

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933
FAX: 202-434-9949

December 30, 2014

BRODY MINING, LLC,
Contestant,

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Respondent.

: CONTEST PROCEEDINGS
:
: Docket No. WEVA 2014-82-R
: Order No. 9003242; 10/28/2013
:
: Docket No. WEVA 2014-83-R
: Order No. 7166788; 10/28/2013
:
: 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
:
: Docket No. WEVA 2014-191-R
: Order No. 7166793; 11/18/2013
:
: Docket No. WEVA 2014-192-R
: Order No. 4208899; 11/19/2013
:
: Docket No. WEVA 2014-193-R
: Order No. 9005720; 11/20/2013
:
: Docket No. WEVA 2014-221-R
: Order No. 8155306; 11/26/2013
:
: Docket No. WEVA 2014-244-R
: Order No. 9005722; 12/03/2013

:
: Docket No. WEVA 2014-284-R
: Order No. 8154092; 12/05/2013
:
: Docket No. WEVA 2014-285-R
: Order No. 7166798; 12/09/2013
:
: Docket No. WEVA 2014-447-R
: Order No. 7166805; 01/15/2014
:
: Docket No. WEVA 2014-448-R
: Order No. 7166806; 01/15/2014
:
: Docket No. WEVA 2014-449-R
: Order No. 7166807; 01/15/2014
:
: Docket No. WEVA 2014-450-R
: Order No. 7166808; 01/15/2014
:
: Docket No. WEVA 2014-451-R
: Order No. 8154104; 01/15/2014
:
: Docket No. WEVA 2014-452-R
: Order No. 9005729; 01/13/2014
:
: Docket No. WEVA 2014-453-R
: Order No. 9005731; 01/13/2014
:
: Docket No. WEVA 2014-454-R
: Order No. 9005732; 01/14/2014
:
: Docket No. WEVA 2014-455-R
: Order No. 9005733; 01/14/2014
:
: Docket No. WEVA 2014-456-R
: Order No. 9005735; 01/15/2014
:
: Docket No. WEVA 2014-457-R
: Order No. 9005736; 01/15/2014
:
: Docket No. WEVA 2014-479-R
: Order No. 7166815; 01/23/2014
:
: Docket No. WEVA 2014-480-R
: Order No. 7166816; 01/23/2014
:

: Docket No. WEVA 2014-529-R
: Order No. 7166817; 01/27/2014
:
: Docket No. WEVA 2014-530-R
: Order No. 9005739; 01/27/2014
:
: Docket No. WEVA 2014-531-R
: Order No. 9005747; 02/10/2014
:
: Docket No. WEVA 2014-537-R
: Order No. 9007544; 02/04/2014
:
: Docket No. WEVA 2014-539-R
: Order No. 7166822; 01/28/2014
:
: Docket No. WEVA 2014-561-R
: Order No. 9005740; 01/27/2014
:
: Docket No. WEVA 2014-562-R
: Order No. 9005742; 01/29/2014
:
: Docket No. WEVA 2014-563-R
: Order No. 7166826; 02/04/2014
:
: Docket No. WEVA 2014-570-R
: Order No. 9005750; 02/19/2014
:
: Docket No. WEVA 2014-571-R
: Order No. 7166824; 01/29/2014
:
: Docket No. WEVA 2014-572-R
: Order No. 9005741; 01/29/2014
:
: Docket No. WEVA 2014-593-R
: Order No. 9005753; 02/20/2014
:
: Docket No. WEVA 2014-594-R
: Order No. 7166831; 02/11/2014
:
: Docket No. WEVA 2014-638-R
: Order No. 9005754; 02/24/2014
:
: Docket No. WEVA 2014-639-R
: Order No. 9005762; 03/04/2014
:
: Docket No. WEVA 2014-640-R

