

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

AUG 28 2018

v.

POCAHONTAS COAL COMPANY, LLC

: Docket Nos. WEVA 2014-395-R
: WEVA 2014-1028
: WEVA 2015-854
:
:

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

ORDER

BY: Althen, Acting Chairman; Jordan and Young, Commissioners

These cases involve a notice of contest and two civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012). On December 31, 2015, Pocahontas Coal Company, LLC (“Pocahontas”) filed a petition for discretionary review (“PDR”), which the Commission granted. On July 10, 2018, Pocahontas filed a motion to dismiss its PDR. On July 17, 2018, the Secretary of Labor filed a response in support of Pocahontas’ motion.

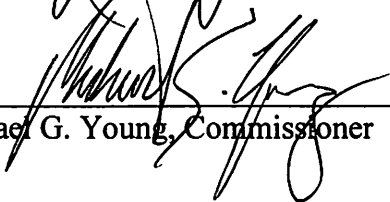
Upon consideration of Pocahontas’ motion and the Secretary of Labor’s response, the direction for review issued by the Commission is hereby VACATED and Pocahontas’ appeal is DISMISSED. The Administrative Law Judge’s summary decision is final and unappealable.¹



William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

¹ These pleadings were initially labeled “under seal.” In an Order issued on July 19, 2018, the Commission directed the parties to explain why the documents had been designated as such. The Secretary’s response explained that he had been unaware that Pocahontas was going to file its motion under seal and did not believe there was any reason for such designation. Pocahontas agreed to lift its request to seal its prior filing.

Commissioner Cohen, dissenting:

Although Pocahontas Coal Company’s motion to the Commission nominally seeks merely to withdraw the operator’s appeal of this matter and gain dismissal of the proceedings, the parties’ filings make clear that Pocahontas’s request is part of a broader agreement in which the Secretary of Labor (“Secretary”) seeks to unilaterally relieve Pocahontas’s Affinity Mine of its pattern of violations designation. Such a settlement is directly contrary to the express language of the Mine Act and the Secretary’s own regulations, and approving the settlement only provides cover for an unlawful agreement by the current administration. I dissent.

I.

Section 104(e) of the Mine Act, 30 U.S.C. § 814(e), sets forth the provisions for the Mine Safety and Health Administration’s (“MSHA’s”) issuance and termination of a notice of pattern of violations (“POV”).¹ *Pocahontas Coal Co.*, 38 FMSHRC 176, 177 (Feb. 2016). Under those provisions, if an operator has demonstrated a pattern of violating mandatory health or safety standards, MSHA inspectors “shall issue an order” withdrawing miners from the area affected by any discovered significant and substantial (“S&S”) violation.² 30 U.S.C. § 814(e)(1). Section 104(e)(3) provides the method by which a mine may exit from the POV provisions:

If, upon an inspection of the entire coal or other mine, an authorized representative of the Secretary finds no violations of

¹ Section 104(e)(1) provides:

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

30 U.S.C. § 814(e)(1).

² An “S&S” violation is a serious violation which is “of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard.” 30 U.S.C. § 814(d)(1).

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.

30 U.S.C. § 814(e)(3). The Secretary’s regulations on termination of a pattern of violations notice effectively repeats the statute. *See* 30 C.F.R. § 104.4(a); Pattern of Violations, 78 Fed. Reg. 5,056 (Jan. 23, 2013) (“The final POV rule . . . [m]irrors the provision in the Mine Act for termination of a POV.”).

II.

In this case MSHA notified Pocahontas that a pattern of violations existed at its Affinity Mine pursuant to section 104(e) of the Mine Act, and issued Written Notice No. 7219153 on October 24, 2013. The Notice charged two separate patterns. One of the alleged patterns included 24 separate S&S roof and rib support citations and orders issued within the preceding 12-month period. The other alleged pattern included 16 separate S&S citations and orders involving emergency preparedness and escapeway hazards issued within the preceding 12-month period. Sec’y Memo of Point & Auth. in Support of Mot. for Part. S.D. at 14-15, 24.

