FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2014-202-R
POCAHONTAS COAL COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). It involves a notice of contest filed by Pocahontas Coal Company, LLC challenging the validity of a notice of pattern of violations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 104(e)(1) of the Mine Act, 30 U.S.C. § 814(e)(1).[1] At issue in this case of first impression is whether section 105(d) of the Act, 30 U.S.C. § 815(d), grants the Commission jurisdiction to

[1] 30 U.S.C. § 814(e)(1) provides:

> If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

hear an operator's direct challenge to a notice of pattern of violations, independent of a contested section 104(e) withdrawal order. We conclude that it does not.

I.

Statutory Summary and Background

Section 104(e) of the Mine Act, 30 U.S.C. § 814(e), sets forth provisions regarding MSHA's issuance and termination of a notice of pattern of violations ("POV notice"). It provides that if an operator has demonstrated a pattern of violating mandatory health or safety standards and those violations are of a significant and substantial nature ("S&S"), the operator shall be given "written notice" that such a pattern exists.[2] 30 U.S.C. § 814(e)(1). If an inspector cites the operator for a S&S violation within 90 days following issuance of the POV notice, then MSHA may issue a withdrawal order under section 104(e) of the Act. The operator will thereafter be subject to additional withdrawal orders for each S&S violation subsequently discovered until a complete inspection of the mine has revealed no further S&S violations. 30 U.S.C. § 814(e)(1)-(3); s*ee also Brody Mining, LLC*, 36 FMSHRC 2027, 2028-29 (Aug. 2014).

In enacting the pattern of violations provisions, Congress explicitly recognized that they were necessary to "provide an effective enforcement tool to protect miners when the operator demonstrates [its] 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 ("Legis. Hist.")*, at 620 (1978). The legislation essentially introduced enhanced enforcement procedures for mine operators that have displayed a proclivity for violating the Act. It is employed when MSHA's standard enforcement scheme is unable to address a mine's problem of recurrent violations. *See Brody*, 36 FMSHRC at 2029.

Despite its inclusion in the 1977 Mine Act, the pattern of violations authority has only recently been employed by the Secretary as an enforcement tool. According to a report released in 2010 by the Department of Labor's Office of the Inspector General ("OIG"), MSHA had only once issued a POV notice to an operator in the 32 years since passage of the Act.[3] In response to the report and recommendations contained therein, MSHA issued revisions to its POV rule, which became effective on March 25, 2013. *See Brody*, 36 FMSHRC at 2030. The instant case involves one of the first POV notices issued since adoption of the newly revised rule.

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[2] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

[3] The Commission has taken judicial notice of the OIG Report. *See Brody*, 36 FMSHRC at 2030 n.4.

II.

Factual and Procedural Background

On October 24, 2013, MSHA issued POV Notice No. 7219153 to Pocahontas' Affinity Mine pursuant to section 104(e)(1) of the Mine Act. The POV notice was issued following a 12-month screening period ending on August 31, 2013, after which MSHA determined that Pocahontas had exhibited a pattern of violating the Mine Act's mandatory health and safety standards. The POV notice states:

> Pursuant to Section 104(e)(1) of the Federal Mine Safety and Health Act of 1977 (Mine Act), you are hereby notified that a pattern of violations exists at the Affinity Mine (ID 46-08878). A review of the S&S violations cited at the mine demonstrates a pattern of violations. As illustrative of this pattern of violations, the following groups of violations are representative of violations which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards.

Notice of Contest at 2, PCC Ex. 1 - Att. Ex. A. The notice lists 36 different citations and orders issued between September 6, 2012 and August 13, 2013, citing conditions and/or practices that contribute to roof and rib hazards or emergency preparedness and escapeway hazards. It further states that: "These groups of violations, taken alone or together, constitute a pattern of violations of mandatory health and safety standards . . . ." *Id.* at 2.

On November 26, 2013, Pocahontas filed a notice of contest asserting jurisdiction under section 105(d) of the Act contesting "the issuance of Section 104(e)(1) Written Notice Number 7219153" and requesting an expedited hearing. Notice of Contest at 1, 6. The contest was assigned to an Administrative Law Judge, and the matter was initially set for hearing on March 18, 2014.

As a result of the POV notice, MSHA subsequently issued a number of section 104(e) withdrawal orders to Pocahontas between December 9 and 30, 2013. Pocahontas shortly thereafter contested the orders, and its contests were assigned to the same Judge in nine separate dockets.[4] The cases were set for hearing on May 14, 2014.