: Order No. 9003274; 03/04/2014
:
: Docket No. WEVA 2014-641-R
: Order No. 9005763; 03/04/2014
:
: Docket No. WEVA 2014-672-R
: Order No. 9005758; 02/25/2014
:
: Docket No. WEVA 2014-673-R
: Order No. 9005756; 02/25/2014
:
: Docket No. WEVA 2014-674-R
: Order No. 7166838; 02/24/2014
:
: Docket No. WEVA 2014-675-R
: Order No. 7166839; 02/24/2014
:
: Docket No. WEVA 2014-676-R
: Order No. 8166840; 02/24/2014
:
: Docket No. WEVA 2014-678-R
: Order No. 7166837; 02/24/2014
:
: Docket No. WEVA 2014-679-R
: Order No. 9005755; 02/24/2014
:
: Docket No. WEVA 2014-680-R
: Order No. 9005757; 02/25/2014
:
: Docket No. WEVA 2014-681-R
: Order No. 9005759; 02/25/2014
:
: Docket No. WEVA 2014-715-R
: Order No. 8135796; 03/11/2014
:
: Docket No. WEVA 2014-716-R
: Order No. 8135797; 03/12/2014
:
: Docket No. WEVA 2014-717-R
: Order No. 9001091; 03/11/2014
:
: Docket No. WEVA 2014-718-R
: Order No. 9001095; 03/19/2014
:
: Docket No. WEVA 2014-719-R
: Order No. 9001096; 03/11/2014

:
: Docket No. WEVA 2014-720-R
: Order No. 9005764; 03/05/2014
:
: Docket No. WEVA 2014-722-R
: Order No. 9007123; 03/23/2014
:
: Docket No. WEVA 2014-745-R
: Order No. 9969627; 03/24/2014
:
: Docket No. WEVA 2014-804-R
: Order No. 9005343; 04/03/2014
:
: Docket No. WEVA 2014-805-R
: Order No. 9005768; 04/03/2014
:
: Docket No. WEVA 2014-806-R
: Order No. 9005769; 04/07/2014
:
: Docket No. WEVA 2014-807-R
: Order No. 9005770; 04/07/2014
:
: Docket No. WEVA 2014-811-R
: Order No. 9005344; 04/09/2014
:
: Docket No. WEVA 2014-813-R
: Order No. 9005772; 04/09/2014
:
: Docket No. WEVA 2014-814-R
: Order No. 9005773; 04/09/2014
:
: Docket No. WEVA 2014-819-R
: Order No. 9005774; 04/15/2014
:
: Docket No. WEVA 2014-854-R
: Order No. 9005778; 04/21/2014
:
: Docket No. WEVA 2014-855-R
: Order No. 9005779; 04/22/2014
:
: Docket No. WEVA 2014-856-R
: Order No. 9005780; 04/22/2014
:
: Docket No. WEVA 2014-909-R
: Order No. 9005347; 05/01/2014
:

: Docket No. WEVA 2014-974-R
: Order No. 9005349; 05/13/2014
:
: Docket No. WEVA 2014-975-R
: Order No. 9005350; 05/13/2014
:
: Docket No. WEVA 2014-976-R
: Order No. 9007426; 05/13/2014
:
: Docket No. WEVA 2014-1012-R
: Order No. 9005786; 05/29/2014
:
: Docket No. WEVA 2014-1013-R
: Order No. 9005787; 05/29/2014
:
: Docket No. WEVA 2014-1035-R
: Citation No. 9005792; 06/12/2014
:
: Docket No. WEVA 2014-1036-R
: Citation No. 9005362; 06/11/2014
:
: Docket No. WEVA 2014-1037-R
: Citation No. 9005360; 06/04/2014
:
: Docket No. WEVA 2014-1038-R
: Citation No. 9005361; 06/11/2014
:
: Docket No. WEVA 2014-1135-R
: Order No. 9905374; 07/15/2014
:
: Docket No. WEVA 2014-1138-R
: Order No. 9005376; 07/16/2014
:
: Docket No. WEVA 2014-1157-R
: Order No. 9009660; 07/22/2014
:
: Docket No. WEVA 2014-1993-R
: Order No. 9005384; 07/30/2014
:
: Docket No. WEVA 2014-1994-R
: Order No. 9005383; 07/30/2014
:
: Docket No. WEVA 2014-1995-R
: Order No. 9005382; 07/30/2014
:
: Docket No. WEVA 2014-1996-R

