FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

June 18, 2015

POCAHONTAS COAL COMPANY, LLC, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDING Docket No. WEVA 2014-395-R Order No. 3576153; 12/19/2013 Mine: Affinity Mine Mine ID: 46-08878
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. POCAHONTAS COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDING Docket No. WEVA 2014-1028 A.C. No. 46-08878-350475 Mine: Affinity Mine

ORDER DENYING THE SECRETARY'S MOTION TO RECONSIDER & ORDER DENYING MOTION TO STAY THE COURT'S MAY 22nd ORDER

These cases are before me on a contest filed by Pocahontas Coal Company and a petition for assessment of a civil penalty filed by the Secretary pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. On June 5, 2015 the Secretary filed a Motion to Reconsider the court's May 22, 2015 Order Granting in Part & Denying in Part the Secretary's Motion for a Protective Order. On June 10, 2015 Pocahontas filed a Response in Opposition to the Secretary's motion. For reasons that follow, the Secretary's Motion to Reconsider is **DENIED**. The Secretary also filed a Motion to Stay the court's May 22, 2015 order in light of the Motion to Reconsider. The Motion to Stay is **DENIED**. However, the parties are **ORDERED** to comply with the court's new discovery timeline set forth below.

On April 13, 2015 the Secretary filed a Motion for Protective Order in which he moved the court to issue a protective order preventing the depositions of attorneys from the Office of the Solicitor. On May 22, 2015 this court issued an Order Granting in Part and Denying in Part the Secretary's Motion for a Protective Order (the "May 22, 2015 order") and found that factual information considered by MSHA and the attorneys when selecting and grouping the 42 enforcement actions included in the NPOV, as well as facts involving who, what, where and when the selections were made, may be relevant, were discoverable, and were not privileged. On June 5, 2015 the Secretary filed the instant motion to reconsider the court's order.

The Secretary argues that the court should reconsider its May 22, 2015 order because certain statements made by the court regarding the Secretary's decision about what to include and how to group the 42 enforcement documents listed in the NPOV are not supported by the record. Further, he argues that the deposition testimony of Kevin Stricklin, the Administrator for Coal Mine Safety and Health, makes clear that Stricklin made the ultimate decision whether to issue the NPOV, as well as what citations and orders were included in the NPOV, and that the attorneys from Office of the Solicitor only provided advice in the form of a recommendation to the Administrator.

The Secretary also argues that the court improperly rejected the Secretary's privileges argument. Specifically, the Secretary argues that the order does not adequately comprehend the nature of a NPOV, and that, because the document was issued in anticipation of litigation, the internal deliberations that led to the issuance of the NPOV are privileged. Moreover, the decision to issue the NPOV was an exercise of prosecutorial discretion and is subject to only narrow judicial review of whether MSHA considered the eight factors listed in 30 C.F.R. § 104.2(a) and notified Pocahontas of the basis for the NPOV. The Secretary argues that his submission of the NPOV, district manager's memo, POV panel memo, and the depositions of Jay Mattos and Kevin Stricklin meet this burden, and further review "would cross the line into the Secretary's decision-making process and the exercise of his prosecutorial discretion." Mot. to Reconsider 10.

Finally, the Secretary states that, while he does not concede that he must produce for deposition the field office supervisor involved in the POV process, he has provided a declaration from Sabian Scott VanDyke, the field office supervisor, that "addresses when, where and other factual logistics surrounding the selection of the 42 actions and who was involved in the review of . . . [S&S] violations issued during the POV screening period and what facts were relied upon." Mot. to Reconsider 10-11. As a result, the Secretary argues that he has provided the factual information required by the order.

Pocahontas, in response, argues that the order does not include factual inaccuracies and that the motion for reconsideration should be denied. Specifically, Pocahontas argues that the record, as recognized by the court, clearly demonstrates that Stricklin merely authorized the issuance of the NPOV and was not involved in the selection of the enforcement actions or the patterns. Further, Pocahontas argues that the record shows, as the court stated, that the attorneys from the Solicitor's office played a role in selecting the two categories and the 42 enforcement actions in the NPOV that were recommended to Stricklin. Furthermore, the declaration of Sabian Scott VanDyke confirms that Stricklin did not select the pattern categories or 42 enforcement actions and that, instead, the attorneys from the Solicitor's office were involved.