On January 24, 2014, Pocahontas filed an unopposed motion to withdraw its previous request for an expedited hearing. It asked that the hearing be rescheduled to allow the parties to complete discovery. The Judge granted that motion on January 30.[5] On February 27, 2014, the

[4] The Judge dismissed eight of the nine contest dockets, electing to address the validity of the withdrawal orders in the penalty cases in which the operator had contested the proposed penalties associated with those orders. ALJ Ord. of Dism. at 2 (Oct. 29, 2014).

[5] Pocahontas made similar requests in the related cases containing the underlying violations and the subsequent section 104(e) orders.

Secretary of Labor filed a motion to dismiss with prejudice Pocahontas' contest for lack of jurisdiction, asserting that the Act does not permit Commission review of a POV notice independent of a subsequent section 104(e) order. The Judge granted the Secretary's motion. 36 FMSHRC 1371 (May 2014) (ALJ).

In granting the motion, the Judge held that the Mine Act provides "no statutory authority for the Commission to hear a contest to a *notice* of pattern of violations in the context of a dedicated proceeding." *Id.* at 1372 (emphasis added). She determined that although section 105(d) of the Act provides operators with the right to challenge the issuance or modifications of citations and orders, it "does not afford a right to contest written notices." *Id.* The Judge also found that "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." *Id.* She concluded, however, that the Commission's broad grant of authority to direct "other appropriate relief" under section 105(d) permits Commission review of the validity of the POV notice in the context of a contest to a section 104(e) order issued as a result of the POV notice. Consequently, the Judge stated that any challenges to the validity of the POV notice would be heard when the subsequently issued section 104(e) orders were heard.[6] *Id.* at 1373-74.

The Judge also declined to treat the POV notice as a citation or order. She determined that the Act makes clear that the notice is a separate document which must be issued prior to any order issued pursuant to section 104(e). Lastly, she rejected Pocahontas' claim that its inability to directly contest the POV notice violated its right to due process. In addition to the operator's ability to challenge the POV notice once a section 104(e) order has been issued, the Judge

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[6] Pocahontas raised the same challenge to the validity of POV Notice No. 7219153 in Docket No. WEVA 2014-395-R, which is the contest docket for associated section 104(e) Order Nos. 9001636 and 3576153. Recently, in two separate orders granting summary decision in favor of the Secretary, the Judge upheld the validity of the POV notice and the section 104(e) orders and dismissed the case. *See* Nov. 3, 2015 ALJ Order and Dec. 24, 2015 ALJ Order. Pocahontas appealed the Judge's orders and the Commission granted review on January 6, 2016. The Judge's substantive ruling on the POV notice raises the question of whether the issue currently before us is moot because Pocahontas has obtained Commission review of the validity of POV Notice No. 7219153, which is the relief it seeks from the instant appeal.

A case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome. *North Am. Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012); *Climax Molybdenum Co.*, 2 FMSHRC 2748, 2750 (Oct. 1980), *aff'd* 703 F.2d 447 (10th Cir. 1983). However, when there is a substantial likelihood that an allegedly moot question will recur, the issue remains justiciable. *Marfork Coal Co., Inc.*, 29 FMSHRC 626, 628-29 (Aug. 2007); *North Am. Drillers,* 34 FMSHRC at 358; *Mid-Continent Res., Inc.* 12 FMSHRC 949, 957 (May 1990). Although Pocahontas has obtained the relief it seeks here, and thus no longer has a legally cognizable interest in the outcome, we conclude that the question of whether an operator must wait for a section 104(e) order to issue before it may challenge a notice of POV is highly likely to recur with other operators. Therefore, the issue presented here remains justiciable.

reasoned that the Secretary's need to assure a safe and healthy work environment at a mine with a history of serious violations outweighed the need of the mine operator to be heard immediately. She also found Pocahontas' argument meritless given its "halfhearted attempt to pursue [] prompt review of the matter" after the related section 104(e) orders had been issued. *Id.* at 1374-75.

On June 29, 2014, Pocahontas filed a petition for discretionary review challenging the dismissal of its contest, which the Commission granted.

III.

