FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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January 30, 2014

BRODY MINING, LLC, Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2014-82-R
	:	Order No. 9003242; 10/28/2013
v.	:	
	:	Docket No. WEVA 2014-83-R
	:	Order No. 7166788; 10/28/2013
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
	:	Docket No. WEVA 2014-86-R
	:	Order No. 4208892; 10/29/2013
	:	
	:	Docket No. WEVA 2014-87-R
	:	Order No. 4208893; 10/29/2013
	:	
	:	Docket No. WEVA 2014-97-R
	:	Order No. 7166790; 11/04/2013
	:	
	:	Docket No. WEVA 2014-151-R
	:	Order No. 9003246; 11/07/2013
	:	
	:	Docket No. WEVA 2014-161-R
	:	Order No. 9004638; 11/12/2013
	:	
	:	Docket No. WEVA 2014-190-R
	:	Order No. 4208898; 11/14/2013
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	:	Docket No. WEVA 2014-191-R
	:	Order No. 7166793; 11/18/2013
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	:	Docket No. WEVA 2014-192-R
	:	Order No. 4208899; 11/19/2013
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	:	Docket No. WEVA 2014-193-R
	:	Order No. 9005720; 11/20/2013
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: Docket No. WEVA 2014-221-R
: Order No. 8155306; 11/26/2013
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: Docket No. WEVA 2014-244-R
: Order No. 9005722; 12/03/2013
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: Docket No. WEVA 2014-284-R
: Order No. 8154092; 12/05/2013
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: Docket No. WEVA 2014-285-R
: Order No. 7166798; 12/09/2013
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: Docket No. WEVA 2014-447-R
: Order No. 7166805; 01/15/2014
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: Docket No. WEVA 2014-448-R
: Order No. 7166806; 01/15/2014
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: Docket No. WEVA 2014-449-R
: Order No. 7166807; 01/15/2014
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: Docket No. WEVA 2014-450-R
: Order No. 7166808; 01/15/2014
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: Docket No. WEVA 2014-451-R
: Order No. 8154104; 01/15/2014
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: Docket No. WEVA 2014-452-R
: Order No. 9005729; 01/13/2014
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: Docket No. WEVA 2014-453-R
: Order No. 9005731; 01/13/2014
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: Docket No. WEVA 2014-454-R
: Order No. 9005732; 01/14/2014
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: Docket No. WEVA 2014-455-R
: Order No. 9005733; 01/14/2014
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: Docket No. WEVA 2014-456-R
: Order No. 9005735; 01/15/2014

:	Docket No. WEVA 2014-457-R
:	Order No. 9005736; 01/15/2014
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:	Docket No. WEVA 2014-479-R
:	Order No. 7166815; 01/23/2014
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:	Docket No. WEVA 2014-480-R
:	Order No. 7166816; 01/23/2014
:	
:	Docket No. WEVA 2014-81-R
:	Notice No. 7129154
:	
:	Brody Mine No. 1
:	Mine ID 46-09086

ORDER

Appearances: R. Henry Moore, Michael T. Cimino, Benjamin McFarlane, Jackson Kelly, PLLC, for Contestant

Robert S. Wilson, Office of the Regional Solicitor, U.S. Department of Labor, for Respondent

Before: Chief Judge Robert J. Lesnick

These consolidated proceedings are before me under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (the Mine Act or Act).[1] Brody Mining LLC (Brody) has contested several orders issued to it by the Secretary of Labor's Mine Safety and Health Administration (MSHA) pursuant to an October 24, 2013 notice of a pattern of violations of mandatory health or safety standards under section 104(e) of the Act, 30 U.S.C. § 814(e). On November 27, 2013, Brody filed a Motion for Summary Decision under Rule 67 of the Commission's Procedural Rules, 29 C.F.R. § 2700.67. On December 10, 2013, the Secretary filed a Motion for Partial Summary Decision and Opposition to Brody Mining's Motion for Summary Decision. For the reasons set forth below, I **DENY** Brody's motion and **GRANT** the Secretary's motion.

[1] These proceedings, which I hereby consolidate under Rule 12 of the Commission's Procedural Rules, 29 C.F.R. § 2700.12, were originally assigned to Commission Administrative Law Judge William Steele. When Judge Steele recently announced his intention to retire, the proceedings were reassigned to me by order of January 10, 2014.

As a preliminary matter, I note that on October 30, 2013, Brody notified the Secretary that it was contesting the Pattern of Violations (POV) Notice No. 7219154 issued to Brody. This contest was docketed at the Commission as Docket No. WEVA 2014-81-R. The Commission, however, lacks the necessary jurisdiction to adjudicate Brody's contest of the POV notice. As noted in *Rushton Mining Co.*, "[t]he Commission is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers." 11 FMSHRC 759, 764 (May 1989). Under the Mine Act, for example, the Commission and its judges have "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). Under the Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700, Commission judges have the authority to adjudicate contests of citations, orders, and penalties; complaints for compensation and of discrimination; and applications for temporary relief. No provision of the Act or the Commission's Procedural Rules, however, grants me the authority to adjudicate the POV notice itself. I therefore **DISMISS** Docket No. WEVA 2014-81-R.

On the other hand, a mine operator can challenge a POV notice on an expedited basis[2] before the Commission because I clearly have jurisdiction under section 105(d) of the Act to hear any contest of any order issued pursuant to section 104(e) of the Act, and any properly contested citation or order relied upon by the Secretary in issuing the POV notice. Moreover, I also find that I have jurisdiction to consider Brody's arguments that the rules implementing section 104(e) of the Act, set forth at 30 C.F.R. Part 104, are invalid – arguments set forth in the company's motion for summary decision.

The Commission has long held that it has the authority to entertain arguments regarding the validity of regulations. *See Freeman United Coal Co.*, 6 FMSHRC 1577, 1580 (July 1984). In *Drummond Co.*, the Commission found that a policy letter issued by the Secretary was invalid because the Secretary failed to promulgate it according to the notice-and-comment procedures of the Administrative Procedure Act, 5 U.S.C. § 551. 14 FMSHRC 661, 692 (May 1992). In explaining its authority to address challenges to the Secretary's regulatory actions, the Commission stated:

> The Mine Act expressly empowers the Commission to grant review of "question[s] of law, policy or discretion," and to direct review *sua sponte* of matters that are "contrary to ... Commission policy" or that present a "novel question of policy...." Since

[2] I note that, in these proceedings, Brody filed an Application for Temporary Relief on November 4, 2013 (eleven days after it was issued a POV notice on October 24), which was argued before Judge Steele on November 8, 2013. Brody's Application was denied on November 21, 2013. A hearing was set for December 3, 2013 on several of the violations that served as the basis for the POV notice, but the hearing was continued on December 1, 2013 after Brody filed its Motion for Summary Decision on November 27, 2013 (the day before the Thanksgiving holiday). This was done to allow the Secretary to respond to Brody's motion, and provide the Commission the opportunity to consider and rule on the parties' dispositive motions.

> Congress authorized the Commission to direct such matters for review, we infer that Congress intended the Commission to possess the necessary adjudicative power to resolve them. The reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program. Addressing claims of arbitrary enforcement by the Secretary is at the heart of that adjudicative role.

Id. at 674-75 (citations and footnote omitted).

It is clear that the function of the Commission is to assure that there is meaningful judicial review of the process by which the Secretary promulgates rules, and the appropriate time to do so is when the agency takes its first enforcement action against a mine operator under the new rule or policy. It is also clear that a case such as this, which raises important questions of statutory interpretation that "require a uniform and comprehensive interpretation of the Mine Act," falls squarely within the area of Commission expertise as an independent review body. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 214-15 (1994).

I. STATUTORY AND REGULATORY BACKGROUND

A. Mine Act Section 104(e)

Section 104(e) of the Act states in part:

> If an operator has a pattern of violations of mandatory health or safety standards [POV] in the . . . mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal . . . mine health or safety hazards, he shall be given written notice that such pattern exists.

30 U.S.C. § 814(e). Once given a POV notice, an operator is subject to an order of withdrawal each time an inspector cites it for a significant and substantial (S&S)[3] violation until a complete inspection of the mine has revealed no further S&S violations. *Id.*

Section 104(e) is one of several enforcement tools available to MSHA to ensure that mine operators place the safety of miners above all other considerations, in accordance with the Mine Act's declaration that "the first priority and concern of all in the . . . mining industry must be the

[3] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

health and safety of its most precious resource ― the miner." 30 U.S.C. § 801(a). Identifying and sanctioning mine operators for patterns of serious violations "is an integral part of the Act's enforcement scheme, a scheme which, as an incentive for operator compliance, provides for 'increasingly severe sanctions for increasingly serious violations or operator behavior.'" *Emery Mining Corp.*, 9 FMSHRC 1997, 2000 (Dec. 1987) (citing *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981)). Thus, section 104 of the Act provides authorized representatives of Secretary – i.e., MSHA inspectors – with the authority to issue citations and orders after they make certain findings that violations of the standards and regulations implementing the Act have occurred, including citations issued under section 104(a), orders issued under section 104(b) for a failure to abate a violation cited under section 104(a), and section 104(d) citations and orders issued when a mine operator commits an unwarrantable violation.

