FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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SEP 2 9 2015

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEVA 2014-82-R, et al.[1]
BRODY MINING, LLC	:	

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

DECISION

BY: Young, Cohen, and Nakamura, Commissioners

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), are before the Commission a second time on interlocutory review. In this case of first impression, a Commission Administrative Law Judge dismissed a "pattern of violations" ("POV") notice issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Brody Mining, LLC pursuant to section 104(e) of the Mine Act,[2] 36 FMSHRC 2941 (Nov. 2014) (ALJ), and we granted review of the Secretary

[1] The other relevant docket numbers involved in this proceeding are listed in Appendix A, attached to this decision.

[2] Section 104(e) of the Mine Act, 30 U.S.C. § 814(e), provides:

> (1) 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

of Labor's petition. At issue is whether the Judge had jurisdiction to review the validity of the POV notice and, if so, whether the Judge erred in dismissing the notice. For the reasons discussed more fully below, we conclude that the Judge had jurisdiction to review the POV notice. However, we further conclude that under the circumstances of this case he erred in invalidating the POV notice. Accordingly, we vacate the Judge's invalidation of the POV notice and remand for further proceedings.

I.

Procedural Background

Section 104(e) of the Mine Act sets forth provisions regarding the issuance and termination of a POV notice. Section 104(e)(1) provides that if an operator has a pattern of violations of mandatory health or safety standards which are of such nature as could significantly

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> 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.
> (2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of 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 health or safety hazard. The withdrawal order shall remain in effect until an authorized representative of the Secretary determines that such violation has been abated.
> (3) If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of mandatory health or safety standards that could significantly and substantially contribute to the cause and effect of a coal or other mine health and safety hazard, the pattern of violations that resulted in the issuance of a notice under paragraph (1) shall be deemed to be terminated and the provisions of paragraphs (1) and (2) shall no longer apply. However, if as a result of subsequent violations, the operator reestablishes a pattern of violations, paragraphs (1) and (2) shall again be applicable to such operator.
> (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.

and substantially contribute to the cause and effect of health or safety hazards, it shall be given written notice that such a pattern exists. 30 U.S.C. § 814(e)(1). If, within 90 days following issuance of the POV notice, an inspector cites the operator for a significant and substantial ("S&S") violation,[3] then MSHA shall issue a withdrawal order under section 104(e) of the Act. *Id.* The operator will thereafter be subject to additional withdrawal orders for each new 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)(2), (3).

MSHA has published regulations at 30 C.F.R. Part 104 to implement section 104(e) of the Mine Act. The regulations, which were first published in 1990, initially included provisions which identified information that MSHA used to determine mines with a "potential" pattern of violations ("PPOV") and provided that only citations and orders that had become final orders were used to identify a mine with a PPOV. 30 C.F.R. § 104.3 (1991). When notified of a PPOV, an operator had an opportunity to engage in certain remedial measures. 30 C.F.R. § 104.4(a) (1991). The rule set forth procedures for the issuance of a POV notice if the MSHA District Manager continued to believe that a pattern of violations existed at the mine. 30 C.F.R. § 104.4(b) (1991). Under these regulations, MSHA never successfully used its pattern of violations authority against a mine operator.[4]

Part 104 was most recently revised in January 2013, and the revised rules became effective on March 25, 2013. 78 Fed. Reg. 5056, 5056-74 (Jan. 23, 2013). The revised POV regulations implemented two major changes from the 1990 rule: (1) the elimination of the PPOV notice and review process; and (2) the elimination of the requirement that MSHA could consider only final orders in its POV review. *Id.* at 5056. In relevant part, the POV regulations list eight factors that MSHA considers in making its POV determination, and provide that MSHA will post specific pattern criteria on its website. 30 C.F.R. §§ 104.2(a), (b).

These proceedings involve a POV notice and subsequent withdrawal orders issued to Brody pursuant to section 104(e) of the Mine Act and the revised POV regulations. In our first interlocutory review, as described below, we upheld the facial validity of the revised rules. In this, our second interlocutory review, we review the application of the rules to the subject proceedings.

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[3] 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."

[4] *See*, U.S. Dep't of Labor, Office of Inspector General audit report, "In 32 Years MSHA Has Never Successfully Exercised its Pattern of Violations Authority," Rep. No. 05-10-005-06-001 at 14 (Sept. 29, 2010), referenced in the preamble of the 2013 POV rule, 78 Fed. Reg. 5056, 5058 (Jan. 23, 2013).

A. **First interlocutory review**

On October 24, 2013, MSHA issued a POV notice to Brody for conditions at its No. 1 Mine. The notice lists 54 citations and orders issued between October 9, 2012 and October 8, 2013, in groups regarding conditions and or practices that contribute to: (1) ventilation and/or methane hazards; (2) emergency preparedness and escapeway hazards; (3) roof and rib hazards; and (4) inadequate examinations. The notice further states that, "[t]hese groups of violations, taken alone or together, constitute a pattern of violations . . . ." Notice No. 7219154.

Brody filed a contest with the Commission, challenging the issuance of the notice. Chief Administrative Law Judge Robert Lesnick dismissed the contest on the basis that no provision of the Mine Act or the Commission's procedural rules authorized him to adjudicate the notice in the absence of a withdrawal order predicated on the notice. 36 FMSHRC 284, 287 (Jan. 2014) (ALJ). Brody did not seek review of the Judge's dismissal of the contest.

After issuance of the POV notice, Brody received several section 104(e) withdrawal orders. Brody filed contests of the withdrawal orders and an application seeking temporary relief from the POV notice and withdrawal orders. The application for temporary relief was denied, and Brody did not seek review of that decision. 36 FMSHRC 2027, 2033 (Aug. 2014).

In the contest proceedings on the orders,[5] the parties filed cross-motions for summary decision regarding the validity of the revised POV regulations. Among other issues, the parties disputed whether MSHA properly eliminated the 1990 PPOV notice and review process and the requirement that MSHA could only consider final orders in its POV review process.

By order dated January 30, 2014, the Chief Judge affirmed the facial validity of the revised POV regulations. 36 FMSHRC at 298-316. The Judge certified his order for interlocutory review, which we granted.

While the facial validity of the rule was pending before us on interlocutory review, prehearing proceedings continued at the trial level.[6] The Chief Judge reassigned the case to Administrative Law Judge William Moran for hearings on the citations and orders underlying the POV notice. On August 4, 2014, Judge Moran issued notices scheduling the hearings for the weeks of September 23, September 29, and October 7, 2014. The captions of the hearing notices

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[5] Contest proceedings arise under 30 U.S.C. § 815(d), as implemented by 29 C.F.R. Part 2700 Subpart B, and involve the contest of a citation or order before MSHA has proposed a civil penalty for the violation described in the citation or order.

[6] Commission Procedural Rule 76(a)(2) provides in part, "[i]nterlocutory review by the Commission shall not operate to suspend the hearing unless otherwise ordered by the Commission." 29 C.F.R. § 2700.76(a)(2).

identified the docket numbers of the civil penalty proceedings[7] associated with the citations and orders listed in the POV notice but did not list the docket numbers of the contests of the section 104(e) orders.

On August 28, 2014, we issued our decision on the first interlocutory appeal. 36 FMSHRC at 2027 ("*Brody I*"). We concluded that the revised POV regulations are facially valid and consistent with the requirements of procedural due process, that MSHA's screening criteria available on MSHA's website (*see* 30 C.F.R. § 104.2(b)) were not required to be the subject of notice-and-comment rulemaking, and that the rule was not applied in an impermissibly retroactive manner to Brody. *Id.* at 2054. Accordingly, we affirmed the Judge's interlocutory order and remanded for further proceedings. *Id.* Brody has filed a petition challenging the Commission's decision in the U.S. Court of Appeals for the D.C. Circuit.[8]

B. Second interlocutory review

Prior to the first hearing date before Judge Moran, the parties filed several pretrial motions, including Brody's Motion in Limine Concerning Definition of a Pattern, in which the operator sought to compel the Secretary to define "pattern of violations" and to explain how the alleged S&S violations constitute a pattern of violations. During a conference call on September 19, 2014, the Judge granted Brody's motion and ordered the Secretary to provide a clearer definition of the term and to set forth with specificity what constitutes a POV with respect to the citations and orders involved in the case. Conf. Call Tr. (9-19-14) at 9-11; *see* also Tr. (9-23-14) at 14.

During the three-week hearing period in September and October 2014, the Judge conducted a hearing on 28 of the citations and orders listed in the POV notice.[9] At the beginning of the hearing, prior to taking evidence, the Judge dismissed the POV charge. Tr. (9-23-14) at 68-69; Tr. (9-24-14) at 439-40. Subsequently, the Judge issued an order, dated November 3, 2014, stating that he had dismissed the POV notice at the beginning of the hearing because the Secretary had failed to adequately set forth the basis for his POV charge and had denied Brody procedural due process. 36 FMSHRC at 2952-53. The Judge also set forth his findings with respect to the violations and S&S designations alleged in the citations and orders, and assessed

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[7] Civil penalty proceedings arise under 30 U.S.C. § 815(a), as implemented by 29 C.F.R. Part 2700 Subpart C, and involve the contest of a civil penalty that MSHA has proposed for a violation described in a citation or order.

[8] The case is pending as No. 14-1171.

[9] Prior to hearing, the 54 citations were reduced to 52 because the Secretary vacated two citations listed in the POV notice. 36 FMSHRC at 3033 (stips. 8, 9). The Secretary further agreed to delete the S&S designations with respect to 12 citations, and Brody agreed to accept the allegations of violation and S&S designations with respect to 12 citations. *Id.* at 2960-61.

civil penalties. *Id.* at 2960-3031. He held that 17 citations and orders were S&S, while 11 were not. *Id.*

The parties filed several post-hearing pleadings, including the Secretary's motion requesting that the Judge certify his November 3 order for interlocutory review. In the motion, the Secretary argued in part that the Judge's dismissal order presented the controlling questions of whether the Judge had jurisdiction to adjudicate the validity of the POV notice, and whether the Secretary's definition of "pattern of violations" satisfies section 104(e)(4) of the Mine Act and due process requirements. The Secretary further asserted that immediate review would materially advance resolution of these proceedings.

On December 30, 2014, the Judge issued an order which, in relevant part, granted the Secretary's motion for certification. 36 FMSHRC 3355, 3363-64 (Dec. 2014) (ALJ). The Judge also stated that, as a result of his dismissal of the POV notice, all section 104(e) orders issued to Brody were automatically converted to section 104(a) citations. *Id.* at 3364 n.5.

In January 2015, we issued an order granting interlocutory review of the Judge's November 3 order "with regard to whether the Judge had jurisdiction to adjudicate the validity of the POV notice issued by the Secretary to Brody on October 24, 2013, and if so, whether the Judge erred in dismissing the Secretary's POV notice." Unpublished Order at 1 (Jan. 8, 2015). We granted leave to the United Mine Workers of America to file an amicus curiae brief supporting the Secretary's position, and heard oral argument.

II.

