FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, N.W., Suite 9500
Washington, D.C. 20001
(202) 434-9933

May 11, 2012

BLEDSOE COAL CORP.,
Contestant

v.

HILDA L. SOLIS, Secretary of Labor,
United States Department of Labor,

Respondent

CONTEST PROCEEDING

DOCKET NO. KENT 2011-972-R
WRITTEN NOTICE NO. 8333606;
04/18/2011

DOCKET NO. KENT 2011-973-R
ORDER NO. 8353820; 04/18/2011

DOCKET NO. KENT 2011-974-R
ORDER NO. 8353821; 04/18/2011

DOCKET NO. KENT 2011-975-R
ORDER NO. 8353825; 04/21/2011

DOCKET NO. KENT 2011-976-R
ORDER NO. 8353838; 05/03/2011

DOCKET NO. KENT 2011-977-R
ORDER NO. 8353839; 05/03/2011

DOCKET NO. KENT 2011-978-R
ORDER NO. 8353855; 05/10/2011

DOCKET NO. KENT 2011-979-R
ORDER NO. 8353858; 05/12/2011

DOCKET NO. KENT 2011-980-R
ORDER NO. 8406696; 05/10/2011

DOCKET NO. KENT 2011-981-R
ORDER NO. 8406699; 05/10/2011

DOCKET NO. KENT 2011-982-R
ORDER NO. 8406809; 05/11/2011

MINE I.D. NO. 15-19132
MINE: Abner Branch Rider

ORDER ON THE SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Moran

Introduction.

Pursuant to 30 C.F.R. § 2700.67, on March 6, 2012, the Secretary of Labor filed a motion for partial summary decision, seeking a ruling upholding the issuance of the Notice of Pattern of Violations, No. 8333606, which Notice was issued to the Respondent, Bledsoe Coal Corporation, regarding its Abner Branch Rider Mine, ("mine"), on April 12, 2011. Motion at 1-2. The Secretary notes that it issued Respondent a notice, alleging a potential pattern of violations on November 18, 2010, as well as a withdrawal order under section 104(e)(1), alleging a significant and substantial violation of a mandatory standard, and eight (8) withdrawal orders pursuant to section 104(e)(2). The Secretary contends that, as it followed the requirements for issuance of a Notice of Pattern of Violations, pursuant to 30 C.F.R. Part 104, the Notice should be upheld. For the reasons which follow, the Court GRANTS the Secretary's Motion and DIRECTS that the outstanding, identified, non-final S&S citations/orders associated with this litigation be set for prompt hearing.

Findings of Fact and Conclusions of Law.

The actions described above were the culmination of several preceding events. The Secretary completed its pattern of violations screening for the mine, which screening encompassed the twelve month period beginning on September 1, 2009 and ending August 31, 2010. As noted above, that screening resulted in the Respondent being notified,[1] on November 18, 2010, pursuant to 30 C.F.R. § 104.4(a), that its mine was identified as having a potential pattern of violations. Nine citations or orders were identified, each pertained to violations of 30 C.F.R. § 75.400, and each of those had become final orders during the twelve month review period.[2] Bledsoe opted to implement a corrective action plan, which was dated January 5, 2011. However, about two months later, on March 18, 2011, in compliance with 30 C.F.R. § 104.4(b), MSHA advised Bledsoe that a potential pattern of violations continued to exist, noting that the mine's S&S violations were double the target violation rate. Ex. 6. The same report, again following section 104.4(b), informed the mine that it had 10 days to submit comments about it to the Administrator for Coal Mine Safety and Health, but comments would not forestall submission of the report to the Administrator.

[1] The Notice informed Bledsoe that nine citations or orders, each of which, pursuant to 30 C.F.R. § 104.2(c), were issued after October 1, 1990, were considered in the initial screening.

[2] The November 18, 2010 Notice advised the mine that it had been issued "10.98 S&S violations per 100 inspection hours during the 12-month review period . . . [and that] the mine must maintain an S&S rate of 5.49 or lower during the evaluation period [which would constitute] a 50 percent reduction from the . . . review period." A greater reduction, to 3.68 or lower would be required if the mine did not opt to implement a corrective action program. Bledsoe did opt for a corrective action plan.

The Secretary concludes that, as MSHA fully complied with the Part 104 Pattern of Violations provisions at every step of that process, and as the Mine's "history of nine final S&S violations of 30 C.F.R. § 75.400 during the one-year pattern review period establishes a pattern of violations [pursuant to 30 C.F.R. § 104.3(a)(1)]," the pattern of violations notice, No. 8333606, should be upheld.[3] Sec. Motion at 4-5. In support of that conclusion, the Secretary notes that this Court, in its November 10, 2011 Order on the Contestant's Motion for Summary Decision, observed that Congress left it to the Secretary's expertise to determine when more was needed to be done for enforcement than simply identifying each violation and then acting to have each violation corrected. Instead, when an operator has a pattern of S&S violations of mandatory standards, the provisions of section 104(e) of the Mine Act are to be applied. In enforcing those provisions, the Secretary was directed by Congress to make such rules *as the Secretary deemed necessary* to establish criteria for determining when a pattern of violations of mandatory standards exists and making the determination for the enhanced enforcement provision addressing a pattern of violations. The Secretary took these steps both through the Pattern of Violations provisions at 30 C.F.R. Part 104 and implementing the policy. Accordingly, it is the Secretary's position that, as it fully complied with both the statutory provision and with the Part 104 Pattern of Violations provisions in all respects, and as there is no issue of any material fact, the issuance of the Notice of Pattern of Violations No. 833606 should be upheld. Sec. Motion at 4-5.

In its response to the Secretary's Motion, Bledsoe decided to renew its cross-motion for partial summary decision. However, that latter matter was fully addressed in the Court's prior Order. For the reader's convenience, it appears again as an appendix to this Order.

Bledsoe notes that the Secretary has argued that POV Notice No. 8333606 should be upheld as a matter of law as she has "followed all of the procedural requirements set forth in 30 C.F.R. Part 104." Bledsoe Response at 2. Bledsoe contends that "[a]ll that is said by the Secretary to support a substantive finding of a POV in this case is . . . 'the Abner Branch Rider Mine's history of nine final [significant and substantial or 'S&S'] violations of 30 C.F.R. § 75.400 during the one-year pattern review period establishes a pattern of violations.'" *Id.* at 3, citing the Secretary's Motion at 4.

Mischaracterizing the Secretary's position, Bledsoe asserts that, by the Secretary's argument, "[a]ll the Secretary must show is that she **accused** Bledsoe of subsequent S&S violations." *Id*. (emphasis in original). Underlying that assertion is Bledsoe's claim that the Secretary has not "offer[ed] a legal definition of 'pattern,' [and] ... instead has determined that more than one final S&S violation is sufficient." *Id.*

[3] That provision, 30 C.F.R. § 104.3(a)(1), identifies "[a] history of repeated significant and substantial violations of a particular standard" as one of three listed, independent, criterion for identifying a pattern. To state the obvious, MSHA was identifying repeated violations of 30 C.F.R. § 75.400, which pertains to the grave matter of accumulation of combustible materials.

