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May 20, 2014

POCAHONTAS COAL COMPANY, LLC Contestant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDING Docket No. WEVA 2014-202-R Written Notice No. 7219153; 10/24/2013 Mine ID: 46-08878 Mine: Affinity Mine

ORDER OF DISMISSAL

This case is before me on a Notice of Contest filed by Pocahontas Coal Company, LLC pursuant to Section 105(d) of the Federal Mine Safety and Health. This contest is directed not at a particular citation or order but, rather, at a written notice of pattern of violations issued by MSHA pursuant to Section 104(e) of the Mine Act. On February 27, 2014 the Secretary filed a Motion to Dismiss for lack of jurisdiction. Sec'y Mot. 1. Pocahontas raises a number of arguments in its notice of contest, however, for reasons that follow, I find that the Commission is without jurisdiction to consider these arguments in the context of this proceeding and, accordingly, I **DISMISS** this case.

On October 24, 2013 MSHA issued Written Notice No. 7219153 in which it notified Pocahontas that an alleged pattern of violations existed at Pocahontas' Affinity Mine. The "Condition or Practice" section of the Written Notice included two groups of citations and orders which the Secretary had deemed "illustrative of this pattern of violations." On November 26, 2013, Pocahontas Coal filed this notice of contest pursuant to Section 105(d) of the Act to contest "the issuance of Section 104(e)(1) Written Notice Number 7219153." Pocahontas Notice of Contest 1.

The question of whether the Commission has jurisdiction to hear a contest of a 104(e) written notice of pattern of violations has not been addressed by the Commission. However, two Commission judges have reached conflicting results on the question of jurisdiction regarding a written notice of pattern of violations. In *Bledsoe Coal*, Unpublished Order dated Nov. 11, 2011, Judge William Moran found that the Commission did have jurisdiction to hear a contest of a written notice of pattern of violations. Recently, in *Brody Mining LLC*, 36 FMSHRC ___, slip op. at 4, Docket No. WEVA 2014-81-R (Jan. 30, 2014), Chief Administrative Law Judge Robert Lesnick found that the Commission was without jurisdiction to adjudicate the mine operator's contest of the written notice of pattern of violations by itself.

In order to address this issue, it is helpful begin with a brief overview of the pattern of violations provision in the Mine Act.

The passage of the Federal Mine Safety and Health Act of 1977 introduced the pattern of violations provision. The provision was designed "to provide an effective enforcement tool to protect miners when the operator demonstrates his disregard for the health and safety of miners through an established pattern of violations." S. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 620 (1978). The provision grants the Secretary enforcement authority against mine operators that have a "pattern of violations of mandatory health or safety standards . . . which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health and safety hazards[.]" 30 U.S.C. § 814(e)(1). The Secretary is charged with providing the mine operator with "*written notice* that such a pattern exists." *Id.* (emphasis added). The provision then grants the Secretary authority to issue withdrawal orders, in a sequence which "parallels the . . . unwarrantable failure sequence." for significant and substantial violations issued in the 90 days subsequent to the issuance of the written notice. *See Id.* at (e)(1)-(3); S. Rep. No. 95-181, at 33 (1977), reprinted in Legis. Hist. at 621. The mine operator remains subject to the Secretary's 104(e) withdrawal order power until such time that an inspection of the "entire mine" reveals no S&S violations. 30 U.S.C. § 814(e)(3).

The Mine Act does not define the term "pattern of violations" and, instead, instructs the Secretary to "make such rules as he deems necessary to establish criteria for determining when a pattern of violations of mandatory health of safety standards exists." 30 U.S.C. § 814(e)(4). Accordingly, the Secretary has promulgated rules establishing those criteria. *See* 30.C.F.R. § 104.2. Most recently, the Secretary, after determining that the previous version of the rules implementing the pattern of violations provision "[did] not adequately achieve the intent" of the Mine Act, promulgated new rules under part 104 of her regulations designed to "simplify the existing POV criteria, improve consistency in applying the POV criteria, and increase the efficiency and effectiveness in issuance of a POV notice." Pattern of Violations; Final Rule, 78 Fed. Reg. 5056 (Jan. 23 2013). The Act and the regulations do not address the issue of contesting a notice of pattern of violations.