MSHA began issuing withdrawal orders pursuant to section 104(e) of the Mine Act, and these were contested by Pocahontas.³ Pocahontas filed a motion for summary decision and the Secretary filed a motion for partial summary decision. On November 3, 2015, a Commission Judge issued an “Order Denying Pocahontas’ Motion for Summary Decision and Granting the Secretary’s Motion for Partial Summary Decision.” 37 FMSHRC 2654 (Nov. 2015) (ALJ). The Judge found that the Secretary had proven the existence of a pattern of violations at the Affinity Mine, and upheld the validity of POV Written Notice No. 7219153. *Id.* at 2673. After the Judge issued a subsequent Summary Decision affirming two section 104(e) orders predicated on the POV notice, the Commission granted Pocahontas’s petition for discretionary review. Then, after the case was fully briefed, Pocahontas submitted its “Motion to Withdraw Petition for Discretionary Review”, which included – and was expressly dependent on the approval of – a proposed settlement agreement between Pocahontas and the Secretary.

The parties’ settlement agreement in this matter provides:

4. In exchange for Pocahontas filing a Motion to Withdraw Appeal in the Proceeding, and the Commission’s issuance of a full, clear, and unambiguous dismissal of the Proceeding, MSHA agrees to immediately terminate Notice of Pattern of Violations Number 7219153 issued at the Affinity Mine on October 24, 2013, and

³ Pocahontas also directly contested the issuance of the POV notice itself, but the Commission ruled that it does not have jurisdiction to review a direct challenge to a POV notice independent of a section 104(e) withdrawal order. *Pocahontas*, 38 FMSHRC at 185.

provide prompt written acknowledgement of the same to Pocahontas.

Pocahontas Mot. at Ex. 1. The motion makes no mention of the statutory provision for obtaining relief from a POV notice. The Secretary's response in support of Pocahontas's motion is similarly silent toward the law's plain requirement that Pocahontas pass an inspection free of any S&S citations before it can be relieved of the POV designation. There is no indication that Pocahontas's Affinity Mine has received such a clean inspection.⁴ Rather than providing a clear indication to the Commission that the parties are proceeding within the framework of the Mine Act, the parties attempted to shield their actions from the public by initially filing pleadings before us in secret (i.e., "under seal").⁵

III.

Lacking any evidence that Pocahontas's Affinity Mine has passed an entire inspection without receiving any S&S citations, the parties' settlement agreement is legally unenforceable. Congress directed that when a mine is in POV status, "a withdrawal order *shall be issued*" for "any violation of a mandatory health or safety standard" that is S&S. 30 U.S.C. § 814(e)(2) (emphasis added). The plain meaning of this language, combined with the express enumeration of the method by which an operator may exit from the POV provisions, forecloses other avenues of relief.

The legislative history supports this plain reading of the language. The Senate Report on the Mine Act explains that an operator that has received its first withdrawal order from the POV provisions "is subject to the issuance of further [POV] withdrawal orders until an inspection of

⁴ Indeed, MSHA's Mine Data Retrieval System indicates that federal mine inspectors issued section 104(e)(2) withdrawal orders for S&S violations at the Affinity Mine in August 2018. See MSHA, *Mine Data Retrieval System: Mine Citations, Orders, and Safeguards*, <https://arlweb.msha.gov/drs/ASP/MineAction.asp> (searchable by mine name).