Disposition

A. Jurisdiction

The Secretary makes two main arguments in support of his position that the Judge lacked jurisdiction to adjudicate the validity of the POV notice. First, he contends that the Judge's hearing notices did not include the dockets of the contests of the section 104(e) withdrawal orders, and that the Judge may not adjudicate the validity of the notice in the absence of a contest of a section 104(e) withdrawal order. Second, the Secretary asserts that the contested withdrawal orders are before the D.C. Circuit on interlocutory appeal, and the Court has exclusive jurisdiction over the contests under section 106(a)(1) of the Mine Act, 30 U.S.C. § 816(a)(1). [10]

[10] 30 U.S.C. § 816(a)(1) provides in relevant part:

> Any person adversely affected or aggrieved by an order of the Commission issued under this Act may obtain a review of such order in any United States court of appeals . . . . Upon such filing, the court shall have exclusive jurisdiction of the proceeding and of

As to the Secretary's first argument, the Secretary is correct in asserting that if the contests of the section 104(e) withdrawal orders were not before the Judge, the Judge lacked jurisdiction to consider the validity of the POV notice issued to Brody. Under the law of the case doctrine, a decision made at one stage of litigation and not challenged on appeal continues to govern the proceedings. *Manalapan Mining Co.*, 36 FMSHRC 849, 852 (Apr. 2014). In his January 30, 2014 order, the Chief Judge dismissed Brody's contest of the POV notice on the basis that no provision of the Mine Act or the Commission's procedural rules authorized him to adjudicate a notice in the absence of a contest of a withdrawal order based upon the notice. 36 FMSHRC at 287. Because Brody did not seek review of the Judge's dismissal of the contest, the Judge's ruling is the law of the case in this proceeding. 36 FMSHRC at 2033. Thus, in this proceeding, the validity of the POV notice may only be considered as part of the adjudication of a contest of withdrawal orders predicated on the notice.[11]

As mentioned above, the Judge's hearing notices did not include the docket numbers of the contest proceedings of the section 104(e) withdrawal orders that were predicated on the POV notice. Rather, the Judge included the docket numbers of the civil penalty proceedings associated with the citations and orders listed on the POV notice. The Judge, however, included the docket numbers of the contests of the withdrawal orders in his November 3, 2014 order disposing of the matters at issue during the hearing.

We conclude that, although the Judge did not include the docket numbers of the contests of section 104(e) withdrawal orders in the notices of hearing, those contests were before him at the time of the hearing. In his January order, the Chief Judge consolidated all contests of the section 104(e) orders predicated on the POV notice.[12] 36 FMSHRC at 293. When the Chief Judge reassigned the case to Judge Moran, he included all of the pending contest proceedings (the original 28 contests that were captioned in the Chief Judge's January 2014 order plus 48 additional contests). Thus, all of the pending contests of the section 104(e) orders were assigned to Judge Moran, including the 28 contests that later became part of an interlocutory appeal to the D.C. Circuit.

> the questions determined therein, and shall have the power to make and enter . . . a decree affirming, modifying, or setting aside, in whole or in part, the order of the Commission . . . .

[11] The issue of whether the Commission is authorized to directly review a POV notice is before the Commission in *Pocahontas Coal Co.*, Docket No. WEVA 2014-202-R.

[12] A Commission Judge may at any time, upon his or her own motion, order the consolidation of proceedings assigned to the Judge and involving similar issues. 29 C.F.R. § 2700.12.

While the docket numbers of the section 104(e) contests were not included on Judge Moran's notices of hearing, the parties and Judge clearly understood that those contests were at issue during the hearing. Indeed, some of them are listed on the Secretary's Prehearing Statement. In addition, counsel for the Secretary and the operator made statements during the hearing indicating their understanding that the contests were at issue during the hearing. Tr. (9-23-14) at 35, 65-67. On the first day of the hearing, the Judge read the docket numbers at issue in the hearing and specifically included the docket numbers of contests of section 104(e) orders predicated on the POV notice. Tr. (9-23-14) at 4; *see also* (Tr. 9-23-14) at 69; Tr. (9-29-14) at 825. The Secretary's counsel did not object, or indicate any surprise, about the inclusion of the docket numbers of contests of section 104(e) orders. The parties were not prejudiced by the Judge's failure to include the docket numbers of the withdrawal order contests in the hearing notices. [13] Thus, the Judge's omission of the docket numbers of the contests of the withdrawal orders in the hearing notices amounts to harmless error and does not deprive the Judge of jurisdiction over the contests.

We further hold that the Judge was not deprived of jurisdiction over the POV notice because the contested withdrawal orders are before the D.C. Circuit on interlocutory appeal. Following our remand in *Brody I*, the 28 contest dockets that were the subject of our decision were simultaneously pending before Judge Moran and the D.C. Circuit.

Section 106(a) of the Mine Act provides that if a party appeals a Commission decision to a court of appeals, the court "shall have exclusive jurisdiction of the proceeding and of the questions determined therein." 30 U.S.C. § 816(a). Appellate review of Commission action is restricted to final Commission orders. *See Meredith v. FMSHRC*, 177 F.3d 1042, 1047-48 (D.C. Cir. 1999) ("[W]e do not discern any exception to the principle of finality within the Mine Act's judicial review provisions."). Because *Brody I* remanded the contests to the Judge "for further proceedings" (36 FMSHRC at 2054), our decision was not a final Commission order. *Meredith*, 177 F.3d at 1047 ("[T]he Commission's order . . . remanding the matter to the ALJ for further record development clearly falls outside the heartland of final action.").

The collateral order doctrine provides a court of appeals with a basis for jurisdiction to hear appeals from a limited category of decisions that are not final. *Id.* at 1048. Under that doctrine, "even though a disposition does not end the litigation, it qualifies for immediate review if it: (i) conclusively determines a disputed question; (ii) resolves an important issue completely separate from the merits of the action; and (iii) is effectively unreviewable on appeal from a final judgment." [14] *Id.* (citations omitted). All three prongs must be satisfied in order for review to be

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[13] We do not consider it significant that the Judge did not refer to the disposition of the section 104(e) contests in his November 3 order. The Judge clarified in his December 30 order that the effect of his determination that the POV notice was invalid was to modify the section 104(e) orders to section 104(a) citations. 36 FMSHRC at 3364 n.5.

[14] The D.C. Circuit has requested that the Secretary and Brody brief whether the

granted. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). If the Court determines that it has jurisdiction over the contest proceedings under this doctrine, such jurisdiction would necessarily involve a question determined to be completely separate from the merits of the proceedings, essentially by operation of an exception to section 106(a). *See, e.g., Vulcan Constr. Materials, LP v. FMSHRC*, 700 F.3d 297, 300 (7th Cir. 2012).

Thus, the exercise of the Court's jurisdiction would not deprive the Judge of jurisdiction to consider the merits of the contest proceedings. Accordingly, we conclude that the Judge had jurisdiction to consider the validity of the POV notice because the contests of the withdrawal orders predicated on the POV notice were properly before him.

B. The Judge's Dismissal of the POV Notice

The Judge noted that Brody filed before him a motion in limine seeking to compel the Secretary to identify: "(1) what constituted a pattern of violations; (2) what number of S&S designations Brody had to prevail upon to defeat the pattern of violations designation; and (3) how the grouping of citations in the pattern notice constituted a pattern of violations." 36 FMSHRC at 2952. The Judge "agreed that each of these were reasonable and necessary inquiries, essential for a Respondent to be able to defend against the [POV] charge," and dismissed the POV notice at the beginning of the hearing based on his determination that the Secretary had failed to set forth the basis for his POV charge. *Id.* at 2952-53.

We address the Judge's determinations with respect to each of the three elements that he concluded were essential for Brody's defense against the POV charge. We begin by addressing whether the Secretary failed to adequately identify what constitutes a "pattern of violations."

In enacting section 104(e), Congress explicitly recognized that the provision was 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). Congress stated that it viewed the pattern notice "as indicating 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." S. Rep. No. 95-181 at 33, *Legis. Hist.* at 621. It observed that the existence of a pattern "should signal to both the operator and the Secretary that there is a need to restore the mine to effective safe and healthful conditions and that the mere abatement of violations as they are cited is insufficient." *Id.* Congress explained that while it "considers that a pattern is more than an isolated violation, pattern does not necessarily mean a prescribed number of violations of

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Commission's order is final and appealable. Unpublished Order, No. 14-1711 (D.C. Cir. Jan. 13, 2015).

predetermined standards nor does it presuppose any element of intent or state of mind of the operator." *Id.*

On review and before the Judge, the Secretary construes "pattern" to mean "[a] mode of behavior or series of acts that are recognizably consistent," and submits that as few as two violations may constitute a pattern. Sec'y Br. at 10, *citing Pattern*, Black's Law Dictionary (9th ed. 2009); Sec'y Post-Hr'g Br. at 9. The Secretary further states that "a POV exists if the S&S violations are 'ordered' or 'arranged' in such a way that reflects an 'external organizing principle' – the principle that the operator has a tendency to commit [] S&S violations."[15] Sec'y Br. at 10; Sec'y Post-Hr'g Br. at 9. The Secretary emphasizes that a "mode of behavior or series of acts" is "rendered 'ordered' or 'arranged' based on their relationship to each other or some external principle, rather than a mere numerical calculation." Sec'y Br. at 10-11; *see also* Sec'y Post-Hr'g Br. at 9.[16]

The POV rule itself provides additional guidance regarding the interpretation of "pattern of violations." It states that it implements section 104(e) of the Act "by addressing mines with an inspection history of recurrent S&S violations of mandatory safety or health standards that *demonstrate a mine operator's disregard for the health and safety of miners*." 30 C.F.R. § 104.1 (emphasis added). The stated purpose of the procedures set forth in the POV regulations "is the restoration of effective safe and healthful conditions at such mines." *Id.* The POV regulations also set forth eight criteria that MSHA reviews to identify mines with a POV in section 104.2:

> (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

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[15] The Secretary's identification of an "external organizing principle" is not very helpful. In defining the external organizing principle as a "tendency to commit S&S violations," the Secretary essentially is referring to the pattern rather than identifying what it is a pattern of. Thus, with regard to the "external organizing principle," the Secretary's definition is circular. As noted below and consistent with the legislative history and regulations discussed herein, the actual "external organizing principle" is whether the operator has demonstrated a disregard for the health and safety of miners.

[16] The Secretary has invited the Commission to determine which factors are relevant to determining the existence of a pattern of violations. Sec'y Post-Hr'g Br. at 12; Sec'y Br. 13-14.

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).[17]

We can discern in the Secretary's definition of "pattern," together with the Secretary's implementing regulations, a definition of "pattern of violations" that is consistent with the purpose of section 104(e), as evident in the legislative history. Accordingly, we hold that a "pattern of violations" under section 104(e) is established by an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator's disregard for the health or safety of miners. No particular number of S&S violations is required in order to constitute a pattern of violations, and a finding of a pattern of violations does not presuppose any element of intent or state of mind of the operator.[18] The eight criteria listed in section 104.2(a) are relevant to the determination of whether a pattern of

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[17] We note that with respect to section 104.2(a)(7), regarding "[o]ther information that demonstrates a serious safety or health management problem at the mine," the Secretary stated in the preamble to the regulations that:

> [T]his other information may include, but is not limited to, the following:
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> - Evidence of the mine operator's lack of good faith in correcting the problem that results in repeated S&S violations;
> - Repeated S&S violations of a particular standard or standards related to the same hazard;
> - Knowing and willful S&S violations;
> - Citations and orders issued in conjunction with an accident, including orders under sections 103(j) and (k) of the Mine Act; and
> - S&S violations of health and safety standards that contribute to the cause of accidents and injuries.