: Order No. 9005380; 07/30/2014
:
: Docket No. WEVA 2014-2172-R
: Order No. 9003948; 09/08/2014
:
: Docket No. WEVA 2014-2173-R
: Order No. 9005393; 09/09/2014
:
: Docket No. WEVA 2014-2174-R
: Order No. 9005398; 09/10/2014
:
: Docket No. WEVA 2014-2175-R
: Order No. 9005400; 09/10/2014
:
: Docket No. WEVA 2014-2221-R
: Order No. 9007439; 09/17/2014
:
: Docket No. WEVA 2015-59-R
: Order No. 7272454; 10/07/2014
:
: Docket No. WEVA 2015-60-R
: Order No. 7272462; 10/07/2014
:
: Docket No. WEVA 2015-61-R
: Order No. 7272494; 10/07/2014
:
: Docket No. WEVA 2015-63-R
: Order No. 9005704; 10/14/2014
:
: Docket No. WEVA 2015-66-R
: Order No. 9005705; 10/14/2014
:
: Docket No. WEVA 2015-67-R
: Order No. 9006768; 10/14/2014
:
: Docket No. WEVA 2015-68-R
: Order No. 9006769; 10/14/2014
:
: Docket No. WEVA 2015-121-R
: Order No. 7219154; 10/24/2014
:
: Mine: Brody Mine No. 1
: Mine ID: 46-09086
:

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

BRODY MINING, LLC,
Respondent.

:
: CIVIL PENALTY PROCEEDINGS
:
: Docket No. WEVA 2013-370
: A.C. No. 46-09086-308309
:
: Docket No. WEVA 2013-564
: A.C. No. 46-09086-310927
:
: Docket No. WEVA 2013-997
: A.C. No. 46-09086-321030
:
: Docket No. WEVA 2013-1055
: A.C. No. 46-09086-323691
:
: Docket No. WEVA 2013-1189
: A.C. No. 46-09086-326531
:
: Docket No. WEVA 2013-619
: A.C. No. 46-09086-342759
:
: Docket No. WEVA 2013-620
: A.C. No. 46-09086-342759
:
: Docket No. WEVA 2014-702
: A.C. No. 46-09086-344708
:
: Docket No. WEVA 2014-842
: A.C. No. 46-09086-347271
:
: Mine: Brody Mine No. 1

Before: Judge William B. Moran

Order on the Secretary’s Motion for Certification for Interlocutory Review and Order on the Secretary’s Renewed Emergency Motion to Stay the Court’s Order Dismissing the Pattern of Violations Notice

Upon consideration of the Secretary’s Motions and the response thereto, for the reasons which follow, the Court GRANTS the Motion for Certification for Interlocutory Review and DENIES the Secretary’s Renewed Emergency Motion to Stay.¹

¹ The use of the term “Emergency” is the Secretary’s self-characterization of its motion to stay. The Court does not subscribe to the accuracy of that characterization.

I. Order on the Secretary's Motion for Certification for Interlocutory Review

The Secretary's Motion for Certification for Interlocutory Review ("Motion for IR") requests that this Court certify its November 1, 2014 Order, which among other actions and findings, dismissed the claim that Brody had a pattern-of-violations ("POV"), as asserted in the POV notice issued by the Secretary to Brody Mining on October 24, 2013. Pursuant to Commission Rule 76 (29 C.F.R. § 2700.76), the Secretary now requests that the ALJ certify its Order for interlocutory review.

In support of its Motion for IR, the Secretary states that the Court's Order is interlocutory because it did not resolve the 357 citations and orders not designated as "significant and substantial" ("S&S") that were included with the 54 S&S citations and orders.² It notes that "[a]n order qualifies for interlocutory review under Rule 76 if: (i) the interlocutory ruling involves a controlling question of law, and (ii) immediate review may materially advance the final disposition of the proceeding [and the Secretary maintains that] both requirements are met here." Motion for IR at 2.

The IR motion continues with the Secretary stating that the "dismissal order presents the following controlling questions of law: (i) whether the ALJ had jurisdiction to adjudicate the validity of the POV notice issued to Brody when the hearing notice listed only the civil penalty dockets containing the citations and orders underlying the POV notice, and not the dockets containing Brody's contests of the withdrawal orders issued pursuant to the POV notice; (ii) whether the ALJ erred as a matter of law in finding that the Secretary failed to comply with the ALJ's oral pre-hearing order; and, (iii) whether the Secretary's definition of "pattern of violations" satisfies the requirements of Section 104(e)(4) of the Mine Act and the Due Process Clause of the Fifth Amendment to the United States Constitution."³ Motion for IR at 2.