Section 104(e) provides an incrementally more severe sanction – a withdrawal remedy – that MSHA may invoke when it finds that a mine operator has engaged in a pattern of S&S violations. The statute contemplates the following sequence of events: First, a mine operator shall have been "engaged in a pattern of violations of mandatory health or safety standards in the . . . mine which are of such nature as could have significantly and substantially contributed to the cause and effect of . . . mine health or safety hazards." When MSHA determines that such a pattern exists, the agency provides to the operator a "written notice that such a pattern exists." Following the issuance of the pattern notice, for a period of ninety days, if the mine operator has any newly discovered S&S violations, MSHA may issue a section 104(e) withdrawal order. 30 U.S.C. § 814(e)(1).

Once one or more of such orders are issued, the mine operator may be subject to additional withdrawal orders for each new S&S violation subsequently discovered, until such time as there is a complete inspection of the mine that discloses no S&S violations. 30 U.S.C. § 814(e)(2). These withdrawal orders "cause all persons in the area affected by such violation . . . to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated." 30 U.S.C. § 814(e)(1).

The term "pattern of violations" is not defined in the text of the Mine Act. Nor has the Commission fully adjudicated any enforcement actions wherein the Secretary has stated how he proposed establishing what constitutes a "pattern of violations." Thus, the Commission has not had the opportunity to determine the statutory meaning of the term "pattern of violations."

B. Rules Implementing Mine Act Section 104(e)

Although the Act grants the Secretary the authority to "make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists," 30 U.S.C. § 814(e)(4), it was not until 1990 that such regulations were promulgated. 55 Fed. Reg. 31136 (July 31, 1990) (codified at 30 C.F.R. Part 104). The

Secretary revised the Part 104 POV regulations in early 2013, with an effective date of March 25, 2013. 78 Fed. Reg. 5056 (Jan. 23, 2013).

Under the procedures promulgated in 1990, MSHA engaged in an annual initial screening process, which included reviewing information regarding a "mine's history of . . . [S&S] violations." 30 C.F.R. § 104.2(1) (1990). Section 104.3 specified the information MSHA used to identify mines with a "potential" POV (PPOV). It stated:

> (a) The criteria of this section shall be used to identify those mines with a potential pattern of violations. These criteria shall be applied only after initial screening conducted in accordance with § 104.2 . . . reveals that the operator may habitually allow the recurrence of violations of mandatory safety or health standards which . . . [are S&S]. These criteria are:
>
> (1) A history of repeated [S&S] violations of a particular standard;
>
> (2) A history of repeated [S&S] violations of standards related to the same hazard; *or*
>
> (3) A history of repeated [S&S] violations caused by unwarrantable failure to comply.
>
> (b) Only citations and orders issued after October 1, 1990, and *that have become final* shall be used to identify mines with a *potential* [POV].

30 C.F.R. § 104.3 (1990) (emphasis added). This section does not specify the actual numbers of final orders to be applied in the screening process, which provided MSHA wide discretion in determining when a POV existed. Guidance issued by the agency stated, however, that "[f]or a pattern of violations review, mines identified during the initial screening must have at least five S&S citations of the same standard that became final orders of the [C]ommission during the most recent 12 months OR at least two S&S unwarrantable failure violations that became final orders of the [C]ommission during the most recent 12 months." Secy's Motion Sum. Dec. at Ex. 2 (Pattern of Violations Screening Criteria – 2012) (emphasis omitted). The record is silent on how often this disjunctive final order screening process had operated to remove many otherwise potentially "at risk" operators from further POV consideration.

When notified of a PPOV, an operator would have the opportunity to engage in an assortment of remedial measures, including submission of a written corrective action plan designed to eliminate repeated S&S violations. In determining whether to issue a formal POV notice after issuance of a PPOV, MSHA would determine whether the operator had reduced the

frequency rate of S&S violations by 30 percent or had achieved a frequency rate for S&S violations that was at or below the industry average. The citations and orders used to make such a determination *did not need to be final orders of the Commission. See Rockhouse Energy Mining Co.*, 30 FMSHRC 1125, 1129-30 & fn.4-5 (Dec. 2008) (ALJ).]

MSHA revised the Part 104 POV regulation in 2013 because it "determined that the existing regulation [did] not adequately achieve the intent of the [Mine Act] that the POV provision be used to address mine operators who have demonstrated a disregard for the health and safety of miners." 78 Fed. Reg. at 5056. From the time of the passage of the Mine Act, a number of mine operators received PPOV notices but actual POV notices were almost never issued because, at least during the violation avoidance period, the subject mine operators were able to reduce the issuance rates to below MSHA's improvement criteria. *Id.* at 5058. *See also* Sec'y 6th Cir. Br. at 11.[4] In fact, the National Mining Association claims that no economically viable mine operator ever received a pattern of violations notice. NMA 6th Cir. Br. at 40.

The 2013 revision to the POV regulation streamlines the procedures set forth in the prior rule. As in the prior rule, once every 12 months MSHA will review the compliance records and accident and injury records of mines to identify where patterns of S&S violations exist. There are initial screening criteria composed of eight elements related to issuances of certain types of citations and orders, accident and injury rates and mitigating factors. 30 C.F.R. § 104.2(a)(1-8). These criteria are nearly identical to the screening criteria under the prior rule, but in the revised regulation, there is no requirement that any of the issuances considered in the initial screening be final orders of the Commission. *See* 78 Fed. Reg. at 5059-60. MSHA has also disclosed its internal procedures that illustrate how the agency will conduct POV reviews. According to MSHA's POV Procedures Summary, at least once per year, a date will be chosen to conduct the review, and screening criteria will be applied. The MSHA Administrator will send the results to MSHA district managers who, in turn, will write a memorandum to the MSHA Administrator reporting any mitigating circumstances that justify postponing a POV notification. Next, a POV panel reviews that information, along with any other necessary information, and makes a recommendation to MSHA administrators and other high level officials. The administrators make the final decision regarding the issuance of a POV notice after receiving that information. In addition, a mine operator can meet with a district manager to provide input as to the accuracy of MSHA's records. *See* Brody Appl. for Temp. Relief at Ex. 11.

[4] Both the Secretary and Brody have submitted for my consideration briefs filed in the U.S. Court of Appeals for the 6th Circuit in the matter *Nat'l Mining Ass'n v. MSHA*, Case No. 13-3324. The Secretary's briefs were filed in the 6th Circuit on behalf of MSHA. The briefs on which Brody relies were filed on behalf of the National Mining Association (NMA) by counsel that are not of record in the instant proceeding, though the NMA briefs were incorporated by reference in Brody's filings. Broday has since indicated that it adopts some, but not all, of the NMA's arguments made to the 6th Circuit. I have not considered any arguments not specifically adopted. Hereafter, arguments are to be made to me by counsel of record in this proceeding.

The new rule provides that "MSHA will post the specific pattern criteria on its Web site." 30 C.F.R. § 104.2(b). The preamble to the regulation states that the information available on MSHA's website will include "the specific criteria, with numerical data, that the Agency will use to identify mines with a pattern of S&S violations." 78 Fed. Reg. at 5064. MSHA also notes that it "may from time to time need to modify thresholds and other factors to assure mine operators of fair and equitable criteria that take into account different mine sizes, mine types, and commodities." *Id.*

The preamble also highlights MSHA's creation of "a user-friendly 'Monthly Monitoring Tool for [POV]' . . . that provides mine operators, on a monthly basis, a statement of their performance with respect to each of the PPOV screening criteria." *Id.* at 5057. MSHA characterizes the Monitoring Tool as "quick and easy to use; it does not require extra skill or training." *Id.* MSHA eliminated all of its prior PPOV procedures based largely on the creation of this tool, stating in the preamble that "[e]limination of PPOV underscores the mine operators' responsibility to monitor their own compliance records and encourages them to verify that the information on MSHA's Web site is accurate." *Id.* at 5059.

Under the new rule, following the initial review process, the appropriate district manager simply issues the POV notice to any mine operator that he or she believes has committed a pattern of S&S violations. Thus, the revised rule eliminates the PPOV process that existed under the prior rule (with attendant delays of up to 120 days for assessment of compliance improvement). 30 C.F.R. § 104(3); *see* 78 Fed. Reg. at 5058-5059.

To summarize, the effects of the revised POV regulation are to change only two salient aspects of the prior POV issuance process. First, the final order screening criteria MSHA used under the prior rule in one step of the POV screening process has been eliminated. Second, the PPOV process, with its attendant "cure period," has been eliminated and replaced by a system of ongoing internet self-monitoring, with any compliance efforts considered as a mitigating factor. As for the statutory meaning of the term "pattern of violations" for purposes of demonstrating a valid POV notice, the revised regulation does not break the silence of its predecessor.

C. Summary Decision before the Commission

Motions for summary decision are governed by Commission Procedural Rule 67, which provides:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
>
> (1) That there is no genuine issue as to any material fact; and

> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission "has long recognized that [] '[s]ummary decision is an extraordinary procedure,"' and has analogized it to Rule 56 of the Federal Rules of Civil Procedure,[5] under which "the Supreme Court has indicated that summary judgment is authorized only 'upon proper showings of the lack of a genuine, triable issue of material fact."' *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981); *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)).

II. PROCEDURAL HISTORY

On October 24, 2013, MSHA issued to Brody a notice that "a pattern of violations exists at the Brody Mine No. 1." Notice No. 7219154. The notification explained that "a review of the S&S violations cited at the mine demonstrates a pattern of violations. As illustrative of this pattern of violations, the following groups of violations are representative of the violations which are of such a nature as could have significantly and substantially contributed to the cause and effect of coal or other mine safety or health standards." What follows in the notice is a listing of 54 S&S citations and orders issued between October 9, 2012 and October 8, 2013, grouped according to the hazards they allege (ventilation and methane hazards, emergency preparedness and escapeway hazards, roof and rib hazards, and inadequate examination hazards). *Id.* All the citations and orders listed in the notice are either contested or in the penalty assessment process and have not become final orders of the Commission.

