FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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POCAHONTAS COAL COMPANY, LLC Contestant, v. U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent.	)	**CONTEST PROCEEDING** **Docket No.: WEVA 2014-395-R** **Order No.: 3576153; 12/19/13**
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner v. POCAHONTAS COAL COMPANY, LLC Respondent.	)	**CIVIL PENALTY PROCEEDING** **Docket No.: WEVA 2014-1028** **Docket No.: WEVA 2014-854** Mine ID No.: 46-08878 Mine: Affinity Mine

PETITION FOR DISCRETIONARY REVIEW

NOW COMES Pocahontas Coal Company, LLC ("Pocahontas"), by counsel and files this Petition for Discretionary Review pursuant to Federal Mine Safety and Health Review Commission ("Commission") Procedural Rule 70, 29 C.F.R. Section 2700.70. Pocahontas requests that the Commission reverse Administrative Law Judge ("ALJ") Margaret A. Miller's November 3, 2015, Order Denying Pocahontas' Motion for Summary Decision and December

24, 2015 Order Granting Summary Decision.[1] Discretionary Review is necessary because the ALJ's "finding or conclusion of material fact is not supported by substantial evidence," "[a] necessary legal conclusion is erroneous," "[t]he decision is contrary to law or to the duly promulgated rules or decisions of the Commission," "[a] substantial question of law, policy, or discretion is involved," and "[a] prejudicial error of procedure was committed." See 29 C.F.R. § 2700.70(c)(1-5).

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

On October 24, 2013, the Mine Safety and Health Administration ("MSHA") issued Section 104(e)(1) Written Notice Number 7219153 ("POV Notice") to Pocahontas' Affinity Mine alleging that a pattern of violations ("POV") existed at the mine. Along with the POV Notice, MSHA issued a POV Letter dated October 24, 2013, stating that the Affinity Mine had "met MSHA's screening criteria for a pattern of violations." The POV Notice was issued pursuant to Section 104(e)(1) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. Section 814(e)(1).

MSHA issued Order Number 3576153 on December 19, 2013. On January 3, 2014, Pocahontas filed its Notices of Contest for the first nine (9) Section 104(e) orders issued by MSHA. On January 9, 2014, the Commission docketed these Notices of Contest at WEVA 2014-390-R through WEVA 2014-398-R. These Notices of Contest were filed pursuant to Section 105(d) of the Mine Act, 30 U.S.C. Section 815(d) and Commission Procedural Rule 20, 29 C.F.R. Section 2700.20. Order Number 3576153 was assigned as Docket Number WEVA 2014-395-R. Thereafter, MSHA assessed a civil penalty for Order Number 3576153 and the Secretary

[1] ALJ Miller's November 3, 2015 Order Denying Pocahontas' Motion for Summary Decision is attached as Exhibit 1 and ALJ Miller's December 24, 2015 Order Granting Summary Decision is attached as Exhibit 2.

filed her Petition for Assessment of Civil Penalty for WEVA 2015-854 on August 27, 2015, which included Order Number 3576153. On August 28, 2015, Pocahontas answered the Petition for Assessment of Civil Penalty for WEVA 2015-854.

On March 26, 2014, MSHA issued Order Number 9001636 to Pocahontas' Affinity Mine. On July 15, 2014, the Secretary filed her Petition for Assessment of Civil Penalty for WEVA 2014-1028 which included Order Number 9001636. On July 21, 2014, Pocahontas answered the Petition for Assessment of Civil Penalty for WEVA 2014-1028. After settlement negotiations, Pocahontas and the Secretary agreed to a settlement for all of the enforcement actions in WEVA 2014-1028 except Order Number 9001636. On May 6, 2015, ALJ Miller issued an Order Approving Partial Settlement.[2]

In each of these proceedings, Pocahontas conducted extensive discovery necessary for the Commission to evaluate whether the underlying POV Notice was properly issued to Pocahontas. Eventually, and notwithstanding concerted efforts by the Secretary to limit the scope of Pocahontas' discovery, Pocahontas was able to piece together the relevant facts through a protracted discovery process, which included the submission of one set of interrogatories, three requests for production of documents, and the deposition testimony of Jay Mattos (Director of the Office of Assessments, Accountability, Special Enforcement and Investigations ("OAASEI"), and Chairman of the POV Review Panel), David Scott Mandeville (the District 4 Manager for MSHA); Kevin Stricklin (the Administrator for Coal Mine Safety and Health), David Morris (the Assistant District 4 Manager for MSHA acting District 4 Manager at the time

[2] Pocahontas is not appealing the May 6, 2015 Order Approving Partial Settlement for the previously settled 17 enforcement actions.

of the issuance of the POV Notice), and Sabian Scott VanDyke (the Coal Mine Inspector Supervisor for District 4).

Pleadings filed in respect of the parties' cross motions for summary decision include:

- Motion for Summary Decision (Pocahontas);
- Motion for Partial Summary Decision (Secretary);
- Response in Opposition to Motion for Partial Summary Decision (Pocahontas);
- Response in Opposition to Motion for Summary Decision (Secretary);
- Supplemental Memorandum of Law in Support of Motion for Summary Decision (Pocahontas); and
- Supplemental Brief in Support of Motion for Partial Summary Decision (Secretary).

On November 3, 2015, ALJ Miller issued her Order Denying Pocahontas' Motion for Summary Decision and Granting the Secretary's Motion for Partial Summary Decision. On December 7, 2015, Pocahontas and the Secretary filed a Joint Motion to Consolidate WEVA 2014-395-R, WEVA 2014-1028, and WEVA 2015-854. On December 15, 2015, Pocahontas and the Secretary filed a Joint Motion for Summary Decision for WEVA 2014-1028 and WEVA 2015-854. On December 24, 2015, ALJ Miller granted the Joint Motion to Consolidate and issued an Order Granting Summary Judgment for WEVA 2014-1028 and WEVA 2015-854.[3]

[3] In the December 24, 2015 Order Granting Summary Decision, ALJ Miller noted the following:

> The parties have also filed a Joint Motion for Summary Decision. The purpose of the motion is to complete these two penalty dockets so that the parties may file an appeal with regard to the order granting summary decision on the issue of the validity of the notice of pattern of violations. That order disposed of most of the issues in these cases and this order disposes of the remaining issues.

See December 24, 2015 Order, p. 1.

II. ASSIGNMENTS OF ERROR

1. The Secretary Failed to Produce Evidence to Establish a Nexus Between Accidents and Injuries and the Two Pattern Categories in the POV Notice.