The Court does agree with the Secretary's assertion that "[i]mmediate review may materially advance resolution of this proceeding by allowing the POV issues, which are legal issues that may be resolved independently from the rest of the case, to be adjudicated on appeal without awaiting the ALJ's adjudication of the 357 non-S&S citations and orders—which have no bearing on the POV issues—contained in the civil penalty dockets pending before the ALJ." Motion for IR at 2-3.⁴ (emphasis added).

² The Secretary adds that "[t]o the extent that the contested POV withdrawal orders were properly before the ALJ—and the Secretary contends they were not—the fact that the ALJ did not adjudicate those orders not only prevents the order from being final but also deprived the ALJ of jurisdiction to rule on the validity of the POV notice." Motion for IR at n.1.

³ The quoted language reflects the Secretary's characterization of the issues.

⁴ The Secretary adds that "[a]lternatively, the ALJ may wish to consider directing that his November 1, 2014 order of dismissal be entered as a final, appealable order pursuant to Federal Rule of Civil Procedure 54(b), citing *Westmoreland Coal Co.*, 5 FMSHRC 1406, 1411-12 (1983) ("*Westmoreland*"). Motion at 3, n. 2. The Commission observed in *Westmoreland* that Rule 54(b) permits adjudication of fewer than all claims presented in an action and that the judge in that case could have applied that Rule allowing him to resolve two of the three claims while retaining jurisdiction of the third. The Commission noted that had the Judge issued a decision resolving the first two claims and that, as there was no just reason to delay

Finally, the Secretary notes that it “contacted Brody’s counsel, who stated that he does not oppose the motion to certify the ALJ’s decision vacating the pattern of violations notice, but reserves the right to address any particular assertion by the Secretary in this motion.” Motion for IR at 3. Brody, in a December 17, 2014 email response to an email inquiry from the Court about the Secretary’s characterization of its position, advised that while it does “not necessarily agree with the Secretary’s formulation of the three issues [presented in the Secretary’s Motion for certification for Interlocutory Review] [it believes that] the fundamental issue of whether the vacation of the POV notice (which in the Secretary’s view raises those three issues) is properly [the] subject of interlocutory review and the Judge could rule on it without further submission by Brody.”

Based on the foregoing, the Court GRANTS the Secretary’s Motion and in so doing certifies that the determinations made by it in its November 3, 2014 Order are interlocutory in the sense that a large number of citations and orders are associated with the listed dockets which do not involve claims that they were S&S, and that the rulings which were made in the November 3, 2014 Order involve controlling questions of law and that, in the Court’s opinion, immediate review will materially advance the final disposition of the proceeding.⁵

that decision, the decision would have been a final decision, subject to the review procedures of the Mine Act and that such an outcome would also have been in harmony with then Commission Rule 64(a), (now Rule 2700.67(a)), which then and now provides in pertinent part that at any time after commencement of a proceeding and before the scheduling of a hearing on the merits, a party to the proceeding may move the judge to render summary decision disposing of all or part of the proceeding. The Commission held that the resolution of such a question “belongs within the informed discretion of the judge.” However, in *Westmoreland* as here, neither party suggested applying Federal Rule 54(b) and the hearing has occurred for the critical aspects of the Secretary’s Pattern claim. While it would appear that this option is not available, as noted in the body of this Order, the Court may avail itself of procedural rule section 2700.76(a)(1)(i), addressing interlocutory review and does so.

⁵ Brody has also urged the Court to leave no doubt that its decision vacating the pattern notice “automatically converts the Section 104e orders based on the POV notice to 104a citations.” Brody email dated December 17, 2014. Although the Court believes that its Order clearly conveyed that its decision had that effect, it hereby reaffirms that its decision, which vacated the claim that Brody had a pattern of violations. That determination automatically converts all Section 104e orders based on the POV notice to 104a citations. That result is ineluctable. When faced with the evidentiary burdens at the hearing, the Secretary’s Pattern of Violation Notice turned out to be stillborn. Beyond listing some 54 citations with, at 25, nearly half of its basis for the claim determined not to be S&S, the Secretary was also unable to present a coherent basis for its claim that there was a pattern of violations by Brody.