Since the issuance of Notice No. 7219154, MSHA has issued (and continues to issue as of the date of this order) numerous section 104(e) withdrawal orders. Brody has contested, and continues to contest, all of these orders (since Brody received its POV notice, and as of the date of this order, it has been issued 28 section 104(e) orders that have been contested and docketed at the Commission). As additional contests are filed with the Commission, I will consolidate them with these proceedings.

On November 4, 2013, Brody filed an Application for Temporary Relief and Vacation of the Notice of Pattern of Violations. Brody's application was denied on November 21, 2013 because it did not establish that the requested relief would not adversely affect the safety and health of miners. Before me now are the aforementioned cross motions for summary decision filed by Brody on November 27, 2013, and the Secretary on December 10, 2013.

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[5] Rule 56(a) of the Federal Rules of Civil Procedure provides for the filing of motions for summary judgment and states that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a).

III. STIPULATIONS OF FACT

The parties have entered the following stipulations of fact relevant to my consideration of their cross motions for summary decision:

1. Brody is an "operator" as defined in § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter "the Mine Act"), 30 U.S.C. § 803(d), at the coal mine at which the Orders at issue in this proceeding were issued.

2. The Brody Mine, an underground bituminous coal mine at which the Orders were issued in this proceeding, is subject to the jurisdiction of the Mine Act.

3. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to Sections 105 and 113 of the Mine Act.

4. The individuals whose signatures appears in Block 22 of the Orders at issue in this proceeding were acting in their official capacity and as authorized representatives of the Secretary of Labor when the Orders were issued.

5. True copies of the Orders at issue in this proceeding were served on Brody as required by the Mine Act.

6. The regulations on which MSHA relies to issue the notice of pattern of violations became final on March 25, 2013. *See* [78] Fed. Reg. § 5056 (January 23, 2013). Such rules are currently being challenged in the United States Court of Appeals for the Sixth Circuit by the National Mining Association and Murray Energy Corporation, among others.

7. The rule relies upon issued citations/orders regardless of whether they are final orders of the Commission as a basis for determination of the existence of a pattern of violations.

8. MSHA based its POV determination on a 12-month period ending August 31, 2013.

9. The parties disagree as to the effect of MSHA's screening criteria set forth on MSHA's website. Brody believes the effect is that, absent mitigating circumstances, a mine that meets the screening criteria is placed on a pattern of violations. The Secretary submits that such criteria are used to screen mines and identify mines that will be more closely reviewed for the determination of whether a pattern of violations exists.

10. The screening criteria were not subjected to mandatory notice-and-comment procedures. The parties disagree as to whether such notice and comment procedures were required by the Administrative Procedure Act.

11. A written notice was issued under Notice No. 7219154 on October 24, 2013, pursuant to section 104(e)(1) of the Act, 30 U.S.C. § 814(e), notifying the operator that MSHA finds that a pattern of violations exists at the Brody Mine No. 1.

12. Under the heading and caption "Condition or Practice" the Notice alleges in relevant part as follows:

> Pursuant to Section 104(e)(1) of the Federal Mine Safety and Health Act of 1977 (Mine Act), you are hereby notified that a pattern of violations exists at the Brody Mine No. 1 (ID 46-09086). A review of the S&S violations cited at the mine demonstrates a pattern of violations. As illustrative of this pattern of violations, the following groups of violations are representative of violations which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards:
>
> 1. The following eighteen citations/orders were issued citing conditions and/or practices that contribute to ventilation and/or methane hazards: 8125045 (10/9/12), 8137713 (10/9/2012), 8146352 (10/9/2012), 7167400 (11/26/12), 7168841 (11/26/2012), 7168866 (1/14/2013), 8139621 (1/15/2013), 7168913 (2/13/2013), 3577965 (2/2/7/2013), 3578036 (5/15/2013), 8155954 (5/21/2013), 8155960 (5/29/2013), 8154782 (6/5/2013), 9000282 (6/10/2013), 7165682 (7/24/2013), 9000311 (7/30/2013), 9000312 (7/30/2013), 9002292 (8/27/2013).
>
> 2. The following twenty citations/orders were issued citing conditions and/or practices that contribute to emergency preparedness and escapeway hazards: 8153617 (10/9/2012), 7167386 (10/22/2012), 7167387 (10/23/2012), 7167388 (10/29/2012), 7167389 (10/29/2012), 7167393 (11/1/2012), 7167405 (12/4/2012), 7167412 (12/12/2012), 7168854 (12/17/2012), 7167474 (3/18/2013), 8155914 (4/8/2013), 9000286 (6/19/2013), 7165680 (7/17/2013), 9000305 (7/24/2013), 9000309 (7/29/2013), 9000313 (7/30/2013), 7165694 (8/14/2013), 7166781 (10/3/2013), 7166783 (10/8/2013), 7166784 (10/8/2013).
>
> 3. The following nine citations/orders were issued citing conditions and/or practices that contribute to roof and rib hazards: 8151320 (10/18/2012), 7168899 (2/5/2013), 7167471 (3/6/2013), 8155908 (4/4/2013), 8155925 (4/17/2013), 8155936 (5/6/2013), 9000277 (6/5/2013), 7165683 (7/24/2013), 9000307 (7/29/2013).

> 4. The following seven citations/orders were issued citing conditions and/or practices that contribute to inadequate examinations: 7168801 (10/18/2012), 7167473 (3/18/2013), 8155909 (4/4/2013), 8155926 (4/17/2013), 8155937 (5/6/2013), 9000278 (6/5/2013), 9000304 (7/24/2013).
>
> These groups of violations, taken alone or together, constitute a pattern of violations of mandatory health and safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards.
>
> If upon any inspection within 90 days after issuance of this Notice, an Authorized Representative of the Secretary finds any violation of a mandatory health or safety standard that could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the Authorized Representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in Section 104(c) of the Mine Act, to be withdrawn from, and to be prohibited from entering such area until an Authorized Representative of the Secretary determines that such violation has been abated. This Notice of Pattern of Violation shall remain posted at the Brody Mine No. 1 until it is terminated by an Authorized Representative.

13. The contest of that Notice is docketed at No. WEVA 2014-81-R.

14. 253 S&S citations/orders were issued to Brody Mine No. 1 over the course of 12 months from September 1, 2012 through August 31, 2013. 108 S&S citations/orders were issued between March 25, 2013 and August 31, 2013.

15. The rate of S&S issuances at the Brody Mine No. 1 was 8.41 per 100 inspection hours during the screening period.

16. None of the S&S citations/orders that were issued at the Brody Mine No. 1 during the screening period are final orders of the Commission.

17. Each of the citations/orders listed in POV Notice 7219154 have either been contested by Brody or have not yet been assessed a civil penalty by MSHA . . .

18. 21 elevated enforcement actions (defined as citations or orders issued pursuant to Sections 104(b), 104(d), 104(g) or 107(a) of the Mine Act) were issued by MSHA at the Brody

Mine No. 1 during the screening period.

19. The rate of elevated enforcement actions issued to the Brody Mine No. 1 during the screening period was .7 per 100 inspection hours.

20. The Severity Measure for the Brody Mine No. 1 was above the national average for the screening period.

21. Approximately 57% of the S&S citations listed in the 2013 POV review data for Brody Mining are currently in contest due to the designated severity, with a significant portion of S&S issuances presently un-assessed. Further, 31 of the citations upon which MSHA is referencing in the POV notice have not been assessed penalties.

22. 24 citations/orders referenced in the pattern notice were issued before March 25, 2013. 30 citations/orders referenced in the pattern notice were issued after March 25, 2013. 23. Brody contends that if the citations referenced in the pattern notice at issue only involve those issued after March 25, 2013, the number of S&S citations per 100 inspection hours would be below the 8.0 S&S per 100-hour criteria. The Secretary contends that application of the screening criteria is not subject to review and Brody contends that it is. The Secretary further contends that the screening criteria are designed to apply to a twelve month period and applying those criteria to a shorter time frame would not be as representative. It is further the Secretary's position that all S&S citations/orders issued during the period under consideration, not just those listed in the pattern notice, must be considered when applying the screening criteria. It is Brody's contention that based on the Secretary's arguments in this matter that he is arguing that the citations /orders in the pattern notice establish a pattern of violations.

24. 108 S&S citations or orders were issued to Brody Mine No. 1 between March 25, 2013 and August 31, 2013 with a total of approximately 1468.75 MSHA inspection hours as calculated by MSHA (1506 by Brody's records). The S&S rate using MSHA's number, for that period would be 7.35 per 100 inspection hours and 7.17 by Brody's calculation.

25. 12 citations/orders designated as S&S with a negligence finding of high or reckless disregard were issued between March 25, 2013 and August 31, 2013 representing 11% of the 108 S&S citations/orders issued during that period.

