

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 1, 2015

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

v.

POCAHONTAS COAL COMPANY, INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2014-1160
A.C. No. 46-08878-354868

Mine: Affinity Mine

**ORDER DENYING RESPONDENT'S MOTION
REQUESTING GARY CHILCOT TO TESTIFY**

Before: Judge Miller

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. On February 27, 2015 Pocahontas filed a Motion Requesting Gary Chilcot to Testify in which it asserts that the testimony of Chilcot is relevant to the issues in this proceeding and that his testimony will aid the court. On March 18, 2015 the Secretary filed a response in opposition to Pocahontas' motion. For reasons that follow, Pocahontas' motion is **DENIED**.

On October 24, 2013, MSHA notified Pocahontas Coal Company, Inc. (hereinafter "Pocahontas") that it determined a pattern of violations existed at Pocahontas' Affinity Mine and issued Written Notice No. 7219153 (hereinafter the "notice" or "NPOV") pursuant to section 104(e)(1) of the Mine Act. Subsequently, MSHA issued multiple 104(e) withdrawal orders, six of which are at issue in this docket. The parties have filed a motion to approve settlement, resolving all issues in the case. However, the issue of the testimony of Chilcot will be raised many times in the upcoming cases set for hearing that contain 104(e) citations and orders. The parties will address the issue of the validity of the NPOV in the context of the 104(e) and the Respondent will seek to have the NPOV declared invalid. In each case involving the notice of POV, the mine will assert that Chilcot's testimony is necessary to show that the mine will suffer harm as a result of the orders issued after the mine was put on the pattern of violations. Therefore, I issue a decision on the matter in this case with the understanding that the ruling will be the same in all cases in which the validity of this particular NPOV is raised.

On December 17, 2014 the Secretary filed a Motion to Exclude Gary Chilcot in which he argued that Respondent should be precluded from offering any testimony, reports or other evidence from Chilcot in these proceedings. On December 30, 2014 Pocahontas filed a response in opposition to the Secretary's motion. Subsequently, on January 28, 2015, the court issued an order directing Pocahontas to provide an expert report to the Secretary and following that, file a motion requesting that Chilcot be allowed to testify as an expert witness and explaining the

relevance of, and need for, his expected testimony. On February 27, 2015 Pocahontas filed this motion and the Secretary has filed a response.

Pocahontas, in its motion, argues that Chilcot should be allowed to testify given that his expected testimony is relevant to this proceeding and, in the event the NPOV is vacated, will aid the court by showing the economic harm resulting from MSHA's impermissible utilization of its 104(e) withdrawal power. Chilcot is expected to testify about the financial harm that may be caused by stopping production at the mine to correct a violation as required by 104(e). The mine asserts not only that the NPOV violates the mine's due process but the refusal to allow its witnesses to testify violates its due process rights. In so arguing, Pocahontas asserts that while the Commission's decision in *Brody Mining LLC*, 36 FMSHRC 2027 (Aug. 2014), addressed whether the pattern of violations rule "provided adequate pre- and post-deprivation procedures once an operator is placed on pattern of violations status[,]" it did not reach the issue with regard to Pocahontas' interest in ensuring that it will not be erroneously deprived of a property interest when a NPOV is found to have been invalidly issued.

The Secretary argues that Chilcot's expected testimony regarding economic and market harm the mine may suffer should be excluded because it is irrelevant to the issues pending in this case. While there is no dispute that being placed on a pattern of violations may have an adverse economic impact on a mine, the issue is not relevant to question of whether the mine has demonstrated a pattern of violations. The Commission has already spoken to the issue of due process and determined that the pattern of violations rule adequately addressed the potential for erroneous deprivation. Further, Chilcot should not be allowed to testify as an expert witness under the Federal Rules of Evidence since his testimony will not aid the court in understanding any relevant issue in this proceeding, as is required by those rules and Supreme Court precedent. In addition, Chilcot's expected testimony is speculative, based on both inaccurate and insufficient information, and is not expressed with any degree of certainty.

