FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
721 19TH STREET, SUITE 443
DENVER, CO 80202-2500
303-844-5267/FAX 303-844-5268

August 7, 2014

POCAHONTAS COAL COMPANY, INC., Contestant,	CONTEST PROCEEDINGS
	Docket No. WEVA 2014-390-R Order No. 9002712; 12/09/2013
	Docket No. WEVA 2014-391-R Order No. 9002713; 12/09/2013
	Docket No. WEVA 2014-392-R Order No. 9002714; 12/09/2013
	Docket No. WEVA 2014-393-R Order No. 9002715; 12/09/2013
	Docket No. WEVA 2014-394-R Order No. 9002716; 12/10/2013
v.	Docket No. WEVA 2014-395-R Order No. 3576153; 12/19/2013
	Docket No. WEVA 2014-396-R Order No. 9002720; 12/22/2013
	Docket No. WEVA 2014-397-R Order No. 9002721; 12/22/2013
	Docket No. WEVA 2014-398-R Order No. 9002725; 12/30/2013
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	Mine ID: 46-08878 Mine: Affinity Mine

ORDER GRANTING IN PART AND DENYING IN PART SECRETARY'S MOTION TO LIMIT DISCOVERY

Before: Judge Miller

This case is before me upon notices of contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). On July 17, 2014, the Secretary filed a motion to limit discovery as a result of receiving a list of 11 potential areas of inquiry for the depositions of Kevin Stricklin and David Mandeville from Contestant.[1] In his motion, the Secretary argues that Contestant's proposed depositions exceed the scope of discovery and seek irrelevant information, that Contestant improperly seeks to discover privileged information, and that Stricklin and Mandeville should be protected from depositions due to their status as high-ranking government officials. Contestant has filed a response in opposition. For the reasons set forth below, I GRANT IN PART and DENY IN PART the Secretary's motion.

Scope of Discovery

The Secretary argues that the issue to be decided by the Commission in these cases is whether the citations and orders listed in the Notice of Pattern of Violations (NPOV) establish a pattern and argues that the scope of discovery should be limited to matters pertaining to the specific facts and circumstances of the citations and orders listed in the NPOV. Sec'y Mot. at 13. The Secretary also maintains that the 28 violations identified in the NPOV that are final fall outside the scope of discovery. *Id.* n.6. However, the Secretary also states that "factual issues relevant to the validity of the NPOV are clearly within the scope of discovery." Sec'y Mot. at 2. Finally, the Secretary argues that the factual inquiries submitted by Contestant sought through the depositions of Strickland and Mandeville seeks information about MSHA's internal deliberations and decision-making process as to the NPOV issued to the mine.

Pocahontas agrees that the issue in these cases is whether the underlying NPOV was properly issued to Pocahontas and argues that discovery in this matter should be broader than the

[1] The list of potential areas given to the Secretary on May 19, 2014 are as follows:

1. Factual inquiry relating to screening criteria data and POV Written Notices.
2. Factual inquiry relating to identifying enforcement actions in POV Written Notices.
3. Factual inquiry relating to mitigating circumstances.
4. Factual inquiry relating to development and approval of Corrective Action Plans.
5. Factual inquiry relating to citations/orders in a POV Written Notice and Corrective Action Plans.
6. Factual inquiry into MSHA's POV Mitigating Circumstances Determination Form.
7. Factual inquiry into identifying a Pattern of Violations.
8. Factual inquiry into the use of other enforcement options for POV determinations.
9. Factual inquiry regarding pre March 25, 2013 citations/orders and POV screening criteria data.
10. Factual inquiry relating to POV Panels.
11. Factual inquiry into MSHA's regulatory economic analysis.

Secretary asserts and should include inquiries into each of the 11 subject areas listed in its response to the Secretary. The mine states that the list of inquiries is not exhaustive and frames the list in general terms. Contestant particularly argues that it should be able to inquire into the mitigating factors that were or were not considered by the Secretary to determine that this mine should be placed on the pattern of violations.

Commission Procedural Rule 56(b) states that "[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." A judge may "limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense." 29 C.F.R. § 2700.56(c).

The citations that Pocahontas contested were issued pursuant to sections 104(e)(1) and (2) of the Mine Act. Under section 104(e)(1), [i]f an operator has 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 safety and health hazards, he shall be given written notice that such pattern exists." 30 C.F.R. § 104(e)(1). MSHA posted screening criteria that it uses to perform the pattern of violation review. 30 C.F.R. § 104.2(b). Once a mine meets the requirements of the initial screening criteria, MSHA uses eight different pattern criteria in order to determine if the mine actually has a pattern of S&S violations.[2] § 104.2(a).