Disposition

Pocahontas argues that the Commission has broad jurisdictional power to hear all disputes arising under the Mine Act, including the authority to review issues surrounding the exercise of the Secretary's enforcement actions. It asserts that section 105(d) permits operators to challenge all enforcement actions issued by MSHA, including a POV notice. Pocahontas maintains that because the section 104(e) POV notice is a written allegation of a violation, it is an enforcement action equivalent to a section 104 citation or order.

As discussed below, Pocahontas' position conflicts with the language of the Act, its legislative history, basic principles of administrative law, and Commission case law. Accordingly, we conclude that the Commission lacks jurisdiction to directly review the issuance of a POV notice.

A. The Commission's jurisdiction to review enforcement actions is limited by Congress' grant of authority as set forth in the Act.

Although it is well settled that the Commission has broad authority to address a wide range of disputes arising under the Mine Act, the exercise of that authority is governed by the language of the Act's jurisdictional provisions. The Commission has long recognized that it is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers. S*ee generally, Kaiser Coal Corp.,* 10 FMSHRC 1165, 1169-70 (Sept. 1988); *Old Ben Coal Co.*, 1 FMSHRC 1480, 1484 (Oct. 1979); *Rushton Mining Co.*, 11 FMSHRC 759, 764 (May 1989). As an administrative agency created by statute, the Commission cannot exceed the jurisdictional authority granted to it by Congress. *Kaiser Coal,* 10 FMSHRC at 1169; *Santa Fe Indus., Inc. v. Green,* 430 U.S. 462, 472–73 (1977); *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 322 (1961).

In *Kaiser Coal*, we explained that:

> Several provisions of the Mine Act grant subject matter jurisdiction to the Commission by establishing specific enforcement and contest proceedings and other forms of action over which the Commission presides: *e.g., section 105(d), 30 U.S.C. § 815(d), provides for the contest of citations or orders, or the contest of civil penalties proposed for such violations*; section

> 105(b)(2), 30 U.S.C. § 815(b)(2), provides for applications for temporary relief from orders issued pursuant to section 104; section 107(e), 30 U.S.C. § 817(e), provides for contests of imminent danger orders of withdrawal; section 105(c), 30 U.S.C. § 815(c), provides for complaints of discrimination; and section 111, 30 U.S.C. § 821, provides for complaints for compensation.

10 FMSHRC at 1169 (emphasis added). Specific provisions, such as these, delineate the scope of the Commission's jurisdiction. *Id.* Thus, contrary to Pocahontas' argument, the Commission does not possess plenary authority to review all enforcement actions taken under the Act.

B. Section 105(d) does not grant the Commission jurisdiction to directly review POV notices.

In section 105(d), Congress explicitly set forth enforcement actions that invoke this Commission's jurisdiction. By section 105(d)'s express language, the Commission's jurisdiction under this section only attaches when an operator contests MSHA's issuance or modification of a citation, order, or proposed penalty assessment, or the reasonableness of the abatement time. Section 105(d) states in pertinent part:

> If, within 30 days of receipt thereof, an operator of a coal or other mine notifies the Secretary that he intends *to contest the issuance or modification of an order* issued under section 104, *or citation or a notification of proposed assessment of a penalty* issued under subsection (a) or (b) of this section, *or the reasonableness of the length of abatement time fixed in a citation or modification* thereof issued under section 104, . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing . . . and thereafter shall issue an order, based on findings of fact, affirming, modifying, or vacating the Secretary's citation, order, or proposed penalty, or directing other appropriate relief.

30 U.S.C. § 815(d) (emphasis added).

Significantly, section 105(d) does not mention contesting the issuance or modification of a "notice of pattern of violations." In fact, although the statute specifically allows for contesting a "*notification* of proposed assessment of a penalty," it does not permit a challenge to any other form of "notice." This precise list of jurisdictional triggers strongly indicates a Congressional intent to exclude other actions, such as other types of "notices." *See Saxon v. Georgia Ass'n of Indep. Ins. Agents, Inc.*, 399 F.2d 1010, 1014 (5th Cir. 1968) (holding that "a power which has been withheld or denied by Congress cannot be found to exist as an 'incidental' and 'necessary'

power" when Congress has specifically delineated other powers).[7] Indeed, the Mine Act's legislative history provides that "an independent Mine Safety and Health Review Commission is established to review orders, citations, and penalties." S. Rep. No. 95-181, at 11; *Legis. Hist.* at 599. Significantly, the word "notice" is absent. *See also Kaiser Coal*, 10 FMSHRC at 1169; *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620-21 (Sept. 1987) ("The statutory scheme for review set forth in section 105 provides for an operator's contest of citations, orders, and proposed assessment of civil penalties.").