I find that Chilcot's expected testimony is not relevant to the issues presented in this proceeding. Specifically, I find that, because the due process concerns articulated by Pocahontas were addressed by the Commission in *Brody* and need not be litigated here, and, because there is no legal authority for this court to award damages in the event the NPOV is found to have been invalidly issued, Chilcot's testimony is not relevant to this proceeding.

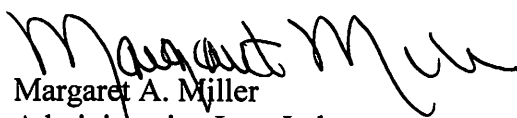
While Pocahontas argues that the Commission's decision in *Brody* does not reach the issue of whether due process is violated when miners are withdrawn when a 104(e) order is issued, based upon a NPOV that is later found to be invalid, I disagree. In *Brody* the Commission explained that the pattern of violations rule "adequately addresses the potential for erroneous deprivation and satisfies procedural due process." *Brody Mining LLC*, 36 FMSHRC 2027, 2044. (Aug. 2014). There, the Commission, in reaching its conclusion that due process was satisfied, weighed three factors: (1) the private interest affected, (2) the government interest, and (3) the risk of erroneous deprivation of the private interest. The Commission acknowledged that, while operators have a significant property interest in continuing mining operations and not having their miners withdrawn, the Secretary has a compelling interest in protecting public health and safety. *Id.* at 2042-2044. With regard to the third factor the Commission held that the pattern of violations rule adequately addressed the risk of erroneous deprivation through the

multiple pre-deprivation and post-deprivation protections available to mine operators. *Id.* at 2044-2047. I find that the Commission's decision in *Brody* directly addressed the issue of potential erroneous deprivation. The issue here, even if stated in slightly different terms, has been explicitly spelled out by the Commission. I find that the Commission's analysis in *Brody* is equally applicable here and that due process has been satisfied on the issue of potential erroneous deprivation of a property interest in the context of the pattern of violations provision.

Even if Pocahontas' due process argument were to remain a relevant issue in this matter, the court is without authority to grant relief in the form of damages to Pocahontas, in the event that the NPOV is found to have been invalidly issued. A review of the Act reveals no language granting the court power to award damages in the event the NPOV is invalidated. Moreover, Pocahontas cites no legal authority for its argument. In *Brody* the Commission explained that Congress intended that the pattern of violations provision, and MSHA's 104(e) withdrawal power, to parallel the unwarrantable failure provisions of section 104(d). Just as there is no right to damages in Commission proceedings where a 104(d) withdrawal order has been invalidly issued, there is also no right to damages in a Commission proceeding where a 104(e) withdrawal order has been invalidly issued. Given the size of this operator I do not address the potential for any award of fees or expenses under the Equal Access to Justice Act.

Finally, I do not agree that prohibiting the testimony of Chilcot will in and of itself be a violation of the due process rights of Pocahontas. Commission Procedural Rule 63(a) states that "[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). It is up to the Commission to determine what is relevant and therefore what is admissible in any given case. A Commission judge cannot, without some oversight, allow any person to testify when a party asserts the testimony is relevant. The cost to the parties and Commission is obvious in terms of time and resources. I find that this case is clear cut, that Chilcot has nothing to offer, provides no insight to the Court, and does not address any relevant issue and therefore should not be allowed to provide testimony. The mine has provided no other evidence, than a few statements, that barring Chilcot is a violation of its right. It is the mandate of Commission ALJS to ascertain that all parties be given the opportunity for a full and fair hearing, but in doing so must weigh the nature of the evidence, its relevance and importance, against the resources of the court and parties. Denying the testimony of Chilcot does not deny the mine of any other due process right.

Based upon the analysis here, I find that Chilcot's expected testimony is not relevant and denying his testimony, does not deprive Pocahontas of due process in this matter. I need not, and do not, reach the other arguments of the parties. Accordingly, Pocahontas' motion is **DENIED** and Gary Chilcot will not be allowed to offer testimony in these proceedings.


Margaret A. Miller
Administrative Law Judge

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