Bledsoe then transitions to its overriding issue of dissatisfaction, a matter already addressed in the Court's prior Order, asserting that "[i]t is incumbent upon the Secretary to establish criteria to guide Bledsoe – and other operators – on what the law requires."[4] Bledsoe asserts that, per the Court's Order, the Secretary has both unfettered and unreviewable discretion to call "any pattern of more than one S&S accusation a POV." [5] *Id.* at 4-5. Resurrecting its due process claim, it suggests that, as there is no definition of a POV, it would be impossible to determine if a POV is present for Bledsoe. On this basis, Bledsoe renews, with no new grounds, its prior motion for partial summary decision. The Court again directs attention to the Appendix to this Order, which provides its prior decision addressing these contentions.

Short of its wish to have the Secretary's POV provisions cast aside, Bledsoe alternatively maintains that "[a]t the very least, [it] must be allowed to adjudicate whether the violations which placed it on POV status were properly designated S&S." *Id.* at 6. In support of this, departing from the facts here, Bledsoe points to *Rockhouse Energy Co. v. Secretary*, 30 FMSHRC 1125 (December 2008) (ALJ)(*"Rockhouse*"), wherein another ALJ "accelerat[ed] his trial schedule to rule decided similar S&S issues [*sic*] prior to the issuance of a POV notice . . . ." *Id.* But Bledsoe, in characterizing what another judge had to decide as "similar S&S issues," must be using the phrase "similar S&S issues" in the loosest of senses in trying to apply that case to the facts at hand.[6] The reason is plain. Whereas in *Rockhouse* the mine operator was

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[4] Bledsoe, noting that the Court observed that the dictionary definition of a "pattern" involves " a *reliable sample* of traits, acts, or other observable features characterizing an individual [ ] behavior [pattern] . . . ," redescribes the issue as "[w]hether there is a '*reliable pattern*, . . ." asserting that is "a question for which there is no legal answer." Respondent's Response at 3-4 (emphasis added). A *reliable sample* is not synonymous with a *reliable pattern.*

[5] Divorced from the reality of what occurred here, Bledsoe then lifts off into a nightmarish scenario, starting with the idea that the Secretary could call "any pattern of more than one S & S accusation a POV . . .[and] [o]nce a mine has more than one final S&S violation, the Secretary could call this a PPOV." The subsequent issuance of S&S violations "could be factually deficient, contrary to law or even arbitrary, and [yet] the [mine] operator would be subject to a pattern finding." Bledsoe Response at 5. While Bledsoe acknowledges that the Secretary would be required to follow her own internal guidelines, it asserts these could change at any time and without notice. *Id.*

[6] As Bledsoe stretches the applicability of *Rockhouse*, using a case that the Court considers to be very distinguishable, it also took the opportunity to bemoan that in this Court's earlier Order of November 10, 2011, it "was needlessly castigated for not quoting a portion of [the] language contained in 30 U.S.C. Section 814(e), although it repeatedly cited to the statute, the full text of which is readily available." Response at 6-7. Bledsoe claims it was "needlessly castigated" because, after all, it made *reference to the cite for* the full statutory provision. By the full provision being cited, Bledsoe means it gave a full listing to the cited provision and one would not have to guess, for example, the chapter or section involved and therefore anyone could go look up the provision and there they would discover *all* of its words. While that much is true, as Bledsoe has elected to recast its approach as innocent, it is necessary to revisit what occurred in Bledsoe's argument and its renewed protestation over the Court's dim view of it. The provision at issue provides, *in full*, "(4) The 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." 30 U.S.C. § 814 (e)(4). In contrast, Bledsoe, citing to the same provision advised that "Congress mandated the Secretary, under Section 104(e)(4) of the Mine Act, to "make such **rules"** to establish the

challenging whether some 23 citations issued under Section 104(a) were valid and whether, if valid, they were "S&S," those issues had *not* already been decided. For Bledsoe, though it would like to unring the bell, it cannot. It has settled and paid the matters constituting the violations the Secretary has used for its pattern case.

Having considered the Secretary's Motion and Bledsoe's Response, the Court posed questions to the parties to better understand their positions. These were useful to the Court's resolution of the Motion. Based in part upon those responses, the Court makes the following observations and findings. In Exhibit 1 to the Secretary's Motion, the Secretary did identify, with particularity, to Bledsoe, under the page entitled "Screening Criteria for Pattern of Violations" at the "Final Order Criteria" box, that there were at least five (5) S&S citations /orders of the same standard that became final orders of the Commission during the 12 month period being reviewed of September 1, 2009 through August 31, 2010. In fact, MSHA identified that nine (9) such citations/orders were so involved. There is no dispute that each of these 9 violations involved the same standard, that each became final orders of the Commission and that each of them became final during the review period, as just cited above.[7]

The Court also noted that, within the Secretary's Exhibit 1, attached to the Secretary's Motion, five (5) pages were included, listing some 159 citations. Thirty-one (31) of those listed citations cited section 75.400 and Citation numbers 8356674, 8356676, 8362103, 8362416, 8362419 and 8362424 were among the thirty-one citations citing that section.[8] The Secretary

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criteria for determining when a pattern of violations exists." Bledsoe Motion at 3-4. (emphasis in Bledsoe's motion). Apparently to save toner ink, Bledsoe omitted the *four* unhelpful words "as he deems necessary" from the 27 word provision. Four pages later in its argument, Bledsoe reasserted this claim, asserting that "Section 104(e)(4) of the Mine Act directed the Secretary to make rules for determining when a pattern of violations exists," again omitting the "as he deems necessary" language. That omission is no small matter though, as Bledsoe takes the implication of its selective reading further by advising that in directing the Secretary "to make rules", "Congress, in unambiguous language directed the Secretary to use notice and comment rulemaking."

[7] The Court found it unclear why Citation number 8333031, issued 4/15/2008, Citation number 7528749, issued 7/30/2009 and Citation number 7528752, issued 8/3/2009 were included among the 9 citations identified by MSHA when they seemed to be before the commencement of the September 1, 2009 review period. The answer was that the test for inclusion considers citations that *became final* during the September 1, 2009 through August 31, 2010 time frame. The Court had overlooked that the "Pattern Criteria" provision, at 30 C.F.R. § 104.3, in fact provides that in identifying mines with a potential patten of violations, two prerequisites must be present: only citations and orders issued after October 1, 1990 are considered *and they must have become final*. The nine citations identified in the Final Order Criteria meet both those requirements: each was issued after October 1, 1990 and each became *final* during the review period. There is no dispute about these facts.