IV. PARTIES' ARGUMENTS

Brody argues that it is entitled to summary decision on several grounds. As a preliminary matter, the company argues that the revised POV rule (78 Fed. Reg. 5056) is invalid because it is arbitrary, capricious, and an abuse of discretion, and because it impermissibly construes the term "violation" to include non-final orders. Brody Mot. Sum. Dec. at 3; NMA 6th Cir. Br. at 6. Brody also argues that its POV notice is invalid because MSHA relied on screening criteria that was not subject to notice-and-comment rulemaking, which, Brody argues,

MSHA was required to do. Brody Mot. Sum. Dec. at 3. Further, Brody argues the application of the POV rule does not provide adequate procedural due process to mine operators. NMA 6th Cir. Br. at 19. Finally, Brody argues that the POV notice it was issued is invalid because it relies on violations that occurred before the effective date of the new regulations in an impermissibly retroactive manner. Brody Mot. Sum. Dec. at 1-2.

The Secretary opposes Brody's motion in its entirety, and believes he is entitled to summary decision on certain issues of law. The Secretary argues that the POV rule is valid, that it is consistent with the Mine Act and Administrative Procedure Act, and does not violate the due process clause of the 5th Amendment to the U.S. Constitution. Sec'y Mot. for Sum. Dec. at 2. The Secretary also argues that the screening criteria are a valid statement of agency policy and did not need to be subjected to notice-and-comment rulemaking as a matter of law. *Id.* Finally, the Secretary argues that the application of the POV rule to Brody was not impermissibly retroactive. *Id.*

V. FINDINGS OF LAW

A. The Term "Violation" as used in Section 104(e)

I first address the question of whether the regulation promulgated by the Secretary to implement section 104(e) of the Mine Act, 30 C.F.R. Part 104, is consistent with the terms of the Act. When assessing the validity of standards and regulations the courts have adopted the two-part test set forth by the Supreme Court in *Chevron U.S.A, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). In *Chevron*, the Court stated:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-843 (citations and footnotes omitted). *See also Nat'l Mining Ass'n v. MSHA*, 116 F.3d 520, 526 (D.C. Cir. 1997) (relying on *Chevron*).

The Court in *Chevron* explained that when there is an explicit delegation of rulemaking

authority, the degree of deference given to the promulgating agency is very high:

> The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress. If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute.

467 U.S. at 843-844 (citations and footnotes omitted).

In this case, in specifying that the Secretary "shall make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health or safety standards exists," 30 U.S.C. § 104(e)(4), Congress has granted the Secretary explicit regulatory authority to determine the criteria for action under Section 104(e) of the Act. Accordingly, the Commission must give controlling weight to the criteria the Secretary determined were necessary for the Secretary's POV determination unless the criteria are "arbitrary, capricious or manifestly contrary to the statute." 467 U.S. at 844.

Brody argues that under the Mine Act, only *final* orders can be considered in establishing a POV because the term "violation" in the phrase "pattern of violations" as set forth in section 104(e) can only refer to finally adjudicated issuances. NMA 6th Cir. Br. at 21-22. According to Brody, this is evident from the plain meaning of the term "violation:" "A 'violation' is '[a]n infraction or breach of the law; a transgression . . . [t]he act of breaking or dishonoring the law; the contravention of a right or duty.' *Black's Law Dictionary* 1564 (7th ed. 1999). A violation is an established fact – not a mere allegation – that an operator violated a law or regulation." NMA 6th Cir. Br. at 22.

Brody notes that the issuance of a section 104(a) citation occurs when a mine inspector "believes" that a mine operator has violated any standard, rule, or regulation; and that section 104(a) of the Act requires that each citation reference the legal rule "alleged to have been violated," which would be surplus language if "violation" was merely taken to mean an issued citation or order. The Secretary responds to Brody's textual arguments by claiming that the term "violation" is ambiguous, and under the tenets of statutory construction set forth in *Chevron*, the Secretary is owed deference to his reasonable interpretation that the "pattern of violations" referred to in section 104(e) includes issuances that are not yet final. *See generally* Secy's 6th Cir. Br. at 23-33. The Secretary points out that although section 104(a) does include language requiring citations to state the provision "alleged to have been violated," it also requires the citation the inspector issues to "fix a reasonable time for the abatement of the violation." Secy's 6th Cir. Br. at 22. The Secretary refers to sections 104(b) and 104(d) in which the word

"violation" must be read as referring to recent acts, which are remedied under those provisions and thus not yet subject to final adjudication. Secy's 6th Cir. Br. at 22-23. The Secretary also cites to the Commission's reading that under Section 104(d)(1), a subsequent withdrawal order can be issued although no penalty has yet been proposed for the order or citation preceding it. Secy's 6th Cir Brief at 23 (citing *Energy Fuels Corp*., 1 FMSHRC 299, 307-308 (May 1 1979)). The Secretary also claims that his reading is consistent with section 104(h) of the Act, which states that "[a]ny citation or order under this section shall remain in effect until modified, terminated or vacated" by the Secretary, the Commission, or the courts; and with comments in the Congressional Record by Senators considering the meaning of the term "pattern of violations." Secy's 6th Cir. Br. at 24, 30-33.

Brody's textually based arguments lack merit. It is unclear how the *Black's Law Dictionary* definition that Brody relies on compels one to find that only finally adjudicated actions are violations. In fact, the definition of "violation" as an "act of breaking or dishonoring the law; the contravention of a right or duty" emphasizes that the term can refer to an action rather than a legal outcome. This second common definition is consistent with the Secretary's reading of section 104(e).

More importantly, the term "violation" is used in the Act in several remedial sections that clearly indicate that existence of a final order was never contemplated. For example, section 104(b) mandates that a violation need not be finally adjudicated for a duty to abate to arise. This duty to abate is one of the very cornerstones of the Mine Act. The statute has also established in section 104(d) a procedure for issuance of unwarrantable failure orders. By the wording of the statute it is clear that prior *non-final* issuances suffice to establish a section 104(d) withdrawal sequence. After the issuance of an unwarrantable failure citation, any subsequent unwarrantable violations found "during the same inspection or any subsequent inspection of such mine within 90 days" will result in the issuance of an unwarrantable failure orders. 30 U.S.C. § 814(d). Because of the time frames involved, it is clear that Congress did not intend the initial issuances to have become final orders before the subsequent orders were issued.

Moreover, the legislative history makes clear that 104(d) orders can be validly issued even if the prior, predicate orders and citations are still in contest. As one judge noted in an earlier opinion on this question:

> [T]he Secretary aptly compares the pattern of violation application with the unwarrantable failure sequence of Section 104(d). This is not a stretch by any means, as the Senate Report itself made such a comparison, observing that the POV "sequence parallels the current unwarrantable failure sequence." S. Rep. No. 95-181, p. 33. Particularly pertinent here in that comparison is the point that "[i]t is beyond debate that a closure order under Section 104(d)(1) may be based upon a Section 104(d)(1) citation that is not final, and a closure order under Section 104(d)(2) may be based upon a Section

104(d)(1) order that is not final." *Id.* at 25.

Bledsoe Coal Corp., 34 FMSHRC 1136, 1154 (May 2012) (ALJ).

Another usage of the term "violation" that indicates it was never intended to refer only to finally adjudicated citations and orders is found in section 103(g) of the Act, which gives miners the right to notify MSHA of "violations." The section states in part: "Prior to or during any inspection of a . . . mine, any representative of miners or a miner . . . may notify the Secretary . . . of any violation of this Act." 30 U.S.C. § 813(g)(2).

Finally, Brody argues that the consideration but ultimate rejection of a bill proposing amendments to the Mine Act that would have eliminated the final order requirement in the POV rule indicates Congressional support of the final order requirement. NMA 6th Cir. Br. at 26-28. I find this unconvincing. As the Secretary correctly points out, the Supreme Court has held that courts should give little if any weight to failures by Congress to enact clarifying amendments related to the interpretation of a statute. Sec'y 6th Cir. Brief at 33; *Central Bank of Delaware v. First Interstate Bank of Delaware*, 511 U.S. 164, 187 (1994) ("Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction." (citations omitted)).

I conclude that the term "violation," as used in section 104(e) of the Act, is ambiguous, and that the Secretary's interpretation of the term as referring to a violation which is the subject of an issuance, whether final or not, is reasonable and as such is entitled to deference.

B. Validity of 30 C.F.R. Part 104 under the Administrative Procedure Act

1. Arbitrary and Capricious Discussion

Having determined that nothing in the Mine Act requires that MSHA must rely on issuances that have become final orders in determining whether a mine operator should be considered for further evaluation and potentially issued a POV notice, I now turn to the question of whether the policy choices the Secretary made when promulgating 30 C.F.R. Part 104 were arbitrary, capricious, or an abuse of discretion. In essence, Brody wants MSHA to base its POV decisions on *past* violations rather than *current* conditions in a mine. For the following reasons, I reject this proposition.

A regulation will run afoul of the provisions of section 706(2)(A) of the Administrative Procedure Act (APA) if a reviewing court finds it "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). In *Motor Vehicle Manufacturers Association of the U.S. v. State Farm Mutual Auto Ins. Co.*, the Supreme Court held that under the arbitrary and capricious standard, "a reviewing court may not set aside an agency rule that is rational, is based on consideration of relevant factors, and is within the scope of the authority delegated to the agency by statute." 463 U.S. 29, 43 (1983). The scope of review is narrow and a court must not substitute its judgment for that of the agency. *Id.* Courts

will look to determine whether the agency examined the relevant data and articulated a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Id.* The court went on to say:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. at 44. The holding in *Motor Vehicles Manufacturers* has specifically been applied to standards issued under the Mine Act. *See NMA v. MSHA*, 116 F. 3d 520, 527 (D.C. Cir. 1997); *Kennicott Greens Creek Mining Ass'n v. MSHA*, 476 F.3d 946, 952 (D.C. Cir. 2007); *UMWA v. MSHA*, 626 F. 3d 84, 90 (D.C. Cir. 2010). A party challenging a rule has the burden of proof, and the court's review is limited to the rulemaking record before the agency. *Advocates for Highway and Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1144 (D.C. Cir. 2005); *Kroger Co. v. Reg. Airport Auth.*, 286 F.3d 382, 387 (6th Cir. 2002).