Accordingly, we conclude that the language of section 105(d) does not give the Commission authority to review a direct challenge to a POV notice.

C. POV notices cannot be treated as citations or withdrawal orders for review purposes.

Faced with the language of section 105(d), Pocahontas argues that the terms "citation" and "order" should be read broadly to encompass all alleged violations, so as to include POV notices. This reading is based in part on the location of the POV provision, which is found in section 104 of the Act – the section that primarily governs the process for citations and orders. 30 U.S.C. § 814. However, the language of section 104 does not support this theory.

Section 104(a) provides that a citation shall be issued by the Secretary if an operator has

> violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act . . . . Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated . . . [and] fix a reasonable time for [] abatement.

30 U.S.C. § 814(a). Thus, according to the statutory language and consistent with MSHA practice, a section 104 citation is a written allegation, detailing a specific violation of a specific standard, and containing a specific time by which the violation must be abated.

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[7] In accordance with the language of section 105(d), Commission Procedural Rule 20(a)(1) states that an operator may contest:

> (i) A citation or an order issued under section 104 of the Act, 30 U.S.C. 814;
> (ii) A modification of a citation or an order issued under section 104 of the Act; and
> (iii) The reasonableness of the length of time fixed for abatement in a citation or modification thereof issued under section 104 of the Act.

30 C.F.R. § 2700.20(a)(1). Commission Procedural Rule 26 provides that an operator may contest a "proposed penalty assessment." 30 C.F.R. § 2700.26. As in the statute, "notice" is omitted in both of these provisions.

In contrast, a POV notice simply alerts a mine operator that it has displayed a propensity for violating the Act through prior S&S citations and orders referenced in the notice. It further informs the operator that after being placed on notice, it faces enhanced enforcement penalties *if* it continues to significantly and substantially violate federal mine standards. *See Brody*, 36 FMSHRC at 2029, *quoting* S. Conf. Rep No. 95-181, at 33, *Leg. Hist.* at 621 (stating that the POV notice indicates "to both the mine operator and the Secretary that there exists at that mine a serious safety and health management problem").

A POV notice differs from an enforcement order under the Act for similar reasons. Most significantly, "orders" under the Mine Act usually require the withdrawal of miners from an affected area of the mine. *See* 30 U.S.C. §§ 814(b), (d)(1), (d)(2), and (e) (describing withdrawal orders due to an operator's failure to abate a violation, unwarrantable failure violations under certain circumstances, or based on a pattern of S&S violations).[8] A POV notice requires no such withdrawal or mine closure.

Additionally, section 104(e) employs both a POV notice and a withdrawal order as discrete and sequential steps in the POV process. First, the POV notice is issued. Then, if another S&S violation is found, a withdrawal order follows. In other words, the notice and the withdrawal order cannot be one and the same.

Section 110(a)(1) of the Act also requires the proposal and assessment of a civil penalty for each violation of the Act in the case of a citation or order. 30 U.S.C. § 820(a)(1). However, the Secretary lacks the authority to propose a penalty after the issuance of a POV notice.

Furthermore, adjudicating a direct challenge to a section 104(e) POV notice would not only ignore the statutory language, but would conflict with the Act's legislative history. In the Senate floor debate on the final bill, Senator Schweiker, an author of the POV provisions, was repeatedly asked by Senator McClure whether POV notices would be immediately and directly reviewable by a court. *Leg. Hist.* at 1080-81. Senator Schweiker responded that immediate judicial or administrative review would not be available but that POV notices would be reviewable before the Commission after a section 104(e) withdrawal (closure) order had issued. In particular, he stated that an operator would not have access to the courts after issuance of the POV notice because "[n]othing has happened to him yet." *Id.* at 1080. He explained that the operator could seek Commission review with regard to a withdrawal order and the Commission could grant relief. This debate reveals that Congress not only considered the question of whether POV notices would be directly reviewable, but that the drafters decidedly intended to prohibit such review.