[8] The Court also inquired about the relevance of the 31 citations which cited the proscription of accumulations of combustible materials, per 30 C.F.R. § 75.400, among the total number of 159 citations. Those 31 citations concerning § 75.400 included six of the nine citations which became final during the review period. As noted above, the other three became final during the review period, being issued *after* October 1, 1990 and becoming *final* during the review period but they were not *issued* during the twelve

explained the inclusion of these documents stemmed from the fact that they were included in MSHA's November 18, 2010 letter to the Respondent. The five page list of 159 citations represents all of the violations issued to the mine during the review period and, of those, 79 were S&S.[9] The five page list of 159 citations supports the Secretary's determination that the mine met the initial screening criteria, per 30 C.F.R. § 104.2. As shown by the "Screening Criteria Results for Pattern of Violations," ("SCR for POV"), which was included in November 18, 2010 letter from MSHA to the Bledsoe Mine, Initial Criteria 1 at item 1 requires that a mine have at least 50 citations/orders that were "S&S" and Bledsoe had 79. In each of the three other categories for Initial Criteria 1, Bledsoe's Abner Branch Mine met those requirements.[10]

The Court also inquired as to the particular pattern criteria MSHA relied upon when it informed Bledsoe on November 18, 2010 that a Potential Pattern of Violations existed at its Abner Branch Mine. A related question, the Court asked whether, when MSHA informed the mine on March 18, 2011 that a PPOV continued to exist, that determination was based upon *all* S&S violations or only S&S violations involving 30 C.F.R. § 75.400. The Secretary advised that the November 18, 2010 letter relied upon Section 104.2 *in toto*, as that Section identifies the factors to be considered in the Initial Screening review period. Once, as happened here, that Initial Screening did not eliminate the mine, MSHA advanced to the Pattern Criteria provision, as set forth at Section 104.3. In turning to Section 104.3, MSHA examined the three criteria identified at that provision, which includes "[a] history of repeated significant and substantial violations of a particular standard." 30 C.F.R. § 104.3(a)(1). That "particular standard" here was 30 C.F.R. § 75.400. That determination was then reflected in MSHA's November 18, 2010 letter to the mine which letter included the Agency's "Screening Criteria Results for Pattern of Violations" (i.e. the "SCR for POV," referred to above). Accordingly, the Court finds that MSHA followed its rules completely; first finding that the mine was captured within the Initial Screening, per 30 C.F.R. Section 104.2, then identifying the applicable Pattern Criteria, per 30 C.F.R. Section 104.3, and then issuing the notice, per 30 C.F.R. Section 104.4, on March 18, 2011, that the mine failed to meet its target rate. Again, completely complying with its 30 C.F.R.

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month review period. One will recall that, as long as a citation/order is issued *after* October 1, 1990, the other determining factor for inclusion is that the citation/order becomes *final* during the review period. Each of those three did become final during the review period and, as previously noted, there is no factual dispute about that. Accordingly, while representing a complete record of the Section 75.400 violations cited during the review period, the 31 citations are not germane to the Secretary's motion, other than reflecting six of the nine S&S violations which became final. Those nine, it will be recalled, met the "Final Order Criteria," requiring that at least 5 such S&S citations/orders became final orders of the Commission during the one year review period. The Court notes that there is no factual dispute about this matter either.

[9] The same 5 pages include a running total of the S&S violations, (described as "S&S Count" within the "Cumulative During Review Period" categories) as reflected in the next to the last column on the right hand side of each page. The S&S Count begins with Citation No. 8356674, which was issued on 11/19/2009; it was the 6th citation issued to the mine during the date span reflected on the 5 pages reflecting all of the citations issued during the review period.

[10] For example, in category 2, it exceeded the rate of eight or more S&S citations/orders issued per 100 inspection hours by having a rate of 10.98.

Pattern of Violations provisions, the MSHA District Manager, finding that Bledsoe did not meet its target rate,[11] and that no mitigating circumstances existed to explain that failure,[12] submitted his report to the Administrator for Coal Mine Safety and Health and noted that the mine had 10 days to submit comments to the Administrator about MSHA's finding that a Potential Pattern of Violations continued to exist.[13]

MSHA has noted in its Supplement to Motion for Partial Summary Decision (Sec's Supplement) that for the 18 alleged violations, each of which is also alleged to be S&S, none are final. That is, each of the 18 alleged violations, referenced in its March 18, 2011 letter to Bledsoe, are contested and pending litigation. Supplement at 6 and Exhibit 6. The Secretary takes the position that none of those 18 would need to be upheld for the Respondent to continue to be under a pattern. As expressed in the Sec's Supplement, the mine met the pattern criteria per the District Manager's November 18, 2010 letter to Bledsoe. However, the Secretary goes on to state that "[*t*]*o avoid* the consequences that may result from establishing such a pattern, under 30 C.F.R. § 104.4(a)(4) the mine was provided with an opportunity to institute a program to avoid repeated significant and substantial violations. The District Manager allowed a nine-week period, from January 11, 2011 to March 12, 2011, for determining whether the program effectively reduced the occurrence of significant and substantial violations at the mine. . . . that program was aimed at reducing the occurrence of significant and substantial violations at the mine without limitation to specific mandatory standards. The program failed." Sec's Supplement at 7. Thus, by the Secretary's vantage point, because the mine "failed to effectively reduce the occurrence of significant and substantial violations during the period provided under 30 C.F.R. § 104.4(a)(4), the Secretary issued 104(e) Notice No. 8333606." *Id.*

Although the Secretary notes, and the Court agrees, that "[t]here is no regulatory requirement that significant and substantial violations issued during the corrective-action-program period must be final before the Secretary may determine whether the program effectively reduced the occurrence significant and substantial violations at the mine," that can only carry the Secretary's position until the alleged violations with the disputed significant and substantial findings have been adjudicated. Any other position would make no sense at all. For example, if none of the 18 S&S violations were found, upon being litigated, to be, in fact,

[11] MSHA's November 18, 2010 letter to the mine advised that it had to meet an S&S target rate of 5.49, *or lower*, per 100 inspection hours. As noted in MSHA's March 18, 2011 letter to the mine, Bledsoe did not come even close to this rate. Instead, its rate was more than *double* the maximum rate allowed, at 11.54 S&S violations per 100 inspection hours. In noting that the mine failed to achieve the target rate, MSHA's review took into account all S&S violations issued per 100 inspection hours.

[12] It should be noted that Bledsoe's Counsel has not argued that there were any such mitigating circumstances that should have been considered to explain its failure to meet the target rate of S&S violations.

[13] The 18 S&S violations identified in MSHA's March 18, 2011 letter to Bledsoe have not become final orders. Each of them are being litigated. Accordingly, it is possible that, should a certain number of those S&S violations ultimately be found, either through litigation or otherwise, that they were not, in fact, S&S, the S&S violation rate could be redetermined to be at a lower rate than the presently assumed rate of 11.54 such violations per 100 inspection hours.

"S&S," the Secretary could hardly assert that the mine failed to meet its target rate. While the Secretary adds that the pattern provision under the Mine Act does not even require "that the mine be provided with an opportunity to institute a program to avoid repeated significant and substantial violations before the Secretary may issue a 104(e) pattern notice," the fact of the matter is that *MSHA does provide such an opportunity*. Sec's Supplement at 7. That *opportunity* would be meaningless if, under the example just given, a mine, despite showing that it *in fact had met or exceeded its target rate*, would remain under the pattern, regardless.

Finally, the Court inquired as to the impact on the other ten (10) dockets[14] if it were to rule in favor of the Secretary's Motion for Partial Summary Decision. The Secretary advises that a hearing would be needed for each of dockets.

Bledsoe too responded to questions posed by the Court and it renewed its cross-motion for summary judgment in the same document. ("Bledsoe Response"). In its Response, Bledsoe contends that the Secretary "argues that following the **procedures** set forth in 30 C.F.R. Part 104 is all that is needed for an adjudication of a POV." Bledsoe Response at 2 (emphasis in Response). Of course, the Secretary does not merely claim that **procedural** fealty alone can carry the day. Among other things, there have to be violations, which have become final and which became final during a particular review period. Bledsoe continues its argument, asserting that "the statute and the regulations remain silent as to what constitutes a POV," but that too is an exaggeration, as the regulations do explain the pattern criteria and the steps which follow on the road to the issuance of a notice of a pattern of violations from the Administrator. Continuing its usage of hyperbole, Bledsoe claims that the Secretary "has determined that more than one final S&S violation is sufficient." *Id.* at 3. The Secretary made no such claim. Instead, the Secretary gathered the facts pertaining to violations which became *final* during the review period and applied those final determinations to the regulations, noting along the way the Agency's meticulous adherence to the procedural steps under the Pattern of Violations regulations at Part 104.