78 Fed. Reg. 5056, 5062 (Jan. 23, 2013).

[18] Nor is it necessary, as the Judge suggested (Tr. (9-23-14) at 60; Tr. (9-25-14) at 649-50; 36 FMSHRC at 2953), for the Secretary to demonstrate that the existing enforcement scheme is unable to address the history of recurrent violations.

violations exists.[19] As specific to this case, the POV notice issued to Brody lists four patterns, identifying the specific standard or hazard that was implicated by those patterns. Sec'y Br. at 16; Oral Arg. Tr. at 10; Sec'y Post-Hr'g Br. at 10, 15; Conf. Call Tr. (7-22-14) at 9.

Regarding the second part of the motion in limine, the Judge accepted Brody's argument that it was "essential" that Brody know the number of S&S designations that it had to prevail upon in order to defeat the pattern of violations designation.[20] 36 FMSHRC at 2952; *see also*

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[19] In a particular case, there may be "other information that demonstrates a serious safety or health management problem . . . ." 30 C.F.R. § 104.2(a)(7). In this case, the Secretary suggested, before the Judge and on review, that the Commission consider such factors as:

1. The nature and seriousness of the hazards presented;
2. The timing of the violations;
3. The location of the violations in the mine;
4. Any trends with regards to injuries and/or accidents;
5. Whether management personnel were involved;
6. The standards violated;
7. The conduct of the operator in responding to the related violations and whether the operator exhibited any heightened awareness of possible consequences; and
8. Any other factor that is revealed by the evidence to establish a 'mode of behavior or series of acts that are recognizably consistent.'

Sec'y Br. at 13; Sec'y Post Hr'g Br. at 12-13; Tr. (9-23-14) at 48-49. At oral argument before us, the Secretary's counsel provided a fuller explanation of these factors. With respect to the third factor above, counsel stated that if violations "keep happening in the same location, that would be a factor strengthening a pattern allegation." Oral Arg. Tr. at 33. The sixth factor above refers to the standards encompassed by MSHA's Rules to Live By initiative, whereas the first factor relates to standards other than those encompassed by the Rules to Live By. *Id.* at 34. With respect to the seventh factor, the "consequences" referred to are those that relate to the safety and health of miners. *Id.* at 34-35. Depending upon the facts of a case, we agree that these may be helpful interpretative tools. The Judge may also consider other evidence that tends to show or refute a pattern arising from the relationship between violations and other circumstances, such as a change in safety or senior management personnel, or notice of a general problem communicated to mine management and the response by the mine.

[20] Our dissenting colleague disagrees that the Judge accepted Brody's argument that it was "essential" that Brody know the number of S&S designations that it had to prevail upon in order to defeat the POV designation. Our colleague relies in part upon a statement that the Judge made on the first morning of the hearing that he was not "looking for numbers." Slip op. at 27-29. As Brody has acknowledged, however, Brody repeatedly sought "information as to what number of S&S citations it needed to defeat to have the POV notice vacated," from the first hearing on temporary relief to the hearing before Judge Moran. *See, e.g.*, B. Br. at 2, 4, 18. In

Conf. Call Tr. (7-22-14) at 7-8; Tr. (9-23-14) at 13, 15-16. The Secretary contends that no particular number of violations is necessary to establish a POV. Sec'y Br. at 10. The Secretary's contention is supported by legislative history, in which Congress explained that while it "considers that a pattern is more than an isolated violation, pattern does not necessarily mean a prescribed number of violations." S. Rep. No. 95-181 at 33, *Legis. Hist.* at 621. Accordingly, because no particular number of S&S violations is required in order to constitute a POV, we conclude that the Judge erred in his determination that Brody would need to know what number of S&S designations it had to prevail upon in order to defeat the pattern charges.

We next address the Judge's determination that the Secretary failed to adequately identify how the grouping of the citations and orders in the POV notice issued to Brody constituted a pattern of violations. We recognize that in this case of first impression, the appropriate procedural path is far from clear. While we commend the Judge on his expeditious and decisive handling of this case, we nonetheless conclude that it was premature to dismiss the POV notice at the beginning of the hearing, prior to taking evidence.

Preliminarily, we briefly describe our due process holding in *Brody I* in order to clarify the scope of our consideration in the subject appeal.

In the first interlocutory appeal before us, Brody argued that the POV rule denied it due process because the rule permitted interruptions in its mining operations caused by the issuance of section 104(e) withdrawal orders without a prior hearing. 36 FMSHRC at 2041. We applied the three-part test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to consider whether due process was denied by the POV rule's elimination of the provision that MSHA could consider only final orders in its POV review and its elimination of the PPOV review process.[21] 36 FMSHRC at 2042-47. We concluded that an operator may have a "post-

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his November 3 decision, the Judge stated that he had "agreed" that Brody's inquiry regarding the number of S&S designations was a "reasonable and necessary inquir[y], *essential* for a Respondent to be able to defend against the [POV] charge." 36 FMSHRC at 2952 (emphasis added). We view this statement by the Judge in his written decision as adequate to support our conclusion that the Judge's invalidation of the POV notice rested in part on his conclusion that Brody would need to know what number of S&S designations it would have to prevail upon in order to defeat the pattern charges. *See Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475,1483 (Aug. 1982) (citing *Capitol Aggregates, Inc.*, 2 FMSHRC 1040, 1041 (May 1980)) (holding that a bench decision may be subject to later revision by a Judge and that it is not considered a final decision until it is written).

[21] The three-part test set forth in *Mathews v. Eldridge* balances the operator's interest in avoiding a loss against the interests which the government seeks to advance through summary proceedings. 4 Jacob A. Stein et al., *Administrative Law* § 32.02[1], at 32-54, 32-55 (2015). If the "private interest outweighs the government's interest, greater procedural due process rights will be afforded to the affected party." *Id.* at 32-55, 32-60, 32-61. The test requires "a weighing

deprivation" hearing on a POV notice after it has been issued a section 104(e) withdrawal order, after it has been deprived of its property interest of uninterrupted mining, and still be afforded adequate due process under the regulations. *Id.* at 2044. In reaching this conclusion, we relied upon various protections afforded operators.[22] We also noted that the unwarrantable failure provisions of section 104(d), like the POV provisions of section 104(e), do not contain any provisions for a hearing or other due process protection prior to the withdrawal of miners. *Id.*

At issue in the instant litigation are the contests of section 104(e) orders and the validity of the POV notice upon which they are predicated. The Commission's formal adjudicatory procedures set forth in 29 C.F.R. Part 2700 apply to these proceedings, including the opportunity for a full due process hearing as required by the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (2011) ("APA"). *See* 75 Fed Reg. 81459, 81460 (Dec. 28, 2010) (noting that hearings provided under the Commission's procedural rules, including those designated for simplified proceedings, are "full due process hearings").

Section 105(d) of the Mine Act requires that in adjudicating contests of orders issued under section 104 of the Mine Act, the Commission shall comply with the notice requirements set forth in section 554 of the APA. It provides:

> 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 . . . of an order issued under section 104 . . . the Secretary shall immediately advise the Commission of such notification, and the Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), and thereafter shall issue an order . . . .

30 U.S.C. § 815(d). The APA "codifies fairness guarantees for the administrative process." *Dep't of Educ. of State of Cal. v. Bennett*, 864 F.2d 655, 659 (9th Cir. 1988); *accord SunBridge*

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of the interests of the affected [operator], the risk of erroneous decision-making based on the procedures used, and the government's interest in efficient resolution of the issues." *Id.* at 32-54.

[22] The Commission noted the following pre-deprivation protections: MSHA's monthly monitoring tool; a process allowing operators to present information to support mitigating circumstances to the District Manager; a procedure permitting a corrective action program at any time; an opportunity to discuss citations with inspectors during a close-out conference; and an expedited procedure for contesting S&S citations. 36 FMSHRC at 2044-46. The Commission also relied upon the following post-deprivation procedures: an operator may seek temporary relief from a section 104(e) withdrawal order; and operators may seek expedited proceedings on contests of section 104(e) orders. *Id.* at 2046-47.

Care and Rehab. for Pembroke v. Leavitt, 340 Fed.Appx. 929, 935 (4th Cir. 2009) ("The APA 'requires procedural fairness in the administrative process.'") (citations omitted). Thus, we apply principles developed under the APA in considering whether the Secretary failed to adequately state how a pattern of violations exists with respect to the citations and orders listed in the POV notice.

Section 554(b)(3) of the APA requires that parties "shall be timely informed of . . . the matters of law and fact asserted." 5 U.S.C. § 554(b)(3).[23] Under this standard, courts have held that as "long as a party to an administrative proceeding is reasonably apprised of the issues in controversy, and is not misled, the notice is sufficient." *St. Anthony Hosp. v. U.S. Dep't of Health & Human Servs.*, 309 F.3d 680, 708 (10th Cir. 2002) (citations omitted); *SunBridge*, 340 Fed.Appx. at 936. "To establish a due process violation, an individual must show he or she has sustained prejudice as a result of the allegedly insufficient notice." 309 F.3d at 680 (citations omitted); *Long v. Bd. of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1158 (10th Cir. 1997). Prejudice may be demonstrated by a showing that a party would have litigated the matter differently if adequate notice had been received. *See* 117 F.3d at 1158; *Rapp v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1520 (10th Cir. 1995); *Citizens Bank of Marshfield, MO v. FDIC*, 751 F.2d 209, 213-14 (8th Cir. 1984); *see also Cumberland Coal Res., LP*, 32 FMSHRC 442, 449 (May 2010).

Here, the Judge invalidated the POV notice at the beginning of the hearing prior to the taking of evidence[24] based on his conclusion that the Secretary had failed to describe how the citations and orders listed in the notice constituted one or more patterns of violations. Tr. (9-23-14) at 68-69; Tr. (9-24-14) at 439-40. The Judge perceived that the Secretary had refused to describe how the citations and orders listed on the notice constituted patterns until after such time that the Judge had made his S&S determinations. Tr. (9-23-14) at 12; *see also* 36 FMSHRC at 2953 n.5 (citing Tr. (9-24-14) at 439-42); *Id.* at 2949-50 (noting that the Secretary's refusal to

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[23] 5 U.S.C. § 554(b) provides:

> (b) Persons entitled to notice of an agency hearing shall be timely informed of—
>
> (1) the time, place, and nature of the hearing;
> (2) the legal authority and jurisdiction under which the hearing is to be held; and
> (3) the matters of fact and law asserted. . . .