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[8] Throughout the history of mine safety legislation, references to "orders" issued by the Secretary have generally been in the context of a withdrawal of miners or of mine closures. *See, e.g.*, sections 203 (a) and (c) of the Coal Act of 1952, 30 U.S.C. § 471 et seq. (1964) (repealed 1969); sections (a) and (b) of the Metal and Nonmetal Mine Act of 1966, 30 U.S.C. § 721 et seq. (1976) (repealed 1977); sections 103(f) and 104 of the Coal Act of 1969, 30 U.S.C. §801 et. seq. (1970) (amended 1977). However, withdrawal and closure are not always required, particularly where the Secretary has determined that there is no physical area affected or are any miners to withdraw. *See Mid-Continent Res., Inc.*, 12 FMSHRC 949, 951 n.4, 957 (May 1990).

In its reply brief, Pocahontas points to judicial precedent indicating that the Commission has authority to review orders issued under section 103(k), 30 U.S.C. § 813(k), even though the statutory language is silent on the matter.[9] However, unlike a section 104(e) POV notice, authority for Commission review of section 103(k) orders can be found in the Act's legislative history. S. Conf. Rep No. 95-181, at 13 (1977), *Leg. Hist.* at 601; *see also Am. Coal Co. v. U.S. Dep't of Labor*, 639 F.2d 659, 660 (10th Cir. 1981); *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 515 (8th Cir. 2012). In determining that the Commission possessed the requisite jurisdiction to review section 103(k) orders, the Tenth Circuit found support in its reading of the entire Mine Act, as well as the legislative history, which states that "an operator . . . *may appeal to the Commission the issuance of a closure order*." *Am. Coal Co.*, 639 F.2d at 660, quoting, S. Conf. Rep. No. 95-181, at 13 (1977), *Leg. Hist.* at 601 (emphasis added). This language is particularly important, because a section 103(k) order, like a MSHA enforcement order, frequently does result in the withdrawal of miners through closure of an affected area. In contrast, a POV notice, by itself, cannot result in withdrawal or closure.

Accordingly, given the plain meaning of section 105(d), its relationship to section 104, and the Act's legislative history, we conclude that a POV notice cannot be treated as a citation or order under the Mine Act.[10]

D. An operator may obtain Commission review of a POV notice during the contest of a related withdrawal order issued pursuant to section 104(e).

The Commission and the courts have consistently concluded that once jurisdiction has attached, section 105(d) unambiguously sets forth a broad grant of Commission authority to direct "other appropriate relief." *North Am. Drillers*, 34 FMSHRC 352, 356 (Feb. 2012). Thus, "where the statute creates Commission jurisdiction, it endows the Commission with a plenary range of adjudicatory powers to consider issues, to make findings of fact and conclusions of law, and to render relief – in short, to dispose fully of cases committed to Commission jurisdiction." *Drummond Co.*, 14 FMSHRC 661, 674 (May 1992); *see also Kaiser*, 10 FMSHRC at 1171; *Climax Molybdenum Co. v. Sec'y of Labor*, 703 F.2d at 452.

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[9] Although the Secretary correctly asserts that Pocahontas did not raise the section 103(k) argument prior to its reply brief, we believe that this example of the Commission's jurisdictional authority is sufficiently related as part of the larger reading of the Act's structure and language, and therefore, should be considered. *See Oak Grove Res., LLC*, 33 FMSHRC 2657, 2664 (Nov. 2011).

[10] Having concluded that we have no jurisdiction to directly review the POV notice received by Pocahontas, we do not reach its argument that it was deprived of procedural due process in this case because it could not immediately contest the POV notice. That argument can be raised by Pocahontas in a challenge to a section 104(e) withdrawal order involving a specific factual situation. We note that in *Brody* we concluded that an operator may obtain a hearing on a POV notice after it has received a section 104(e) withdrawal order and be afforded due process. 36 FMSHRC at 2044. We further note that, as evidenced by its numerous motions to reschedule or stay the hearings in the instant or related section 104(e) dockets, Pocahontas' own actions delayed the adjudication of the very issue it sought review of here.

In the recent *Brody* decision, we held that in exercising our jurisdiction over section 104(e) withdrawal orders, the Commission may address a challenge to the validity of the POV rule underlying the withdrawal orders. 36 FMSHRC at 2035. The same is true for the instant case. Because the Commission has jurisdiction to review the section 104(e) withdrawal orders, its section 105(d) power to direct "other appropriate relief" grants us the requisite authority to address Pocahontas' challenge to the POV notice in the context of those orders. *See Leg. Hist.* at 1080 (explaining that POV notices are reviewable before the Commission once a section 104(e) withdrawal order has issued).