So too, Bledsoe takes references to Congress' statements about a pattern, wherein that body expressed that "a pattern would be 'more than an isolated violation' but not necessarily 'a prescribed number of violations," and the Court's statement from that Congressional remark about patterns that "Congress identified one end of the spectrum, that a pattern is more than an isolated violation, but left it to the Secretary's expertise to determine when *more* was needed to be done for enforcement than simply the routine process of identifying each violation, one by one, and then having each violation abated," and transforms them into "the ALJ's ruling" claiming that it is a "more than one" standard. In its subsequently submitted "SUPPLMENTAL [*sic*] MEMORANDUM", Bledsoe repeats this claim: "Bledsoe is fully aware that the ALJ has ruled that more than one S&S violation may be sufficient to establish a pattern" and that this judge-created standard "subjects every mine in the country to a POV finding . . . [by] hold[ing] that any mine which receives more than one S&S violation over a two year period may be

[14] These are Docket Numbers KENT 2011-1345, KENT 2011-1220, KENT 2012-284 and KENT 2012-381.

subject to a POV finding based on whatever criteria the Secretary chooses to apply at a given time." SUPPL[E]MENTAL MEMORANDUM at 3. The Bledsoe-created "more than one" standard blossoms into a claim that it allows the Secretary to "call any pattern of more than one accusation a POV." BLEDSOE RESPONSE TO SECRETARY'S MOTION at 4-5.[15]

In Bledsoe's "SUPPL[E]MENTAL MEMORANDUM IN RESPONSE TO THE SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION," it responded to two questions posed by the Court in reaction to the Motion and Bledsoe's initial response thereto.[16] The Court asked if Bledsoe believed it should be entitled to relitigate all S&S violations, including those which have become final orders. As to final orders, Bledsoe concedes that it cannot relitigate S&S violations which have become final. However, Bledsoe, notes that, of the 79 citations designated as "S&S" in the period from November 2, 2009 through August 25, 2010, it challenged 53 of them, with the 26 others becoming final orders. Bledsoe Suppl[e]mental Memorandum at 2-3. Bledsoe notes that "**[**a]ll 79 were the basis for the PPOV notice issued by the Secretary." *Id*. at 3.

In one aspect the Court does agree with Bledsoe. This relates to any S&S citations/orders which it has contested and have not since become final orders. As noted in a more detailed fashion below, any such non-final citations/orders which were a part of the basis for MSHA's determination to issue its Section 104(e) Notice, No. 8333606, because they were part of the Agency's determination that Bledsoe failed to meet its target rate, must be tried promptly because there is the possibility that some number of those violations could be found by the Court as non-S&S violations. A sufficient number of such non-S&S findings raises the possibility that Bledsoe's S&S rate could be at or below 5.49 per 100 inspection hours. Only a hearing and a decision on those non-final matters can resolve that. In the meantime, just as with a section 104(d)(1) citation or order, that is subsequently found, after a hearing, to lack the special findings of being S&S and unwarrantable, or simply unwarrantable, as the case may be, the section 104(e) Notice, No. 8333606 remains intact. Should the requisite number of violations be found to be "non-S&S," and therefore establish that Bledsoe did achieve at least its target rate, the section 104(e) Notice would be unwound, just as in the case of 104(d)(1) citations and orders found to be lacking.[17]

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[15] Though it started with the "more than one" seed, then nurtured it into a flower, Bledsoe then cultivates an entire garden, claiming that "[o]nce a mine has more than one final S&S vioilation, the Secretary could call this a PPOV [and following that it] "could issue as many S&S violations as her inspectors could write." Moving to the hysterical, in both senses of the word, Bledsoe asserts "[i]n no time, every underground coal mine in the country will be on a POV." *Id.* at 5. Really.

[16] The Court's second question to Bledsoe requires little time to address. The Court asked Bledsoe whether, given its position that there is no definition of what constitutes a POV, does it maintain that MSHA must embark on rulemaking again. Bledsoe answered in the affirmative, asserting that the Secretary must engage in rulemaking to define a pattern of violations. Bledsoe Suppl[e]mental Memorandum at 4. The Court, based on its prior Order on Contestant's Motion for Partial Summary Decision and this Order, finds that the Secretary's Rulemaking for Part 104, Pattern of Violations passes scrutiny.

[17] The analogy to the "chain" created under section 104(d) of the Mine Act is well understood and

CONCLUSION

For the reasons set forth above, the Secretary's Motion for Partial Summary Decision is GRANTED. However, as noted at footnote 13, "The 18 S&S violations identified in MSHA's March 18, 2011 letter to Bledsoe have not become final orders. Each of them are being litigated. At the hearing, these will be tried first. Accordingly, as discussed earlier, it is possible that, should a certain number of those S&S violations ultimately be found, either through litigation or otherwise, that they were not, in fact, S&S, the S&S violation rate could be redetermined to be at a lower rate than the presently assumed rate of 11.54 such violations per 100 inspection hours." This is potentially important for Bledsoe, as a finding that some, yet to be calculated, number of violations either were not violations or at least were not "significant and substantial" violations, could reduce its S&S violation rate to at or below 5.49 per 100 inspection hours. Therefore these alleged violations need to be set for hearing immediately. The parties are directed to email the Court immediately to establish a date and time for a conference call so that the prompt hearing for these matters can be finalized.

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

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apt here. Placing a mine operator under the "increasingly severe sanctions" through that provision does not have to await a final determination before such sanctions become effective. *See, e.g., Secretary v. Weirich Brothers*, 27 FMSHRC 379, 2005 WL 1198587 (April 2005), and *Secretary v. Lodestar Energy*, 25 FMSHRC 343, 2003 WL 21665294 (July 2003), noting that, where S&S and unwarrantable findings are not sustained, the citations or orders issued under section 104(d) are to appropriately modified.

APPENDIX

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OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
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	)	
HILDA L. SOLIS, Secretary,	)	DOCKET NO. KENT 2011-975-R
of Labor, United States Department	)	ORDER NO. 8353825; 04/21/2011
of Labor	)	
	)	DOCKET NO. KENT 2011-976-R
	)	ORDER NO. 8353838; 05/03/2011
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	)	DOCKET NO. KENT 2011-977-R
	)	ORDER NO. 8353839; 05/03/2011
	)	
	)	DOCKET NO. KENT 2011-978-R
	)	ORDER NO. 8353855; 05/10/2011
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	)	DOCKET NO. KENT 2011-979-R
	)	ORDER NO. 8353858; 05/12/2011
	)	
	)	DOCKET NO. KENT 2011-980-R
	)	ORDER NO. 8406696; 05/10/2011
	)	
	)	DOCKET NO. KENT 2011-981-R
	)	ORDER NO. 8406699; 05/10/2011
	)	