[24] The Judge clarified during the hearing that he had dismissed the POV notice at the beginning of the hearing, although he would issue the order setting forth his ruling after the hearing. Tr. (9-24-14) at 439-40; *see also* Tr. (9-23-14) at 34-35, 68.

identify the basis for the pattern claim until after the Judge made his S&S determinations was antithetical to procedural due process).[25]

We agree with the Judge that the Secretary is ordinarily required to disclose his theory of how the groupings in a POV notice constitute one or more patterns of violations prior to a hearing on the pattern. In *Brody I*, we accepted the Secretary's interpretation of the term "violations" in the phrase "pattern of violations" to include nonfinal orders that have not been the subject of Commission review. 34 FMSHRC at 2036-38. The Secretary relied upon nonfinal orders to describe the patterns set forth in the POV notice issued to Brody. Before the Commission, the Secretary requested that the proceedings be bifurcated so as not to disclose his theory of how the individual S&S violations comprised a pattern until after the Judge ruled on which citations were S&S. Conf. Call Tr. (9-19-14) at 2-3; Tr. (9-23-14) at 12. As an exercise of his discretion, the Judge properly rejected this request. 36 FMSHRC at 2950, 2959. Given the Judge's ruling rejecting bifurcation, Brody was entitled to the Secretary's theory of how the groupings amounted to patterns prior to the hearing on the pattern so as to be able to defend against the pattern charges.

In future cases,[26] we anticipate that in proving a POV, the Secretary may call one or more witnesses, such as inspectors or District Managers, who will testify about how the S&S violations constitute a POV. The identity of such witnesses will be disclosed prior to hearing by virtue of a Judge's prehearing order. The operator may become familiar with the Secretary's theory of the pattern by discovery, including contention interrogatories[27] and/or depositions of the Secretary's POV witness. However, evidence should not be developed, nor should discovery be permitted, regarding MSHA's prosecutorial discretion in issuing a POV notice.

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[25] Indeed, in the introduction to his order, the Judge said, "Like the unfair card game, the Secretary advised that he would be announcing the 'rules,' not simply after the hearings were concluded, but that he would also wait until after the Court made its determinations as to which of the litigated citations and orders were found to have the significant and substantial findings associated with them." 36 FMSHRC at 2950. As described below, however, the Secretary's counsel had modified his position and had agreed to address how the S&S violations link up and establish a pattern at the conclusion of evidence on each group of S&S violations. Tr. (9-23-14) at 49.

[26] We note that parties may file motions to sever non-pattern related citations from dockets involved in contests of section 104(e) orders. *See* 36 FMSHRC at 2960 n.9.

[27] We note that Brody, for instance, could have filed contention interrogatories requesting the basis for the Secretary's contention that the groupings on the POV notice constituted patterns. *See* 29 C.F.R. § 2700.58; *see also* Fed. R. Civ. P. 33(a)(2) ("An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact . . . .").

Nonetheless, we conclude that the Judge used an overly harsh remedy in invalidating the POV notice before it was sufficiently clear that such a remedy was warranted. Contrary to the Judge's perception that the Secretary was maintaining the position that he would not address the pattern charges until after the Judge made his S&S determinations, it appears that the parties had indicated at the beginning of the hearing prior to the taking of evidence that they would address the alleged patterns during closing arguments at the conclusion of evidence relating to the citations and orders included in each pattern, and in post-hearing briefs. Tr. (9-23-14) at 49, 71-72. In fact, the Secretary's counsel attempted to describe in his opening statement regarding a grouping listed in the notice – "emergency preparedness and escapeway hazards" – how the alleged S&S violations formed a pattern.[28] Notice No. 7219154. The Secretary's counsel stated:

> [Y]ou'll be hearing this week the first group of violations, the escapeway, emergency preparedness violation[s]. These violations are all similar in nature. Several of them cite the same standard. Several of them cite very similar conditions. They all relate to the same hazard; that hazard being, in the event of a mine emergency, miners being able to evacuate the mine quickly or to access lifesaving equipment, such as SCSRs or refuge alternatives.
>
> These violations were all issued within a confined period of time. We started in September of 2012 and went through up until when the POV notice was issued in October of 2013. And we believe that those are the types of factors that, as I discussed earlier, support a finding that these violations – that there's a pattern here. They were told by the violations themselves, "You're not maintaining your lifelines; you're not maintaining your directional indicators; you're not maintaining access to lifesaving equipment." And they were cited over and over and over again.
>
> And you'll hear from Inspector Hatfield that he had a meeting with mine management in July of 2013, gave them a copy of the Cumberland Mining decision, told them, talked to them about what S&S meant and how that applied to escapeway and emergency-type violations and that you have to view those conditions in the context of an emergency. And yet there were more violations after that.[29]

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[28] We further note that during the course of the hearing and during closing argument, the Secretary's counsel attempted to make arguments relating the citations to patterns. Tr. (9-24-14) at 372; Tr. (9-25-14) at 814-15; *see* 36 FMSHRC at 2958.

[29] We disagree with our dissenting colleague that an inspector can "offer no meaningful testimony regarding the basis for MSHA's POV determination." Slip op. at 34 n.9. For example, an inspector who witnesses safety practices at a mine over a period of time and who

> We believe that the totality of the evidence, your Honor, will show that there was a consistent mode of behavior with respect to these types of violations and that that history shows a pattern of violations.

Tr. (9-23-14) at 52-53.[30] The Judge, however, effectively foreclosed such argument based on his dismissal of the POV notice at the beginning of the hearing. Tr. (9-24-14) at 438-40; Tr. (9-25-14) at 691-92, 814-15. Furthermore, based on the Judge's ruling, Brody did not defend against the patterns.[31] Tr. (9-24-14) at 438-39; Tr. (9-25-14) at 814-15.

In light of the foregoing, we conclude that the Judge dismissed the POV notice before Brody had demonstrated that it had sustained prejudice as a result of the Secretary's failure to describe how the citations and orders listed in the POV notice amounted to patterns. *See Long*, 117 F.3d at 1158 ("To establish a due process violation, an individual must show he or she has sustained prejudice as a result of the allegedly insufficient notice.") (citations omitted). Instead, the Judge should have permitted the Secretary to submit evidence regarding the citations and orders, including any evidence relevant to the patterns, and allowed Brody to rebut the evidence and to argue post-hearing that it had been prejudiced by the Secretary's alleged failure to identify the basis for the pattern charges. It is possible that the opportunity to rebut such evidence and make such argument would have been sufficient for Brody to defend against the POV charges. However, if Brody was prejudiced by the Secretary's pre-hearing failure to provide a sufficiently clear articulation of how the citations and orders listed on the notice constituted patterns, Brody would have the record necessary to specifically demonstrate how it would have litigated its defense differently. Because the POV notice was invalidated prior to the taking of evidence, we lack the record necessary to review whether Brody had been prejudiced by the Secretary's failure to disclose his POV theory prior to hearing and, if not, whether one or more patterns had been

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may have communicated concerns about those practices to mine management and seen the response by the mine, can certainly provide meaningful testimony.

[30] Our dissenting colleague states that the Secretary "toss[ed] out a few potential 'factors' on the opening day of the hearing" without correlating them to the POV allegations against Brody. Slip op. at 36. We disagree. The opening statement quoted above clearly reflects application of the factors to the specific POV charges.

[31] Brody attempted to elicit testimony that it considered relevant to the pattern charges but the Judge stated, "Do you want to open the door to the subject of what constitutes a pattern when the government has essentially said, well, we'll let you know about that after the judge has decided what violations are S&S?" Tr. (9-24-14) at 437-38. As noted, the Judge was incorrect that the Secretary would not state the basis for the pattern charges until after the Judge made his S&S determinations. This had been the Secretary's position previously, but it had changed as of the Secretary's opening statement.

proven. *See generally Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1321 (Aug. 1992) (noting the importance of the development of necessary factual findings at the trial level to the Commission's review function). Hence, we conclude that the Judge erred in dismissing the POV notice at the beginning of the hearing.

Accordingly, because the Judge erred in finding it necessary for the Secretary to respond to Brody's inquiry regarding the number of S&S designations it had to prevail upon in order to defend against the POV charge, and in dismissing the POV notice at the beginning of the hearing, we vacate the Judge's invalidation of the POV notice and remand for further proceedings.[32]

On remand, the Judge shall apply the definition of "pattern of violations" set forth above in determining whether the Secretary has proven one or more patterns of violations with respect to the 29 citations and orders[33] affirmed as S&S.[34] In so doing, the Judge shall permit the parties to brief the application of the definition of POV to the 29 violations found to be S&S, and such other matters as he may consider appropriate. After such briefing, if any, the Judge shall consider any request by Brody to reopen and further develop the record in order to defend

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[32] Our dissenting colleague states that affirmance of the dismissal would go much further toward assuring the Secretary's good-faith compliance with our future roadmap. Slip op. at 36. However, our decision to vacate rests on an essential balancing of the private interests at stake against the paramount public interest in miner safety, in considering a statutory sanction that has not been effectively employed in nearly four decades. *See Long Branch Energy*, 34 FMSHRC 1984, 1996 (Aug. 2012) (recognizing that the public interest in miner safety must be balanced against private interests). We recognize that the Mine Act is built around Congress's fundamental declaration that "the first priority and concern of all in the . . . mining industry must be the health and safety of its most precious resource – the miner." 30 U.S.C. § 801(a). It is worth noting that Brody had received 253 S&S citations during the POV screening period. 36 FMSHRC at 2060.

[33] The 29 citations and orders include the 17 affirmed as S&S by the Judge and the 12 citations for which Brody agreed to accept the S&S designations.

[34] We reject the Secretary's suggestion that appeals from the Judge's S&S determinations should be handled in the instant proceeding. Such review exceeds the scope of our order granting interlocutory review. *See* 29 C.F.R. § 2700.76(d); *Asarco, Inc.*, 14 FMSHRC 1323, 1326-27 (Aug. 1992). Moreover, the Secretary's position would mean that once the Secretary issued a POV notice, the mine would be subject to section 104(e) withdrawal orders not only during the litigation of the underlying S&S citations and orders, but also during appeals of Judges' S&S determinations to the Commission. Due process does not permit such a delay in the resolution of the validity of the POV notice.

against the POV allegations. Any such further development of the record by Brody shall be subject to evidentiary rebuttal by the Secretary.[35]

III.

Conclusion

For the reasons discussed above, we vacate the Judge's invalidation of the POV notice and remand for further proceedings consistent with this decision.[36]

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

[35] While a second evidentiary hearing as described above may be appropriate in the unusual posture of this case, which involves multiple interlocutory appeals including an appeal to the D.C. Circuit, we emphasize the need for expedition in other POV cases in the future.

[36] The Secretary filed with the Commission a motion to stay the effect of the Judge's November 3, 2014 order, so that MSHA may continue issuing section 104(e) withdrawal orders to Brody. The effect of our decision is to permit MSHA to resume issuing section 104(e) orders to Brody, effective upon the issuance of this decision. Furthermore, any withdrawal orders issued to Brody which had been converted to section 104(a) citations by virtue of the Judge's invalidation of the POV notice are hereby converted back to orders issued under section 104(e) of the Act. Hence, we hereby deny the Secretary's motion to stay as moot. *See Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 34 FMSHRC 996, 1001 (May 2012).

Chairman Jordan, concurring:

Although I agree with the majority that the decision of the judge below should be vacated and remanded, I reach that conclusion by way of a different analysis and therefore write separately.[1] As discussed below, I find that the information provided to Brody before the hearing about MSHA's pattern of violations notice afforded the operator sufficient due process.