The Secretary issued a NPOV to Contestant based on a number of S&S citations, some of which are still pending before the Commission. On May 20, 2014, I dismissed Pocahontas' contest of the written notice, WEVA 2014-202, finding that the Commission did not have jurisdiction to adjudicate a contest of a written notice without an accompanying 104(e) citation. Pocahontas contests the above listed citations and orders issued under sections 104(e)(1) and (2) in addition to the validity of the NPOV and these two areas are now subject of discovery here.

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[2] The pattern criteria includes:

> (1) Citations for S&S violations;
> (2) Orders under section 104(b) of the Mine Act for not abating S&S violations;
> (3) Citations and withdrawal orders under section 104(d) of the Mine Act, resulting from the mine operator's unwarrantable failure to comply;
> (4) Imminent danger orders under section 107(a) of the Mine Act;
> (5) Orders under section 104(g) of the Mine Act requiring withdrawal of miners who have not received training and who MSHA declares to be a hazard to themselves and others;
> (6) Enforcement measures, other than section 104(e) of the Mine Act, that have been applied at the mine;
> (7) Other information that demonstrates a serious safety or health management problem at the mine, such as accident, injury, and illness records; and
> (8) Mitigating circumstances.

30 C.F.R. § 104.2(a).

Both parties assert and I agree that the inquiry here is into the N POV that was issued to Pocahontas; the inquiry, therefore, is not a broad, general inquiry, but is limited to the cases related to this specific POV that have been filed and remain active.

As the Secretary stated, the facts related to the pending citations and orders listed in the NPOV are relevant and discoverable. However, facts relating to the 28 citations and orders listed in the NPOV that are final, for the purposes of discovery, are only relevant and discoverable insofar as they relate to MSHA's determination that they are part of a pattern of violations.

Contestant provided a list of the 11 potential areas of inquiry for depositions which are set forth in the Secretary's motion and Contestant's response; I find that facts related to the majority of these areas as they pertain directly to Pocahontas, are relevant and within the scope of discovery. In most instances, however, the factual inquiries must be made in the context of these cases and not general inquiries, particularly about other mines that may or may not have been considered for the NPOV. I do not know what Pocahontas seeks with number 8 on the list of inquiries, which is "factual inquiry into the use of other enforcement options for POV determinations." To the extent MSHA engaged in some other enforcement option for this mine, the facts may be relevant, but I see no other inquiry that would relate to this request that is relevant to these cases. In addition, a number of the inquiries, while couched in terms of "factual" don't appear to be designed for inquiry into facts. For example, the economic analysis used by MSHA is a matter of public record and was provided to Contestant. Factual inquiry into the economic impact on this mine made when the NPOV was issued is relevant, but any other inquiry is not.

Two of the arguments Contestant made are that MSHA's issuance of the NPOV to this mine was arbitrary and capricious and that it did not follow its own rules during its decision-making process. In order to determine this, the Court must know which facts MSHA considered when making its decision and the listed areas will provide this information.[3] Facts related to these areas may also prove useful if the court must determine *de novo* whether a pattern of violations exists.

The Secretary also brought to the Court's attention that notices of deposition served by the Contestant included WEVA 2014-202-R, which was previously dismissed and WEVA 2014-569-R, which is similarly situated to WEVA 2014-202-R because it is also a written notice. I find that the Commission does not have jurisdiction to adjudicate these types of cases. Therefore, these docket numbers shall be stricken from the notices of deposition served on the Secretary as they are outside the scope of discovery.

[3] Pocahontas' assertion in its response that the POV panel only discussed three potential mitigating circumstances when it provided numerous mitigating circumstances is precisely the reason why the information it intends to seek in depositions is relevant and discoverable. Cont. Resp. at 23-24.

Privileged Information

The Secretary maintains, based on the list of potential areas of inquiry it submitted to him on May 19, 2014, that Pocahontas seeks information about the internal thoughts, processes, and opinions of those who participated in the POV review process. While the Secretary cites deliberative process cases related to the production of documents and the Freedom of Information Act's (FOIA) Exemption 5,[4] the case law can easily be applied to producing deliberative process information orally. To qualify under Exemption 5,

> a document must satisfy two conditions: its source must be a government agency, and it must fall within the ambit of a privilege against discovery under judicial standards that would govern litigation against the agency that holds the document. This Court's prior Exemption 5 cases have addressed the second condition, and have dealt with the incorporation of civil discovery privileges. So far as they matter here, those privileges include the privilege for attorney work product and the so-called "deliberative process" privilege, which covers documents reflecting advisory opinions, recommendations, and deliberations that are part of a process by which Government decisions and policies are formulated.