) MINE ID NO. 15-19132
) MINE: Abner Branch Rider

ORDER ON CONTESTANT'S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Moran

On August 17, 2011, Contestant Bledsoe Coal Corporation ("Bledsoe") filed its Motion for partial summary decision ("Motion") seeking the vacation of each order issued by the Mine Safety and Health Administration ("MSHA" or "Agency") associated with the Agency's issuance of a notice of a pattern of violations ("POV") on April 12, 2011. Bledsoe assails the Agency's decision on the grounds that it was never subjected to notice and comment rulemaking, that it lacked fair notice and that the criteria it used were an unreasonable interpretation of the Mine Act and regulations. For the reasons which follow, each of Bledsoe's claims is rejected.[18]

In an unfortunate practice of selectively quoting, and by that process, being misleading as to the Mine Act's requirements regarding a pattern of violations of mandatory health or safety standards, Bledsoe asserts "Congress mandated the Secretary, under Section 104(e)(4) of the Mine Act, to "make such **rules**" to establish the criteria for determining when a pattern of violations exists." Motion at 3-4 (emphasis in Motion). The Mine Act states no such thing. Instead, the provision provides, *in full*, that "The 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."[19]

Although once would be too often, Bledsoe repeats its mischaracterization, which mischaracterization is *not* about some ancillary matter, but involves a fundamental aspect of the issue. Bledsoe's own words put this on full display, as it asserts: "Section 104(e)(4) of the Mine Act directed the Secretary to make rules for determining when a pattern exists, but in so doing, Congress, in unambiguous language, directed the Secretary to use notice and comment rulemaking in accordance with the Administrative Procedure Act." Bledsoe Motion at 8. And yet again, not much later in its Motion: "Congress required the Secretary to use notice-and-comment rulemaking to establish POV criteria." *Id.* at 11. To borrow, and slightly alter, an expression, "a mischaracterization, stated often enough, does not become an accurate

[18] Simultaneously being issued today is the Court's ruling on the Secretary's Motion to Dismiss for Lack of Jurisdiction in which the Court DENIES the Secretary's Motion. For ease of reference and because the two orders need to be considered together, a copy of that Order appears as an Appendix to this Order.

[19] It is a curious thing, the practice of advocates to parse out words and apparently assume that no one will notice that only part of the story has been told. In the Court's view, it is better, and ethically superior, to acknowledge the troublesome language and deal with it forthrightly, either by arguing that it means something other than the words suggest or by demonstrating, if possible, that notwithstanding the nettlesome words, the Secretary must make rules even though the statute suggests that discretion is involved.

characterization." That is, proof by repeated assertion does not make something so. Accordingly, to keep the facts straight, it bears repeating, with emphasis upon the critical phrase omitted by the Contestant, to bring attention to the words of the statutory provision:

> The 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.

Thus, as evident by the italicized language, any rules are only as the *Secretary deems necessary.* With that power and discretion, one obvious option for the Secretary was that it could have been decided that no such rules were necessary.

The parameters which may constitute a Pattern of Violations

As the Secretary has observed, the dictionary defines a "pattern" in a manner which is consistent with the common understanding of the word, by describing it as "a reliable sample of traits, acts, or other observable features characterizing an individual [] behavior [pattern] . . . ." In line with that sense, the Senate Committee spoke to that provision of the Mine Act, expressing that it would be shown where a mine has "'an inspection history of recurrent violations' or 'continuing violations,' and that a pattern would be 'more than an isolated violation' but not necessarily 'a prescribed number of violations.'" Response at n. 2, citing S. Rep. No. 95-151, pp. 32-33. Thus, Congress identified one end of the spectrum, that a pattern is more than an isolated violation, but left it to the Secretary's expertise to determine when *more* was needed to be done for enforcement than simply the routine process of identifying each violation, one by one, and then having each violation abated.

That Congress decided to leave it to the Secretary to develop the parameters for a pattern is not simply surmise. Both the statutory provision itself and the legislative history make this clear. Regarding the latter, the same Senate Report expresses an intent for the Secretary to be afforded "broad discretion in establishing criteria for determining when a pattern of violations exists." Response at 6, citing the same S. Rep. at 33. The Senate, rather than setting a number of conditions and requirements for the pattern tool to be employed, did the opposite. It noted that the criteria for identifying a pattern would "necessarily have to be broad enough to encompass the varied mining activities within the Act's coverage." *Id.* The Senate went further in explaining its design, stating that a pattern can be composed of violations of *different* standards and was certainly not limited to violations of particular standards. Although it acknowledged the obvious, that a pattern, by definition must be more than a single, isolated, violation, that did not mean that "a prescribed number of violations" had to occur, nor that the violations had to come from "predetermined" that is, previously identified, standards. Last, the Senate noted that, while a "pattern" represents something more than an isolated violation, it does not require some intent or state of mind on the part of the mine where a pattern is found to exist. *Id.* Thus, if the pattern is present, that is sufficient, even if no intentional disregard of safety or health concerns is evident. In short, with intent not a prerequisite, a number, as long as it is a number greater than one, potentially can be enough, dependent upon the circumstances, to establish a pattern.

As the Secretary notes, from the Mine Act's legislative history, the provision was intended to "provide an effective enforcement tool" in situations where the mine operator has demonstrated disregard for miners' safety and health by having a pattern of violations. Its use was contemplated where a mine has permitted continued safety and health standard violations, and it has been concluded that simply abating violations as they occur is not doing the job, and that a next step is necessary to "restore the mine to effective safe and health conditions." Response at 5, citing S. Rep. No. 95-181, pp. 32-33. (1977).

Apart from whether the Secretary was obligated to promulgate a pattern regulation, the fact is that it did so, utilizing the notice and comment rulemaking procedures under the Administrative Procedure Act. This result of this process, appearing at 30 C.F.R. Part 104, begins by examining the compliance records of mines annually. Other factors, such as whether a mine has demonstrated a lack of good faith in correcting significant and substantial violations, the non 104(e) enforcement measures that have been applied, and whether the mine's accident, injury or illness record reflects a serious problem with managing safety or health matters, are examined, together with any mitigating considerations. Where a mine is not ruled out after the initial screening, then a mine with recurring significant and substantial violations is evaluated by application of the pattern criteria. These are set forth at 30 C.F.R. § 104.3(a)(1)- (3).[20] Again, the review works by determining, at that second stage, if the mine under review may be eliminated from a pattern designation. If a mine remains a subject of concern, the third phase is applied. In that posture, the mine is notified of MSHA's concern and that it has been identified as having a potential pattern of violations issue.[21] Even then, in what can only be described as an

[20] § 104.3 Pattern criteria. (a) The criteria of this section shall be used to identify those mines with a potential pattern of violations. These criteria shall be applied only after initial screening conducted in accordance with § 104.2 of this part reveals that the operator may habitually allow the recurrence of violations of mandatory safety standards or health standards which significantly and substantially contribute to the cause and effect of mine safety or health hazards. These criteria are (1) A history of repeated significant and substantial violations of a particular standard; (2) A history of repeated significant and substantial violations of standards related to the same hazard; or (3) A history of repeated significant and substantial violations caused by unwarrantable failure to comply. (b) Only citations and orders issued after October 1, 1990, and that have become final shall be used to identify mines with a potential pattern of violations under this section. 55 FR 31136, July 31, 1990.

[21] The Proposed Rule noted that the intention behind section 104(e) is plain; it is intended to address "mines with a record of repeated S & S violations" upon the Secretary's determination that the Act's other enforcement mechanisms have not been effective in achieving compliance with the safety and health standards. The Rule noted that, in accomplishing that next step, "[t]he Secretary has broad discretion in determining [the] criteria [for determining when a pattern exists]." 54 FR 23156-01 at * 23156.