ALJ Miller erred by finding that MSHA had established a pattern of violations at Pocahontas' Affinity Mine despite the failure of the Secretary to produce any evidence that established a nexus between accidents and injuries at Pocahontas' Affinity Mine and the 42 enforcement actions and two pattern categories as set forth in Written Notice Number 7219153. See Order on Motion for Summary Decision, pp. 17-20. In doing so ALJ Miller disregarded the Commission's holding in Brody Mining, LLC, WEVA 2014-82-R et al., p. 16 (Sept. 29, 2015) ("Brody II"). That holding (as well as the preamble to the Final POV Rule (78 Fed. Reg. 5056, 5058 (Jan. 23, 2013)) requires that the Secretary demonstrate that:

- The *particular* recurrent S&S violations;
- Due to their *nature and relationship with one another* (and not merely because they all happen to relate to roof/rib control or escapeway hazards);
- Prove that *this particular operator of this particular mine* 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." Accordingly, "the Secretary is…required to disclose his theory of how the groupings in a POV notice constitute one or more patterns of violations." See Brody II, *slip op.* at 16.

Here, the Secretary did nothing more than submit a number of enforcement actions and state that they all related to either roof/rib control or emergency preparedness/escapeway issues. The foregoing is insufficient proof of a "theory" and, as ALJ Miller admits, the "Secretary has not produced evidence relating to all of the potential POV factors listed by the Commission in

Brody II." See Order on Motion for Partial Summary Decision, p. 19. Indeed, in Brody II, the Judge and the Commission knew the same information relied upon by ALJ Miller in this case: that there was a certain number of S&S violations of a similar hazard that was considered serious. If this were sufficient to uphold a "pattern" then there would have been no need to articulate the other factors listed by the Commission in Brody II.

Moreover, in order to reach her intended result, ALJ Miller ignored many undisputed facts and, in fact, re-cast many facts to suit her purpose of ruling in favor of MSHA. For example, she incorrectly claims that a team of inspectors performed a "qualitative review of the compliance history at the mine, including its history of violations and documentation relating to those violations." In fact, the undisputed evidence is that Sabian Scott Van Dyke assisted the Solicitor's Office in identifying enforcement actions selected by the Solicitor's Office to support two pre-selected patterns *weeks prior to the issuance* of the NPOV. The objective was to reference enforcement actions that were likely to be affirmed by an ALJ. ALJ Miller also mischaracterizes the scope of review by the POV Panel – ignoring, for example, the fact that the panel simply accepted the results of the screening criteria without any analysis whatsoever.

2. The Undisputed Evidence Established that the Pattern of Violations Screening Criteria Was Applied as a Binding Norm.

ALJ Miller erred by disregarding the undisputed facts that the pattern of violations screening criteria were applied as a binding norm. See Order on Motion for Summary Decision, pp. 9-11; Cleveland Cliffs Iron Co. v. Interstate Commerce Com., 664 F.2d 568, 575 (6th Cir. 1981) (noting that "[i]f it appears that a so-called policy statement is in purpose or likely effect one that narrowly limits administrative discretion, it will be taken for what it is – a binding rule of substantive law.") (quoting American Bus Ass'n v. United States, 627 F.2d 525, 529 (D.C.

Cir. 1980); Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983) (noting that a policy statement or rule that "effects a change in existing law or policy" – i.e., a substantive change – is a legislative rule regardless of its characterization by the administrative agency.); National Mining Ass'n v. Sec'y of Labor, 589 F.3d 1368, 1371 (11th Cir. 2009) (noting "[t]he key inquiry, therefore, is the extent to which the challenged policy leaves the agency free to exercise its discretion to follow or not to follow that general policy in an individual case….") (citing Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir. 1983).

ALJ Miller asserted that"[t]he Commission addressed this argument in Brody I, rejecting the contention the screening criteria were applied as a binding norm." See Order on Motion for Summary Decision, p. 11. The Commission in Brody I, however, did not have the benefit of any administrative record. In this case, the undisputed evidence, as acknowledged by ALJ Miller, is that:[4]

> 3. Based on a computer generated report, MSHA concluded that the Affinity Mine met Criteria 1 of the POV screening criteria because for the applicable screening period (1) at least fifty S&S citations and orders had been issued; (2) the degree of negligence for at least twenty-five percent of the S&S citations and orders issued was high negligence or reckless disregard; (3) the mine had at least 0.5 elevated citations and orders issued per 100 inspection hours; and (4) the injury severity measure for the mine was greater than the overall industry severity measure for mines of the same type and classification. MSHA, Screening Criteria Results for Pattern of Violations (Ex. 5).
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> 5. On September 17, 2013, Jay Mattos, in his capacity as Director of the Office of Assessments, Accountability, Special Enforcement and Investigations ("OAASEI"), prepared a memorandum for Kevin Stricklin ("Stricklin"), the Administrator for Coal Mine Safety and Health, wherein he concluded that the Affinity Mine, Brody Mine, and Tram Mine met the POV screening criteria for

[4]ALJ Miller tacitly recognized that Brody I was not dispositive in this regard. Notably, she asserts that "[a] team of inspectors from the MSHA District Office and attorneys from the Regional Solicitor's Office also conducted a "qualitative review" of the compliance history of the mine, including its history of violations and documentation relating to those violations." In fact, her assertion is not supported by any evidence whatsoever, as set forth above.

the selected period. Memorandum from Jay Mattos to Kevin Stricklin (Sept. 17, 2013) (Ex. 6).[5]

Additional undisputed facts, which were ignored by ALJ Miller in her decision, include the following:

- The Screening Criteria was applied retroactively – the applicable screening period was September 2012 through August 2013 while the effective date of the new POV rule was March 25, 2013. See Pocahontas' Statement of Undisputed Facts, ¶ 4, 1.[6]

- As Director of OAASEI, Mattos acknowledged that he did not independently review that information contained in his September 17, 2013 memorandum – instead, his role was limited in scope to a quantitative review of the screening criteria. See Pocahontas' Statement of Undisputed Facts, ¶ 6.

- When David Scott Mandeville ("Mandeville"), the District 4 Manager, received that memorandum he read the first page and determined that the POV sanction would be imposed against Pocahontas' as the operator of the Affinity Mine because the mine met the POV screening criteria. See Pocahontas Statement of Undisputed Facts, ¶ 8. He also affirmatively acknowledged that a "pattern" of violations is established once the POV screening criteria "guidance" is met and that the definition of a "pattern" of violations is identical to the POV screening criteria. See Pocahontas' Statement of Undisputed Facts, ¶ 31.

[5] Facts Not in Dispute 3 and 5 are taken from ALJ Miller's November 3, 2015 Order Denying Pocahontas' Motion for Summary Decision.

[6] Pocahontas' Statement of Undisputed Facts is taken from Pocahontas' Memorandum of Law in Support of Motion for Summary Decision and Supplemental Memorandum in Support of Motion for Summary Decision.

● Mandeville only had discretion to consider mitigating circumstances and, accordingly, did not consider any other information pertinent to the POV sanction imposed against Pocahontas as the operator of the Affinity Mine. See Pocahontas Statement of Undisputed Facts, ¶10.

