FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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November 26, 2014

BRODY MINING, LLC,	:	CONTEST PROCEEDINGS
Contestant,	:	
	:	Docket No. WEVA 2014-82-R
v.	:	Order No. 9003242; 10/28/2013
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	:	Order No. 7166788; 10/28/2013
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	:	Docket No. WEVA 2014-86-R
SECRETARY OF LABOR,	:	Order No. 4208892; 10/29/2013
MINE SAFETY AND HEALTH	:	
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Respondent.	:	Order No. 4208893; 10/29/2013
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: Mine: Brody Mine No. 1
: Mine ID: 46-09086
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SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2013-370
Petitioner,	:	A.C. No. 46-09086-308309
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v.	:	Docket No. WEVA 2013-564
	:	A.C. No. 46-09086-310927
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	:	Docket No. WEVA 2014-842
	:	A.C. No. 46-09086-347271
BRODY MINING, LLC,	:	
Respondent.	:	Mine: Brody Mine No. 1

ORDER DENYING SECRETARY'S "EMERGENCY" MOTION TO STAY

Appearances: Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, VA, for the Secretary
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Adam J. Schwendeman, Esq., Jackson Kelly PLLC, Charleston, WV, for Brody Mining, LLC

Before: Judge William B. Moran

The Secretary has filed what it has characterized as an "Emergency Motion to Stay," ("Motion"), seeking to have this Court stay its November 1, 2014, Order, dismissing the Secretary's pattern of violations action against the Respondent. A response was filed by Respondent, Brody Mining, LLC. Upon consideration, for the reasons which follow, the Secretary's Motion is DENIED.

The Secretary's Motion

In its Emergency Motion to stay,[1] the Secretary begins by noting, correctly, that this Court's November 1, 2014, Order precludes MSHA from issuing any further withdrawal orders under Section 104(e) of the Mine Act, which is the "pattern of violations" provision. 30 U.S.C. § 814(e).

The motion observes that four factors are to be evaluated in deciding whether a stay is appropriate: "(1) the likelihood that the movant will prevail on the merits of its appeal; (2) irreparable harm to the movant if the stay is not granted; (3) absence of adverse effects on other interested parties; and (4) a showing that the stay is in the public interest." Motion at 2.

Speaking to the first factor, the Secretary the asserts that it has "at least four reasons" making it likely that it will prevail:

> (a) the Court did not have jurisdiction to dismiss the POV "charges"; (b) even if the Court did have jurisdiction, its due process analysis is erroneous; (c) the Mine Act does not require the Secretary to define "pattern of violations"; and (d) the Secretary provided both: (i) a definition of "pattern of violations," and (ii) fair notice to Brody of the basis for his POV determination.

Id.

[1] Despite its characterization that its motion is an "emergency," the Secretary relates that it will take "perhaps several weeks" to draft the documents in its effort to obtain interlocutory review. Motion at 2. Therefore, it seeks a stay of the Court's Order until it files for such review, a route which will first entail a ruling by the Court.

Each of these will now be briefly discussed. Regarding the Secretary's claim that the Court did not have jurisdiction to dismiss the POV charges, he notes that Brody has appealed, on an interlocutory basis, the Commission's "jurisdiction to adjudicate—[and his decision] uphold[ing]—the validity of the POV Rule itself and the POV notice" to the D.C. Circuit Court of Appeals. As the circuit court's jurisdiction is exclusive, per Section 106(a) of the Mine Act, 30 U.S.C. 816(a), the Secretary contends that this Court "did not have jurisdiction to adjudicate the validity of the POV notice or, as the Court referred to it, the POV 'charges.'" Motion at 3.

