FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
875 GREENTREE ROAD
7 PARKWAY CENTER, SUITE 290
PITTSBURGH, PA 15220
TELEPHONE: (412)920-7240
FAX: (412)928-8689

NOV 21 2013

BRODY MINING, LLC, Contestant,	:	CONTEST PROCEEDINGS
	:	Docket No. WEVA 2014-83-R
	:	Order No. 7166788; 10/28/13
v.	:	Docket No. WEVA 2014-82-R
	:	Order No. 9003242; 10/28/13
	:	Docket No. WEVA 2014-86-R
	:	Order No. 4208892; 10/29/13
	:	Docket No. WEVA 2014-87-R
	:	Order No. 4208893; 10/29/13
	:	Notice No.: 7219154; 10/24/13
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	:	Mine ID: 46-09086 Mine: Brody Mine No. 1

ORDER DENYING APPLICATION FOR TEMPORARY RELIEF

Before: Judge Steele

This case is before me upon an Application for Temporary Relief filed by Contestant Brody Mining, LLC ("Brody Mining") pursuant to Section 105(b)(1)(B)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* ("Act" or "Mine Act") and 29 C.F.R. §§ 2700.46, 47. Brody Mining filed its Application on November 4, 2013. On November 7, 2013, the Secretary filed his Memorandum of Law in Support of Opposition to Application for Temporary Relief. A hearing on this matter was held on November 8, 2013 in Pittsburgh, Pennsylvania.

Factual and Procedural Background

These Contest cases are related to a Pattern of Violations ("POV") notice issued to the Brody Mine pursuant to section 104(e) of the Mine Act. Notice No. 7219154 was issued on October 24, 2013. Subsequently, Order Nos. 9003242, 7166788, 4208892, and 4208893 were issued at the mine on October 28 and 29, each requiring the withdrawal of all persons in the

affected area until the violation was abated, pursuant to section 104(e)(1) of the Act. In its Application for Temporary Relief, Brody sought temporary relief from these orders and the notice of a pattern of violations.

Legal Standard

Section 105(b)(1)(B)(2) of the Act states:

> [a]n applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 104 together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if –
>
> (A) A hearing has been held in which all parties were given an opportunity to be heard;
> (B) The applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and
> (C) Such relief will not adversely affect the health and safety of miners

The requirements of the statute are mirrored in the Commission's rules:

§ 2700.46 Procedure.

(a) When to file. As provided in section 105(b)(2) of the Act, 30 U.S.C. § 815(b)(2), an application for temporary relief from any modification or termination of any order or from any order issued under section 104 of the Act, 30 U.S.C. 814, may be filed at any time before such order becomes final. No temporary relief shall be granted with respect to a citation issued under sections 104(a) or (f) of the Act. 30 U.S.C. §§ 814(a) and (f).

(b) Statements in opposition. Any party opposing the application shall file a statement in opposition within 4 days after receipt of the application.

(c) Prior hearing required. Temporary relief shall not be granted prior to a hearing on such application.

§ 2700.47 Contents of application.

(a) An application for temporary relief shall contain:

(1) A showing of substantial likelihood that the findings and decision of the Judge or the Commission will be favorable to the applicant;

(2) A statement of the specific relief requested; and

(3) A showing that such relief will not adversely affect the health and safety of miners in the affected mine.

(b) An application for temporary relief may be supported by affidavits or other evidence.

Analysis

The parties appear to agree that temporary relief may be granted in this situation. See Application at 4 (quoting 78 FR 5056 (January 23, 2013)). The court agrees. In seeking temporary relief, consistent with the forgoing statutory provision and Commission Procedural Rules 46 and 47, the applicant has the burden of showing all three of the statutory requirements before temporary relief is granted. As noted above, a hearing was held on November 8, 2013, satisfying part (A) of the temporary relief provisions.