● Accordingly, *at no time thereafter* did David Scott Mandeville review any of the mine's health and safety conditions. Notably, no district employee reviewed the Affinity Mine's accident and injury history, S&S enforcement actions, orders issued under Section 104(b), citations and withdrawal orders under Section 104(d) of the Mine Act, orders issued under Section 104(g) of the Mine Act, other enforcement measures other than Section 104(e), other information that demonstrated a serious safety or health management problem at Pocahontas' Affinity Mine. See Pocahontas Statement of Undisputed Facts, ¶ 9.

● Because the POV Review Panel applied the POV screening criteria for the purpose of confirming that a "pattern" of violations had been established at the mine, it did not independently review the enforcement actions utilized in respect of the POV screening criteria. See Pocahontas Statement of Undisputed Facts, ¶ 29.

● Accordingly, the only factors considered by the POV Review Panel in evaluating whether the POV sanction should be imposed against Pocahontas' Affinity Mine was whether the mine had a bona fide change in ownership that resulted in demonstrated performance compliance; whether the mine had an approved CAP to address the repeated S&S violations, accompanied by positive results in reducing S&S "violations"; and whether MSHA received any verified information that the mine had become inactive. At no time did the POV Review Panel request additional information from Mandeville or

any other source during its deliberations regarding Pocahontas' Affinity Mine. See Pocahontas Statement of Undisputed Facts, ¶ 30.

● The selection of the patterns and the supporting enforcement actions was outsourced to the Solicitor's Office and no MSHA representative performed any qualitative review of any of the citations. Indeed, the local representative assigned to support the Solicitor's Office, Sabian Scott VanDyke ("VanDyke"), received his assignment before the POV Review Panel was even selected for the exclusive purpose of serving an administrative function, i.e., compiling information for the Solicitor. VanDyke (i) did not play a role in assisting the POV Review Panel in its deliberations, (ii) did not otherwise participate in drafting the text of the POV Notice, and (iii) did not participate in selecting the two categories of enforcement actions listed therein. Instead, his role was limited to gathering 50 to 60 pre-selected enforcement actions, supporting inspector notes, and accident information for the attorneys in the Solicitor's Office. See Pocahontas Statement of Undisputed Facts, ¶¶ 67-69, 73-75.

● In addition to its failure to provide Pocahontas with fair warning of the meaning of a "pattern" of violations (which likely resulted in MSHA's application of its POV Screening Criteria as a binding norm), MSHA's admittedly "ad-hoc" process for imposing the POV sanction pursuant to the new POV Rule against Pocahontas' Affinity Mine violated basic principles of procedural due process.[7]

[7] The Final POV Rule eliminated MSHA's longstanding practice of giving operators advance notice of a possible POV designation through the "initial screening and the potential pattern of violations (PPOV) notice and review process. See 78 Fed. Reg. at 5056.

3. Pocahontas Has Been Deprived Due Process Because the POV Sanction Was Applied in an Arbitrary and Capricious Manner.

ALJ Miller's assertions that that (i) "[t]he Commission addressed a due process challenge to MSHA's current procedures in is *Brody I*" and (ii) "MSHA's pre- and post-deprivation procedures adequately address the risk of erroneous deprivation" is a misapplication of the holding in Brody I and is otherwise erroneous. See Order on Motion for Summary Decision, p. 12. Notably, the challenge in Brody I was in respect of a facial challenge to MSHA's POV sanctioning process (i.e., was not based upon any administrative record). See Brody Mining, LLC, 36 FMSHRC 2027 (Aug. 2014).

In the instant case, the undisputed administrative record here established that the POV sanction was imposed pursuant to an admittedly "ad-hoc" process that was devoid of rudimentary due process protections and was other otherwise implanted in an arbitrary and capricious manner notwithstanding the Commission's determination that mine operators "have a significant property interest in conducting its mining operations without withdrawing miners." See Brody Mining, LLC, 36 FMSHRC 2027, 2042 (Aug. 2014) (citing United States v. James Daniel Good Real Prop., 510 U.S. 43, 49 (1993)). Moreover, "[t]he POV sanction is one of the most severe enforcement tools that MSHA may use, indicating a specific Congressional intent that 'the Secretary use the POV enforcement tool as a last resort when other enforcement tools…fail to bring an operator into compliance." Id. (citing 78 Fed. Reg. at 5060). While "a withdrawal order may affect only a part of a mine or a piece of equipment until the S&S violation is abated," "the significant impact on [the operator's] property interest comes from the remaining 'chain' of withdrawal liability until the chain is broken by a clean inspection." Id.; see also 30 C.F.R. § 104.4 ("Termination of a section 104(e)(1) pattern of violations notice shall

occur when an MSHA inspection of the entire mine finds no S&S violation or if MSHA does not issue a withdrawal order in accordance with section 104(e)(1) of the Mine Act within 90 days after the issuance of the pattern of violations notice.")

Consequently, it is indisputable that a mine operator is required to be provided with meaningful due process protections before the extraordinary POV sanction is imposed. Such meaningful protections include – consistent with fundamental fairness – a "root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." Boddie v Connecticut, 401 U.S. 371, 379; see also United States v. James Daniel Good Real Prop., 510 U.S. 43, 53 (1993). "The fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). The requirements of procedural due process apply fully to administrative proceedings and remedies under the Mine Act. See Jones v Federal Mine Safety & Health Comm'n, 827 F.2d 769, 1987 U.S. App. LEXIS at *10 (6th Cir. 1987 (unpublished).

The undisputed administrative record in this case establishes that:

● MSHA improperly outsourced its core functions to the Office of the Solicitor. No MSHA manager or employee participated in the selection of the two categories of enforcement actions and the 42 enforcement actions listed in the NPOV. Despite MSHA's own guidance, it is undisputed that these core functions were not performed by representatives of the Secretary of Labor. See Pocahontas' Statement of Undisputed Facts, ¶¶ 67-69, 73-76; see also Coal Mine Safety and Health General Inspection Procedures Handbook, Handbook Number PH13-V-1 (February 2013), at 1-1 (noting that "Section 103(a) of the Act provides authorized representatives (ARs) of the Secretary of Labor with the authority to conduct

inspections and investigations" and "[o]nly persons who have been authorized by the Secretary and have had proper credentials issued to them shall conduct inspections and investigations under the Act.").

● Pocahontas' proposed Corrective Action Plan ("CAP") for the Affinity Mine was first submitted to MSHA's District 4 office for approval on August 6, 2013. Pocahontas submitted a revised CAP, which was eventually approved by MSHA, eight days later (August 14). MSHA approved that second CAP on September 23, 2013 – approximately one month prior to the "ad hoc" POV Review Panel meetings. Nevertheless, no such inspection of the Affinity Mine took place before the POV sanction was issued by MSHA. See Pocahontas' Statement of Undisputed Facts, ¶¶ 33-34, 36, 39.