⁵ Although courts may place documents filed with them under seal to protect sensitive information, federal courts have recognized the common law right of public access to public records and documents, including judicial records. See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–98 (1978). Such access is critical to allow the public and the press to keep a watchful eye on the workings of public agencies. Here, Pocahontas filed its Motion to Withdraw Petition for Discretionary Review publicly, but the motion stated, "[a] copy of the Settlement Agreement is filed separately under seal to this motion as Exhibit 1." Mot. at 2. A week later the Commission received the "Secretary's Response in Support of Pocahontas' Motion to Withdraw Petition for Discretionary Review", on which was imprinted "*FILED UNDER SEAL*". Upon receipt of the parties' filings in this matter, the Commission issued an order directing the parties to "explain how sealing these pleadings is consistent with Congressional intent that settlements under the Federal Mine Safety and Health Act of 1977 take place with sufficient transparency so that the public will be aware of the process." July 19, 2018 Ord. at 1. In response, the Secretary and Pocahontas filed pleadings removing the "under seal" designation from their previous filings. Neither Pocahontas nor the Secretary have ever explained or attempted to provide justification for their attempt to shield the Settlement Agreement from the public in a cloak of secrecy.

the mine in its entirety discloses no violations of any safety and health standards which could significantly and substantially contribute to the cause and effect of a mine health or safety hazard.” S. Rep. No. 95-181, at 32-33 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 620-21 (1978) (“*Legis. Hist.*”).⁶ The report further elaborates that section 104(e)(3) requires “an inspection of the mine in its entirety in order to break the sequence of the issuance of orders.” *Id.* at 622.

Congress limited the method for ending POV status for good reason. In enacting the pattern of violations provisions, Congress provided the Secretary with its most powerful tool for protecting the lives of the nation’s miners. Congress explicitly recognized that the POV provisions were necessary to “provide an effective enforcement tool to protect miners when the operator demonstrates [its] disregard for the health and safety of miners through an established pattern of violations.” *Id.* at 620. Congress thus recognized that the POV designation was necessary to ensure compliance with safety regulations at those mines where the other tools in the Mine Act’s graduated enforcement scheme proved insufficient to curb an operator’s dangerous behavior. The POV designation signals to an operator that “the mere abatement of violations as they are cited is insufficient.” *Id.* at 621.

Congress determined such a powerful enforcement tool was necessary after the investigation of the 1976 Scotia mine disaster revealed that the mine had a recurring history of violations that the existing enforcement scheme had failed to address. *Id.* at 620. But for 35 years, MSHA utterly failed to successfully exercise its authority under the POV provisions. *See* 78 Fed. Reg. at 5,058 (Jan. 23, 2013). The Secretary did not even issue regulations implementing the POV provisions until 1990. *See* Pattern of Violations, 55 Fed. Reg. 31,128 (July 31, 1990). The 1990 rule contained gaping holes. It counted only citations that had become final orders of the Commission. 30 C.F.R. § 104.3(b) (1990). And when screening of the final orders identified mines that had a pattern of disregarding safety regulations, MSHA first provided those chronically unsafe operators with warning letters of their “potential” POV (“PPOV”) and an opportunity to improve prior to receiving a POV notice. 30 C.F.R. § 104(a) (1990); 78 Fed. Reg. at 5,058. As described below, unscrupulous operators such as Massey Energy manipulated the system, putting profit above the safety of their miners.

Following the disasters at the Sago, Darby, and Aracoma mines in 2006, MSHA began to develop new screening criteria to better identify mines with recurring safety issues. Even then, however, enforcement of the POV provisions was completely ineffective. After the catastrophic explosion at the Upper Big Branch Mine in April 2010, the Secretary’s Office of Inspector General (“OIG”) conducted a performance audit to evaluate MSHA’s implementation of the pattern of violations authority conferred under section 104(e) of the Mine Act. The results of the audit were distinctly summarized in its title: “In 32 Years MSHA Has Never Successfully Exercised Its Pattern of Violations Authority.” U.S. Dep’t of Labor, O.I.G. Report No. 05-10-005-06-001. The OIG Report stated that during the 32 years since passage of the Mine Act,

⁶ In contrast, the legislative history makes clear that Congress intended to give the Secretary “broad discretion in establishing criteria for determining when a pattern of violations exists.” *Legis. Hist.* at 621.