Other than the hearing requirement, the right to temporary relief is to be decided by two statutory requirements. First, the applicant must show that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and second the applicant must show that such relief will not adversely affect the health and safety of miners. The applicant has the burden of proof to establish these elements. The wording of the statute requires that the applicant make "showings," and accordingly, the burden is on the applicant. In addition, even general procedural rules require the applicant to shoulder the burden of proof as the proponent of the order. *See* Commission Rule 63(b)("The proponent of an order has the burden of proof"); *See also Buck Mountain Coal Company*, 15 FMSHRC 2350, 2352 (July 1993)(ALJ) (wherein temporary relief was denied by a Judge who found that the applicant had failed to meet its burden of proof to justify relief due to the conflicting testimony of witnesses).

The Contestant's application raises a number of arguments which relate to the likelihood that the Commission will ultimately favor its challenge to the pattern of violations notice by its challenge to the later issued orders enforcing the notice. It argues that the Secretary's regulations at 30 C.F.R. Part 104, as constituted as of March 25, 2013 are invalid since it argues that POV notifications cannot be based on non-final prior issuances. Application at 6-10. The Contestant appended a brief filed by other parties in the 6th Circuit challenging Part 104 rule for various reasons. Application at Exhibit 7. It argues that the underlying screening criteria, posted on the MSHA website, had not been subjected to notice and comment rulemaking as required by the Administrative Procedure Act and therefore could not be utilized. Application at 10-12. The Contestant also alleges a change of ownership on December 31, 2012, subsequent mine personnel and mine management changes, and closures of certain areas of the mine, which it claims the Secretary should have considered more fully as mitigating factors. It states that the Secretary abused his discretion in considering the criteria the Secretary used to assess the POV finding against its mine. Application at 13-14.

The Secretary defends the pattern of violations rule's consistency with the Mine Act, and claims that it validly adopted the pattern of violations rule, and that the screening criteria are not subject to the requirement of notice and comment rulemaking *See* Secretary's Memorandum at 3-25. The gist of the Secretary's arguments is that the screening criteria and pattern criteria guide him in the identification of mine operators who may have a pattern of such violations.

This is data that informs the prosecutorial decision-making process. Secretary's Memorandum at 41. He claims that he has identified a pattern of violations in a set of previously issued significant and substantial violations at the Brody Mine and that he will demonstrate that this pattern exists at a hearing. *Id.* at 39-40. The Secretary appears to be willing to demonstrate the existence of the violations and their levels of gravity at a hearing in this matter and thereby addresses the issue of finality regarding violations which compose the pattern but which have not been adjudicated in the past.

These questions are complex and the meaning of term "pattern of violations" has not been fully litigated. In many respects, this appears to be a case of first impression. The court does not now definitively make a determination of whether the Contestant has established that the Commission would favor its position on the merits on the question of whether Part 104 and the screening criteria are invalidly promulgated, or incorrectly applied, because it is unnecessary to do so at this early point in the litigation. That is because the Contestant has failed to meet its burden to establish that granting the relief would not adversely affect the health and safety of the miners.

The court has looked diligently for argument on this essential point and found remarkably little mention of it, and importantly, no evidence adduced to support it. The Application only mentions this prong in passing. Application at 5. The Memorandum states only that "because of wide-ranging improvements, complete change of management personnel, and increased scrutiny, relief will not adversely affect the safety and health of the miners." Memorandum in Support of Application at 9. Statements of counsel are not evidence. *See Secretary of Labor o/b/o Walter Jackson v. Mountain Top Trucking Co., Inc. et al.*, 21 FMSHRC 1207, 1213 (November 30, 1999). As for unauthenticated documents of disputed real world significance, they could be excluded as lacking authentication under an analogous rule at Federal Rule of Civil Procedure 56(e), and they remain open to dispute as to their meaning and accuracy. *See Hoffman v. Applicators Sales and Service, Inc.*, 439 F.3d 9 (1st Cir. 2006).

The Secretary did not reply to the statement of the Contestant in the Application on this point, but in the discussion of the claimed mitigating circumstances surrounded by the alleged change of ownership and the adoption of a corrective action program, the Secretary discounts the idea that these changes might be found to have an impact on miner safety and health. Secretary's Memorandum at 36-39. Accordingly, whatever effect these changes have made, they remain disputed by the parties and there is certainly no evidence upon which to base relief. There is insufficient indication that removing the possibility of Section 104(e) withdrawal orders will not affect mine safety and health.