Brody attacks MSHA's revised POV rule as non-compliant with section 706 of the APA on several grounds. First, it argues that the agency's decision to rely on citations and orders that include non-final issuances for its POV screening criteria is flawed, since some portion of the S&S violations MSHA uses may subsequently be vacated or modified to eliminate the S&S designation originally made by the inspector. NMA 6th Cir. Br. at 31-33; NMA 6th Cir. Reply Br. at 13. Brody claims that there is a fairly high rate – approximately 20 percent – of S&S issuances that are later vacated. Accordingly, it claims that MSHA should have given a better explanation as to why it is relying on a designation that the agency is so frequently unable to sustain for its POV screening procedures. NMA 6th Cir. Br. at 31-33; NMA 6th Cir. Reply Br. at 13. The Secretary acknowledges that recently issued, non-final S&S issuances can later be reversed, but points out that when uncontested S&S violations are included with contested ones, the actual reversal rate is lower than Brody claims. Sec'y 6th Cir. Br. at 38-39.

Having acknowledged that inspectors' findings are not invariably sustained, the Secretary articulates the reason for his choice to include them, to wit, that waiting for all issuances to be final carries the risk of precluding MSHA from considering the most relevant data, which is a mine operator's *recent* compliance history. Waiting on all determinations to become final before considering them for POV screening purposes would result in a mine's safety and health practices in the past to outweigh those of the present – clearly an anomalous result. *See* Sec'y 6th Cir. Br. at 36-38. This is particularly true in light of the fact that, as set forth in the preamble to the revised rule, high contest rates have in the past been correlated with low case disposition rates. In 2011, for example, contested issuances lingered an average of 534 days after issuance, and 18 percent of all violations remained pending in contest two years after issuance. 78 Fed. Reg. at

5059-5060.

In light of these considerations, I find that the Secretary did not engage in arbitrary and capricious decision-making or abuse his discretion when he determined that MSHA's POV screening criteria could be based on recent issuances irrespective of their status as final. I take particular note of the fact that MSHA's consideration of recent issuances – whether final or not – is for screening purposes only. The Secretary states in his brief to the 6th Circuit that "the screening criteria do not finally and conclusively determine whether the mine has a POV. . . . [O]nce MSHA initiates an enforcement proceeding under section 104(a) any contest thereof is under the jurisdiction of the Commission, which is not bound by the Screening Criteria." Sec'y 6th Cir. Br. at 45.

Since the Secretary claims that these criteria are for his own pre-enforcement decision-making purposes, and that they do not bind the Commission, concerns about erroneous S&S determinations in issuances used to screen operators for POV scrutiny are secondary to the determinative issue of whether the Secretary can prove the existence of a POV by a preponderance of evidence in a de novo proceeding before an impartial judge of the Commission. In such a hearing, S&S violations must be conclusively proven to establish the existence of a POV. In light of this, the Secretary's reliance on recent issuances for its screening criteria is reasonable.

While a mine operator's long-term history of violations has clear relevance, including repeated violations of the same or similar standards that have become final orders, the Secretary is reasonably concerned with the current situation at a given mine in choosing which mine operators to proceed against under section 104(e). If only relatively older final orders were used for POV determinations, recent compliance levels would still have to be addressed in any contest proceedings involving section 104(e) orders issued after the issuance of a POV notice. Moreover, the data upon which Brody relies reveal that the percentage of S&S violations that will survive to finality is predictable. *See* NMA 6th Cir. Br. at 32. Accordingly, the screening criteria the Secretary uses to determine which mine operators should be subject to further scrutiny for MSHA's enforcement purposes can reasonably take into account all recent compliance history. I thus find the Secretary's adoption of this policy rational, as well as adequately justified.

Brody also argues that it was arbitrary and capricious for the Secretary to abandon the prior PPOV procedures, which Brody claims successfully reduced the issuance of violations at subject mines. NMA 6th Cir. Br. at 57-58; NMA 6th Cir. Reply Br. at 14-16. Specifically, Brody claims that MSHA's data show that 94 percent of all mines that received a PPOV notice were able to reduce their rate of S&S violations by 30 percent, and that mine operators that had received a PPOV notice reduced their rate of S&S violations to below the national average in 77 percent of the cases. Brody also points to the decline in the fatality rate during the effective period of the prior Part 104 rule as proof of its efficacy. NMA 6th Cir. Reply Br. at 15-16.

The Secretary agrees that the PPOV process resulted in reductions in violations for mines

that had been subject to PPOV scrutiny. However, the Secretary notes that 21 percent of mine operators that received PPOV notices regressed in their compliance rates, and potentially faced being issued new PPOV notices. Sec'y 6th Cir. Br. at 40 (citing 78 Fed. Reg. at 5058). The Secretary also notes that after avoiding issuance of POV notices, mines saw injury rate increases in the following year at 39 percent of the subject mines. Sec'y 6th Cir. Br. at 40-41 (citing 78 Fed. Reg. at 5069). The Secretary points to the introduction of online monitoring, which allows mine operators to know earlier in the POV process that they are at potential risk for POV scrutiny, thereby allowing earlier voluntary efforts to improve compliance. Sec'y 6th Cir. Br. at 41 (citing 78 Fed. Reg. at 5058-59). Finally, the Secretary disputes Brody's assertion that a causal link exists between the prior rule's PPOV process and overall reductions in fatalities during the time when the prior rule was in effect, noting that any such decrease can be attributed to any number of other causes, including MSHA's enforcement of the Act. Sec'y 6th Cir. Br. at 41-42.

Under the standard of review articulated in *Motor Vehicle Manufacturers*, 463 U.S. at 44, I find the Secretary's arguments persuasive, and that his determination to abandon the once-a-year PPOV process, and to replace it with an ongoing online monitoring process, is rational. I am particularly persuaded by the Secretary's concerns that PPOV compliance gains were sometimes fleeting, a phenomenon well documented in the preamble to the revised rule. 78 Fed. Reg. at 5058-59. The Secretary has adequately explained that the issuance of PPOV notices as a tool for improved compliance has been superseded by the nearly instantaneous notification of the need for greater compliance efforts through utilization of MSHA's web-based Monthly Monitoring Tool; and that the availability of online self-monitoring will benefit the health and safety of miners. *Id.* at 5059. I thus conclude that the Secretary's elimination of the prior PPOV procedure is rational, well explained, and not inconsistent with the Mine Act.

2. Due Process Discussion

Brody argues that the revised POV rule deprives it of adequate due process. NMA 6th Cir. Br. at 38-49. Due process claims require the Commission to consider three factors when a deprivation to a property interest occurs: (1) the private interest that will be affected by the official action;" (2) the risk of an "erroneous deprivation of such interest through the procedures used," and the value of additional or substitute procedural safeguards; and (3) the government's interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Due process, as described by the Court in *Mathews*, is "not a technical conception with a fixed content unrelated to time, place, and circumstances," and further, "is flexible and calls for such procedural protections as the particular situation demands." *Id.* (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

In general, the Fifth Amendment guarantees some form of hearing prior to deprivation of life, liberty, or property. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970). However, the Supreme Court has held that a post-deprivation hearing alone can be adequate when public health and

safety is at stake. *See Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 298-302 (1981) (holding that summary post-deprivation procedures satisfied due process when Secretary of Interior issued "immediate cessation" orders that were based on an inspector's determinations that a mine was violating the law and that surface mining activities were causing or could reasonably be expected to cause significant, imminent environmental harm); *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 595-596 (1950) (affirming the FDA's seizure and destruction of mislabeled drugs without the opportunity for a pre-deprivation hearing due to the risk of injury to the purchaser of such drugs). In this instance, the new POV rule provides for the issuance of a POV notice prior to a hearing under which withdrawal orders under section 104(e) may be issued, which burdens the operator's interest in uninterrupted mining operations. It is not until such a subsequent order is issued that an operator has the opportunity for a hearing in which it may contest the 104(e) order and the underlying notice. Determining whether this is permissible involves balancing the operator's property rights, the extent and type of procedure provided, and the governmental interest.

Private Interest at Stake. As a threshold matter, there must be a deprivation of a private property interest in order for a court to engage in the *Mathews* balancing test. Although the Secretary argues that Brody does not suffer any deprivation of property whatsoever, I find that Brody does in fact suffer a deprivation of property when subjected to the issuance of section 104(e) withdrawal orders under a POV notice. However, I also find that Brody's descriptions of the POV notice's impacts on its private interests are overstated. Brody argues that the private interests at stake are great because being on a POV notice may lead to mine closures and harms reputation and stock prices. NMA 6th Cir. Br. at 39-41. However, a withdrawal order generally applies only to the section of the mine or piece of equipment affected by the cited S&S violation, and MSHA generally orders withdrawal only of persons exposed to a risk of harm from the cited violation. *See* 78 Fed. Reg. at 5066. Furthermore, in underground coal mines, S&S violations are usually abated immediately or within hours of issuance and have little or no impact on production, as the orders are lifted as soon as abatement occurs. *Id.* at 5071. While some 104(e) orders might be disruptive to daily operations, they cannot be expected to result in closures of the entire mine on a regular basis. In addition, I reject Brody's claims that a POV sanction affects its private interests by harming its reputation and triggering immediate reporting requirements under Securities and Exchange Commission ("SEC") regulations because freedom from such corporate reputational harms is not a right entitled to due process protections. *See Paul v. Davis*, 424 U.S. 693, 711-12 (1976).