Therefore, the validity of POV Notice No. 7219153 is properly the subject of the proceedings containing the section 104(e) withdrawal orders and may be heard by the Commission during the contest of those orders.[11]

[11] As previously explained, the validity of the subject POV Notice was properly challenged and considered by a Commission ALJ alongside its contest of two related section 104(e) withdrawal orders in Docket No. WEVA 2014-395-R. *See* n.6, *supra.*

IV.

Conclusion

For the reasons set forth herein, we conclude that the Commission does not have jurisdiction under section 105(d) to review a direct challenge to a POV notice independent of a section 104(e) withdrawal order. Accordingly, we affirm the Judge. This contest proceeding is dismissed for lack of jurisdiction.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

Commissioner Althen, concurring:

I concur with the majority in result only. I reach that result through a markedly different path.[1] Based upon the following considerations, I would find the validity of a POV determination is not justiciable unless and until MSHA issues a section 104(e) withdrawal order within the statutorily prescribed ninety day period.[2]

There is, of course, a strong presumption that agency action is reviewable. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140-41 (1967), a*brogated on other grounds, Califano v. Sanders,* 430 U.S. 99 (1977) ("*Abbott Labs.*"). However, that presumption is not absolute.

Principles of justiciability limit the types of administrative agency actions amenable to review. To be subject to review, the claimant's dispute must be justiciable – that is, *inter alia*, the controversy must have ripened into a dispute concerning a final decision that has a direct and immediate impact upon the complainant. *Abbott Labs., supra.* This element of justiciability serves "to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 143-49.

In *Abbott Labs.*, the Court described ripeness as a flexible concept implicating consideration of (1) whether the matter was in a posture amenable to judicial review and (2) the hardship upon the parties stemming from withholding judicial consideration. The Court identified these factors, stating that "[t]he problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149.

The Court provided additional guidance regarding principles of the fitness for review in *Bennett v. Spear*, 520 U.S. 154 (1997).

> As a general matter, two conditions must be satisfied for agency action to be "final": First, the action must mark the "consummation" of the agency's decisionmaking process, *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 113 – it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations

[1] I dissented in *Brody Coal Co.*, 36 FMSHRC 2027 (Aug. 2014), in which the Commission found that MSHA's POV regulation is facially valid by holding that MSHA (1) did not violate the Administrative Procedure Act by failing to provide notice or opportunity to comment on the specific pattern criteria created by the regulation, and (2) does not deny due process by placement of an operator in POV status without having proved any S&S violation. Those issues are not before us in this case.

[2] In discussing mootness, the majority finds this case is not moot and, therefore, "remains justiciable." Slip op. at 5 n.6. I agree in the sense that if the case were justiciable in the first instance, it would not now be moot.

> have been determined," or from which "legal consequences will flow."

Id. at 178 (quoting *Port of Boston Marine Terminal Assn. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970)).

In *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726 (1998), the Court again addressed factors related to ripeness for review. There, the Sierra Club challenged a Land and Resource Management Plan developed by the United States Forest Service. The Plan established logging goals but did not permit any specific logging activities. The Court found the case was not justiciable:

> [T]he provisions of the Plan that the Sierra Club challenges do not create adverse effects of a strictly legal kind, that is, effects of a sort that traditionally would have qualified as harm. . . . [T]hey do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations.

Id. at 733 (citations omitted).

Following these precepts, federal courts have assiduously applied the principles of ripeness for review in considering the availability of judicial review of agency decisions. *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"), *quoting Thomas v. Union Carbide Agricultural Products Co.,* 473 U.S. 568, 580–581 (1985) (quoting 13A Wright, Miller, & Cooper, Federal Practice and Procedure § 3532, at 112 (1984)); *National Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 809 (2003) (the regulation did "not create 'adverse effects of a strictly legal kind,' which we have previously required for a showing of hardship."); *Joshi v. NTSB*, 791 F.3d 8, 13 (D.C. Cir. 2015) ("Before we may consider the agency's action a final 'order,' the action must "determine rights or obligations or give rise to legal consequences'") (quoting *Safe Extensions, Inc.* v. F.A.A., 509 F.3d 593, 598 (D.C. Cir. 2007)); *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570, 582–583 (8th Cir. 2007) ("The order only suggests the FCC, if faced with the precise issue, would preempt fixed VoIP services. Nonetheless, the order does not purport to actually do so and until that day comes it is only a mere prediction."); *Meredith v. FMSHRC*, 177 F.3d 1042, 1047 (D.C. Cir. 1999) ("We have held repeatedly and across agency contexts that an order will be considered final to the extent that it 'imposes an obligation, denies a right, or fixes some legal relationship, usually at the consummation of an administrative process.'") (quoting *Transwestern Pipeline Co. v. FERC*, 59 F.3d 222, 226 (D.C.Cir.1995) (*quoting State of Alaska v. FERC*, 980 F.2d 761, 763 (D.C.Cir.1992)).