MSHA had only once issued a POV notice to an operator. *Id.* at 2. In that one instance, the Commission subsequently modified some of the citations and orders on which the POV notice was based, and as a result, MSHA did not enforce the order. *Id.* at 4. The report included several recommendations, the first of which was: “Evaluate the appropriateness of eliminating or modifying limitations in the current regulations, including the use of only final orders in determining a pattern of violations and the issuance of a warning notice prior to exercising POV authority.” *Id.* at 24; *see also Brody Mining, Inc.*, 36 FMSHRC 2027, 2030 (Aug. 2014).

The cogency of the OIG Report is illustrated by the Mine Act enforcement history leading up to the deadly explosion at Massey Energy’s Upper Big Branch Mine. As noted by Commissioner Young and me in *Brody Mining*, 36 FMSHRC at 2040-41 n. 11, in 2007 MSHA put Upper Big Branch on a PPOV because its S&S rate was 11.6 per 100 inspection hours. The mine then got an improvement plan, and lowered its S&S rate to 5.6 per 100 inspection hours. Since this was a greater than 30% reduction, MSHA withdrew the POV threat pursuant to the then-existing regulations. With the threat gone, the mine’s S&S rate went back up.⁷ Thus, Upper Big Branch management evaded a pattern of violations notice by bringing down its rate of S&S violations after receiving a PPOV and achieved removal from that status. It then reverted to its prior behavior, incurring an excessive number of S&S violations after the POV threat was lifted. If management had the ability to dramatically reduce the rate of S&S violations, it obviously had the ability to maintain a reduced level. It chose not to do so, and thus endangered the lives of miners.⁸ The deaths of 29 miners would probably have been avoided if the Secretary had enforced the pattern of violations provisions of the Mine Act as Congress intended.

The Upper Big Branch disaster and the subsequent OIG Report compelled the Secretary to amend its POV regulations to close the loophole operators had relied upon to evade a POV notice. With the changes in 2013, MSHA finally established an effective implementation of the POV regulations, screening mines on an open database and considering all of an operator’s pending S&S citations.⁹

⁷ In the next screening cycle, Upper Big Branch would have received another PPOV notice except for an MSHA computer error. U.S. Dep’t of Labor, Internal Review of MSHA’s Actions at the Upper Big Branch Mine-South, Performance Coal Co., at 56-57 (Mar. 6, 2012), <https://www.msha.gov/PerformanceCoal/UBBInternalReview/UBBInternalReviewReport.pdf>.

⁸ The mine’s former superintendent pled guilty to conspiring to hide safety violations from MSHA inspectors, and Massey Energy’s chief executive ultimately was convicted of conspiring to willfully violate mine safety regulations. *U.S. v. Blankenship*, 846 F.3d 663, 666-67 (4th Cir. 2017).

⁹ The Commission has affirmed the key aspects of the Secretary’s updated POV regulations. *Brody Mining*, 36 FMSHRC at 2054 (holding that POV regulations are facially valid), *appeal dismissed*, No. 14-1171 (D.C. Cir. Nov. 2, 2015); *Brody Mining, LLC*, 37 FMSHRC 1914, 1924 (Sep. 2015) (finding the Secretary’s implementing regulations and definition of “pattern” consistent with section 104(e) of the Mine Act).

IV.

The POV screening criteria are extremely restrictive, and capture only a handful of mines. But, because of their deterrent effect, the positive impact on mine industry safety has been much broader, with a sharp reduction in the number of total violations and S&S violations and an even sharper drop in the number of operators that chronically violate safety standards. News Release, Mine Safety and Health Administration, MSHA Chief: Pattern of Violations Reforms Have made Mines Safer (Oct. 2, 2014), <https://www.dol.gov/newsroom/releases/msha/msha20141867>. At last, vigorous enforcement of the POV provisions as Congress intended has had the intended effect of reducing the number of the violations that are most dangerous to miners.