My colleagues in the majority conclude the judge erred in dismissing the Secretary's pattern of violations (POV) notice in this case. However, they "agree with the Judge that the Secretary is ordinarily required to disclose his theory of how the groupings on a POV notice constitute one or more patterns of violations prior to a hearing on the pattern." Slip op. at 16. Without explaining whether the Secretary's failure to provide such a theory would amount to a violation of due process, as Brody and my dissenting colleague maintain, the implication of their opinion is that disclosure of the Secretary's theory will be required in future cases and is best accomplished by following the majority's suggested framework for litigating a POV case:

> In future cases we anticipate that in proving a POV, the Secretary may call one or more witnesses, such as inspectors or District Managers, who will testify about how the S&S violations constitute a POV. The identity of such witnesses will be disclosed prior to hearing by virtue of a Judge's prehearing order. The operator may become familiar with the Secretary's theory of the pattern by discovery, including contention interrogatories and/or depositions of the Secretary's POV witness. However, evidence should not be developed, nor should discovery be permitted, regarding MSHA's prosecutorial discretion in issuing a POV notice.

Slip op. at 16 (footnotes omitted).

On the other hand, my dissenting colleague would affirm the judge because in his view "[t]he Secretary's failure to provide an ascertainable basis for the POV determination, standing alone, demonstrates a denial of due process warranting dismissal of the POV determination." Slip op. at 33.

Turning to the majority opinion, although the procedure outlined therein might be one that parties choose to adopt, I do not consider it to be a necessary prerequisite to the Secretary's prosecution of a POV charge. This is because the POV notice issued to Brody "reasonably apprised [it] of the issues in controversy" so as to provide the notice required under the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (2011). *St. Anthony Hosp. v. U.S. Dep't of*

[1] I agree, however, with the analysis of the majority supporting its ruling that the Commission has jurisdiction to decide this case.

Health & Human Servs., 309 F.3d 680, 708 (10th Cir. 2002) (citation omitted). Brody's contention, accepted by the judge and the dissent, that it was deprived of due process because it did not know why the underlying citations referenced in the notice constituted a pattern of violations is, in my view, without merit.

Due process is a flexible concept, the test being "one of fairness under the circumstances of each case whether the employer knew what conduct was in issue and had a fair opportunity to present his defense." *Soule Glass and Glazing Co. v. NLRB*, 652 F.2d 1055, 1074 (1st Cir. 1981), *abrogated on other grounds*, *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775 (1990).

As the majority correctly states, under the APA we must discern whether Brody was "timely informed of . . . the matters of law and fact asserted." Slip op. at 15, citing 5 U.S.C. § 554(b)(3). The majority also notes that federal appellate courts have held that "[a]s long as a party to an administrative proceeding is reasonably apprised of the issues in controversy, and is not misled, the notice is sufficient." Slip op. at 15, *citing St. Anthony Hosp.*, 309 F.3d at 708.

Here, Brody was informed of the specific conduct upon which the Secretary would rely to support his allegation that Brody had engaged in a pattern of violations. The POV notice referenced 54 citations or withdrawal orders previously issued to Brody. Each of those enforcement actions had alleged a violation of a particular mandatory safety standard and described the conduct that prompted its issuance. Moreover, each citation or order contained the allegation that the violation was deemed "significant and substantial." The POV notice organized these citations and orders into the following four groups:

- 18 citations and orders involving ventilation and/or methane hazards
- 20 citations and orders involving emergency preparedness and escapeway hazards
- 9 citations and orders involving roof and rib hazards and
- 7 citations involving inadequate examinations.

The POV notice alleged that these four groups of violations, either alone or together, established a pattern of violations. *See Brody Mining, LLC*, 36 FMSHRC 2027, 2032 (Aug. 2014) ("*Brody I*").[2]

Brody contends it needed more information in order to prepare its defense to the pattern charge. However in promulgating the POV regulation, the Secretary provided guidance about the kind of behavior that would prompt an allegation of "pattern of violations." *See Harmon*

[2] As the majority correctly points out, only 28 citations were litigated at the hearing. Prior to that, the Secretary vacated two citations listed in the POV notice, and agreed to delete the S&S designations with respect to 12 citations. Brody agreed to accept the allegations of violation and S&S designations with respect to 12 other citations. Slip op. at 5, n.9.

Mining Co. v. Layne, No. 97–1385, 1998 WL 610651 (4th Cir. Aug. 27, 1998) (holding that the regulation at issue provided the operator adequate notice of the applicable standard used to rebut a claim of disability in a black lung case). The regulation explained that it implemented section 104(e) of the Mine Act (the pattern of violations provision) "by addressing mines with an inspection history of recurrent S&S violations of mandatory safety or health standards that demonstrate a mine operator's disregard for the health and safety of miners." 30 C.F.R. § 104.1.[3] Besides the underlying citations and the description of the kind of conduct the pattern regulation was designed to address, the regulation and its accompanying preamble also set forth several factors that the Secretary indicated he might consider in deciding whether to issue a POV.[4]

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[3] My colleagues have adopted a definition of "pattern of violations," derived from the language of the Secretary's POV regulation, a definition with which I agree. Slip op. at 11 (majority opinion), slip op. at 37 (dissenting opinion).

[4] The POV regulations set forth eight criteria that MSHA reviews to identify mines with a POV:

(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 or 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).

Regarding the above reference to "[o]ther information that demonstrates a serious safety or health management problem at the mine," the preamble to the POV regulation explained that it may include, but is not limited to, the following:

- Evidence of the mine operator's lack of good faith in correcting the problem that results in repeated S&S violations;
- Repeated S&S violations of a particular standard or standards related to the same hazard;
- Knowing and willful S&S violations;
- Citations and orders issued in conjunction with an accident, including orders under sections 103(j) and (k) of the Mine Act; and
- S&S violations of health and safety standards that contribute to the cause of

Thus, after the receipt of the POV notice, Brody knew that the Secretary would rely on the conduct described in the underlying citations (at least those that were upheld as S&S violations), and would apply any relevant criteria listed in the POV regulation and preamble, in urging the Judge to conclude that the operator had exhibited a disregard for the safety and health of miners to such an extent that the enforcement tool of a POV notice was warranted.[5]

Admittedly, Brody did not know exactly how the Secretary would make that argument. However the discovery process, as well as the use of prehearing orders, is available to help in that regard. This is different than holding that due process requires that an operator be provided with the Secretary's "theory" prior to the hearing, which seems akin to a requirement that the Secretary provide the operator with his closing argument or post-hearing brief, prior to the start of the trial.

The information provided to Brody was sufficient to afford it due process. Moreover it is consistent with the type of notice provided to operators when other kinds of enforcement actions are taken. For example, an operator can be subjected to a withdrawal order or citation that contains the Secretary's determination that the underlying condition is "significant and substantial" or resulted from an "unwarrantable failure" to comply.[6] In such cases, the operator has been provided with a citation or withdrawal order describing the condition or behavior that prompted the enforcement action. The Commission has never concluded that due process required the Secretary to provide his underlying theory as to why the violations merited these determinations before the operator could mount a defense. In the case of citations describing conditions deemed S&S or unwarrantable, an operator would be considered adequately

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accidents and injuries.

78 Fed. Reg. 5056, 5062 (Jan. 23, 2013).

[5] My dissenting colleague points out that due to the heavily regulated nature of mining, operators of underground coal mines receive numerous S&S citations every year, and that therefore every operator experiences a "'recurrence' of S&S violations." Slip op. at 37. It is worth bearing in mind, however, that 99 percent of mines are not even considered for a POV notice because they do not meet the pattern screening criteria. *Brody I*, 36 FMSHRC at 2049, n.19. Brody's receipt of 253 S&S citations during the POV screening period helped make it a potential candidate for a POV notice. *Id.* at 2060 (Althen, dissenting).

[6] Certain violations can be deemed to be "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard" or caused by the "unwarrantable failure" of the operator to comply with the mandatory health and safety standard. 30 U.S.C. § 814(d)(1). The Secretary's decision to attach these designations can result in the immediate issuance of a withdrawal order or, like the pattern notice, lead to withdrawal orders upon the detection of future violations.

informed, for due process purposes, even if the citation did not spell out why the Secretary decided to attach those designations to the conditions described therein.

Undoubtedly caselaw concerning what constitutes a pattern of violations will develop over the coming years, just as the law regarding the enforcement actions referred to above has been clarified. This does not mean, however, that because Brody's challenge to its POV notice occurred before Commission jurisprudence in this area had been refined that due process was not provided.

Our precedent regarding unwarrantable failure provides an analogous example. In *Emery Mining Corporation*, 9 FMSHRC 1997 (Dec. 1987), the Commission announced for the first time that unwarrantable failure meant "aggravated conduct constituting more than ordinary negligence." The parties had litigated the case without the benefit of this definition, and on appeal the Commission, after stating this ruling, went on to determine whether the specific violation was unwarrantable. In subsequent rulings, the Commission identified factors that could be considered to help determine if such aggravated conduct occurred. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

Brody's due process claim also fails because an integral part of a due process claim based on a lack of sufficient notice is a party's showing that it was prejudiced:

> "To establish a due process violation, an individual must show he or she has sustained prejudice as a result of the allegedly insufficient notice.". . . *Long v. Bd. of Governors of the Fed. Reserve Sys.*, 117 F.3d 1145, 1158 (10th Cir. 1997). Prejudice may be demonstrated by a showing that a party would have litigated the matter differently if adequate notice had been received. *See* 117 F.3d at 1158; *Rapp v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 52 F.3d 1510, 1520 (10th Cir. 1995); *Citizens Bank of Marshfield, MO v. FDIC*, 751 F.2d 209, 213-14 (8th Cir. 1984); *see also Cumberland Coal Res.*, LP, 32 FMSHRC 442, 449 (May 2010).

Slip op. at 15.

Clearly the burden was on Brody to show that it had been prejudiced. Brody failed to meet this burden. Nowhere in its briefs to the Commission did it explain how it would have litigated the case differently if a more elaborate or detailed theory regarding the pattern had been presented by the Secretary in the POV.[7]

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[7] At oral argument before the Commission, Counsel for Brody was asked "how specifically was the operator prejudiced by these proceedings . . . . What would you have done that you weren't able to do as a result?" Oral Arg. Tr. at 59. Counsel responded that he would

The operator has offered nothing more to demonstrate that it suffered prejudice. It failed to show in any meaningful way what it would have done differently at the hearing – in terms of evidence, witnesses, lines of inquiry, etc. – had it been provided the additional information about the alleged patterns it claims it required. Consequently, its due process claim cannot survive. For the reasons discussed above, I join my colleagues in the majority in vacating the Judge's decision invalidating the POV notice and remanding for further procedures.[8]

Mary Lu Jordan, Chairman

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have asked "why you think, for example, this particular group's citations forms a pattern based on any of the 13 criteria?" (referring, presumably to the criteria in the Secretary's POV regulations and the preamble to the regulations). In my view, this fairly obvious question could have been posed at the hearing before the Judge based solely on the information available to Brody at the beginning of the proceedings.

[8] I agree with my colleagues in the majority that the effect of the Commission's decision is to permit MSHA to resume issuing section 104(e) withdrawal orders to Brody, and that therefore the Secretary's motion to stay should be denied as moot.