Truly, the Rule's operation allows, effectively, an individualized notice and comment procedure, upon the Agency's notification to a particular mine that the mine is under review for a possible pattern of violation issuance. This process ensures that a given mine will have had the opportunity for full input into the Agency's review of the appropriateness for that specific mine to be issued a notice of a pattern

overabundance of due process, the mine is not faced with a section 104(e) enforcement action. Instead the mine has the opportunity: to examine the documents MSHA has relied upon to arrive at that stage of review; to provide additional information to the Agency; to request a conference with MSHA; and to launch a program to avoid such repeated significant and substantial violations.[22] As the Secretary appropriately observes, Section 104(e)(1) does not require that these extraordinary lengths be taken before a notice under that provision can be issued. Thus, it is a great understatement on the Secretary's part to describe the rulemaking as providing "ample notice" before issuance of the section 104(e)(1) notice. A mine operator is provided notice "writ large" under the rule and this occurs in the context of requiring the Secretary to provide only a notice that a pattern of violations exists.[23] Again, that determination by the Secretary, that a mine has "a pattern of violations of mandatory health or safety standards," requires making rules for establishing the criteria for determining when a pattern exists, only as the Secretary *deems necessary*. Section 104(e)(4).

Even after the completion of all that process, more is provided, as the District Manager, upon concluding at the end of the day that a potential pattern exists, then sends a report concerning the evaluation to the applicable MSHA Administrator at which point the mine has yet another opportunity for comment. It is not until all that has transpired that the Administrator

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under section 104(e).

Certainly the Agency's final rule reflected full consideration of all comments made to the proposal, together with the Agency's rationale for its responses to those comments. In short, the rule does not operate in any automatic function; input from the mine involved is considered before the Administrator makes the final determination. Further, while the "Initial screening" considers non-final citations and orders, the "pattern criteria" used to identify mines with a potential pattern takes into account only those that have become final citations or orders. 55 FR 31128-01 at * 31136.

[22] Section 104.4, Issuance of notice, provides: (a) When a potential pattern of violations is identified, the District Manager shall notify the mine operator in writing. A copy of the notification shall be provided to the representative of miners at the mine. The notification shall specify the basis for identifying the mine as having a potential pattern of violations and give the mine operator a reasonable opportunity, not to exceed 20 days from the date of notification, to take the following steps: (1) Review all documents upon which the pattern of violations evaluation is based. (2) Provide additional information. (3) Submit a written request for a conference with the District Manager. The District Manager shall hold any such conference within 10 days of a request. The representative of miners at the mine shall be provided an opportunity to participate in the conference. (4) Institute a program to avoid repeated significant and substantial violations at the mine. The District Manager may allow an additional period, not to exceed 90 days, for determining whether the program effectively reduces the occurrence of significant and substantial violations at the mine. The representative of miners shall be provided an opportunity to discuss the program with the District Manager. 30 C.F.R. § 104.4.

[23] Accordingly, Bledsoe's claim that the Secretary did not give "fair notice" of the criteria to determine a POV is hollow. When challenging those citations/orders which have not been settled, Bledsoe could, in theory, challenge whether it received "fair notice" of the particular standard therein cited, as distinct from the rejected claim that it had no notice of the criteria used to determine a POV. In the same vein, claims that "rulemaking by program policy manual and website" and by "press release" do not deserve further comment.

makes the decision whether the mine is to be issued a notice of a pattern of violations. 30 C.F.R. § 104.4(c). If there is a problem to be identified with the procedure developed by MSHA, it is that it is far too generous and prolonged. It is hard to imagine, given the Senate Report statements about this enhanced enforcement tool and the design for its use, that Congress intended such a protracted process.[24]

Moving from the established framework for determining whether to proceed with a pattern of violations to applying that procedure in the present case, the Secretary notes that it conducted such a screening for Bledsoe's Abner Branch Rider Mine, examining a 12 month period which ended on August 31, 2010, and then, following the final rule's procedure, informed Bledsoe there was a potential pattern. Bledsoe was advised at that time that 9 citations or orders pertaining to violations of 30 C.F.R. § 75.400, which had all become final orders were part of this matter. Meetings followed and Bledsoe, utilizing the Rule's procedures, submitted a corrective action plan. That plan, again pursuant to the Rule, was evaluated by the District Manager, who advised the Respondent that he would be required to make a report to the Administrator and that occurred on March 18, 2011. Nearly four weeks later, on April 12, 2011, the Administrator for Coal Mine Safety and Health notified Bledsoe that he had determined the existence of a pattern of violations at the mine. The District Manager then issued, that same day, a Section 104(e)(1) notice, Number 8333606, which is the subject of this litigation.

In arguing that Bledsoe's arguments should be rejected, the Secretary first addresses the claims about inadequacy of the screening process, and its objections that the regulation does not "specify the time period of a mine's compliance history that will be examined during the initial screening" and that it is not limited to considering only final orders in that initial screening process. The Secretary's response is convincing, as it notes that Section 104(e) has no such requirement for a particular time period to be examined. The implicit suggestion, that MSHA should have selected a fixed time period, would have been arbitrary. The Secretary properly notes that the legislative history recognized that a one-size-fits-all approach would be jejune.[25] Further, as this reasoned choice by the Secretary is not unreasonable, nor arbitrary or capricious,

[24] While one might think that the final rule would be the final word on the subject, MSHA has further addressed the subject in its Program Policy Manual. Suffice it to say that while the PPM provides helpful explanatory guidance about the final rule for Agency personnel, it does not amend, alter, or otherwise change that Rule.

[25] As the Secretary states: "In promulgating § 104.2 - the initial screening regulation - the Secretary expressly declined to impose a particular period to be examined in every case, recognizing that 'interruptions in mining operations, changes in mine management or ownership, or other factors could indicate that this period should be longer or shorter.' 55 Fed. Reg. 31,130 (July 31, 1990). And in promulgating the pattern criteria in § 104.3, the Secretary expressly rejected the suggestion that 'only citations and orders issued within certain time periods . . . be considered in applying the pattern criteria' because such a rule 'would unduly restrict the Agency's ability to enforce section 104(e). . . .' *Id.* at 31,132-3." Sec. Response at 23. Further, the Secretary observes that "Congress expressly delegated to the Secretary the authority to make rules to implement Section 104(e) [and that the same Section] is silent with respect to the compliance-history period to be considered when determining whether the mine has a pattern of violations. *Id.*

the deference principles articulated in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) apply. Sec. Response at 23.

In the same vein, the Secretary observes that the statutory provision is also silent on the issue of whether non-final citations and orders may be considered.[26] The Secretary makes two key points on this issue:

> Limiting pattern consideration to final orders would undermine Section 104(e)'s effectiveness by eliminating consideration of current or recent mine conditions and practices – precisely the matters that are most relevant in determining whether the mine currently should be considered for enhanced enforcement measures – and focusing consideration instead on mine conditions and practices that are more remote in time.

Sec. Response at 24-25. The Contestant's position would severely hamper the enforcement tool that Section 104(e) surely is, as "citations and orders frequently do not become final until months or years after they are issued."[27] *Id.* at 24.