II. Order on the Secretary's Renewed Emergency Motion to Stay the Court's Order Dismissing the Pattern of Violations Notice

The Secretary has also filed a Renewed Emergency Motion to Stay the Court's Order Dismissing the pattern of violations notice⁶ ("Renewed Motion"). The Motion correctly asserts that the Court's November 1, 2014 Order "effectively preclud[es] the Secretary from issuing any further withdrawal orders pursuant to that notice so long as the ALJ's order remains in effect." Renewed Motion at 1.⁷

As the Renewed Motion essentially repeats the arguments made in its first Emergency Motion, an extended discussion is not required. Although the Secretary expends effort on a contention that, in its most favorable construction, could be described as a semantic dispute, there is no genuine question about the subjects that were litigated during the three weeks set aside for hearing. In this regard the Court would comment that, in reaction to the Secretary's claim that the Court cannot address the validity of a POV notice, the heart of the matter at issue here need not be made more complex than it deserves. Arguments over nomenclature should not control the resolution of this matter. For example, one could contend that a POV *notice* stands forever, unassailable by itself, but such notice has no meaning, effect or impact until the first 104(e) withdrawal order flows from it. At that point, all would agree that whether there is in fact a pattern of violations and whether the alleged violations in support of that claim are present may be challenged. And that is exactly what occurred here with the end result of this Court dismissing the Secretary's claim that it demonstrated a pattern of violations.

In his January 30, 2014 Order, Chief Administrative Law Judge Robert Lesnick noted that the basis for the Secretary's pattern notice rested upon 54 S&S citations and orders, which were "grouped according to the hazards they allege[d] (ventilation and methane hazards,

⁶ The Renewed Motion notes that the Secretary previously filed an "Emergency Motion to Stay Order" with the Court on November 4, 2014, which Brody opposed and which was denied on November 26, 2014. This is an opportune moment to note the extent to which Brody has been adversely impacted by a process which was advertised by MSHA as being designed for the expeditious resolution of challenges to POV notices. With the pattern-of-violations notice having been issued to Brody Mining on October 24, 2013, more than a year and two months now have elapsed since then and there is no near term resolution of Brody's challenges to that POV notice in sight. To maintain legitimacy, enforcement of the Mine Act's provisions, through measures such as a charge of a pattern of violations, must still be about fair procedures. A stay would effectively mean that Brody, though it prevailed at the hearing, would continue to face an indefinite, and likely prolonged, period of new section 104(e) withdrawal orders, each of which in this Court's determination stem from the same defective notice. In this Court's view, such a result is inconsistent with procedural due process.

⁷ In what the Court views as a troublesome inclusion, the Secretary has inserted the irrelevant and inaccurate claim that "[i]n the six weeks since issuance of the ALJ's order dismissing the POV notice, Brody's rate of "significant and substantial" violations has tripled." Renewed Motion at 2. The Court views this inclusion as emblematic of the Secretary's continuing conflation of charges with proof of violations, as if they were the same thing. Brody's rate of *citations* being issued with the significant and substantial element may have increased threefold, but that does not mean that its rate of *established violations* with that element has tripled, unless the Secretary believes that leveling the charge is all that is needed.

emergency preparedness and escapeway hazards, roof and rib hazards, and inadequate examination hazards)” 36 FMSHRC 284, 293 (Jan. 2014). Thus, it has been clear since the inception of the issuance of the pattern notice that the 54 citations and orders were the foundation upon which that pattern charge was built. Contrary to the implication of the Secretary that “[t]he ALJ subdivided the hearing into three separate parts, each part corresponding to one subgroup of the 54 S&S citations and orders relating to one of the distinct patterns identified by the POV notice,” (Renewed Motion at 3) the Court didn’t invent those groupings; they were presented by the Secretary, with a hearing week dedicated to each group. Importantly, Chief Judge Lesnick took note that “[s]ince 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, [the Chief Judge announced in his January 30, 2014 Order that he would] “consolidate them with these proceedings.”*⁸ 36 FMSHRC 284, 293 (Jan. 2014)(emphasis added).