Mindful of these principles, I turn to the first prong of *Abbott Labs., supra.*, the ripeness of the issue for judicial determination. I conclude that an agency decision to designate an operator as a "pattern violator" does not impose any immediate obligations upon an operator.

Without doubt, a POV determination may have – indeed, is likely to have – serious legal consequences for an operator. However, such consequences arise if and only if the operator commits an S&S violation within 90 days following the determination. Whether the POV determination will affect an operator in a "concrete way" depends upon whether the operator commits an S&S violation within 90 days following the issuance of the notice of the determination. Consequently, a POV determination, standing alone, does not impose any new legal obligations or sanctions upon an operator.[3]

There is no doubt that the POV determination of which an operator receives "notice" is final from the standpoint of the agency. There is no appeal within MSHA from the POV determination. Review and reversal by the Commission is the only recourse, and an S&S violation within 90 days will result in issuance of a section 104(e) withdrawal order followed by the chain of 104(e) orders. However, the critical point here is that the heightened sanction does not apply immediately and concretely to future S&S violations.

Regarding the second prong of *Abbott Labs., supra.*, the hardship upon the parties, it would be disingenuous to ignore the reality of mine safety enforcement. One may reasonably infer that MSHA inspectors pay especially close attention during an inspection of an alleged "pattern violator." Moreover, MSHA frequently issues S&S citations to virtually every operator. Therefore, once an operator has received notice of a POV determination, it very likely will receive an S&S citation within 90 days and experience the adverse consequences from the POV determination.

However, in considering hardship in the context of reviewing the agency determination, I also weigh the extent of hardship flowing from a delay of review until the issue has ripened into a concrete dispute with legal consequences. In this respect, within 90 days of issuance, a disputed POV determination will either fall by the wayside or ripen into a concrete and justiciable dispute.[4] I do not dismiss the "hardship" of each day during which an operator is on a

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[3] Senator Schweiker's statement that when a POV Notice is issued "nothing has happened yet" goes to justiciability. *Legis. Hist.* at 1080. As the District of Columbia Circuit has observed: "Ordinarily, a claim that a challenge to an agency's final legal position must await an enforcement proceeding is analyzed under the ripeness doctrine's requirements that issues be fit for review and (in some cases) that deferral of review would pose significant hardship on the complaining party." *Unity08 v. FEC*, 596 F.3d 861, 865 (D.C. Cir. 2010).

[4] The Commission has jurisdiction to grant declaratory relief if, "'one or both of the parties have taken steps or pursued a course of conduct which will result in an 'imminent and inevitable litigation, provided the issue is not settled and stabilized by a tranquilizing declaration.'" *Mid-Continent Res., Inc.*, 12 FMSHRC 949, 955 (May 1990), *quoting Bruhn v. STP Corp.*, 312 F. Supp. 903, 906 (D. Colo. 1970), *quoting* Borchard, Declaratory Judgments 57 (2d ed. 1941); *North American Drillers, LLC*, 34 FMSHRC 352 (Feb. 2012). In light of the annual issuance of literally tens of thousands of S&S citations, an operator might argue, unsuccessfully in light of the majority's decision, that issuance of an S&S citation within 90 days is "inevitable" and delay serves no purpose. In this case, however, the operator neither sought a declaratory judgment nor proffered evidence that a section 104(e) withdrawal order is inevitable following an adverse POV determination.

chain of withdrawal orders. However, an operator fearing the commencement of such chain during the 90-day period may begin immediately to review the asserted basis for the POV determination and marshalling facts, evidence, and arguments to rebut the basis of the POV determination.

In summary, prior to initial issuance of a section 104(e) withdrawal order, the impact of a POV determination is conditional. A dispute over the validity of the determination will either become moot or ripen into a concrete controversy within 90 days. For these reasons, I would find the operator's notice of contest to the POV determination filed prior to issuance of a section 104(e) withdrawal order does not present a justiciable controversy.

William I. Althen, Commissioner

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