● Notwithstanding his position as Director of OAASEI, Jay Mattos was asked to serve as the POV Review Panel Chairman. No consideration was given as to whether that appointment constituted a potential conflict of interest or gave rise to the appearance of impropriety. See Pocahontas' Statement of Undisputed Facts, ¶ 12.

● While the stated purpose of the POV Review Panel was to determine "whether the [Subject Mines] should be excluded from POV notification or have POV notifications postponed due to mitigating circumstances" or, alternatively "to provide a *somewhat* independent review of the information so it's independent and objective," the only information reviewed by the POV Review Panel regarding Pocahontas' Affinity Mine was applicable POV screening criteria, the Mitigating Circumstances Determination Form, the number of citations and orders issued over the relevant period of time, the trends of those S&S issuance rates, mine status information and legal identity filings, and

the accident and injury information. See Pocahontas' Statement of Undisputed Facts, ¶¶ 15-16, 21.

● While the POV Review Panel held "ad-hoc" deliberations (involving the three Subject Mines) on October 16, 17, 18, and 21, 2013, those "ad-hoc" collective deliberations lasted between 15 minutes and one or two hours. See Pocahontas' Statement of Undisputed Facts, ¶¶ 22-23.

● At no time did the POV Review Panel request additional information from David Scott Mandeville or any other source (including Pocahontas) during its deliberations regarding Pocahontas' Affinity Mine. See Pocahontas' Statement of Undisputed Facts, ¶ 30.

● The POV Panel did not independently review the POV Screening Criteria, and instead applied it for the purpose of confirming that a "pattern" of violations had been established in respect of the Affinity Mine. See Pocahontas' Statement of Undisputed Facts, ¶ 29.

● No transcripts, notes, or other records were kept of the "ad-hoc" collective deliberations. See Pocahontas' Statement of Undisputed Facts, ¶ 24.

● Even though Jay Mattos was required to maintain a file which documented the facts and information received from David Scott Mandeville, as well as the dates and times of formal POV Review Panel meetings and discussions, no such physical file was maintained by him. Moreover, while he maintained an electronic file, that file did not contain any information regarding dates and times of POV Review Panel meetings or discussions, nor does it reference the substance of any such meetings or discussions. See Pocahontas' Statement of Undisputed Facts, ¶¶ 25-27.

● The only record of the POV Review Panel proceedings – the October 22, 2013 POV Panel Memorandum – recites that the only factors considered by the POV Review Panel

in evaluating whether the POV sanction should be imposed against Pocahontas' Affinity Mine was: whether the mine had a bona fide change in ownership that resulted in demonstrated performance compliance; whether the mine had an approved CAP to address the repeated S&S violations, accompanied by positive results in reducing S&S "violations"; and whether MSHA received any verified information that the mine had become inactive. The POV Review Panel disregarded MSHA's POV Procedure Summary, POV Mitigating Circumstances Guidance, and notwithstanding MSHA's approval of a Corrective Action Plan (the "CAP") for the Affinity Mine less than a month prior to its deliberations.[8] See Pocahontas' Statement of Undisputed Facts, ¶¶ 28, 30.

● While the POV Review Panel claimed that it "used the Pattern of Violations regulations to guide the deliberation process," it determined that the CAP was not a sufficient mitigating circumstance even though no follow up inspection was conducted. The POV Review Panel's disingenuous conclusion – that "[b]ased on the mine's knowledge [*sic*] of the 2 fatalities and the fact that the numbers of S&S violations [citations] were increasing in the last 2 months of the review period, the panel finds no

[8] MSHA's Mitigating Circumstance Guidance states as follows:

> The POV Mitigating Circumstances Guidance provides that "MSHA may be less likely to find that a CAP justifies postponing a POV Notice if a mine met the quantitative criteria for a POV for *several months before submitting a CAP*." [Emphasis added.]
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> "To determine whether positive results exist, District Managers should ensure complete inspections are conducted within 90 days after a CAP is approved and prior to MSHA's POV screening." Furthermore, "[i]f the operator has implemented a CAP in a diligent and timely fashion, but the inspection to evaluate the effectiveness of the CAP is not yet complete, a POV determination may be postponed pending completion of the inspection." See POV Mitigating Circumstances Guidance, p. 4-5.

mitigating circumstances that would not justify issuing a POV Notice and unanimously recommends issuance of a POV Notice to the Affinity mine" disregards MSHA's approval of the CAP. See Pocahontas' Statement of Undisputed Facts, ¶ 40.

● Notwithstanding MSHA guidance to the contrary, the POV Review Panel summarily concluded that Pocahontas should have proposed a CAP "sooner" (i.e., should have guessed much earlier that it would meet the POV screening criteria). See Pocahontas' Statement of Undisputed Facts, ¶ 40.

● The selected patterns set forth in the POV Notice – roof and rib hazard enforcement actions and emergency preparedness escapeway hazard enforcement actions – have no direct or indirect causal connection with the February fatalities. See Pocahontas' Statement of Undisputed Facts, ¶¶ 56-58.

4. The Pattern of Violations Sanction Was Improperly Applied Retroactively to Pocahontas' Affinity Mine.

ALJ Miller erred by retroactively applying the definition of "pattern" of violations despite the undisputed facts that no individual from within MSHA could define "pattern" at the time of the alleged conduct (i.e., at the time the POV Written Notice was issued (October 24, 2013)). See Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) (noting that "[v]ague laws may trap the innocent by not providing fair warning" and that "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them."); LaFarge N. Am., 35 FMSHRC 3497, 3500 (Dec. 2013) (noting that "[b]efore a civil penalty may be imposed, due process considerations preclude the adoption of an agency's interpretation which 'fails to give fair warning of the conduct it prohibits or requires.'"); Western Fuels-Utah, Inc., 11 FMSHRC 278, 287 (Mar. 1989) (noting that "a regulation subjecting an

operator to enforcement under the Mine Act must give fair notice to the operator of what is required or prohibited and 'cannot be construed to mean what an agency intended but did not adequately express.'") (quoting Phelps Dodge Corp. v. FMSHRC, 681 F.2d 1189, 1193 (9th Cir. 1982)); Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (noting that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner."); Twentymile Coal Co., 30 FMSHRC 736, 753-54 (Aug. 2008) (noting that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" (quoting Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)).

ALJ Miller found that the "Commission's decision [in *Brody II*] is binding on the case at hand." See Order on Motion for Summary Decision, p. 9. This ignores MSHA's replete failure to articulate a coherent "pattern" definition even *after* the POV sanction had been imposed. Notably, neither Jay Mattos, David Morris (the Acting District 4 Manager and issuing inspector of the Notice of Pattern of Violations), David Scott Mandeville, nor Kevin Stricklin could provide a meaningful or consistent definition of a "pattern" of violations.[9] See Pocahontas' Statement of Undisputed Facts, ¶¶ 17, 49-50, Stricklin Deposition Transcript, p. 15, ln. 3-11.