Second, the Secretary aptly compares the pattern of violation application with the unwarrantable failure sequence of Section 104(d). This is not a stretch by any means, as the Senate Report itself made such a comparison, observing that the POV "sequence parallels the current unwarrantable failure sequence." S. Rep. No. 95-181, p. 33. Borrowing from that Senate Report, the Secretary notes that the comparison was expressly stated. Particularly pertinent here in that comparison is the point that "[i]t is beyond debate that a closure order under Section 104(d)(1) may be based upon a Section 104(d)(1) citation that is not final, and a closure order under Section 104(d)(2) may be based upon a Section 104(d)(1) order that is not final." *Id.* at 25.

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[26] The Secretary looks to the legislative history, urging that it "suggests that Congress did not intend to require the Secretary to limit her consideration to final orders. Section 104(e) was enacted in response to the Scotia mine disaster and the ensuing investigation which revealed that the mine had an 'inspection history of recurrent violations.' S. Rep. No. 95 181, p. 32. Congress thus focused Section 104(e) on a mine's 'inspection history' rather than on a mine's final order history." Sec. Response at 24. In the Court's view, this is certainly a rational interpretation of the legislative history and therefore it supports the Secretary's approach here, per *Chevron.*

[27] One could fairly expect that if mine operators had their way and only final orders could be considered before a pattern could be invoked, the defense would then be raised by some that such information was now stale and useless in assessing the mine's current operational procedures, given the passage of years since the conditions were initially cited. Thus, if it were to prevail that such pre-final orders were "too soon" to be considered, and MSHA were left to consider only final orders, those would then be characterized as "too late." Often, the approach is really about delay. For example, back in 1980, when the task of identifying mines with a pattern of violations was first raised as a proposed rule, the "concerns" raised caused the Agency to withdraw its proposal with the result that it was not until nearly nine (9) years later before it was proposed again.

Thus, the Court agrees with the Secretary's point that, by Congress making such a comparison, it is reflective that POV determinations also need not be based upon final orders. Further, clearly, under a *Chevron* analysis, the Secretary's decision to include non-final citations and orders, does not run counter to the statute, nor can it be characterized as arbitrary, unreasonable or capricious.

Turning to Contestant's claim[28] that the POV Procedures Summary and Screening Criteria are "rulemaking through website" in violation of Section 104(e) of the Mine Act and the notice-and-comment provisions of the APA, the Secretary makes the same point that the Court noted earlier, namely that, "Section 104(e)(4) of the Mine Act does not 'require[] the Secretary to use notice-and-comment rulemaking to establish POV criteria' . . . . Section 104(e)(4) provides only that the Secretary 'shall make such rules as he deems necessary'; it does not require any particular rulemaking procedure." *Id.* at 26, referencing Contestant's Motion at 11.

The Secretary also makes note that, under the Administrative Procedure Act, rules may be valid even though not promulgated after notice under 5 U.S.C. § 553(b),[29] and that, as "rules," they are exempt from the APA's notice-and-comment provisions because such provisions "do not apply to 'interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice [ ].'"[30] *Id.* at 26-27.

These two observations also make sense when placed in the context of the use for the "POV Procedures Summary and Screening Criteria." That critical context is that the POV Procedures "describe the *internal* procedures MSHA personnel – and only those who answer to the Administrator – follow in reviewing mine violation histories under Section 104(e) of the Mine Act and Part 104; they pertain to the procedural aspects of the review of mine violation histories. They are not law; they do not bind the public." *Id.* at 27. (emphasis added).

Further, as the Secretary also notes, although the POV Procedures "may bind MSHA personnel to the extent personnel must follow supervisory direction, they do not bind the Administrator in any case. *They address MSHA's conduct* in reviewing mine violation histories *in preparation for the Administrator's exercise of discretion regarding possible enforcement action*; they do not address operator conduct. [Accordingly,] [t]hey help 'direct the analysis [of whether the mine has a pattern of violations] but not necessarily the answer.'" *Id.* at 27.[31]

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[28] Contestant's Motion at 12.

[29] 5 U.S.C. § 553(b)(3)(A), (B).

[30] 5 U.S.C. § 553(b)(3)(A)

[31] Citing *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369, 1377 (11th Cir. 1983). As the 11th Circuit observed in that case, "[a]s long as the agency remains free to consider the individual facts in the various cases that arise, then the agency action in question has not established a binding norm." Citing *American Trucking Associations, Inc. v. ICC*, 659 F.2d at 463, among other cases. In *Ryder*, the Court recognized that various criteria had been enumerated but that any presumptions remained rebuttable and that the review will involve scrutinizing the actual operation. That is *exactly* what occurs here. Also as in *Ryder*, the process of issuance of a section 104 (e) notice follows "an intensely factual determination

(emphasis added). The Secretary observes that this is consistent with "MSHA's Procedure Instruction Letter [which was] held exempt from notice-and-comment rulemaking in *National Mining Ass'n. v. Secretary of Labor*, 589 F.3d 1368, 1372 (11th Cir. 2009)."[32] Similarly, the Secretary points out that "the POV Procedures Summary and Screening Criteria address 'the general procedures District Managers are to consider' in evaluating a mine's violation history under Section 104(e) of the Mine Act and Part 104; but the agency – the District Managers and ultimately the Administrator – is 'free to consider individual facts' when evaluating each specific mine." (quoting *Ryder Truck Lines*, 716 F.2d at 1377)." Sec. Response at 27-28.[33]

Thus, the Court agrees with the Secretary that Part 104 informs the mining community of the pattern criteria used to identify a potential pattern of violations at a given mine and the procedures MSHA will follow upon making such identification, culminating in the Administrator's decision as to whether a notice of a pattern of violations will be issued.[34]

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informed by [the] relevant criteria."

[32] As the 11th Circuit emphasized, *National Mining Ass'n. v. Secretary of Labor*, the obligation to publish a proposed rule pertains to the promulgation of new or revised *mandatory* standards. No new "across-the-board rules" have been created by the POV Procedures.

[33] The Secretary cites a host of cases presenting similar situations: the Occupational Safety and Health Administration's per-instance-penalty policy held exempt from notice-and-comment rulemaking in *Kaspar Wire Works, Inc. v. Secretary of Labor*, 268 F.3d 1123, 1132-33 (D.C. Cir. 2001), the POV Procedures Summary and Screening Criteria do not "'encode[] a substantive value judgment or put[] a stamp of approval or disapproval on a given type of behavior.'" (quoting *American Hosp. Ass'n. v. Bowen*, 834 F.2d 1037, 1047 (D.C. Cir. 1987)); the
Department of Health and Human Services ("HHS") Provider Reimbursement Manual provision held exempt from notice-and-comment rulemaking in *Sentara-Hampton Gen. Hosp. v. Sullivan*, 980 F.2d 749, 759 (D.C. Cir. 1992), the POV Procedures Summary and Screening Criteria are "not intended to substantively change existing rights and duties." In *Sentara-Hampton Gen. Hosp*., the Court explained that explaining ambiguous language or reminding parties of existing duties, that is not creating new law. *Id.* Thus, the POV procedures only address the exercise of enforcement discretion under 30 C.F.R. Part 104 and not "enforcement of new obligations." Accordingly, they do not bring about substantive change. See also *JEM Broadcasting Co. v. FCC*, 22 F.3d 320, 326-27 (D.C. Cir. 1994) (holding exempt FCC's "hard look" rules that guided agency's review of license applications and resulted in elimination of some applications); the HHS Manual IM85-3 policy held exempt from notice-and-comment rulemaking in *American Hosp. Ass'n. v. Bowen*, 834 F.2d 1037, 1051-52 (D.C. Cir. 1987), the POV Procedures Summary and Screening Criteria "target" the "focus" of MSHA's "enforcement efforts," do not impose new burdens on operators, and are well within MSHA's "discretionary enforcement authority;" and the Federal Savings and Loan Insurance Corporation's directives held exempt from notice-and-comment rulemaking in *Guardian Fed. Sav. and Loan Ass'n. v. FSLIC*, 589 F.2d 658, 666-67 (D.C. Cir. 1978), the POV Procedures Summary and Screening Criteria preserve the enforcement discretion of the Administrator."