Thus, Brody has a property interest in the uninterrupted continuation of their mining operations without the threat of withdrawal orders during subsequent inspections, and being on a POV status hampers that interest by subjecting the mine to temporary disruptions of workflow whenever an S&S violation is written. The question is whether the Mine Act's post-deprivation, potentially expedited review processes and the government's interest in issuing POV notices to safeguard the health safety of miners are sufficiently strong to justify this property deprivation.

Adequacy of Proposed New Procedures. Although the procedures for protesting a

POV notice are available only after the imposition of the first closure order, I find that the expedited procedures in the Mine Act and the Commission's Procedural Rules allow for expedient adjudication and relief for erroneous deprivations before significant deprivation of private interests occurs. Section 105(b)(2) of the Act allows for a party to file a request for temporary relief, which a Judge may grant after a showing by the applicant that there is a substantial likelihood that the findings of the Commission will be favorable to the applicant and that such relief will not adversely affect the health and safety of miners. *See* 29 C.F.R. Subpart F. The Commission's Procedural Rules further require that responses to an application for temporary relief be filed within four days, allowing for quick cessation of a POV notice should a Judge find the notice was issued erroneously. *See* 29 C.F.R. § 2700.46(b). I note that Brody availed itself of these procedures in these proceedings before Judge Steele. Beyond the temporary relief provisions, the Commission's rules also provide parties the opportunity to request expedited proceedings in order to have cases quickly adjudicated. 29 C.F.R. § 2700.52. These procedures mitigate the pre-hearing deprivation of a POV by allowing for swift remedies in cases of wrongful issuance.

Brody argues that these procedures are inadequate because it claims that violations designated as S&S are later overturned by Commission Judges at a rate of 20-30 percent, and that review of S&S designations prior to deprivation is necessary to reduce the risk of erroneous deprivation. NMA 6th Cir. Br. at 41-44. Even at such a rate of S&S designations being overturned, the majority of S&S designations are still upheld or uncontested. *See* Sec'y 6th Cir. Br. at 58. The Secretary points out that when this is viewed in light of his position that he does not need a minimum number of valid S&S designations to prove a "pattern" within the meaning of the statute, the risk of erroneous deprivation due to overturned S&S citations is quite low. *Id.* at 57.

Brody's arguments also equate the elimination of the PPOV process to the elimination of a crucial procedural safeguard. But as discussed above, operators still have access to the screening criteria online and are capable of ascertaining whether they are at risk of receiving a POV notice and taking corrective action as needed. In fact, this provides operators with more day-to-day opportunities to understand their risk and take corrective action without having to wait for formal issuances from MSHA.

The cost of additional procedures that Brody suggests is unacceptably high. NMA 6th Cir. Br. at 47-48. Requiring MSHA to wait until it has final orders to issue a POV notice, as Brody suggests, would invite mine operators to contest as many cases as they can, creating delays that could extend for years, resulting in case backlogs at MSHA and the Commission. *See* 78 Fed. Reg. at 5059. It would also mean that if a POV notice did issue, it would likely be based on past violations that might not reflect current conditions in the mine. *Id.* Re-instating the PPOV process would also hamper future effective enforcement of section 104(e) of the Act. The PPOV system created circumstances in which operators would come into compliance during the relevant period and then "backslide" into the dangerous practices they engaged in before. *See* 78 Fed.Reg. 5058. Thus, an additional "warning" such as the PPOV is likely to harm more

miners who are working in unsafe mines that managed to avoid POV status.

By contrast, the risk of erroneous deprivation under the current procedures is low. MSHA's decision not to give written notice of a "potential" pattern will not increase the risk of an erroneous pattern designation because MSHA provides the criteria on their website so operators can monitor their own POV risk. 78 Fed. Reg. at 5059. The temporary relief and expedited review provisions of the Mine Act and the Commission's Procedural Rules also provide a swift remedy for operators that believe they were issued POV notices erroneously – should they choose to avail themselves of such procedures – thus making the magnitude of any erroneous deprivation very small.

Government Interest. In this instance, the Government's interest is quite strong, because it centers on the health and safety of miners and is needed to prevent injuries and fatalities in mines that have demonstrated a pattern of dangerous conduct.

As the Supreme Court held in *Hodel v. Va. Surface Mining & Reclamation Ass'n*, pre-hearing deprivation of property interests is often justified in cases when the government must act quickly to protect public health and safety. 452 U.S. at 298-302. As the *Hodel* Court stated, "[p]rotection of the health and safety of the public is a *paramount governmental interest which justifies summary administrative action.* Indeed, deprivation of property to protect the public health and safety is one of the oldest examples of permissible summary action." *Id.* at 300 (emphasis added) (citations omitted).

In *Donovan v. Dewey*, the Supreme Court noted the importance of the Mine Act in particular as a statute designed to protect public health and safety. In upholding the constitutionality of the Act despite 4th Amendment challenges, the Court stated:

> As an initial matter, it is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce.

452 U.S. 594, 602 (1981) (relying on preamble to the Mine Act) (footnote omitted). *Donovan* highlights the importance of the Mine Act's concern with protecting the health and safety of miners working in an extremely dangerous industry, and judicial evaluation of its provisions must be cognizant of that goal.

The POV rule and the general provisions of section 104(e) of the Act fit perfectly into the types of governmental interests envisioned by *Hodel*. Like the immediate cessation orders upheld in *Hodel*, 104(e) orders issued pursuant to a POV notice are taken as an emergency

measure to ensure miners are not in a dangerous part of the mine until the dangerous condition has been abated. The provision is only used in mines that have shown an egregious history of non-compliance, where similar but less stringent provisions of the Act have not been enough to incentivize the operator to reduce their violation history.

In fact, the changes to the POV rule are MSHA's response to the inadequacies of the prior rule and highlight the POV rule's focus on the truly bad actors that repeatedly allow dangerous working conditions to exist. Under the old rule, high-profile mine accidents took the lives of many miners, such as the massive coal dust explosion that occurred on April 5, 2010 at the Upper Big Branch mine in Montcoal, West Virginia. That accident killed 29 miners and injured two. MSHA Report of Investigation at 1 (available at www.msha.gov/Fatals/2010/UBB/ExecutiveSummary.pdf). The mine is operated by Performance Coal Company, a former subsidiary of Massey Energy Company, which had "avoided being placed on a POV despite an egregious record of noncompliance." 78 Fed. Reg. at 5057. The preamble to the new POV rule makes it clear that the changes are aimed at ensuring the safety of miners, and shows that continuing to wait for the PPOV process to unfold could very well place the health and safety of miners at increased risk.

After balancing these three factors, I find that the government's significant interest in the timely protection of public health and safety, particularly in light of an operator's opportunity for expedited post-deprivation review, justify the deprivation of the small property interest associated with un-interrupted mine production prior to a hearing. I further find that the revised POV rule is valid, and that it does not run afoul of the due process clause of the 5th Amendment to the U.S. Constitution.

3. Notice-and-Comment Rulemaking Discussion

Section 553 of the APA generally requires agencies to provide notice of proposed rulemakings for all rules. 5 U.S.C. § 553. A "rule" is defined in relevant part as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency . . ." 5 U.S.C. § 551(4). However, APA section 553(b)(3)(A) specifically states that the notice-and-comment requirements otherwise outlined in the section do not apply to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." In this instance, Brody argues that the POV screening criteria are legislative in nature and do not fall into any of the stated exceptions. The Secretary argues that the criteria are a general statement of agency policy, and thus, are valid even though they were not promulgated in accordance with notice-and-comment procedures.[6]

Legislative rules "implement congressional intent; they effectuate statutory purposes. In

[6] The APA also allows for a "good cause" exception to notice-and-comment requirements, 5 U.S.C. § 553(b)(3)(B), but the Secretary does not argue that the screening criteria fall under this exception.

doing so, they grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed." *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980) (citations omitted). The D.C. Circuit further elaborated in *Dyer v. Sec'y of Health and Human Services*:

> In order to determine whether a particular statement is a binding rule or a general, non-binding policy statement, courts must examine both the language of the statement and the purpose it serves. If a pronouncement implements a statute by enacting a legislative-type rule affecting individual rights and obligations, it is likely to be a substantive rule. A statement is also likely to be considered binding if it narrowly circumscribes administrative discretion in all future cases, and if it finally and conclusively determines the issues to which it relates. A policy statement is a pronouncement that simply advises the public what the agency's prospective position on an issue is likely to be.

889 F.2d 682, 685 (D.C. Cir. 1989) (citations omitted). While the Secretary's description of the type of rule he promulgated is afforded some weight, the more significant factors by far are the language and actual effects of the agency action. *See Chamber of Commerce v. OSHA*, 636 F.2d 464 (D.C. Cir. 1968); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537-38 (D.C. Cir. 1986). In the context of the Secretary's rulemaking authority under the Mine Act specifically, the Commission discussed the requirements for notice-and-comment rulemaking most thoroughly in *Drummond Co.*, 14 FMSHRC 661 (May 1992).