5. The Record Evidence Established that Pocahontas' Affinity Mine Did Not Meet the Pattern of Violations Screening Criteria After Three Enforcement Actions were Modified to Moderate Negligence.

ALJ Miller erred by disregarding the undisputed facts that Pocahontas' Affinity Mine fell below the 25% threshold for purposes of the pattern of violation screening criteria when three (3) enforcement actions were modified from high negligence to moderate negligence, thus bringing Pocahontas' Affinity Mine below the requirement to be placed on a pattern based on the pattern

[9] Nor did the Solicitor's Office in the context of discovery or any motion pleading.

of violations screening criteria. See Order on Motion for Summary Decision, p. 11; see also Landgraf v. USI Film Products, Inc., 511 U.S. 244, 270 (1994) (finding a statute has retroactive effects if the statute "attaches new legal consequences to events completed before its enactment."); Nat'l Mining Ass'n v. United States Dep't of Interior, 177 F.3d 1, 8 (D.C. Cir. 1999) (noting that a rule is retroactive if it "takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions already past.").

6. The Administrative Law Judge Erred by Finding that the Enforcement Actions in WEVA 2014-1028 and WEVA 2015-854 Were Properly Issued as Section 104(e) Enforcement Actions.

ALJ Miller erred in her December 24, 2015 Order by finding that Order Number 3576153, as set forth in WEVA 2014-395-R and WEVA 2015-854, and Order Number 9001636, as set forth in WEVA 2014-1028, were properly issued as Section 104(e) orders instead of Section 104(a) citations. See December 24, 2015 Order Granting Summary Decision, p. 5. For these two orders to be properly designated as Section 104(e) orders there must be a finding that a valid pattern of violations notice was issued at the Affinity Mine prior to the issuance of the subject orders. Because Pocahontas is appealing ALJ Miller's finding that the notice of a pattern of violations was validly issued at the Affinity Mine, as set forth above, Pocahontas likewise appeals ALJ Miller's decision finding that Order Numbers 3576153 and 9001636 were properly marked as Section 104(e) orders.

III. LAW AND ARGUMENT

Immediate Review is Warranted Because Pocahontas Has Been Aggrieved by the Administrative Law Judge's Decision.

The Commission's procedural rules permit a petition for discretionary review when "[a]ny person [has been] adversely affected or aggrieved by a Judge's decision or order…." See 29 C.F.R. § 2700.70(a). While review by the Commission is discretionary, review is appropriate when

> (1) A finding or conclusion of material fact is not supported by substantial evidence;
> (2) A necessary legal conclusion is erroneous;
> (3) The decision is contrary to law or to the duly promulgated rules or decisions of the Commission;
> (4) A substantial question of law, policy, or discretion is involved; or
> (5) A prejudicial error of procedure was committed.

29 C.F.R. § 2700.70(c)(1)-(5). Clearly, because the ALJ denied Pocahontas' Motion for Summary Decision and granted the Secretary's Motion for Partial Summary Decision, Pocahontas has been aggrieved by the decision. There is no dispute that this important legal issue has been resolved by ALJ Miller and, therefore, immediate review is appropriate.

IV. CONCLUSION

For the foregoing reasons Pocahontas submits that review of ALJ Miller's decision is appropriate and respectfully requests that the Commission grant its Petition for Discretionary Review on these important questions of law and policy.[10]

[10] Pocahontas intends to file a full opening brief should the Commission grant its Petition for Discretionary Review.

Respectfully submitted,

POCAHONTAS COAL COMPANY, LLC
Contestant,

BY COUNSEL

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Date: December 31, 2015

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004-1710

POCAHONTAS COAL COMPANY, LLC Contestant, v. U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Respondent.	)	**CONTEST PROCEEDING** **Docket No.: WEVA 2014-395-R** **Order No.: 3576153; 12/19/13**
U.S. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) Petitioner v. POCAHONTAS COAL COMPANY, LLC Respondent.	)	**CIVIL PENALTY PROCEEDING** **Docket No.: WEVA 2014-1028** **Docket No.: WEVA 2014-854** Mine ID No.: 46-08878 Mine: Affinity Mine

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **PETITION FOR DISCRETIONARY REVIEW** upon the parties on the **31st day of December, 2015**, via FMSHRC e-filing and electronic mail, where indicated, to:

Lisa M. Boyd
Executive Director
Federal Mine Safety and
Health Review Commission
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, D.C. 20004-1710

The Honorable Margaret A. Miller
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Federal Mine Safety and
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EXHIBIT 1

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 3, 2015

POCAHONTAS COAL COMPANY, LLC, Contestant, v. SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Respondent.	CONTEST PROCEEDING Docket No. WEVA 2014-395-R Order No. 3576153; 12/19/2013 Mine: Affinity Mine Mine ID: 46-08878
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner, v. POCAHONTAS COAL COMPANY, LLC, Respondent.	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2014-1028 A.C. No. 46-08878-350475 Mine: Affinity Mine

ORDER DENYING POCAHONTAS' MOTION FOR SUMMARY DECISION AND GRANTING THE SECRETARY'S MOTION FOR PARTIAL SUMMARY DECISION

Before: Judge Miller

This case is before me on a petition for penalty filed by the Secretary of Labor pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) (the "Mine Act" or "Act"). One citation remains in this docket, but the primary focus of the case and this decision is the Pattern of Violations ("POV") allegation. Both parties filed motions for summary decision and memoranda of law in support of those motions, and subsequently filed responses in opposition. The parties, during the course of a conference call, acknowledged a preference for deciding the POV matter on the record, as there is little, if any, dispute of fact. The parties agreed to complete the final portion of discovery and supplement the record so that a decision could be made without a hearing. The final submissions were made on August 19, 2015, and the parties agree that the case is ready for decision on the record. A draft order had been prepared when the *Brody II* decision was issued by the Commission and the parties were given an opportunity to further supplement the record, but both declined to do so. Based upon the entire record in this case and for the reasons that follow, I deny Respondent's motion for summary decision and I grant the Secretary's motion.

On October 24, 2013, the Mine Safety and Health Administration ("MSHA") notified Pocahontas Coal Company, LLC, ("Pocahontas") that MSHA had determined that a pattern of

violations existed at Pocahontas's Affinity Mine and issued Written Notice No. 7219153 (hereinafter the "notice" or "NPOV") pursuant to section 104(e)(1) of the Mine Act. Subsequently, MSHA issued multiple 104(e) withdrawal orders, which are at issue in this proceeding. The parties have settled all but one of the citations, and those are addressed in a separate order approving partial settlement. In addition to the 104(e) withdrawal order, the validity of the underlying NPOV remains at issue.