In its Response, Brody notes that the Secretary never made such a claim in the weeks leading up to the hearing nor during the three consecutive weeks of hearings in which the citations constituting the alleged pattern were heard. Response at 7-8. It points to the Secretary's July 17, 2014, position statement in which he acknowledges that "[s]hould the Commission agree with the Secretary's view, then a hearing on the citations listed in the POV Notice *and whether those citations establish a pattern of violations* would be appropriate." Sec. Position Statement at 10 (emphasis added). Until now, with this Motion, the Secretary has acknowledged that a POV notice can be challenged.[2] Pointing to a number of indicia, among those, Brody notes that, during the hearing, the Secretary would at times pop up to assert that, albeit as a conclusion only, that a pattern had just been shown, as evidence that he knew that the POV notice and a pattern were in issue.[3] Response at 8.

As for the claim that because there is an appeal before the United States Court of Appeals, challenging the Commission's interlocutory ruling, Brody notes that the matters before this Court are distinct from those before the federal court of appeals. Response at 9. The Court

[2] The Secretary is apparently flummoxed by the Court's use of the term "POV charges," which it describes as a "vague term." It is observed that, if the Court's reference to "POV charges" is vague, it is not nearly as vague as the term "pattern of violations." It is ironic that the Secretary has failed to define its own vague term even in the face of litigation asserting the presence of a pattern. And yet one would think, and hope, that there had to have been some sort of thought process, internally, that led the Secretary to assert that the violations constituted such a pattern in order for them to make that claim and not that it simply grouped some violations dealing with escapeways, roof control, and ventilation, and left it at that. That observation aside, the Secretary reads into the Court's use of term "POV charges," suggesting that, by employing it, the Court knew it did not have jurisdiction to adjudicate the validity of the POV notice. Motion at 3. To clear up any confusion, the Court advises that it employed that term simply as an alternative, short-hand expression for expressing that the Secretary's burden before the Court was for him to first lay out *the basis* for its claim that the groups of violations "taken alone or together, constitute a pattern of violations of mandatory health and safety standards," and then to establish that the 54 citations/orders, undergirding these particular POV charges, in fact had the significant and substantial characteristic. The Secretary failed, despite the Court's instructions, to identify *the basis* for his claim of a pattern of violations. Had the Secretary complied, at the conclusion of the evidentiary hearing for the disputed citations/orders, the Court would then have been in a position to rule upon the Secretary's basis underlying the bald phrase "pattern of violations" and then to apply that determination to those violations established as having the significant and substantial element.

[3] However, as the Court had previously noted, in its November 1st Order, the Secretary apparently believes that asserting, by fiat, that something is a pattern is enough and that there is no need to look beyond that assertion for it to explain how a given number of violations constitute such a pattern.

agrees[4] and would note, apart from that observation, that the *particular violations* forming the underlying basis for the POV notice, *and whether such violations as were proven were also significant and substantial*, have a life untethered to the distinct matters before the Court of Appeals.

The Secretary also contends that, even if the Court has jurisdiction, its due process analysis was erroneous, because neither the POV notice, nor a withdrawal order emanating from such a notice, is punitive. Motion at 4. As the Secretary sees it, a withdrawal order is merely a "remedial enforcement action designed to protect the safety and health of miners working in mines whose operators have inspection histories of chronic violations of safety and health standards." *Id.* Although the Secretary oddly avoids use of the term, the "remedial enforcement action" to which he is referring, is the pattern of violations charge. Besides, the Secretary continues,

> Brody had fair notice of what it had to do to comply with the law: comply with existing mandatory safety and health standards. Nothing in the POV Rule, the POV notice, or the POV withdrawal orders affected Brody's pre-existing obligation to comply with such standards. On the contrary, both the Rule and the notice provided Brody with fair notice that its next S&S violation would trigger a withdrawal order.

Id.

This analysis by the Secretary conflates the obligation to comply with mandatory safety and health standards, with a pattern of violations claim, as if they are the same thing. They are not. Further, the analysis suggests that a POV notice, by itself, establishes a POV, a conclusion supported by the Secretary's very next statement that, by giving such a POV notice, that act of notification "provided Brody with fair notice that its next S&S violation would trigger a withdrawal order." *Id.* The Secretary's position cannot withstand scrutiny, and his stance highlights the concern expressed by the Court in its Order dismissing the POV charges, as it exposes the Secretary's apparent belief that it need only issue a pattern of violation notice to prove a pattern, all without ever having to state how the violations constitute a pattern.