Commissioner Althen, concurring in part and dissenting in part:

I concur with the Commission majority regarding the jurisdictional issues raised by the Secretary. Regarding the reversal of the Judge's dismissal of the Secretary's pattern of violations determination, I respectfully dissent. I agree with the excellent opinion of the Administrative Law Judge. I write only to explain my disagreement with the majority's decision and to comment briefly upon the framework outlined by the majority for adjudication of future pattern of violation cases.

I.

DISCUSSION

A. The Majority's Decision

The majority reverses the Judge on two grounds. First, it asserts that the Judge required the Secretary to identify a specific number of S&S violations necessary for a pattern of violations, thereby committing reversible error. Second, it holds that the Judge erred by dismissing the case at the beginning of the hearing.

The first is a makeweight to justify reversal. The second is inexplicable. The majority's instruction for the handling of future pattern of violation ("POV") cases demonstrates that it agrees that the Secretary failed to provide due process rights. However, the majority finds dismissal "too harsh" a remedy. Thus, the majority treats the Secretary as a schoolchild failing to complete his homework rather than a cabinet officer failing to accord the operator due process protections in seeking the most severe sanction available under section 104 of the Mine Act.

1. The Judge did not require the Secretary to identify a specific number of proven violations necessary to sustain the POV notice.

The majority asserts that the Judge required the Secretary to specify how many S&S designations he had to prevail upon in order for Brody to defend against the POV. The Judge did no such thing. The Judge did not issue a written order. However, the nature of his oral order is clear. He directed the Secretary to provide an explanation of the theory by which the 54 alleged violations set forth in the POV notice constituted a pattern of violations.

At an early stage of the proceeding, the Judge asked Secretary's counsel for an explanation of why the alleged violations constituted a pattern,

> Okay. Let me ask this and I think I know the answer but I want to hear. Is there any document that's been filed by the Secretary that has clearly identified at this point in time, basis for the charge if there's a pattern involving Brody. Or is it sort of still, a haze.

> Kind of, you know, something that's sort of like London fog where there's an assertion made that there's a pattern but the Secretary hasn't yet clearly identified the basis of that claim. Is that what – is that the way things are?

Conf. Call Tr. (7-22-14) at 9. In reply, the Secretary's counsel referred only to the POV notice.

In a later prehearing conference, the Judge clearly articulated that he wanted the Secretary to identify the basis for asserting that the alleged violations constituted a POV. In part, the Judge stated:

> Now, let's get to the last outstanding motion which is Brody's motion that the Secretary should define a pattern. . . . I agree with Brody on this. It is my position that the Secretary should announce at the outset its theory as to how these violations either in total or independently as the four group . . . .
>
> . . . Here's my thinking on this. I think as a fundamental matter of fairness, Brody is entitled to know this.

Conf. Call Tr. (9-19-14) at 9. At the outset of the hearing, the Judge recapitulated his order:

> So I did grant the – Brody's motion to compel the Secretary to – this is not an exact quote, but it doesn't distort it – to define what constitutes a pattern of violation in these particular cases and to set forth with specificity what the Secretary believes constitutes a pattern of violation with respect to the 52 citations or orders involved here.

Tr. (9-23-14) at 14.

Earlier, when the parties said they were attempting to settle some of the alleged violations, the Judge responded:

> Yes, I'm glad to hear that some of these are being worked out. I guess whatever number are determined to be S&S, the larger issue is, "What is the definition of a pattern and do these constitute that?" That's what we want to keep our eye on ultimately and that's all you care about ultimately, one of the major things you care about ultimately.

Conf. Call Tr. (9-19-14) at 14.

Finally, on the opening day of the hearing, the Judge could not have been more explicit. He expressly said he was not looking for numbers: "We're not looking for numbers here. I'm not looking for numbers. I'm looking for something a little more sophisticated than that." Tr. (9-23-14) at 52.

In none of these statements does the Judge state or imply that the Secretary had a duty to provide a specific number of violations necessary to prevail. In fact, as set forth immediately above, he expressly disclaimed such a desire. Indeed, the Judge and the parties were well aware of the Secretary's position that there are not a specific number of S&S violations necessary or sufficient to constitute a Pattern of Violations. The Secretary articulated this position in briefing the first Brody POV case before the Commission. Sec'y Resp. Br. at 32, *Brody Mining, LLC*, 36 FMSHRC 2027 (Aug. 2014) (Docket Nos. WEVA 2014-82-R, et al.). Accordingly, there could have been no doubt in either party's mind that the Judge's order was not focused on a particular number of violations but rather on a basic description of why the Secretary contended the alleged violations identified in the POV notice constituted a pattern of violations.[1]

Notwithstanding these orders issued before the hearing, including the express disclaimer of a need for numbers, the majority plucks one word – "essential" – from the Judge's lengthy dismissal order after the hearing to conjure a reason for reversal.[2] Of course, in reality, the reason for dismissal was the failure of the Secretary to provide any explanation of why the alleged violations identified in the POV notice constituted a pattern of violations.

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[1] The Secretary asserts and the Commission agrees that MSHA need not prove any specific number of violations to demonstrate a pattern of violations. Conversely, no specific number of S&S violations, standing alone, establishes POV status. In every case, the Judge must apply the pattern criteria to determine whether the Secretary has demonstrated that recurrent S&S violations, by their nature and relationship with one another, prove the operator is one of "those few operators who have demonstrated a repeated disregard for the health and safety of miners and the health and safety standards issued under the Mine Act." 78 Fed. Reg. 5056, 5058 (Jan. 23, 2013).

[2] The majority also references two transcript cites: Conf. Call Tr. (7-22-14) at 7-8 and Tr. (9-23-14) at 13, 15-16. Slip op. at 12-13. Neither is relevant. In the first, the Judge inquired how many of the alleged violations the Secretary would need to prove. His orders, however, do not reflect any such inquiry. In the other cited pages, the Judge notes that in an earlier POV case the Secretary did identify a specific number but had stepped back from that position in this case. That was simply a factual statement. Indeed, the passage shows that the Judge and Brody understood that the Secretary's position that no specific number of violations was needed to demonstrate a pattern of violations. On these pages, as elsewhere, the Judge simply emphasized the need for the Secretary to explain how the alleged violations identified in the POV notice constituted a pattern of violations. He said, "[a]nd so with that being alleged, the Secretary must not only define a 'pattern' but also how the cited violations constitute a pattern." Tr. (9-23-14) at 16.

Just as in his prehearing orders, the Judge's written dismissal order repeatedly restates that his order was for an explanation of why the alleged violations constituted a pattern of violations. Two examples of this basis suffice:

> An agency provides adequate notice in such a situation when, whether "by reviewing the regulations and other public statements issued by the agency, a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects parties to conform." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995).

36 FMSHRC at 2957 (footnote omitted). Earlier the Judge stated "[t]hus, the Court expressed that, on procedural due process grounds, it was an obligation on the Secretary's part to identify, in advance of the hearing, the road map explaining the basis for his claim that the mine has shown a pattern of violations." *Id.* at 2953.

Indeed, in the very paragraph from which the majority seizes one word, the Judge reiterates that he "directed that, prehearing, the Secretary was to set forth the basis for its contention that those violations created a pattern of violations." *Id.* at 2952. The Judge then notes the due process issue arose from a Motion in Limine by Brody asserting the need to have several identified types of information. In the following sentence, the Judge characterized Brody's request as reasonable and refers to the previously identified grouping of inquiries as "essential."

The majority focuses upon the one word "essential" in the post-trial written order in which the Judge referred to a group of varying inquiries as the support for finding that the Judge had required the Secretary to identify a specific number of violations. As we have seen, however, throughout the prehearing process and in his post-hearing decision, the Judge grounded dismissal in the generalized failure of the Secretary to provide any basis for his contention that the allegations in the POV notice set forth a suitable basis for his POV determination. I cannot join in a reversal founded upon a gross and obvious mischaracterization of the Judge's order.[3]

Two points remain. First, even under the majority's selection of one word upon which to hang reversal, the majority does not claim that the Judge based the dismissal solely upon a failure to provide a specific number of necessary. They cannot deny that the Judge ordered an

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[3] The majority concede that the Judge expressly said he not looking for numbers – a point that directly undercuts their position. Slip op. at 12 n.20. Their further comment in that footnote explains that they vacate the Judge's decision not based upon the Judge's findings, but instead based upon the majority's claim that Brody wanted a specific number. Thus, the majority admits to basing their decision upon the unfulfilled desires of the respondent.

explanation of the basis for finding a pattern of violations and the Secretary failed to obey that order. Indeed, the majority expressly recognizes this in its finding that "[h]ere, the Judge invalidated the POV notice . . . based on his conclusion that the Secretary had failed to describe how the citations and orders listed in the notice constituted one or more patterns of violations." Slip op. at 15. Given the indisputable failure of the Secretary to provide any prehearing explanation of the basis of the POV determination, an erroneous demand for a precise number would be harmless error when compared to the Secretary's failure to provide *any* of the necessary information covered by the Judge's order. That leads to a final point.

At the Commission meeting on this case, Commissioners spoke of a need to advise the Secretary of the requirements for presentation of a POV case. In turn, as part of its roadmap,[4] the majority requires the Secretary, in future cases, to provide exactly the kind of information required by the Judge in this case. The majority writes "[w]e agree with the Judge that the Secretary is ordinarily required to disclose his theory of how the groupings in a POV notice constitute one or more patterns of violations prior to a hearing on the pattern."[5] Slip op. at 16. Thus, the majority reverses the Judge for applying a standard with which they agree and which they themselves now impose upon the Secretary.

I would advance the process for the fair adjudication of POV cases by requiring the Secretary to comply with the requirements of the Constitution from the earliest cases forward. There is no learning curve or hall pass for due process violations by federal agencies.

2. **Dismissal was not premature.**

The majority's second reason for reversal is that the Judge erred by dismissing the case at the beginning of the hearing – that such action was "too harsh." Two propositions underlie the majority's belief that dismissal was premature. These are (1) Brody did not show prejudice from not receiving fair notice of the basis of the POV determination; and (2) on the opening day of the hearing, the Secretary allegedly changed his position and stated he would explain the basis of his determination as the trial proceeded.

The majority asserts that the Judge dismissed the proceeding without a showing of prejudice. This position reflects a fundamental misunderstanding of the Judge's decision and of the application of the pattern criteria to a POV determination.[6]

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[4] The Judge asked the Secretary for a roadmap of the basis for the POV determination.

[5] Use of the term "ordinarily" by the majority is somewhat mysterious. They do not elaborate upon the kind of case that would be sufficiently "extraordinary" to obviate the due process requirement for fair notice. In any event, they do not find this case to be extraordinary.