The overriding point is that the Secretary completely understood that the hearing before the Court had a twofold purpose associated with the POV notice: 1. the Secretary had to present a coherent basis for its claim that the 54 citations/orders constituted a pattern of violations and 2. upon setting forth that basis, the Secretary was then obligated to prove that each of the citations/orders making up the claim of a pattern of violations were factually established as having the significant and substantial trait. The Secretary failed in both regards. The Secretary never explained the basis for his claim that the alleged violations constituted a pattern and, of no small consequence, at the hearing he failed to establish for nearly half, 46.3%, of the citations/orders that they were in fact S&S violations. With these, twin, *significant and substantial failures* on the Secretary’s part, no pattern of violations was established and the claim that Brody had engaged in a Pattern of Violations was properly dismissed. As the foundation for its Pattern of Violations Notice crumbled, the required consequence was that *all* subsequently issued 104(e) orders built on that defective foundation were necessarily converted to 104(a) citations.

Brody submitted a Response in Opposition. As the Court is denying the Secretary’s Renewed Motion, the discussion of that Response will be brief. However, the Court would comment that it largely endorses Brody’s contentions. For example, the Court agrees that the Secretary’s claim of lack of jurisdiction is hollow.⁹ So too, the Court rejects the Secretary’s

⁸ It should also be noted that if the docket numbers containing Brody’s contests of the withdrawal orders were deemed to have been improperly included, subsequent litigation would change nothing - the core issues have already been litigated and decided. Thus, in the Court’s estimation, this is simply an attempt by the Secretary to avoid facing up to its twin failings in its pattern of violations claim.

⁹ As Brody observed in its Response, “The Secretary first raised such argument in his posthearing brief but had not previously raised that issue. . . . In his Position Statement to the ALJ, filed July 17, 2014, which included docket numbers for prepenalty contests of Section 104(e) orders in its caption, the Secretary clearly evidenced an understanding that any hearing would include the contests of the POV notice (Position Statement at 11). In his prehearing statement filed August 25, 2014, the Secretary again included as part of the caption four prepenalty contests of Section 104(e) orders in addition to the civil penalty dockets that he now includes in the caption by themselves. . . . It has been clear in each notice of

claims regarding the likelihood that the movant will prevail on the merits of its appeal; that irreparable harm will result to the movant if the stay is not granted; that there is an absence of adverse effects on other interested parties; and that it has established that the stay is in the public interest. See the Court's November 26, 2014 Order Denying the Secretary's first emergency motion to stay.

Conclusion

On the basis of the foregoing, the Court DENIES the Secretary's Renewed Emergency Motion to Stay the Court's Order Dismissing the Pattern of Violations Notice.

So Ordered

William B. Moran

William B. Moran

contest filed by Brody that the POV notice is at issue. It has also been clear that the Secretary concedes that in the contest of a Section 104(e) order, the POV notice can be challenged. . . . It is clear that the Secretary fully understood that the validity of the POV was at issue prior to and during the hearing and his removal of the docket numbers from his last submissions is either inadvertent or disingenuous. . . . It is clear that throughout the 7 days of hearing that the Secretary believed that the issue of the POV notice and a pattern was at issue as evidenced by a discussion of the docket numbers at hearing: MR. MOORE: -- are related to every prepenalty contest in the 104(e) order that's pending before the Commission, and there are approximately a hundred -- a hundred of those, some of which were before the commission on the appeal, the interlocutory appeal. So I'm a little bit -- I want to be careful that we're -- all understand that, while we're looking at individual citations for civil penalty dockets, we're also looking at the broader issue or else we wouldn't even have to talk about that. . . . The Secretary did not object to such assertion." Response at 7-9.

Distribution:

Michael T. Cimino, Esq., Jackson Kelly, PLLC, 500 Lee Street East, Suite 1600, Charleston, WV 25301-3202

R. Henry Moore, Esq., Jackson Kelly, PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

K. Brad Oakley, Esq., Jackson Kelly PLLC, 175 East Main Street, Suite 500, Lexington, KY 40507

Adam J. Schwendeman, Esq., 500 Lee Street East, Suite 1600, Charleston, WV 25301-3202

Benjamin M. McFarland, Esq., Jackson Kelly, PLLC, 1144 Market Street, Wheeling, WV 26003

Robert S. Wilson, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22 Floor West, Arlington, VA 22209-3939

Lauren Marino, Esq. Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2226, Arlington, VA 22209-2296

Jason Grover, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2226, Arlington, VA 22209-2296

Ronald Gurka, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2226, Arlington, VA 22209-2296

Dana Ferguson, Esq., Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., Room 2226, Arlington, VA 22209-2296