In *Rushton Mining Co.*, 11 FMSHRC 759, 764 (May 1989) the Commission stated that it "is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers." Given that the Commission is "an administrative agency created by statute, it cannot exceed the jurisdictional authority granted by Congress." *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860 (Aug. 2012) (citing *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (Sept. 1988).

A review of the Mine Act reveals no statutory authority for the Commission to hear a contest to a notice of pattern of violations in the context of a dedicated proceeding. Pocahontas has brought this action pursuant to section 105(d) of the Act. Section 105(d) provides mine operators with the right to contest, among a limited number other things, the issuance or modification of citations and orders. 30 U.S.C. § 815(d). Notably, the section does not afford a right to contest written notices. Further, the legislative history, the Secretary's regulations, Commission case law, and the Commission's Procedural Rules do not reveal any language which could be interpreted to grant the Commission jurisdiction to hear a contest of a written notice of pattern of violations.

In addition, the Mine Act and legislative history make clear that written notices are distinct from citations and orders. The Commission has stated that "in considering the meaning of the Mine Act, we must 'give effect to the unambiguously expressed intent of Congress.'" *Revelation Energy*, 35 FMSHRC 3333, 3337 (Nov. 2013) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). Here, the distinction between a 104(e) written notice and an order issued subsequent to that notice is clear. The language of the Act makes clear that the written notice is a separate document which must be issued prior to any order issued pursuant to section 104(e). Even if one could read some ambiguity into the language of the Act, Congress clearly intended to distinguish between written notices issued pursuant to section 104(e), which are meant to "indicate to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem, one which permits continued violations of safety and health standards..." and orders issued after the operator has been "advised" of the existence of the pattern by way of the written notice. S. Rep. No. 95-181, at 32 (1977), reprinted in Legis. Hist. at 620.

If Congress had intended the Commission to hear contests to written notices of pattern of violations, it would have said so or at least equated the written notices with citations or orders, which are subject to contest proceedings. Instead, Congress differentiated written notices from citations and orders.

Contestant is not without remedy on the issue and may properly challenge the notice of pattern of violations in the context of a contest to an order issued under section 104(e) following the issuance of the written notice of pattern of violations.[1] The Secretary, in his answer to Pocahontas' notice of contest, stated that, while there is "no statutory right to independently contest" the written notice, he "acknowledges that the validity of Notice No. 7219153 is at issue in the Contest Proceedings docketed at WEVA 2014-390-R, 391-R, 392-R, 393-R, 394-R, 395-R, 396-R, 397-R and 398-R" and, "as a component of these Contest Proceedings, the Secretary does not oppose the Commission's review of the validity of Notice No. 7219153. Sec'y Answer n. 2.

Section 105(d), as mentioned above, provides mine operators with the right to contest the issuance or modification of citations and orders. 30 U.S.C. § 815(d). The section then charges the Commission with affording an opportunity for a hearing and then issuing "an order . . . affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief." *Id.* "Section 105(d)'s unambiguous . . . broad grant of . . . authority to direct 'other appropriate relief'" allows the Commission to address a notice of

[1] In a somewhat analogous situation, the Commission has acknowledged a mine operator's right to contest the validity of a safeguard in the context of a contest to a citation issued pursuant to a violation of the underlying safeguard. *See e.g., Southern Ohio Coal Co.*, 14 FMSHRC 1 (Jan. 1992). Commission judges have declined to review the validity of an underlying safeguard, which is issued via a "notice to provide safeguard," prior to the issuance of a citation for a violation of the underlying safeguard. *Beckley Coal Mining Co.*, 9 FMSHRC 1454 (Aug. 1987) (ALJ); *Colorado Westmoreland, Inc.*, 10 FMSHRC 1236 (Sep. 1988) (ALJ); *Jim Walters Resources, Inc.*, Unpublished Order of Dismissal, Docket No. SE 96-118-R, (Apr. 1996) (ALJ).

pattern of violations in the context of a contest to an order issued under section 104(e) following the issuance of the written notice of pattern of violations. *See North American Drillers, LLC*, 34 FMSHRC 352, 356 (Feb. 2012). There are presently a number of 104(e) orders before me that are related to the notice of pattern of violations and, when those cases are heard, I will hear the arguments regarding the validity of the notice of pattern of violations. If Pocahontas wishes to pursue the arguments set forth in its notice of contest of the written notice of pattern of violations, it may properly do so in the context of those proceedings.