[6] The majority cites cases under the notice requirement of section 554(b)(3) of the Administrative Procedure Act. Slip op. at 15. The cited cases involve issues of whether the

Citing *General Electric Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995), the Judge based dismissal on the undebatable proposition that the government must provide "fair notice" of the basis of its claim with "ascertainable certainty" in the imposition of a civil or criminal sanctions. *See Loma Linda Univ. Med. Ctr. v. Sebelius*, 408 Fed. Appx. 383 (D.C. Cir. 2010), *aff'g* 684 F. Supp. 42 (D.D.C. 2010); *City of Chicago v. Morales*, 527 U.S. 41 (1999); *Gates & Fox Co. v. OSHA*, 790 F.2d 154 (D.C. Cir. 1986); *Stansberry v. Holmes*, 613 F.2d 1285, 1289 (5th Cir. 1980); *Dravo Corp. v. OSHA*, 613 F.2d 1227, 1232 (3d Cir. 1980) (citing *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649-50 (5th Cir. 1976)).

As the United States Court of Appeals for the Fourth Circuit stated in *U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir. 1997), "because civil penalties are 'quasi-criminal' in nature, parties subject to such administrative sanctions are entitled to 'clear notice.'" *See also Diamond Roofing*, 528 F.2d at 649 ("Like other statutes and regulations which allow monetary penalties against those who violate them, an occupational safety and health standard must give an employer fair warning of the conduct it prohibits or requires . . . .").

Moreover, in his dismissal order, the Judge made a specific and well-founded finding of prejudice,

> By [MSHA] not setting forth the basis for its claim of a pattern of violations, Brody was put at a great disadvantage to defend itself from that charge. Not being forearmed with the knowledge of the theory of the Secretary's pattern of violations, facing the unknown as it were, Brody could not know how to defend itself. It could not, for example, anticipate nor ask questions during the hearing if it has not been informed of the basis for the alleged pattern. In fact, under the Secretary's approach, Brody would not know of the

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claimant could fairly understand the issues ruled upon by the Administrative Law Judge based upon the notice it received. That issue is subtly but substantially different from the duty to provide the basis of the claim with sufficiently ascertainable certainty to permit a fair trial in the first place. Tribunals set aside claims failing the requirement for fair notice. *Dep't of Educ. of State of Cal. v. Bennett*, 864 F.2d 655, 659 (9th Cir. 1988) ("For notice to have been adequate in this case, then, California must have been afforded ample opportunity to understand that reallocations among local educational agencies outside of the Tydings period could be the determinative issue. . . . The Secretary's final decision thus ranged beyond the issues defined in the notice of hearing. The final decision is therefore void . . . ."). As the United States Court of Appeals for the Second Circuit has explained, "the time for giving notice of the matters of fact and law asserted is prior to the hearing, not in what the Board calls 'General Counsel's post-complaint theory of the case' unveiled in a post-hearing brief." *NLRB v. Majestic Weaving Co.*, 355 F.2d 854, 861 (2d Cir. 1966).

> grounds for the pattern charge until *after* the Court made its findings as to which of the citations/orders were affirmed and among those, which were significant and substantial.

36 FSMSHRC at 2958-59 (emphasis in original). The Secretary's failure to provide an ascertainable basis for the POV determination, standing alone, demonstrates a denial of due process warranting dismissal of the POV determination. Were it necessary, however, even a cursory examination of the record demonstrates the substantial prejudice.

When the Judge said "good morning" on the first day of the hearing, Brody knew that the Secretary originally had based the POV determination on 54 alleged S&S violations that, by then, had been reduced to 40 in number.[7] Brody also knew the substantive pattern criteria for POV determinations promulgated by MSHA after formal rulemaking.[8] Due to the Secretary's

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[7] By then the Secretary had vacated two of S&S citations entirely and had modified 12 others to drop their S&S designations. On the opening day of the hearing, therefore, the POV claim rested upon 40 alleged S&S violations. Brody conceded 12 of the violations, leaving 28 for trial. After trial, the Judge sustained 17 of the alleged S&S violations. Therefore, after trial, the Judge sustained 29 S&S violations out of the original 54 allegations – 54%.

[8] The criteria, set forth in 30 C.F.R. § 104.2(a), are:

> 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.

In the preamble to the final rule, MSHA stated that the catchall provision of "other information" includes evidence of the mine operator's lack of good faith in correcting the problem that results in repeated S&S violations; repeated S&S violations of a particular standard or standards related to the same hazard; knowing and willful S&S violations; citations and orders issued in conjunction with an

noncompliance with the Judge's order, Brody did not know why MSHA claimed 12 conceded and 28 contested S&S citations constituted a pattern of violations.[9]

Of course, Brody could apply the pattern criteria to the 40 alleged violations, and the pattern criteria do serve as a form of notice of alleged conduct constituting a pattern of violations. Of those 40 alleged S&S violations: none alleged a failure to abate; five alleged unwarrantable failures; none alleged an imminent danger violation; none alleged a training violation; none alleged a violation related to an accident, injury, or illness records; four alleged high negligence, thirty-five alleged moderate (ordinary) negligence, and one alleged low negligence.

From the yearlong monitoring process, therefore, out of 40 alleged S&S violations, at least insofar as the formally promulgated pattern criteria were involved, the Secretary's case depended upon alleged unwarrantable failures to comply with several different safety standards and the criterion of "information that demonstrates a serious safety or health management problem" from 30 C.F.R. §104.2(a)(7). Presumably, the Secretary knew why MSHA found the 40 S&S citations demonstrated a serious safety or health management problem warranting POV status. If the Secretary could not explain the relationship among the alleged violations that led to that determination until after a hearing, how did MSHA make the determination in the first place? Yet, the Secretary refused to provide such information to the respondent.

Under these circumstances, as the Judge below correctly stated in vivid terms, the need for an advance explanation of the basis of the basis for finding "management disregard" is obvious. The prejudice in facing a hearing without such explanation is palpable.

To borrow the imagery of the Judge, the Secretary refused to explain why he asserted he had a winning hand based upon the 54 S&S violation cards he himself had deliberately selected and dealt, but instead wanted to see which cards remained after the hearing thereby allowing a post hoc rationalization for his initial determination. Further, in this case, that rationalization occurs against an ambiguous standard of a "safety and health management problem" and without any advance explanation of how or why the alleged violations demonstrated a safety and health

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accident, including orders under sections 103(j) and (k) of the Mine Act; and S&S violations of health and safety standards that contribute to the cause of accidents and injuries. 78 Fed. Reg. at 5062.

[9] Of course, Brody had information about each of the 40 alleged S&S violations, but information about a particular citation does not inform the operator of any relationship connection warranting a POV determination. Further, inspectors obviously do not make the POV determination. Therefore, they could offer no meaningful testimony regarding the basis for MSHA's POV determination. Each inspector can testify about the citations he/she wrote but, unless the inspector was involved in making the POV determination, the inspector cannot explain the theory of how the groupings on a POV notice constitute one or more patterns of violations – information the majority recognize as essential to the Secretary's case. Slip op. at 16.

management problem. In the absence of any explanation of the relationship basis allegedly supporting the POV notice, it is clear that the respondent could not be prepared to submit evidence to rebut an unknown prosecution theory.[10]

The majority sets out a unique standard for dismissal of an insufficient claim – a party must show prejudice from not knowing vital information that it cannot know because the government withholds the information. Further, based upon the duty of the Secretary in future cases to disclose his theory of how the groupings on a POV notice constitute one or more patterns of violations prior to a hearing on the pattern, future respondents will be entitled to receive such information. In light of the obvious prejudice of not knowing the basis of the claim of POV status, the majority decision demands future respondents have the very information it denies Brody. The roadmap for future cases is appropriate. The majority does not explain why Brody was not similarly entitled to such information.

Separately, the majority credits the Secretary's offer on the first day of the hearing of additional factors that it asserts could play into the finding of a pattern of violations. Of course, a listing of a few random factors the Secretary might seek to apply in any pattern of violation case minimally expressed in the opening statement at hearing was not responsive to the Judge's order. It does not explain the theory of liability in the particular case. Further, a partial list of potential factors does not apprise a party of the relationship factors regarding the specifically alleged violations that must underlie a finding that a specific respondent was a pattern violator. That is what the Judge rightly ordered. As the Judge sagely observed, "I'm looking for the [link], the underlying intellectual theory that groups these together and then equates to a pattern." Tr. (9-23-14) at 52.[11]

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[10] The dilemma facing the Secretary arises from the decision to base POV determinations on unproven allegations. A respondent facing a decision based on relationships among and between unproven allegations is most certainly prejudiced if the charging party can wait to explain the basis of the charge until after a hearing. Such a process allows the Secretary to refuse to explain the basis of the decision until after he arrives at the place where he could have begun – a set of proven violations.

[11] The Secretary derived the few factors expressed on the opening day from Commission unwarrantable failure cases: "the extent of the condition, the length of time that it existed, whether the violation was obvious, whether it posed -- it posed a significant hazard, the operator's knowledge." Tr. (9-23-14) at 47. This list, even if offered in the weeks before the hearing, provided little or no meat to the skeletal charges against Brody. In his post-hearing brief, the Secretary offered a more comprehensive list consisting of the nature and seriousness of the hazards; timing of the violations; location of the violations in the mine; any trends regarding injuries and/or accidents; whether management personnel were involved; the standards violated; the conduct of the operator in responding to the related violation and whether the operator exhibited any heightened awareness of the possible consequences; and the ever present catchall of any other factor that is revealed that would be evidence to establish a "mode of behavior or

Tossing out a few potential "factors" on the opening day of the hearing without correlation to the allegations against Brody clearly did not cure the prejudice of the Secretary's refusal to obey the Judge's pre-hearing order. The Secretary had not identified any of these factors before the opening day despite two years of rulemaking, and having issued the POV determination nearly a year before the start of the hearing and the Judge's pre-trial order. That offer was far too little and far too late to satisfy the Judge's order or the Secretary's due process obligation.[12]

The Commission should sustain the dismissal of the POV notice. The Judge did not demand a detailed advance description of all the evidence or even all the arguments the Secretary planned to make. He demanded an explanation of the theory underlying the claim that the specifically identified alleged S&S violations constituted a pattern of violations. Affirmance of the dismissal would go much further to assuring the Secretary's good-faith compliance with the majority's future roadmap than inventing excuses for the Secretary's failure to provide basic due process.[13]

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series of acts that are recognizably consistent." Sec'y Post-Hr'g Br. at 12-13. As of the opening day of the hearing, the Secretary had not expressed these factors and, more importantly, had not alerted Brody in any respect how relationships among the alleged violations could sustain MSHA's POV determination.

[12] The majority quotes in full a scant four-paragraph (267 words) statement by the Secretary's counsel on the opening day of the hearing to argue that some disclosure, however late-blooming, was made or attempted to be made to Brody. Slip op. at 17-18. Not only does the majority fail to deal with the fact that this was the "opening day of the hearing" thereby hardly affording time for preparation but also, and far more importantly, the Secretary's statement provided virtually no information related to the pattern criteria. The Secretary did not claim, let alone, specify that any of the alleged violations were orders for failure to abate, unwarrantable failure orders, imminent danger orders, failure to train orders, etc. Indeed, from the face of the text, it appears they all fell into the "other" category of the pattern criteria. Even then, the only "factors" from the list suggested by the majority are terse statements that the groupings were for violations of the same standard or related to the similar hazards, occurred within a 13 month period (hardly the definition of a short period of time), and there was allegedly one conversation with one unidentified member of "mine management."

