakings Guidelines this decision will be published on the regulator's website.