Dep't of Interior v. Klamath Water Users Protective Assn, 532 U.S. 1, 2 (2001) (citing *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 150 (1975)); *In Re: Contests of Respirable Dust Sample Alteration Citations*, 14 FMSHRC 987 (June 1992). The purpose of the privilege is to "prevent injury to the quality of agency decisions" and to protect "open and frank discussion among those who make [decisions] within the government." *Sears, 421 U.S.* at 150; *Klamath,* 532 U.S at 2-3.

As is evident from the list provided by Pocahontas and its response in opposition, it appears to seek only factual information related to the 11 areas. Cont. Resp. at 22. The Secretary has provided no evidence that suggests Pocahontas intends to ask questions related to the deliberation process. "The fact that objections may be raised to specific questions in a deposition does not provide a sufficient basis to bar the deposition[s] altogether." *Rail Link, Inc.*, 20 FMSHRC 181, 182 (Jan. 1998) (ALJ). The Secretary concedes that the facts available to him regarding the citations and orders stated in the NPOV are not privileged. Sec'y Mot. at 18. I also find that other *facts* related to the above listed areas of inquiry are not privileged. However, I agree with the Secretary that internal deliberations leading up to the decision to issue the NPOV, including the weight given to the different pattern criteria, and thoughts and opinions of the agency's employees are privileged.[5] I further agree that many of Pocahontas' arguments in challenging the NPOV are legal arguments that relate to the promulgation of the POV rule and

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[4] Exemption 5 of FOIA states, "[t]his section does not apply to matters that are-- . . . (5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5) (2000).

[5] I decline to develop a system for dealing with the assertion of the deliberative process privilege during depositions as Contestant suggests. Cont. Resp. 27-28. I presume that Counsel for Pocahontas is aware of the case law regarding inquiries related to the deliberative process and expect them to consider that during the depositions.

therefore any inquiry into the rule in general that relates to agency policy, rule-making, or constitutional challenges would not be factual and would be subject to privilege. I assume, given the status of the POV cases pending before the Commission and the Sixth Circuit, that these issues have been discovered, argued, and briefed and that any arguments made in this case would follow those made in the earlier cases. Therefore, as the parties agree, the issues here focus on the application of the rule to Pocahontas and not the promulgation of the rule itself.

Protection from Depositions

The Secretary argues that Kevin Stricklin, the Administrator of Coal Mine Safety and Health, and David Mandeville, MSHA's District 4 Manager, should be protected from participating in depositions due to their status as high-ranking government officials.[6] He states that the time required "preparing for and defending" Stricklin and Mandeville would lead to a "significant withdrawal of much-needed attention to their administrative and supervisory functions." Sec'y Mot. at 20.

The Commission has held that "high-level executive department officials may not be required to give oral testimony by deposition or at trial except in extraordinary circumstances." *Respirable Dust*, 14 FMSHRC at 241; *Simplex Time Recorder Co.*, 766 F.2d 575, 586 (D.C. Cir. 1985). "Extraordinary circumstances may be established where the executive sought to be deposed has relevant information not available from any other source[,]" but "where the agency has or is willing to respond by . . . making lower-level officials available for deposition, there is no justification for requiring the testimony of an agency head or high level agency official. *Respirable Dust*, 14 FMSHRC at 241, 242; *Sweeny v. Bond*, 669 F.2d 542, 546 (8th Cir.), *cert. denied*, 459 U.S. 878 (1982).

The Secretary states that Stricklin and Mandeville were not the issuing inspectors for the citations and orders identified in the NPOV and have no first-hand knowledge of the conditions cited. He offered to provide the issuing inspectors of the eight remaining NPOV S&S violations for depositions. Sec'y Mot. at 21. Given that the issues in this case go beyond the fact of the citations and the information provided by the issuing inspectors, I find this argument is without merit. Someone with MSHA who has knowledge of the facts that caused this mine to receive an NPOV should be available to the mine for discovery purposes.