[13] The majority criticizes the view that the Commission would advance fair and efficient enforcement of section 104(e) by requiring adherence to the Constitution in this early POV proceeding. Slip op. at 19 n.32. Their stated basis is that the unquestionable purpose of the Mine Act to preserve miner safety outweighs the constitutional rights of the respondent. They take their argument a revealing step too far, however, by expressly basing their equation upon the failure of the Secretary to enforce section 104(e) effectively for forty years. To the majority, therefore, a weighty factor in their balancing has nothing to do with this case but rather is

B. Future POV Litigation

The majority opinion provides two directions for future POV cases. First, it holds that a pattern of violations "is established by an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a mine operator's disregard for the health or safety of miners." Slip op. at 11. Second, recognizing the requirements of due process, at least for future cases, the majority announces that the Secretary "is ordinarily required to disclose his theory of how the groupings on a POV notice constitute one or more patterns of violations prior to a hearing on the pattern." *Id.* at 16. Both the definition and the imposition of minimal requirements of due process are welcome. I offer a few additional comments regarding the elements identified by the majority.

The majority states that disregard of health and safety does not imply intent or state of mind. I agree. Congress has found that the first priority of everyone involved in mining must be the health and safety of miners. Therefore, when an operator is, or should be, aware of the recurrence of violations of mandatory safety standards that significantly and substantially threaten the health or safety of miners, it must take steps to prevent such recurrences. Applying that obligation in the context of POV determinations, however, requires an understanding of the reality of S&S citations in the mining industries.

In order to protect the health and safety of miners, MSHA, in accordance with the Congressional directive, heavily regulates and vigorously inspects mines. Mining involves continual movement of miners, machines, and strata in difficult and ever-changing environments. As a result, given the pervasive regulation of mining and the frequency of inspections, MSHA annually issues numerous citations many of which are designated S&S. For example, according to data on the MSHA's website, during the five years between 2010 and 2014, MSHA issued approximately 395,000 citations to coal operators, and approximately 29 percent, or approximately 115,000, were marked significant and substantial. *Mine Safety and Health at a Glance*, MSHA, http://www.msha.gov/MSHAINFO/FactSheets/MSHAFCT10.asp (last visited Sept. 25, 2015).

Effectively, therefore, dependent upon the size of the operation, operators of underground coal mines annually receive numerous S&S citations. Thus, every operator experiences a "recurrence" of S&S violations, and every S&S violation manifests some failure to meet a mandatory safety standard. However, MSHA has emphasized that the pattern of violations

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dependent on the past failures of the Secretary. By the date this decision issues, Brody will have been operating for more than nine months without the POV sanction. If Brody has failed the specific pattern criteria, the Secretary obviously may make another POV determination regarding Brody.

regulation aims at operators who have demonstrated a repeated disregard for the health and safety of miners and the health and safety standards.[14]

It is in this context of numerous S&S violations but a regulation aimed at operators that disregard safety that we must focus upon the four key elements of a pattern of violations: recurrent S&S violations of a nature and relationship that show a pattern of disregard of health and safety. At the outset, MSHA must prove a series of recurrent S&S violations. Then, based upon the evidence presented by the parties, the Judge must evaluate the nature and relationship of the S&S violations. This evaluation must lead to a reasoned conclusion of whether the Secretary has demonstrated the recurrent S&S violations prove the operator disregards safety.

Understanding the centrality of the four elements, the question becomes how, when virtually all underground coal operators annually receive numerous S&S citations, the Commission should determine when the recurrence of S&S violations by a specific operator demonstrates the particular set of violations are sufficient to place that operator in the category of disregarding safety.

The starting point is application of the substantive regulatory criteria promulgated by MSHA at 30 C.F.R. § 104.2 (a). The regulatory criteria result from notice-and-comment rulemaking and are particularly suited for the POV task because they identify types of S&S

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[14] This is a repeated theme of the POV regulation:

> The final rule allows MSHA to focus on the most troubling mines that disregard safety and health conditions and will not affect the vast majority of mines, which operate substantially in compliance with the Mine Act.
>
> . . . .
>
> . . . the majority of mine operators are conscientious about providing a safe and healthful work environment for their miners. The POV regulation is not directed at these mine operators. . . .
>
> . . . .
>
> With respect to compliance performance, MSHA's experience reveals that the vast majority of mines operate substantially in compliance with the Mine Act.

78 Fed. Reg. at 5058, 5070.

violations that tend to demonstrate disregard for safety. The substantive pattern criteria form the conceptual platform for a POV determination.[15]

Most of the substantive pattern criteria involve violations that by their nature tend to show disregard of safety – failures to abate cited violations, unwarrantable failures (aggravated conduct beyond ordinary negligence), withdrawal orders for insufficient training, and orders issued in conjunction with an accident.[16] An operator that recurrently fails to abate violations, does not sufficiently train miners, or engages repetitively in unwarrantable failures of a standard tends to demonstrate a disregard of safety. Indeed, the Secretary's notion of an "external organizing principle" is useful in this regard, provided it means that the operator "organizes" it operations in a manner that permits repeated S&S violations that are serious and grave and demonstrate that the operator is failing to make sufficient efforts to meet the requirements of a compliant mining operation.

While starting with the substantive pattern criteria that by their nature tend to show a disregard of safety, the inquiry does not necessarily end there. Although most of the pattern criteria set forth violations that by their nature tend to demonstrate a disregard of safety, the

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[15] 30 C.F.R. § 104.1 provides,

> This part establishes the criteria and procedures for determining whether a mine operator has established a pattern of significant and substantial (S&S) violations at a mine. It implements section 104(e) of the Federal Mine Safety and Health Act of 1977 (Mine Act) by addressing mines with an inspection history of recurrent S&S violations of mandatory safety or health standards that demonstrate a mine operator's disregard for the health and safety of miners.

Thus, the criteria deal specifically with the issue of the types of recurrent violations that show a disregard for health and safety. The criteria are set out in their entirety in note 8 above. Slip op. at 33 (dissent).

[16] The Secretary established the use of specific pattern criteria at 30 C.F.R. § 104.2(b), but has announced that the specific criteria are only a statement of policy, and has published the criteria only on its website. The Judge below and I agree "with the Secretary's position that the screening criteria are not relevant to the hearing on the subsequent withdrawal orders issued under section 104(e) or on the notice of pattern of violations issued to Brody Mining on October 24, 2014." Conf. Call Tr. (9-19-14) at 8. Therefore, alleged violations considered in the specific pattern criteria that are not alleged to support the POV notice play no role in a Judge's determination whether an operator satisfies the substantive criteria formally established at 30 C.F.R. § 104.2(a).

pattern criteria include "[o]ther information that demonstrates a serious safety or health management problem at the mine such as accident, injury, and illness records." 30 C.F.R. § 104.2(a)(7).[17] Therefore, MSHA may seek to build a POV case based upon S&S violations of specific mandatory safety standards that occur during the mining process – that is, S&S violations other than those expressly identified in the criteria that provided the evidence proves the requisite disregard of safety. Use of such violations leads to, and demonstrates the need for, the third critical element of analysis – to show a "relationship" among the S&S violations demonstrating disregard of safety.

For the Secretary to prevail in prosecuting a POV notice, he must prove a sufficient relationship among the violations to warrant a finding of a disregard of safety. The relationship element is integral and essential to proof of a "pattern."[18] The requirement for demonstration of a relationship applies to all POV cases including those involving violations expressly identified in the pattern criteria. Thus, the totality of conduct by the operator in light of the nature of proven S&S violations and the relationships among them must determine the outcome of the case.

Obviously, relationship issues involve a fact-intensive analysis of a wide array of factors. An exhaustive list is not possible. At footnote 19, the majority identifies "other information" listed by the Secretary and notes examples of additional evidence that also may be useful such as a change in safety or senior management personnel – a list to which I would add the degree of negligence for proven S&S violations. The key, of course, is not a precise or specific list of factors. It is whether there is a discernable and identifiable relationship among the proven S&S violations. The Secretary and operator both may introduce evidence relevant to the proving or

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[17] Use of the term "information" is inappropriate. The proper terminology is "S&S violations" that show a health and safety management problem. On the other hand, use of the term "management problem" has some advantages – namely, it avoids terminology that might seem to imply a requirement of particular state of mind.

[18] Cases under the Racketeer Influenced and Corrupt Organizations ("RICO") Act illustrate the elements of a "relationship" among acts alleged to constitute a "pattern." *See Sedima v. Imrex Co.*, 473 U.S. 479 (1985); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989).[37] In *H.J. Inc.*, the Supreme Court characterized "relationship" as including acts that "are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc.*, 492 U.S. at 230. Although a pattern of S&S violations is different from a pattern of RICO violations, this model does serve to convey the notion of interrelationship that must exist. These cases also identified "continuity" as an element of a pattern. The need for this element seems to be implicit in the factors identified for evaluation of the regulatory pattern criteria and in the Secretary's use of discrete one-year periods of evaluation.

disputing the nature of and relationship among proven S&S violations bearing upon the final, dispositive issue – disregard of health and safety.

Ultimately then, the outcome determinative question is whether the preponderance of the evidence proves a disregard of safety through commission of S&S violations showing disregard of safety. The Judge may find some factors more or less relevant or important in each particular case. In the end, the Judge must undertake a reasoned consideration of proven S&S violations, the criteria set forth in 30 C.F.R. § 104.2(a), and the relationship between and among the proven S&S violations.

Finally, with respect to due process rights, given that the relationship among S&S violations is an outcome determinative element of a pattern of violations charge, the Secretary must provide in advance a sufficient theory of such relationships to allow the operator to prepare to meet the case with rebuttal evidence. Further, although a respondent may not invade the deliberative or other privileges, it is entitled to know the basis for the POV determination – a basis that presumably inspectors issuing individual citations cannot provide. In short, as the majority said, the Secretary must "disclose his theory of how the groupings on a POV notice constitute one or more patterns of violations prior to a hearing on the pattern." Slip op. at 16. Discovery material, including depositions of relevant individuals, disclosing the factual basis for the allegation that the S&S violations identified in the POV notice constitute a pattern of violations must be available. In short, permissible discovery must be sufficient to permit a fair hearing on the Secretary's theory of why the recurrent S&S violations by their nature and relationship establish the respondent disregarding miners' health and/or safety.

II.

CONCLUSION

The Commission has jurisdiction over this proceeding. Further, the majority properly has identified a workable definition of pattern of violations and properly required implementation of at least minimal due process elements for POV determinations. My disagreement is only with the majority's forgiveness of the deprivation of due process in the present proceeding. For that reason, I respectfully dissent.

William I. Althen, Commissioner

APPENDIX A

WEVA 2014-83-R

WEVA 2014-86-R

WEVA 2014-87-R

WEVA 2014-97-R

WEVA 2014-151-R

WEVA 2014-161-R

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WEVA 2014-479-R

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WEVA 2014-529-R

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WEVA 2014-531-R

WEVA 2014-537-R

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WEVA 2014-561-R

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WEVA 2014-1993-R

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WEVA 2014-2172-R

WEVA 2014-2173-R

WEVA 2014-2174-R

WEVA 2014-2175-R

WEVA 2014-2221-R

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WEVA 2015-60-R

WEVA 2015-61-R

WEVA 2015-63-R

WEVA 2015-66-R

WEVA 2015-67-R

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