At oral argument the issue of the effect of the relief on the safety and health of the miners also was only discussed briefly, as the mine operator's counsel stated that the abatement of the violations found by the inspector is sufficient to address the safety concerns. Tr. 34. The Secretary's counsel responded to the mine operator's claim by stating that what it regards as a pattern of violations has required this enhanced enforcement. Tr. 57.

In this case the mine operator has not met its burden to establish that granting temporary relief would not affect the safety and health of its miners. The remedy at Section 104(e) exists as part of the graduated enforcement scheme put in place by the framers of the Mine Act. *See*

Greenwich Collieries, 12 FMSHRC 940, 945 (May 1990)(citing *White County Coal Corp.*, 9 FMSHRC 1578, 1581 (Sept. 1987) (discussing the graduated enforcement mechanisms of the Act));S. REP. NO. 95-181, AT 4 (1977)(wherein the Committee stated that under the prior Mine Act, "Mine operators still find it cheaper to pay minimal civil penalties than to make the capital investments necessary to adequately abate unsafe or unhealthy conditions, and there is still no means by which the government can bring habitual and chronic violators of the law."). The closure orders are designed to improve miner safety and safeguard their health by spurring increased attempts by the mine operator to assure compliance or remedy non-compliant conditions prior to detection by MSHA inspectors. Relying only on the abatement time requirements is not as effective since the inspector must still detect the violation wherein the possibility of a pattern order is likely to cause the mine operator to take corrective action on potential violations before they are ever discovered by MSHA. The Section 104(e) remedy is one of these remedies that are designed to spur added compliance. Absent some clear testimony and authenticated documentary evidence put in to the record to the contrary, I cannot find that the relief would not reduce the health and safety of the miners during the pendency of this litigation.

Finally, the court notes that the application draws attention to potential "irreparable harm" to the Contestant if temporary relief is not granted. Application at 4-5. As a matter of law, this potentiality is not part of the test to determine the availability of temporary relief under Section 104(b)(1)(B)(2). There is simply nothing in the statute which allows this consideration in an application for temporary relief. In fact, the U.S. Court of Appeals for the D.C. Circuit has stated that this section is a "model of near-perfect clarity," making it clear that there is little room for interpretation of ambiguity in this provision of the Act. *Performance Coal Co. v. FMSHRC*, 642 F.3d 234, 239 (D.C. Cir. 2011). Moreover, no irreparable harm has been established. Mere monetary losses are not considered irreparable harm. *See United Mine Workers Of America On Behalf Of Mark A. Franks v. Emerald Coal Resources*, 2013 WL 4140440 (F.M.S.H.R.C.)(citing *Secretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (Aug. 1987)). Claims regarding the potential effect of the Secretary's actions on the Contestant's bankruptcy are not established and are too conjectural to be credited .In light of the clear statutory wording, and the instruction from the D.C. Circuit that the clear provisions of 105(b)(1(B)(2) should not be embellished, such arguments are not considered material here and if they were, they would be rejected.

Conclusion

Accordingly, Brody Mining's Application for Temporary Relief is **DENIED.**

William S. Steele

William S. Steele
Administrative Law Judge

Distribution:

R. Henry Moore, Esq., Jessica M. Jurasko, Esq., Jackson Kelly PLLC, Three Gateway Center, Suite 1500, 401 Liberty Avenue, Pittsburgh, PA 15222

Michael T. Cimino, Esq., Adam Schwendeman, Esq., Jackson Kelly PLLC, 500 Lee Street East, Suite 1600, Charleston, WV, 25301-3202

Benjamin M. McFarland, Esq., Jackson Kelly PLLC, 1144 Market Street, Wheeling WV 26003

Kenneth B. Oakley, Esq., Jackson Kelly PLLC, 175 East Main Street, P.O. Box 2150, Lexington, KY 40507

Robert S. Wilson, Esq., Jason S. Grover, Esq., U.S. Department of Labor, Office of the Regional Solicitor, 1100 Wilson Boulevard, 22nd Floor West, Arlington VA 22209-3939