Finally, Pocahontas argues that fundamental principles of due process are violated if it is not able to contest the written notice in its own proceeding and, instead, must wait until a 104(e) withdrawal order is issued and contested. Pocahontas Resp. 15-16. Specifically, Pocahontas asserts that the mere issuance of a notice of pattern of violations causes the operator to "suffer tangible consequences flowing from that designation alone," and that absent a "prompt post-designation review..." it is deprived of a significant property interest in violation of Constitutional due process requirements. *Id.* at 16, 19. Pocahontas cites to the standard language about due process and argues that the mine is deprived of a property interest prior to a hearing and that deprivation is not outweighed by a need of the government. I disagree. Here, the Secretary's need to assure a safe and healthy working environment for miners at a mine that is alleged to have a history of serious violations, outweighs the need of the mine to be heard immediately. Additionally, the mine has another immediate remedy, that of contesting any order issued after the notice of pattern of violations and have that order heard while raising all of the issues associated with the underlying notice. The Secretary has frequently worked with an operator to issue an order immediately when there is a dispute over a roof control or ventilation plan so that the matter may be heard expeditiously.

Due process claims require the Commission to consider three factors when a deprivation to a property interest occurs: (1) "the private interest that will be affected by the official action;" (2) the risk of an "erroneous deprivation of such interest through the procedures used" and the value of additional or substitute procedural safeguards; and 3) the Government's interest, including "the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Due process, as described by the Court in *Mathews*, is "not a technical conception with a fixed content unrelated to time, place, and circumstances," and further, "is flexible and calls for such procedural protections as the particular situation demands." *Id.*(citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961); *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)

Pocahontas states that "once a POV notice is issued, an inspector's suspicion of an S&S violation goes from being a mere allegation that may be challenged before an ALJ (with due process protections) to being an automatic withdrawal order that could take months-or years-for the operator to challenge." Pocahontas Resp. 16. Further, it asserts that the issuance of a notice triggers "enhanced SEC reporting requirements," which in turn can have "obvious, adverse consequences on an operator's business". *Id.* at 19.

I find Pocahontas' due process argument to be without merit given its halfhearted attempt to pursue a prompt review of this matter. I do not dispute that Pocahontas initially sought to

expedite both this proceeding and the contest proceedings for the 104(e) orders that followed the issuance of the notice of pattern of violations. In response to that request, I set the cases for hearing. However, subsequently the parties moved for stays of the 104(e) cases, and, with regard to the instant matter of the written notice, Pocahontas asserted that "before determining whether the pattern of violations rule was validly applied to Pocahontas in WEVA 2014-202-R, the Commission will need to issue its decision in *Brody Mining, LLC,* to inform the Secretary and the regulated community as to the extent the rule may be used in future enforcement proceedings." Pocahontas Motion to Stay Further Adjudication of Enforcement Action 7276509, dated January 31, 2014. Given the obvious conflict between Pocahontas' two positions; proceed expeditiously versus wait for the Commission to rule in another similar matter, I reject its argument that dismissal of this matter will amount to a violation of its right to due process. Further, if Pocahontas had wished to proceed expeditiously on its challenge to the notice of pattern of violations, it stands to reason that it could have selected one of the multiple 104(e) orders to advance to hearing in a more expeditious manner. Nevertheless, it chose not do to so, and given the jurisdictional limitations placed on this court, I must dismiss this proceeding.

This docket contains no citations or orders, and rather only the notice of pattern of violations that was issued to the mine, prior to the issuances of any 104(e) citation or order. Any legitimate arguments raised that are directed to the validity of the written notice of pattern of violations will be heard when the subsequently issued 104(e) orders are heard. Therefore, the above captioned contest proceeding is **DISMISSED**.

Margaret A. Miller
Administrative Law Judge

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