Drummond involved a challenge to a Program Policy Letter, or "PPL," issued by the Secretary that set forth a system of proposing penalties known as the "excessive history program." 14 FMSHRC at 661. The Commission affirmed the Judge's ruling that the PPL was invalid because it was issued without having met the notice-and-comment requirements of the APA. *Id.* In the *Coal Employment Project I* litigation that took place prior to *Drummond*, the D.C. Circuit Court found that the single penalty program portion of the Secretary's Part 100 penalty regulations was unreasonable because it failed to adequately consider an operator's history of violations. *See* 14 FMSHRC at 665 (discussing *Coal Employment Project v. McLaughlin*, 889 F.2d 1134 (D.C. Cir. 1989)). The court remanded the case to MSHA with instructions to establish or amend their regulations to clarify the issues of concern regarding the single penalty standard and an operator's history of previous violations. 14 FMSHRC at 665. In addition, the court directed MSHA to issue interim instructions until the new regulations were promulgated. *Id.* at 665-66. Accordingly, the Secretary published both new regulations and interim PPLs that set up a method for assessment of penalties known as the "excessive history" program.

The issue in *Drummond* arose when the Secretary filed a penalty petition against Drummond calculating the proposed penalties according to the provisions of the PPL, which

involved up to a 30 percent increase for "excessive history" based on the methods in the PPL. 14 FMSHRC at 668-669. The Judge in *Drummond* first held that the PPL went beyond the scope of authority granted by the court's interim mandate in *Coal Employment Project I*. Further, the Judge held that the PPL was not otherwise valid outside of the context of the interim mandate because it was a substantive rule that had not been subject to the notice-and-comment process. 14 FMSHRC at 669-70. Crucial to his analysis of the issue was the reduction or elimination of agency discretion that the PPL created, which is a key element of what makes an agency action substantive. *Id*. at 670.

The Commission affirmed the Judge's decision, relying on *Batterton* when determining whether the PPL was the type of administrative action that "carried the force of law" and thus, was a legislative rule that should have been promulgated through notice-and-comment rulemaking. Legislative rules "narrowly constrict the discretion of agency officials by largely determining the issue addressed," whereas interpretive, non-binding rules "do not . . . foreclose alternate courses of action or conclusively affect rights of private parties." Further, non-binding statements "carry no more weight on judicial review than their inherent persuasiveness commands." 14 FMSHRC at 684 (quoting *Batterton v. Marshall*, 648 F.2d at 701-02).

The Commission's decision in *Drummond* centered on the ways in which the PPL restricted the Secretary's discretion and functioned like an automatic rule, creating new legal consequences for mine operators. Specifically, the PPL in *Drummond* restrained the Secretary's discretion by subjecting all his penalty proposals to a mathematical formula. 14 FMSHRC at 686. The impact of the rule was substantive because *all* assessments with excessive history as determined under the PPL were automatically increased by a factor of 18 percent greater than would otherwise have been assessed under the previous method. *Id.* In addition, the Judge hearing Drummond noted that although the penalty amounts proposed by the Secretary were not final because the Commission assesses penalties on a de novo basis, as a practical matter, the vast majority of proposals were not contested and therefore had become final. *Id.* at 670. The totality of these features of the PPL meant that it subjected operators to new, substantive penalty rules that restrained the Secretary's discretion such that they should have been promulgated through notice-and-comment to be valid.

In its Motion for Summary Decision, Brody argues that the criteria are legislative in nature and thus invalid because they were not subject to notice-and-comment rulemaking; and that the criteria are an important part of the new POV rule, particularly because in the absence of the old PPOV process, they are the only means mine operators have to monitor their performance and potential for facing liability. Brody Memo. in Support of Mot. for Sum. Dec. at 9. Brody argues that because MSHA did not include any specific numerical criteria in the rule itself, the published criteria are all that give the parties ascertainable direction in the POV process. *Id.* at 9-10.

Further, Brody argues that the screening criteria fall squarely within the definition of legislative rules as defined in *Batterton* because the criteria are what lead the Secretary to

consider a particular operator for a POV notice, and thus restrain the discretion of the agency by narrowing the limits of who they consider for POV status. According to Brody, the criteria form the basis for the evaluation of whether a pattern exists, and MSHA applies the criteria across the board to all operators "as if it were the law." Brody Memo. in Support of Mot. for Sum. Dec. at 11-12. Brody also argues that the criteria impinge significantly on private interests because they have the potential to force mine closures and even lead to the shutdown of a mine. *Id.* at 14.

The Secretary argues that the criteria are a statement of agency policy and thus, are not subject to the notice-and-comment requirements of the APA. Sec'y Memo. in Support of Mot. for Partial Sum. Dec. at 13. He states that Brody has mischaracterized the criteria as limiting the agency's discretion, and that the criteria merely set forth some possible scenarios that may lead to a pattern notice. *Id.* at 14. The criteria do not create any sort of definitive norm, and so do not have the force of law. *Id.* at 15. As the Secretary describes it, the criteria "flag for MSHA those mines that should be subjected to further consideration to determine whether, in MSHA's case-specific and fact-based judgment, they have indeed demonstrated a pattern of violations. The Secretary retains discretion to make the actual determination regarding whether a pattern notice is sent." *Id.* at 14. The Secretary also notes that the criteria are designed to allow MSHA to change them in response to changing circumstances, and that because the agency expressly reserved the right to adjust the criteria as necessary, the publishing of the criteria "simply advises the public what the agency's prospective position on an issue likely to be." *Id.* at 15 (citing *Dyer*, 889 F.2d at 685).

While I believe that the Commission's *Drummond* decision is instructive in this case, I do not find that it compels me to find that the POV screening criteria are invalid because they were subject to APA notice-and-comment rulemaking requirement. To the contrary, I find that the criteria are not legislative rules that required notice-and-comment.

In *Drummond*, the Commission found the PPL to be so specific and universally applicable that it severely limited MSHA's discretion; and further, that the PPL established "a binding norm" and was "finally determinative of the issues or rights to which it [was] addressed." 14 FMSHRC at 670 (citation omitted). The PPL imposed substantive increases in penalty proposals under a system where such proposals would in all probability become final orders. 14 FMSHRC at 670, 686. The PPL set forth a system that was applied across the board to all operators subject to penalty proposals, without any opportunity for adjustments to account for particular circumstances or for the Secretary to exercise prosecutorial discretion. *Id.* at 686-87.

In contrast, the criteria merely serve as a "sieve" of sorts, to bring the Secretary's attention to mines that should be investigated further to see if they have engaged in what the Secretary believes could be a POV. The criteria do not attempt to define what a "pattern" is for adjudicative purposes. Further, the mitigating circumstances that MSHA must apply allow for a significant degree of subjective judgment to be exercised. Thus, an operator meeting the criteria is not subject to the same sort of automatic, across the board actions being taken against all operators as was the case in *Drummond*.

Here, the POV rule operates in such a manner that even after the issuance of a POV notice triggered in part by application of the screening criteria, an operator is likely to contest section 104(e) orders issued pursuant to a POV notice, giving the Commission the independent opportunity to determine whether a "pattern" has been established. The screening criteria do not operate to provide finality in a sense that is remotely close to the "excessive history" provisions in the *Drummond* PPL.

Although the criteria provide guidance to operators as to whether they are at risk for being placed on POV status, the ultimate decision of whether an operator is issued a POV notice still lies with the Secretary, who must still prove in a de novo proceeding before the Commission the validity of any enforcement actions taken under a POV notice. The criteria simply do not sufficiently restrict the Secretary's discretion to constitute a legislative rule. I thus find that the criteria are a valid statement of agency policy which can be used by the Secretary as a prosecutorial tool without being subject to notice-and-comment rulemaking.[7]

4. Retroactivity Analysis

As a general rule, laws are presumed not to have retroactive effect absent express Congressional authority. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). However, the Supreme Court has since held that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations in prior law. Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 269-70 (1994). Specifically, "a provision operates retroactively when it impairs rights a party possessed when he acted, increases a party's liability for past conduct, or imposes new duties with respect to transactions already completed." *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 859 (D.C. Cir. 2002) (quoting *Landgraf*, 511 U.S. at 280).

In its 2002 *National Mining Association* decision, the D.C. Circuit invalidated some of the Department of Labor's rules promulgated pursuant to the Black Lung Benefits Act on retroactivity grounds. *See generally Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002). The court went through a detailed analysis of each regulation, comparing the expectations of regulated parties before and after the regulation took effect – what it referred to as the "legal landscape." *Id.* The court found that the regulations at issue amounted to a change

[7] My finding is consistent with the finding of another Commission Judge who considered the same question under the old POV rule. *See Bledsoe Coal Corp.*, 34 FMSHRC 1136, 1155-58 (May 2012) (ALJ). I also note that although Brody argues that, even if the criteria are valid, MSHA did not follow its own stated standards correctly when choosing to issue a POV notice to Brody, in order to prevail on this argument, MSHA would have to be bound by the screening criteria in the same way they are bound by statutes and regulations. The agency is not so bound.

in the legal landscape and were impermissibly retroactive when they served to limit how an adjudicator decided a case before him or her or attempted to bind all courts to the ruling of one circuit. *Id.* at 861-68. However, when the changes constituted a clarification of a statutory term or initiated a change in procedures, there were no retroactivity problems. *Id.* The D.C. Circuit's analysis in *National Mining Ass'n* demonstrates that the evaluation of whether a rule operates retroactively is circumstantial and fact-based, and must account for the specific changes to the legal landscape and the particular expectations of regulated parties.