The parties' motions address the issue of the validity of the notice of pattern of violations ("NPOV") only. Both parties assert in their motions that the material facts are not in dispute, and each asserts that summary decision should be granted in its favor. The Secretary asserts that the citations and orders listed in the NPOV establish a pattern of violations, and that issuance of the notice was a valid exercise of his prosecutorial discretion. Respondent argues that the notice is invalid because the Secretary's actions were arbitrary and capricious and violated due process. It further argues that the Secretary has failed to provide a meaningful definition of "pattern" and therefore has failed to meet his burden of proof with respect to the POV sanction.

The Secretary's Motion for Summary Decision

The Secretary argues that partial summary decision should be entered in his favor and Written Notice No. 7219153 should be affirmed. He asserts that he did not abuse his discretion in issuing the NPOV. Further, because the Secretary relied upon the citations and orders listed in the NPOV in establishing that a pattern of violations existed, and because those citations and orders are now final orders of the Commission, there are no genuine issues as to any material fact. Finally, the Secretary argues that the citations and orders listed in the NPOV demonstrate the mine's tendency to commit S&S violations and establish that a pattern of violations exists at the mine.

Given that the Commission has upheld the pattern of violations rule, *Brody Mining, LLC*, 36 FMSHRC 2027 (Aug. 2014), the Secretary argues that Pocahontas's challenge to the rule is limited to, at most, the question of whether the Secretary abused his discretion in the application of the rule to this mine. Sec'y Memo. 11. The Secretary's own POV regulations require that he consider eight criteria listed in 30 C.F.R § 104.2 and provide a written notice to the mine of the basis for the NPOV. Sec'y Memo. 4; Sec'y Supp. Br. 3. The Secretary argues that since MSHA followed these procedures, it did not abuse its discretion in issuing the NPOV. Sec'y Memo. 12; Sec'y Supp. Br. 3-4.

The Secretary next asserts that the violations considered by MSHA and listed in the notice provided to Pocahontas demonstrate a pattern of violations. The Secretary argues, relying on dictionary definitions and judicial interpretations of other statutes, that a pattern of violations "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 to [sic] S&S violations[.]" Sec'y Memo. 7-8. He notes that legislative history indicates that Congress intended a pattern to be "'more than an isolated violation' but 'not necessarily . . . a prescribed number of violations of predetermined standards.'" *Id.* at 8 (citing S. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Comm. on Human Res., Subcomm. on Labor, *Legislative History of the Federal Mine Safety and Health Act of 1977* 620 (1978)). He further argues that, given the

Secretary's rulemaking power under the Mine Act, if the Commission concludes that the term "pattern" is ambiguous, it must defer to the Secretary's reasonable interpretation. *Id.* at 8-9.

The NPOV purports to establish two patterns of violations. The first is based on alleged S&S violations that contribute to roof and rib hazards, and identifies twenty-four S&S violations occurring during a twelve-month period preceding issuance of the NPOV. The second involves emergency preparedness and escape way hazards and is based on sixteen S&S violations occurring during the same time period. The Secretary argues that in both cases the conduct evidences a failure to prevent reoccurrence of similar violations and a tendency towards repeated violations that significantly and substantially contribute to safety and health hazards. Accordingly, he argues that a pattern of violations has been established and the NPOV should be upheld.

Pocahontas' Motion for Summary Decision

Pocahontas argues that the Secretary cannot meet his burden of proving the validity of the pattern of violations, that material facts are not in dispute, and, accordingly, that summary decision should be entered in its favor and the NPOV should be vacated.

First, Pocahontas argues that MSHA failed to define a pattern of violations prior to imposing the sanction, and that application of the POV statute to Pocahontas is therefore a violation of due process. Resp. Memo. 23. Neither the Act nor the regulations define the term "pattern," but MSHA argues that the meaning is plain. Pocahontas argues that the meaning is not in fact plain, since MSHA supplements its dictionary definition with judicial interpretations of other statutes, and since the MSHA District Manager referred to the screening criteria when asked to provide a definition of pattern at his deposition. *Id.* at 26-28. Pocahontas argues that a vague definition coupled with judicial deference to MSHA's reasonable interpretation of the statute would give MSHA unfettered discretion to impose the POV sanction on any operator. *Id.* at 27.

Second, Pocahontas argues that MSHA improperly applied the pattern of violations screening criteria as a binding norm in violation of the Administrative Procedure Act ("APA"). *Id.* at 28-29. The APA requires that agency rules be promulgated in accordance with notice and comment procedures. *Id.* at 29 (citing 5 U.S.C. § 553). Courts to consider the issue have held that an agency policy is a "rule" subject to notice and comment requirements if it operates as a binding norm. *Id.* at 30 (citing *National Mining Ass'n v. Sec'y of Labor*, 589 F.3d 1368, 1371 (11th Cir. 2009)). Pocahontas argues that MSHA used the screening criteria as a binding norm, since the POV Review Panel and District Manager did not reexamine the enforcement history of the mine when deciding whether there was a pattern of violations once the mine had met the screening criteria. *Id.* at 30-32.

Third, Pocahontas asserts that MSHA failed to provide adequate procedural due process protections in imposing the NPOV. It notes that it has a significant property interest in the continuing operation of the mine, and that the NPOV gives MSHA broad authority to shut down the mine. Resp. Memo. 33-34. Pocahontas points to a number of potential defects in the procedures surrounding 104(e) withdrawal orders: the chairman of the POV Review Panel may

have had a conflict of interest because of his position in another division of MSHA; the panel did not consider all evidence regarding violations, injuries, and accidents at the mine, and did not properly consider the mine's Corrective Action Plan; and there were no records kept of the panel proceedings. *Id.* at 36-37. Pocahontas asserts that these defects amount to a denial of due process that warrants vacating the NPOV. *Id.* at 40.

Fourth, Pocahontas argues that the current POV rule was retroactively applied in violation of due process. MSHA adopted a new POV rule effective March 25, 2013. Resp. Memo. 40. Two-thirds of the citations and orders in the NPOV issued to Pocahontas occurred prior to that date. *Id.* at 43. Pocahontas argues that because the new POV rule allowed MSHA to consider citations that were not final orders, whereas the old rule did not, application of the new rule to old citations increased the mine's liability for past conduct, and thus was an impermissible retroactive application. *Id.* at 42.

Finally, Pocahontas argues that MSHA's actions in issuing the NPOV were arbitrary and capricious. Specifically, Pocahontas asserts that MSHA's application of the screening criteria was arbitrary and capricious in that it considered enforcement actions that were later modified. One of the screening criteria is whether twenty-five percent of the mine's S&S violations were a result of high negligence or reckless disregard. However, three of Pocahontas's S&S violations for the twelve month period at issue were ultimately modified from high to moderate negligence, bringing the total number of high negligence violations to less than twenty-five percent. Pocahontas also argues that the POV Review Panel acted arbitrarily and capriciously by failing to give appropriate weight to the mine's Corrective Action Plan ("CAP") as a mitigating circumstance. *Id.* at 45. The Review Panel stated that the CAP was not a mitigating circumstance because it was submitted too late. *Id.* at 46. Pocahontas counters that there was no timeline provided to operators for when to submit a CAP, and that a significant number of its citations were issued after the CAP had been submitted. *Id.* at 47. Additionally, MSHA failed to conduct an inspection of the mine after the CAP was approved, as is recommended in MSHA's Mitigating Circumstances Guidance. *Id.* at 45. Finally, Pocahontas argues that the review panel's reliance on two fatalities at the mine as justification for the POV was arbitrary and capricious, given that the fatalities were not related to the roof control and escape way citations listed in the NPOV. *Id.* at 47.