The correctness of the Court's interpretation is evident with the Secretary's next claim in his motion, a claim that the Mine Act "does not require the Secretary to define 'pattern of violations.'" *Id*. To support the claim that he need not define a pattern, the Secretary notes that Section 104(e)(4) requires only that "[t]he 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." *Id.* However, to note that the provision requires only "such *rules* as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health

[4] Thus, the Court agrees that the issues before the Court of Appeals are the validity of the rule and MSHA's website criteria, which were the same, limited issues that were before the Commission. In addition, as Brody notes, that appeal does not include all of the pre-penalty contest docket numbers, which include "the ones used by the Secretary in its Position Statement and Prehearing Statement." Response at 9. As each of those contests raised the issue of the validity of the pattern notice, at a minimum, the exclusivity argument does not apply to those.

or safety standards exists" is not the same as suggesting that the Secretary is completely excused from articulating what constitutes a pattern at all. Accordingly, though *the rules* for establishing such criteria may be optional, in the context of litigation, the obligation to state *the basis* for the pattern in the POV notice in a given case is not optional.

Though the Secretary bypasses it, Brody reminds that the Commission has acknowledged that a mine operator has a substantial interest, as each section 104(e) order results in a mine closure. Response at 10. In addition, the Court notes that the Secretary, unburdened with any definition of a pattern, has moved forward in the face of nearly half (25 of 54) of the violations constituting its pattern notice having been lost as a consequence of the hearings that have been held.

In maintaining that it did provide "a *definition* of [a] 'pattern of violations,'" the Secretary asserts that, by identifying the 54 citations and orders that constitute its pattern claim, and by further dividing those citations into four groups, that identification, perforce, establishes patterns of violations. Motion at 5. Although the Secretary then acknowledges that only 29 of the 54 citations and orders were upheld, it then contradicts its assertion that it did provide a definition, stating that "[w]hether those 29 S&S violations suffice to establish a pattern is a matter for the ALJ's judgment, guided by the definition of a "pattern" and case law concerning patterns under other statutes." *Id.* Covering ground which has already been addressed by the Court in its November 1, 2014, Order, the Secretary repeats that a "mode of behavior or series of acts that are recognizably consistent" is a pattern and that this can mean two violations sometimes and more than two at other times, reasserting that it is for the Court to apply the Secretary's "definition" and decide if a pattern was established. Motion at 5-6.

Moving to the three remaining factors, the Secretary contends that irreparable harm will result if the stay is not granted. Motion at 6. With no definition of a pattern as applied to the 54 citations/orders, the Secretary asserts that "Brody's inspection history shows that the safety and health of its miners has not been adequately protected by non-POV measures." *Id.* Turning around that he did not prevail on 25 of the citations/orders composing his pattern claim, to note that he won on 29 of them, without explanation, the Secretary asserts that the 29 left standing support its POV notice. *Id.* The Secretary then jumps to a matter unrelated matter *to his POV notice*, asserting that "*since* the POV notice was issued, MSHA has cited Brody for scores of new S&S violations, two of which contributed to the deaths of two miners on May 12, 2014." Motion at 6 (emphasis added). Putting aside for the moment that those matters have not been litigated and therefore that there is only a claim that those newly alleged violations contributed to deaths, those subsequent charges are completely immaterial to the issues in the Motion and do not in any way establish "irreparable harm." The Secretary addresses the "public interest" element for a stay by asserting that the same reasons advanced to show irreparable harm, also establish that the stay is in the public interest. *Id.*