While agreeing with the general legal propositions above, the Secretary argues that the changes to the POV rules at issue are more procedural in nature, and thus, that Brody's liabilities have not changed and the rule has not been applied in an impermissibly retroactive manner. In *Landgraf*, the Court noted the diminished reliance interests in procedural matters, and that generally, application of a new procedure to past conduct was not impermissibly retroactive. 511 U.S. at 275. However, "[w]here a 'procedural' rule changes the legal landscape in a way that affects substantive liability determinations, . . . it may operate retroactively." *Nat'l Mining Ass'n*, 292 F.3d at 859 (citing *Martin v. Hadix*, 527 U.S. 343, 359 (1999)).

Thus, the key inquiry in determining whether the POV rule has been applied in an impermissibly retroactive fashion is whether the March 2013 changes to the POV rule amount to a "change in the legal landscape" that goes beyond procedural changes to alter the legal consequences that Brody faces for conduct prior to March 25, 2013, the effective date of the new rule. As *Landgraf* instructs, "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." 511 U.S. at 270. This requires analysis of the circumstances and operation of both POV rules, with regard to "familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.*

In enacting the new POV rule, MSHA made several changes from the old rule, and the nature and extent of those changes are instructive as to whether MSHA impermissibly applied the revised POV rule retroactively. First, the new rule eliminates the practice of issuing a PPOV notice prior to the issuance of a formal POV notice that carries the full consequences set forth in section 104(e) of the Act. Brody argues that this is significant because the PPOV system put operators on notice that they could be considered for a POV notice in the future, and allowed them the opportunity to develop a Corrective Action Plan in order to curb their rate of issuances before being faced with the consequences of operating under a pattern notice.

Although the POV screening criteria remain largely the same, the new POV rule eliminates the final order requirement of the old rule and relies on non-final orders. Specifically, the 2012 Pattern Screening Criteria provision that the new rule drops stated: "For a pattern of violations review, mines identified during the initial screening must have at least five S&S citations of the same standard that became **final orders** of the commission during the most recent 12 months **OR** at least two S&S unwarrantable failure violations that became **final orders** of the

commission during the most recent 12 months." Sec'y Memo. in Support of Mot. for Partial Sum. Dec. at Ex. 2 (emphasis in original).

Finally, the new rule states that specific screening criteria will be publicly posted on MSHA's website, which was not a feature of the old POV rule. *Compare Id.* at Ex. 2 *with Id.* at Ex. 3. Although the new POV rule explicitly refers to the publication of the criteria on MSHA's website, the agency had provided an online "Monthly Monitoring Tool" under the old regulation as well, so operators have had online notice of their status under POV screening criteria for the past few years. *See* 78 Fed. Reg. at 5059. As noted above, the criteria displayed online have remained the same except for the final order requirement.

Brody argues that the elimination of the PPOV and final order requirements amount to a substantive change in the POV criteria, and that these shifts alter the legal landscape today from that faced by Brody in the fall of 2012. Brody maintains that, if MSHA were to apply the new POV rule prospectively, it would no longer meet the screening criteria. In making this argument, Brody submits that the citations per inspection hour calculations that are required under the screening criteria would yield a result lower than the required threshold if only violations from after March 25, 2013 were used. Brody Memo. in Support of Mot. Sum. Dec. at 26; *See* Joint Stip. 23, 24. However, this particular portion of the screening criteria has remained the same between the 2012 and 2013 criteria, and both sets of screening criteria have always used data over 12 month time periods. Brody has known since the issuance of the 2012 screening criteria that the relevant citations per inspection hours calculations would be taken using data that covered an entire year, based on the date MSHA chose to run its screening criteria. That this statistic changes from quarter to quarter, and has sometimes dropped below the required threshold for periods shorter than one year, does not entitle Brody to reconsideration on retroactivity grounds because other changes to the rule have been made. Rather, the rule is only applied in an impermissibly retroactive fashion if the changes to the legal landscape have altered Brody's liabilities.

In arguing that the POV rule has not been applied in an impermissibly retroactive fashion, the Secretary argues that the rule does not upset expectations because the subject violations were illegal under the old rule and are illegal now. Sec'y Memo. in Support of Mot. for Partial Sum. Dec. at 17. There is no notice or fairness problem because Brody knew "that certain conduct could constitute an S&S violation and that a pattern of S&S violations could subject it to POV sanctions." *Id.* The Secretary argues that Brody is "'unable to point to anything [it] would have done differently had [it] known the effect of the' POV rule when it engaged in its pre-POV rule conduct." *Id.* (citing *Tarver v. Shineski,* 557 F. 3d 1371, 1375 (Fed. Cir. 2009)).

In considering the issue of retroactivity with respect Brody's mining operation, I find that nothing about the changes to the POV rule were so drastic as to impose new sanctions on previous conduct or interfere with notions of reasonable reliance. The types of citations and the numerical rates that trigger further consideration for a POV have remained largely the same under both rules. Thus, Brody has always been on notice that their high rate of S&S issuances

had the potential to subject them to a POV notice. Specifically, Brody has had access to the numerical screening criteria, and has known that based on the criteria, they were getting close to POV status during several parts of 2012 and 2013. In fact, Brody was issued a PPOV notice on March 1, 2013, which indicates that even under the old rule, Brody had exhibited a history of S&S violations that they knew put them in danger of a POV notice.[8] Brody had also implemented a CAP under the previous POV rule, which did not work to the degree necessary to reduce issuances of S&S violations at its mine. Sec'y Memo. in Support of Mot. for Partial Sum. Dec. at 10 (citing Sec'y Opp. to Mot. for Temp. Relief at Exhibit A, page 10).

While the PPOV system did provide an extra procedural step to operators, I find that its elimination is a procedural change that does not change substantive liability determinations with regard to a POV notice. Under the 2013 POV rule, operators still have access to the screening criteria to get a sense of whether they are close to a POV notice, and, upon determining that they are at risk, have the opportunity to present evidence of mitigating circumstances to MSHA at any time, including implementation of a Corrective Action Plan if they so choose. Under the 2012 rule, operators similarly had access to the screening criteria and could present mitigating circumstances, but also had a more formal review period in which to lower their rate of S&S issuances. Generally, elimination of the PPOV and the operator's subsequent ability to present mitigating evidence has been replaced by guidance in the form of public screening criteria and the availability of a self-monitoring web based tool, as well as the operator's ability to present mitigating evidence at any time. 78 Fed. Reg. 5059, 5063. Taken together, these two aspects of the rule provide the operator similar opportunities to anticipate and avoid a pattern notice, so nothing about the "legal landscape" surrounding the POV process has changed in any substantive way. The change merely shifts the primary responsibility for monitoring for potential POV status from MSHA to the operator, and does not substantially change the conduct triggering a POV notice or the pre-notice opportunities for operators to change their violation history.

Thus, the record indicates that Brody cannot point to anything they would have done differently if they knew non-final violations would be included in the POV calculus or that the PPOV notices would cease being issued. I conclude that the changes between the old and new rules have little if any impact on this case and do not alter the legal landscape in such a way that Brody would have lacked notice that their prior conduct was likely to lead to a POV status. Accordingly, I reject Brody's arguments as to retroactivity, and find that the Secretary may use

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[8] Although neither party mentions Brody's PPOV notice in its brief, I take judicial notice of this fact based on Patriot Coal's March 2013 SEC filing. Patriot Coal Co., Current Report (Form 8-K), (Mar. 7, 2013), available at:

http://www.sec.gov/Archives/edgar/data/1376812/000119312513096304/d497205d8k.htm

A court may take judicial notice on its own, at any stage of the proceeding, of facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201.

evidence of all violations listed in the pattern notice as evidence that a pattern of violations exists at Brody's Mine No. 1.

CONCLUSION

On the cross motions for summary decision before me, the dispositive issue is whether the Secretary's revised rule implementing section 104(e) of the Mine Act is a rule of binding effect subject to the notice-and-comment requirements of the APA, or a policy set forth in a rule that does not bind but rather assists the Secretary in the exercise of his prosecutorial discretion. I find the latter to be the case.

The Secretary has established that his revised POV rule is a prosecutorial tool he has used to identify Brody Mining, LLC as an operator critically in need of improvement in its approach to ensuring the health and safety of its miners. When the Secretary applied his new POV rule to Brody's history of S&S violations, he acted with deliberation and exercised his judgment to determine that Brody, among several thousand mine operators operating under the Mine Act, was one of but a few operators he deemed most at risk of having recurring problems arise at their mine that would affect the health and safety of miners.

I find Brody's plea to have the Commission remove this tool from the Secretary's hands as unavailing as it is ill-advised. I find none of the company's arguments persuasive. The revised POV rule is wholly consistent with the statutory provision it implements. The rule was properly promulgated. The Secretary's actions have not deprived Brody of due process – in fact, Brody has already availed itself of several opportunities before the Commission to obtain immediate relief.[9] In addition, the rule was properly applied to Brody under the circumstances presented in these proceedings thus far. It remains for the Secretary to prove that the violations that served as the basis for the POV notice did, in fact, constitute a "pattern" of S&S violations; and if so, that he had a valid basis for all of the subsequent enforcement actions he took based on the POV notice.

WHEREFORE, the Motion for Summary Decision of Brody Mining LLC is **DENIED**, and the Motion for Summary Decision of the Secretary of Labor is **GRANTED**.

/s/ Robert J. Lesnick
Robert J. Lesnick
Chief Administrative Law Judge

[9] *See, supra* note 2.

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