In releasing the Affinity Mine from its POV notice without Pocahontas first satisfying the statutory requirement of an S&S-free inspection, the Secretary threatens to undermine the positive impact of these now-effective POV regulations. Abandoning the POV regulation's strict application sends the dangerous message that an operator who has chronically disregarded safety, thus gaining an unfair advantage over safer competitors in the process, may nevertheless obtain reprieve from the Mine Act's heaviest sanctions by the grace of a friendly administration no longer committed to enforcing those sanctions. That message endangers miners. Already in 2017, we witnessed deaths among coal miners nearly double from 2016 despite sagging activity in the mining industry. See U.S. Dep't of Labor, MSHA, 2018 Comparison of Year-to-Date and Total Fatalities for M/NM & Coal (Jun. 5, 2018), <https://arlweb.msha.gov/stats/daily-bar-chart.pdf>.

The Secretary's illicit reconsideration of Pocahontas's POV status is not the only threat to undermine the current POV regulations. For over a year, the administration has engaged in settlement negotiations with mining industry groups challenging the Secretary's POV rulemaking. See *Ohio Coal Ass'n v. Perez*, No. 2:14-cv-2646 (S.D. Ohio May 9, 2017) (order granting stay of proceedings for parties to engage in settlement negotiations). Any settlement that alters the key elements of the current POV regulations could again relegate those critical provisions of the Mine Act to dormant status.

I recognize that the POV notice has been in effect at Pocahontas's Affinity Mine for five years. Reasonable minds may disagree over whether the enhanced enforcement for such a period of time is sufficient and withdrawal of the POV notice appropriate. But that is a question of policy, which is a matter for Congress to determine. In enacting the Mine Act, Congress did not allow for such a discretionary reprieve.¹⁰ If the Secretary wishes to alter the terms of the Mine

¹⁰ The Secretary suggests that the termination of a POV notice is committed to his discretion, and therefore not subject to review. Sec'y Resp. to Mot. to Withdraw PDR at 1-2. However, this matter is within the jurisdiction of the Commission by virtue of the pending appeal from the Judge's Decision. Moreover, although an agency's decision not to take enforcement action may be presumed immune from judicial review, "presumptively unreviewable" expressions of prosecutorial discretion nonetheless "may be rebutted where the substantive statute has provided guidelines for the agency to follow in exercising its enforcement powers." *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985). The plain language and statutory history of the Mine Act make clear that the Secretary here cannot refuse to issue withdrawal orders for

Act, he may propose such changes to Congress where the issue may be debated and considered in the public eye. Such dramatic deviations from the plain meaning of the law should not be attempted in discrete filings made “under seal” before the Commission.

In passing the Mine Act, Congress declared that “the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner.” 30 U.S.C. § 801(a). In seeking to abandon the POV provisions at the Affinity Mine, this administration threatens to subvert the first principle of the Mine Act.

The de facto settlement of this matter directly conflicts with the plain language of section 104(e) of the Mine Act. As an independent agency charged with reviewing enforcement actions brought by the Secretary, this Commission should not assent to such an illegal act. To the extent that the Commission’s dismissal of these proceedings provides cover to the administration’s corrupted reading of the law, I dissent.



Robert F. Cohen, Jr., Commissioner

S&S violations at a mine that has been placed on a POV notice and has not yet passed a full inspection without the issuance of an S&S citation.

Distribution:

Robert Huston Beatty Jr., Esq.
Dinsmore & Shohl, LLP
801 Pennsylvania Avenue N.W., Suite 610
Washington, D.C. 20004

Jason Nutzman
Dinsmore & Shohl LLP
707 Virginia Street East, Suite 1300
Charleston, West Virginia 25301

Edward Waldman, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

Ali Beydoun, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

April Nelson, Esq.
Office of the Solicitor
US Department of Labor
201 12th St. South, Suite 401
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance, MSHA
U.S. Department of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Administrative Law Judge Margaret Miller
Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2536