Pocahontas also argues that the court correctly found that the privileges asserted by the Secretary do not extend to factual information considered by MSHA and the attorneys when selecting and grouping the 42 enforcement action in the NPOV. Further, The Secretary's argument that the decision to issue the NPOV is subject to only narrow judicial review ignores the issue in this case of whether the action was arbitrary and capricious. Here, the evidence indicates that, even if the court applies the narrow review advocated by the Secretary, the Secretary has not established that MSHA considered the eight factors set forth in 30 C.F.R. §

104.2(a) before issuing the NPOV. Moreover, the failure to consider the factors goes directly to the issue of whether the Secretary has acted in an arbitrary and capricious manner.

Finally, Pocahontas argues that the Secretary failed to comply with an order of the court and, as a result, Pocahontas was precluded from complying with other parts of the order and has been forced to spend unnecessary time and resources to resolve this discovery dispute. Specifically, Pocahontas argues that the Secretary refused to communicate with Pocahontas and, in direct contravention of the court's order, did not provide an individual for deposition. As a result, and based on the information learned from the VanDyke's declaration, Pocahontas argues that it is entitled to depose both VanDyke and Ben Chaykin, the attorney in the Solicitor's office who VanDyke indicated he worked with during their review of the citations and orders included in the NPOV.

I find, just as I have previously found, that, while the internal deliberations involving opinions, thoughts, conclusions and legal theories leading up to the decision to issue the NPOV are privileged, facts related to what information was considered by MSHA and the Secretary's attorneys when selecting and grouping the 42 enforcement actions in the NPOV may be relevant, are discoverable, and are not privileged. The deposition of Kevin Stricklin does show that he made the final decision to issue the NPOV to Pocahontas, but that does not negate the need on the part of the operator to learn the facts he relied upon in making that decision. A number of matters were reviewed by MSHA personnel and a recommendation was made to Stricklin. As a result, while Stricklin made the ultimate decision, the facts that others relied upon in making recommendations to him are relevant and discoverable.

Nothing that the Secretary raises in his motion changes the court's opinion regarding what is discoverable and not privileged in this matter. The Secretary's argument regarding factual inaccuracies relied upon by the court in issuing the May 22, 2015 order amounts to a semantic distinction that detracts from the court's essential finding; that is, the information provided by the Secretary to date demonstrates that the Secretary's attorneys may have played a role in the selection of the two pattern categories and 42 enforcement actions listed in the NPOV. That role would go beyond simply advising MSHA regarding the pattern and its legal requirements. I note that the Secretary's attorneys have not been particularly forthcoming regarding the entire process. While Stricklin may have been the individual who made the ultimate decision to issue the NPOV, the Secretary continues to be opaque about how he reached that decision. If indeed the attorneys for the Secretary merely had an advisory role, then the mine operator is entitled to learn that as well and focus on the facts relied upon by MSHA.

As Pocahontas argues, and the court has repeatedly pointed out, one of the major issues in this proceeding is whether the Secretary acted in an arbitrary and capricious manner when he issued the NPOV. The court has made clear that, in order for it to decide this issue, it must know what facts MSHA considered when making its determination to issue the NPOV. Again, that means what facts were used and what facts were presented to Stricklin so that he could make the final determination. Moreover, facts regarding who selected and grouped the enforcement actions, what facts those individuals considered, when they considered those facts, and where they considered those facts may be relevant, are discoverable, and are not privileged despite the

Secretary's arguments to the contrary. The same is true even if the court accepts the Secretary's argument that the decision to issue the NPOV is subject only to the narrow judicial review.

I find that VanDyke's declaration provides some relevant facts that Pocahontas seeks to discover. However, the court is not in a position to decide if it answers all of Pocahontas's questions. As a result, I find that Pocahontas should be afforded an opportunity to discover additional facts which VanDyke may be able to contribute and, therefore, Pocahontas may take the deposition of Van Dyke. The parties, prior to the status conference set for June 25, 2015, shall contact each other and agree to a date and place for the deposition. If the parties are unable to agree to a date and time, the court, at the status conference, will set the date and time for the deposition.