[34] Having concluded that the Secretary was not required to do as much as it did, the Court agrees that more was not needed beyond the issuance of Part 104. As the Secretary notes, the Administrative Procedure Act "does not require that all the specific applications of a rule evolve by further, more precise rules." Sec. Response at 30, citing *Shays v. Federal Election Comm'n*., 528 F.3d 914, 930 (D.C. Cir. 2008) (quoting *Shalala v. Guernsey Mem'l. Hosp.*, 514 U.S. 87, 96 (1995)).

Drummond is not instructive.

Bledsoe points to *Secretary v. Drummond Company, Inc.*, 14 FMSHRC 661, 682 (May 1992) for authority in support of its inaccurate claim that "Section 104(e)(4) of the Mine Act directed the Secretary to make rules for determining when a pattern of violations exists . . . ." Motion at 8. *Drummond* challenged the Secretary's interim excessive-history civil penalty program and the Commission found that the program was inconsistent with and therefore modified the existing 30 C.F.R. Part 100 penalty regulations. However, as the Secretary correctly observes, " nothing in the POV Procedures Summary or Screening Criteria is inconsistent with or modifies 30 C.F.R. Part 104 or any other regulation." *Id.* at 30.

The Court would add that the circumstances were very different in that case as *Drummond* focused exclusively on the penalty computation regulations which were in existence and formulated through the notice and comment process.[35] Placed in context, in that litigation, the complaint was that penalties were being computed, not in accordance with Part 100 but rather upon the Secretary of Labor's Program Policy Letter, which was a program established outside the notice and comment process of the Administrative Procedure Act. As the Commission expressed it, the challenge from the mine operators in *Drummond* was that the Secretary was failing to act within the framework of its own Part 100 regulations. *Id.* at *672.

The Secretary's action here would seem to fit within the APA definition of a "Rule,"[36] but the present question is whether there is any deficiency in its application. There was, following the proposed rule, the opportunity for comment from the affected public. It is also true that the notice and comment process is not applicable where interpretive rules, general statements of policy, or rules of agency organization, procedure or practice are involved. 5 U.S.C. § 553 (b)(3)(A). While notice and comment is intended to accomplish public participation and fairness, here Congress' expressed intent was to leave it to the Secretary's discretion as to whether such rules were needed. In short, it was left to the Secretary, not the public, to ultimately decide the parameters of a pattern. Further, consistent with the conclusion that the pattern rule is a statement of policy, it clearly leaves the Agency, through the Administrator, with discretion in its decision making. In fact, it is the ultimate in that regard, as the Administrator, not the final rule, makes the final decision whether to proceed with a pattern notice.[37]

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[35] Based on the Court's other comments in this Order, Bledsoe's claim that MSHA has engaged in "rule-making through website postings" needs no further comment. Bledsoe Motion at 12-13.

[36] 5 U.S.C. § 551(4) defines "Rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing."

[37] It must again be noted that once the Administrator makes that determination, it is hardly the end of the story. A mine operator then has the opportunity to challenge the violations constituting the

Regarding Bledsoe's claim that there was retroactive rulemaking, the Secretary responds that the Pattern provision was promulgated decades before the notice of pattern issued here. The Court agrees that, by that rulemaking, Sections 104.2 (a)(1) and 104.3(a) gave Bledsoe notice of the parameters upon which a pattern could be formulated. Therefore, Bledsoe's protestation that it was caught unaware of the effect of not challenging 26 of the citations which make up the 79 citations during the period from September 1, 2009 through August 31, 2010, rings hollow. There are two reasons for this: first, "Bledsoe was not entitled to know and the Secretary was not obligated to supply information about the internal procedures adopted to guide the agency's exercise of Section 104(e) enforcement discretion." Second, and of significance, as a "pattern does not necessarily mean a prescribed number of violations[38], . . . Bledsoe had no reason to expect that it would ever know that a certain number of S&S violations would subject it to review for a potential pattern or pattern of violations."[39] *Id*. at 34-35.

In sum, the Secretary reiterates that the POV Procedures Summary and Screening Criteria were not required to undergo notice and comment rulemaking. Instead, they serve as guidance for MSHA in the exercise of its discretionary enforcement authority and as such they are not binding on the public or the Administrator. Thus, the Secretary emphasizes that it sufficiently "informed the public through § 104.3(a) that a history of repeated S&S violations: (1) of a particular standard; (2) of standards related to the same hazard; or (3) caused by unwarrantable failure to comply, would identify it as a mine with a potential pattern of violations."[40] Sec. Response at 32. The Court agrees.

There is one aspect of Bledsoe's argument with which the Court agrees, at least in theory. That is Bledsoe's assertion that the "practical effect of a POV notice is that a mine is subject to closure every time an S & S citation is issued. [It notes that] [t]hese citations may be challenged by the operator; however there will still be a closure upon issuance. This allows the Secretary, based on nothing more than allegations, to repeatedly close a mine in perpetuity. In fact, even if all such citations are later vacated, the operator has no remedy to prevent such closures."

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pattern.

[38] Though referenced earlier in this Order, the Senate spoke to this subject at S. Rep. No. 95-181, p. 33.

[39] In the same vein, the Secretary points out that *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204 (1988), involving as it did, the retro-active application of a substantive, legislative rule that was intended to have the force and effect of law, is inapposite, as the POV Procedures Summary and Screening Criteria are procedural.

[40] The Court further agrees that the cases cited by Bledsoe, cases – *Akzo Nobel Salt, Inc. v. FMSHRC*, 212 F.3d 1301 (D.C. Cir. 2000), and *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189 (9th Cir. 1982) – involved challenges to the Secretary's interpretation of mandatory standards that required or prohibited certain conduct by the mine operator and that *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618 (D.C. Cir. 2000) – involved the FCC's interpretation of a regulation that required certain conduct by a regulated party. It is a key distinction that the POV Procedures Summary and Screening Criteria "merely instruct agency personnel in screening and reviewing mines for potential patterns of violations" as opposed to requiring or prohibiting certain conduct by operators. Sec. Response at 33.

Bledsoe Motion at 8. In the Court's view, this observation is really an argument in support of Bledsoe's Response to the Secretary's Motion to Dismiss for Lack of Jurisdiction. As noted at the outset of this Order, the Court has DENIED the Secretary's Motion. *See* n.1, *supra.*

For the foregoing reasons, Contestant Bledsoe's Motion for Partial Summary Decision is DENIED. The parties are directed to contact the Court via its email address for the purpose of arranging a hearing date so that this matter can proceed forward.

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge