

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 30, 2014

BRODY MINING, LLC, : CONTEST PROCEEDINGS
Contestant :
 :
 : Docket No. WEVA 2014-82-R
 : Order No. 9003242; 10/28/2013
 :
 v. :
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 : Docket No. WEVA 2014-83-R
 : Order No. 7166788; 10/28/2013
 :
 SECRETARY OF LABOR :
 MINE SAFETY AND HEALTH : Docket No. WEVA 2014-86-R
 ADMINISTRATION (MSHA), : Order No. 4208892; 10/29/2013
 Respondent :
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 : Docket No. WEVA 2014-87-R
 : Order No. 4208893; 10/29/2013
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 : Docket No. WEVA 2014-97-R
 : Order No. 7166790; 11/04/2013
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 : Docket No. WEVA 2014-151-R
 : Order No. 9003246; 11/07/2013
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 : Docket No. WEVA 2014-161-R
 : Order No. 9004638; 11/12/2013
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 : 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
:
: Docket No. WEVA 2014-480-R
: Order No. 7166816; 01/23/2014
:
: Brody Mine No. 1
: Mine ID 46-09086

CERTIFICATION OF INTERLOCUTORY RULING

Before: Chief Judge 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) (Mine Act). Brody Mining, LLC (Brody) filed a Motion for Summary Decision on November 27, 2013. On December 10, 2013, the Secretary filed a Motion for Partial Summary Decision and Opposition to Brody Mining’s Motion for Summary Decision. On January 30, 2014, I issued an order denying Brody’s motion and granting the Secretary’s motion.

Commission Procedural Rule (76)(a)(1)(i) provides that I may certify, upon my own motion, that my interlocutory ruling of January 30, 2014, involves a controlling question of law and that immediate review by the Commission will materially advance the final disposition of this proceeding.

The issue addressed in my January 30, 2014 Order is whether the Secretary’s Pattern of Violations rule promulgated at 78 Fed. Reg. 5056, and effective March 25, 2013, is valid as it was applied by the Secretary’s Mine Safety and Health Administration (MSHA) when it issued a “pattern of violations” notice, Notice No. 7219154, to Brody on October 24, 2013. My Order concludes that the subject rule is a valid exercise of the Secretary’s rulemaking authority under the Mine Act, meets the relevant requirements of the Administrative Procedure Act, and does not unconstitutionally deprive operators of procedural due process rights. Further, my Order holds that with respect to Brody, the 2013 rule was not applied in an impermissibly retroactive manner.

The subsequent hearings in this case will reach the issue of the validity of the underlying citations listed in the pattern notice issued to Brody, whether the Secretary has shown through those citations that a “pattern” existed within the meaning of section 104(e) of the Mine Act, and further, whether the subsequent 104(e) orders issued to Brody after October 24, 2013 were valid.

Resolution of the threshold issue of whether the regulation on which MSHA relied to issue the pattern notice was validly promulgated will remove any doubt as to whether the Secretary can proceed with the bulk of his case. I note that the validity of the pattern of violation regulation is

a question currently before the United States Court of Appeals for the Sixth Circuit in the matter *Natl Mining Ass'n v. MSHA*, Case No. 13-3324. Resolution of the threshold issues before me in these cross-motions for summary decision in this matter is thus not only important for the resolution of the above dockets, but will also provide guidance to the Secretary and the regulated community as to the extent the rule may be used in future enforcement actions.

In light of the foregoing, pursuant to Commission Procedural Rule 76(a)(1)(I), 29 C.F.R. § 2700.76(a)(1)(I), the Order of January 30, 2014 confirming the validity of 30 C.F.R. Part 104, as promulgated at 78 Fed. Reg. 5056 and as applied to Brody Mining, LLC in the above dockets, is certified for interlocutory review.

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

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