VanDyke's declaration also identifies Ben Chaykin as the attorney from the Office of the Solicitor whom VanDyke worked with to review citations and orders issued to the mine as part of the process to determine whether the NPOV would be issued. It is not clear how much involvement Chaykin had in putting together the list that was included in the body of the NPOV, or if other attorneys were also involved. Chaykin is no longer employed by the Department of Labor and, therefore, there is no danger that the Secretary will be deprived of its attorney by involving him in the discovery process.

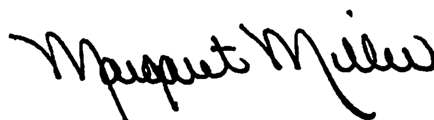
In the May 22, 2015 order the court indicated that, if Pocahontas was unable to learn the facts it needs from the CLR or field office supervisor, it could submit interrogatories to be answered by an attorney in the Solicitor's office who had direct knowledge of those facts. Given the present circumstances, I find that Pocahontas should be afforded an opportunity to discover facts from an attorney in the Solicitor's office if it cannot discover all of the facts it needs from VanDyke. VanDyke's declaration indicates that his involvement was mostly administrative, including gathering and copying materials for the Secretary's attorneys, primarily Chaykin. Since it appears that VanDyke did not select or categorize the citations and orders that were recommended for inclusion in the NPOV, it stands to reason that the Secretary's attorneys are in the best position to provide at least some of the facts that Pocahontas seeks to discover on that issue. Therefore, Pocahontas should be prepared to submit written interrogatories to the Secretary following the deposition of VanDyke. A date for submission of those interrogatories will be set at the June 25, 2015 status conference.

While the court understands the importance of a case that deals with a new regulation and process, there is nothing about the process that should be hidden and the Secretary should be willing to provide facts about how the process works. This case has dragged on for an inordinate amount of time. The Secretary has been unwilling to provide information in a timely manner so that discovery can be completed and the parties and the Court can understand what went into preparing the NPOV. Therefore, at the status conference, the Secretary must be prepared to address all issues remaining and come up with a reasonable schedule to get all the facts associated with the NPOV before the Court. Similarly, the operator has been overreaching in its demands and arguments, and would be better served to focus on the real issues in the case and what it needs to have a full understanding of the facts. These are important matters, but they are not matters that are subject to drama or secrecy.

Given these findings, the parties are **ORDERED** to talk and set a date for the deposition of Mr. VanDyke to be held on or before July 3, 2015. If the parties cannot agree on a date, the court will provide one at the status conference. If the mine operator is not able to discover all facts it requires from the deposition of VanDyke, it shall, within 7 days of the date of the deposition, submit written interrogatories to the Secretary to be answered under oath by a person with knowledge of the facts sought by the questions. The Secretary may chose an attorney with knowledge of the facts, including Mr. Chaykin if appropriate, to respond to the questions. The Secretary may assert that attorneys merely rendered advice, but they must provide facts to back up that position. The Secretary will have one week in which to respond. No extensions of time will be granted.

The deposition of VanDyke and the follow up questions to the Solicitor shall address the factual issues outlined above and in the earlier order, and should not address matters that VanDyke has already addressed in his declaration. Both parties are **ORDERED** to provide a written status report following the completion of this discovery, detailing the information, if any, the operator has yet to discover and the status of the motions for summary decision.

The parties, as set forth in the June 12, 2015 Notice of Status Conference, are **ORDERED** to attend a status conference on June 25, 2015. The conference will commence at 2:00 pm and each party should be prepared to discuss the status of discovery, dates for depositions and a clear schedule for moving forward in this case. The status conference will be recorded and each party must have a non-attorney client, either in person or by telephone.



Margaret A. Miller
Administrative Law Judge

Distribution:

Jason Grover, Francine Serafin, Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, Virginia 22209

Jason Nutzman, Dinsmore & Shohl, LLP, 900 Lee St. Suite 600, Charleston, WV 25301

Robert Huston Beatty, Dinsmore & Shohl, LLP, 215 Don Knotts Blvd., Suite 310, Morgantown, WV 2650