In further support of this conclusion, on November 6, 2014, in what was, in effect, a supplemental comment to its Motion, the Secretary, via email, acknowledged, in response to the Court's inquiry, that all the section 104(e) withdrawal orders, save one, have been abated. E-mail from Jason Grover, Co-Counsel for Trial Litigation, Mine Safety and Health Division, to

William Moran, Michael Small, Michael Cimino, R. H. Moore, and Robert Wilson (Nov. 6, 2014, 05:26 PM EST). The Secretary then contended in that email that his concern was directed at future violations, asserting that the "issue is about the Secretary's ability to issue new Section 104(e) orders as the need arises. The need could arise today, tomorrow, or the day after. We construe the 11/3 order to effectively preclude MSHA from issuing a new Section 104(e) withdrawal order." *Id.*

Neither contention has merit. First, the Secretary is correct that the Court's Order effectively precludes MSHA from issuing any new section 104(e) withdrawal orders. But it is not as if a pattern of violations notice is its only enforcement tool, a fact recognized in the past 35 years since the Act's enactment. For example, apart from any S&S component, a section 104(a) citation's issuance will bring about a withdrawal order if the cited condition is not abated within the time allowed by the issuing inspector.[5] Thus, upon issuance of a citation under section 104(a), an operator will face an order issued under section 104(b) for a failure to abate a violation cited under section 104(a), and section 104(d) citations and orders are issued when a mine operator commits an unwarrantable violation. When appropriate, imminent danger orders are also available. The point is that the Mine Act provides a variety of enforcement tools, all of which have been in use since the 1977 Act.

The Court concludes that, due to the availability of other enforcement tools available to MSHA, the Secretary's claim of irreparable harm and the claim that a stay is in the public interest are not meritorious.

Last, the Secretary declares that "[n]o other parties will be adversely affected by a stay." Motion at 7. The Secretary adds that "the costs of avoiding a POV withdrawal order exist independent of the POV Rule and the POV notice; they are simply the costs of complying with the existing mandatory safety and health standards under the Mine Act." *Id.* But Brody will most certainly be adversely affected by the stay, and the Secretary's request for a stay, while preparing the inevitable motion for interlocutory review and a determination on that by the Court and ultimately by the Commission, demonstrates that the mine operator's challenge to the POV Notice will be anything but expeditious. This protracted process conflicts with MSHA's promise in the Final Rule that the Pattern of Violations review process for mine operators would be expeditious.[6]

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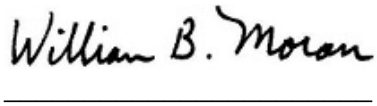
[5] In order to establish the validity of a Section 104(b) Order, the Secretary has the burden of proving by a preponderance of the evidence the existence of the initial underlying citation, including a reasonable time for abatement; the expiration of the abatement time; the failure to abate the cited violative conditions; and that the abatement time should not be extended. *Paramont Coal Co. Va., LLC*, 35 FMSHRC 1118 (Apr. 2013) (ALJ) (citing *Clinchfield Coal Co. v. UMWA*, 11 FMSHRC 2120, 2135 (Nov. 1989)).

[6] As MSHA observed in its Final Rule for pattern of violations, "The Supreme Court has held that adequate post-deprivation procedures are sufficient to satisfy due process where public health and safety are at stake. . . . The Mine Act guarantees due process for mine operators subject to MSHA enforcement actions. A mine operator may seek expedited temporary relief under section 105(b)(2) of the Mine Act from a pattern designation provided a withdrawal order is issued under section 104(e). Operators must have at least one withdrawal order in order to contest the pattern designation. Requests for temporary relief are reviewed within 72 hours and assigned to a Commission Administrative Law Judge as a matter of procedure, provided the request raises issues that require expedited review. The Mine Act's expedited

Accordingly, the Secretary's Emergency Motion to Stay is DENIED.

SO ORDERED.



William B. Moran

review procedure satisfies the Constitution's due process requirements. " Pattern of Violations, Final Rule, 78 Fed. Reg. 5056, 5061 (Jan. 23, 2013) (citations omitted).

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