Summary Decision Standard

Commission Procedural Rule 67 sets forth the grounds for granting summary decision as follows:

> A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:
> (1) That there is no genuine issue as to any material fact; and
> (2) That the moving party is entitled to summary decision as a matter of law.

29 C.F.R. § 2700.67(b). The Commission has explained that summary decision is an extraordinary procedure. *Energy West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994). A material fact is one that is indispensable to the case, the absence of which would render the case unsupported. *Black's Law Dictionary* 881 (5th ed. 1979). In reviewing the record on summary decision the judge should do so in the light most favorable to the non-moving party. *Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007).

Based upon my review of the record, the briefs of the parties, and their attachments and supplemental submissions, I find that there is not a dispute of material fact and that summary decision is appropriate as a matter of law.

Facts Not in Dispute

The parties submitted numerous depositions and other documents to support the motions filed by each. The facts are drawn from a number of documents, including briefs, depositions, affidavits and documentary evidence.[1] Based upon the submissions of both parties, I find the following material facts are not in dispute:

1. The POV screening criteria was adopted by MSHA on March 25, 2013. 78 Fed. Reg. 5056 (Jan. 23, 2013); Jay Mattos Deposition Transcript, p. 27, ln. 18; p. 28, ln. 5 (Ex. 4).
2. On September 16, 2013, MSHA began its screening of mines for a pattern of violations pursuant to 30 C.F.R. § 104 and MSHA's Pattern of Violations Screening Criteria (2013) for the twelve-month period ending August 31, 2013. The screening covered all 14,600 mines under MSHA's jurisdiction. Letter from David Mandeville to Jack Toombs (Oct. 24, 2013) (Ex. 3); U.S. Department of Labor, News Release: MSHA Issues First POV Notices Under New Rule (Oct. 24, 2013) (Ex. 1).
3. Based on a computer generated report, MSHA concluded that the Affinity Mine met Criteria 1 of the POV screening criteria because for the applicable screening period (1) at least fifty S&S citations and orders had been issued; (2) the degree of negligence for at least twenty-five percent of the S&S citations and orders issued was high negligence or reckless disregard; (3) the mine had at least 0.5 elevated citations and orders issued per 100 inspection hours; and (4) the injury severity measure for the mine was greater than the overall industry severity measure for mines of the same type and classification. MSHA, Screening Criteria Results for Pattern of Violations (Ex. 5).
4. The POV screening period was from September 1, 2012, through August 31, 2013. MSHA, Screening Criteria Results (Ex. 5); Jay Mattos Deposition Transcript, p. 71, ln. 15-18 (Ex. 4).
5. On September 17, 2013, Jay Mattos, in his capacity as Director of the Office of Assessments, Accountability, Special Enforcement and Investigations ("OAASEI"), prepared a memorandum for Kevin Stricklin ("Stricklin"), the Administrator for Coal Mine Safety and Health, wherein he concluded that the Affinity Mine, Brody Mine,

[1] Appendix I is attached and lists each document referenced in this decision by number. Because many documents were submitted more than once and by each party, Appendix I was drafted for ease of reference to the number for each exhibit.

and Tram Mine met the POV screening criteria for the selected period. Memorandum from Jay Mattos to Kevin Stricklin (Sept. 17, 2013) (Ex. 6).

6. MSHA's POV procedures require that once a mine has been identified through the data screening, the administrator must issue a memo to each district manager who has mines in his district that meet the POV screening criteria. District managers must then review the mines for mitigating circumstances and report their findings in a memo to the Administrator. MSHA, Pattern of Violations (POV) Procedures Summary 1 (Ex. 14).
7. In this instance, the administrator for coal, Stricklin, sent a memo to David Mandeville, the district manager, on September 19, 2013, notifying him that the Affinity Mine had met the POV screening criteria. David Mandeville Deposition Transcript 25-26 (Ex. 7). Mandeville contacted the owners of the Affinity mine, Pocahontas Coal Company, and met with representatives from the mine on September 20, 2013. Mandeville Deposition at 29-30.
8. After receiving notice from Mandeville that the mine was under consideration for the POV notice, John Schroder, manager of the Affinity Mine, submitted a mitigating circumstances explanation to MSHA. Letter from John Schroder to David Mandeville (Sept. 26, 2013) (Ex. 10); Mandeville Deposition at 54.
9. Mandeville prepared and submitted to the POV Review Panel a Mitigating Circumstances Determination Form. The form addresses whether the mine was inactive, whether there was a bona fide change in mine ownership, and whether there was an approved CAP in place. MSHA, Mitigating Circumstances Determination Form: Affinity Mine (Ex. 11).
10. MSHA procedures require that the POV panel review the mitigating circumstances information provided by the District Manager and make a recommendation to the Administrator as to whether the mine should be excluded from POV notification due to mitigating circumstances. MSHA, POV Procedures Summary 1 (Ex. 14).
11. In this instance, the POV Review Panel consisted of Jay Mattos, the Director of the Office of Assessments; Donald Foster, a District Manager in Metal/Non-Metal; Brian Goepfert, Chief of the Safety Division in Metal/Non-Metal; Thomas Light, a District Manager in Coal; and Jim Langley, an Acting District Manager in Coal. Mattos Deposition at 77, ln. 14 (Ex. 4).
12. The stated purpose of the POV Review Panel was to determine "whether the [subject mines] should be excluded from POV notification or have POV notifications postponed due to mitigating circumstances." Memorandum from Jay Mattos to Kevin Stricklin re: Pattern of Violations Review Recommendations 1 (Oct. 22, 2013) (Ex. 9); *see also* MSHA, POV Procedures Summary 1.
13. The information reviewed by the POV Review Panel included the number of citations and orders issued during the relevant period of time; the S&S issuance rates during that time; the Mitigating Circumstances Determination form; the Corrective Action Program for Affinity; the status of the mine; legal identity filings; and accident and injury information. Mattos Deposition at 82-83 (Ex. 4).
14. The POV Review Panel held deliberations involving the three mines that had met the screening criteria on October 16, 17, 18, and 21, 2013. POV Review Panel Recommendations 1 (Ex. 9); Mattos Deposition at 75-76 (Ex. 4).