With regard to the request to depose Stricklin, Commission precedent has alluded to the fact that the Administrator of Coal Mine Safety and Health is a high-level government official and requiring his attendance at a deposition would disrupt the government's function. *Respirable Dust*, 14 FMSHRC at 243 (denying a motion for a protective order of the former Administrator of Coal Mine Safety and Health because he was retired at the time of the motion and no disruption of government functions would occur). Stricklin is responsible for the oversight of thousands of underground and surface coal mines across the country. Allowing his deposition to

[6] The Secretary also raised objections to notices of depositions for Douglas Parker, Stephen Weatherford, Jay Mattos, and David Morris for the same reasons. Sec'y Mot. at 2. However, the Secretary noted that the earlier deposition notices have become moot and therefore I will not rule on them until it becomes a relevant matter.

be taken would remove him from important official tasks. In addition, the Secretary states that he has no first-hand knowledge of the NPOV citations and orders and the Secretary provided a number of documents related to the POV review process for this mine. While the Secretary did not specifically address Stricklin's knowledge of the decision to issue the NPOV to Pocahontas, the Contestant did not provide any information that suggests he is the only one with this knowledge.[7] Therefore, I find that Stricklin is a high-ranking agency official and should be protected from depositions in these cases.

Mandeville, the MSHA district manager for the district in which the Pocahontas mines are located, is not in a position to be considered a high-ranking official privileged to protection from a deposition.[8] See *Rail Link, Inc.*, 20 FMSHRC 181, 182 (denying the Secretary's motion for a protective order for depositions of an MSHA District Manager and an Assistant District Manager because "they are not the type of high level officials that require such protection"); *Jim Walter Resources*, 26 FMSHRC 317 (2004) (ALJ) (denying the Secretary's motion for a protective order from depositions for the Assistant Administrator of Coal Mine Safety and Health and the MSHA District 11 Manager, stating, "they are not the type of 'top government officials' to whom the protection is usually extended"). Moreover, as the mine is in Mandeville's District and Mandeville supervises the inspectors that wrote the citations that remain for adjudication, he may have relevant information pertaining to the citations and orders. He could also have information related to the decision to issue an NPOV to Pocahontas as the Secretary states that "the Administrator directed district 4 to obtain any mitigating circumstances from Pocahontas." Sec'y Mot. at 22; Cont. Resp. at 19; *See, e.g., Buck Creek Coal*, 17 FMSHRC 845 (1995) (ALJ) (allowing the depositions of 19 people, including managers from district offices, and stating that the "fact that these individuals are managers does not mean that they do not have knowledge of the facts underlying these cases or information that might lead to the discovery of admissible evidence"). In addition, the Secretary did not provide any persuasive arguments that the proposed deposition would be oppressive or subject Mandeville or MSHA to undue burden or expense.

WHEREFORE, the Secretary's motion to limit discovery is **GRANTED IN PART** and **DENIED IN PART**.

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[7] Pocahontas states, "both Stricklin and Mandeville have knowledge of the relevant facts regarding the issuance of the POV notice." Cont. Resp. at 19. It later asserts that it is "entitled to ask the only parties with first-hand knowledge of the facts that permitted MSHA to issue this enforcement action." Cont. Resp. at 25. This assertion indicates that Stricklin is not the only one with first-hand knowledge – that Mandeville has first-hand knowledge also. In addition, the POV panel was the entity that was responsible for submitting the recommendation to Stricklin and may therefore be more appropriate parties with knowledge of what was and was not considered. *Id.*

[8] The court in *Simplex* identified several "top government officials" that other courts refused to allow examination of, including the Governor of Missouri, an Administrator of a government agency, parole board members, and the Comptroller of the Currency. *Simplex Time Recorder Co.*, 766 F.2d at 586-87. An MSHA District Manager, though having an important position within the agency, falls short in magnitude to the examples above.

It is **ORDERED** that the 28 final citations and orders listed in the NPOV are only relevant and discoverable insofar as they relate to MSHA's determination that they are part of a pattern of violations.

It is **ORDERED** that WEVA 2014-202-R and WEVA 2014-569-R be stricken from the notices of deposition that the Contestant provided to the Secretary.

It is **ORDERED** that the factual information sought in the May 19, 2014 list of possible areas of inquiry, if relevant, is discoverable with the limitations listed above, but that any information related to the internal deliberative process of deciding to issue the NPOV is not.

The Secretary's request to protect David Mandeville from depositions in the above cases is **DENIED**.

It is **ORDERED** that Kevin Stricklin be protected from deposition in the above cases.

Margaret A. Miller
Administrative Law Judge

Distribution:

Benjamin D. Chaykin, Anthony Jones, R. Alan Kelly, Anh LyJordan, Office of the Solicitor, U.S. Department of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209

Robert Beatty, Jr., Dinsmore & Shohl, LLP, P.O. Box 11887, 900 Lee Street, Suite 600, Charleston, WV 25339