15. MSHA procedures provide that a possible mitigating circumstance that could justify a decision not to issue or to postpone the issuance of a POV Notice is an operator's approved and implemented Corrective Action Program (CAP) accompanied by positive results in reducing S&S violations. MSHA, POV Procedures Summary 1 (Ex. 14).
16. Pocahontas originally submitted its proposed CAP to MSHA's District 4 office for approval on August 6, 2013. It submitted a revised CAP on August 14, 2013. The revised version was approved by the District Manager, Mandeville, on September 23, 2013. Letter from John Schroder to David Mandeville (Sept. 26, 2013) (Ex. 10); Mandeville Deposition at 42-45 (Ex. 7); Letter from David Mandeville to Jack Toombs (Sept. 23, 2013) (Ex. 15).
17. The POV Mitigating Circumstances Guidance provides that "MSHA may be less likely to find that a CAP justifies postponing a POV Notice if a mine met the quantitative criteria for a POV for several months before submitting a CAP." MSHA, Mitigating Circumstance Guidance 5 (Ex. 12).
18. The POV Review Panel used the Pattern of Violations regulations to guide its deliberation process. POV Review Panel Recommendations 3 (Ex. 9).
19. The POV Review Panel concluded that Affinity's approved CAP was not a sufficient mitigating circumstance because the mine did not implement the CAP until six months after two fatalities occurred at the mine, and because the number of S&S violations increased in the last two months of the review period. The panel therefore recommended that a POV notice be issued to the Affinity Mine. It submitted this recommendation to Kevin Stricklin. POV Review Panel Recommendations 6-7 (Ex. 9).
20. A team of inspectors from the MSHA District Office and attorneys from the Regional Solicitor's Office also conducted a "qualitative review" of the compliance history of the mine, including its history of violations and documentation relating to those violations. Sabian Scott Van Dyke Deposition 36 (Ex. 32).
21. The selection of citations and orders to include in the NPOV was made by attorneys in the Solicitor's Office. Kevin Stricklin Deposition Transcript 46-48 (Supp. Ex. A); Declaration of Sabian Scott VanDyke ¶¶ 26-29 (Ex. 37).
22. In making this selection, the attorneys discussed the evidentiary value of specific citations with inspectors in the field office who had inspected the mine. They relied in part on citation files and notes compiled by Field Office Supervisor Sabian Scott VanDyke. Declaration of Sabian Scott VanDyke ¶¶ 17, 22, 26-28 (Ex. 37).
23. The citations and orders selected were subsequently presented to Administrator Stricklin for inclusion in the NPOV. VanDyke Declaration ¶ 28 (Ex. 37); Kevin Stricklin Deposition Transcript 41-46 (Ex. 32).
24. Stricklin made the ultimate decision whether to issue the NPOV. He reviewed the initial screening documents, the memo prepared by the POV Review Panel, and the draft notice detailing the two sets of patterns alleged at this mine. While he was not involved in the initial determination of which citations and orders were to be included in the final notice, he reviewed and had discretion to accept the patterns as listed. Stricklin Deposition at 12-14, 29-30, 41-46 (Ex. 32).
25. Based on his review of the information submitted to him, Stricklin instructed the District Manager to issue the notice. The notice was issued by David Morris as

Acting District Manager because Scott Mandeville was on vacation. Mandeville Deposition at 59-60 (Ex. 7); David Morris Deposition Transcript 25 (Ex. 8); Stricklin Deposition at 12-14, 29-30, 46 (Ex. 32).

26. Morris received the instruction to issue POV Notice No. 7219153 in a phone call with Stricklin and Charlie Thomas on October 24, 2013. Morris Deposition 25-27 (Ex. 8).
27. Neither Mandeville nor Morris was involved in selecting the enforcement actions described in POV Written Notice Number 7219153. Mandeville Deposition at 59 (Ex. 7); Morris Deposition at 52-53 (Ex. 8).
28. Morris delivered POV Written Notice No. 7219153 to the mine on October 24, 2013, along with a letter signed by Morris on Mandeville's behalf explaining the significance of the notice. Morris Deposition at 50 (Ex. 8); POV Written Notice No. 7219153 (Ex. 2); Letter from David Mandeville to Jack Toombs (Oct. 24, 2013) (Ex. 3).
29. POV Written Notice No. 7219153 lists forty-two enforcement actions (citations and orders) and alleges two discrete patterns of violations. Because six enforcement actions (8149059, 8156134, 8155047, 8155074, 7276508 and 9000362) are listed as contributing to both patterns, the total number of enforcement actions is thirty-six. The enforcement actions listed were issued from September 9, 2012, through August 13, 2013. POV Written Notice No. 7219153 (Ex. 2).
30. The alleged patterns set forth in POV Written Notice Number 7219153 are violations that contribute to roof and rib hazards and violations that contribute to emergency preparedness and escape way hazards. POV Written Notice No. 7219153 (Ex. 2).
31. Two of the citations listed in the NPOV were subsequently modified to non-S&S, 104(a) citations. The thirty-four remaining citations and orders listed in the NPOV, all of which are now final orders of the Commission, are S&S violations.

I. The Secretary's POV Regulations

Pocahontas argues that the Secretary's regulations failed to provide fair notice to regulated parties, and that the NPOV should therefore be vacated on due process grounds. Specifically, Pocahontas argues that the Secretary failed to define a "pattern of violations" before imposing the sanction on the Affinity Mine. It makes a similar argument in its Supplemental Memorandum of Law, contending that the Secretary's failure to define a pattern prevents him from proving that a pattern existed. Resp. Supp. Memo. at 15. The Commission recently addressed this issue in *Brody Mining, LLC*, 37 FMSHRC ___, No. WEVA 2014-82-R, slip op. at 9-13 (Sept. 29, 2015) ("*Brody II*"), rejecting the argument that the Secretary had failed to provide an adequate definition of "pattern." I therefore hold that Pocahontas is not entitled to summary judgment on this ground.

The Mine Act requires that "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." 30 U.S.C. § 814(e)(1). If, within 90 days after the notice is issued, an inspector finds a significant and substantial (S&S) violation at the mine, MSHA is directed to issue a withdrawal order under section 104(e) of the Act. *Id.* The mine will then be subject to a withdrawal order for any subsequent S&S violation

until an inspection of the entire mine reveals no further S&S violations. 30 U.S.C. §§ 814(e)(2), (3).

The Mine Act does not define the term "pattern of violations," nor is there a definition provided in the Secretary's regulations. The Commission decided in *Brody II*, however, that the definition submitted by the Secretary in litigation, together with the Secretary's implementing regulations for the POV, established a sufficiently clear definition of "pattern" consistent with the purpose of the Act. *Brody II*, slip op. at 12. The Commission noted that the legislative history of the Mine Act indicates that while "a pattern is more than an isolated violation, pattern does not necessarily mean a prescribed number of violations of predetermined standards nor does it presuppose any element of intent or state of mind of the operator." *Brody II*, slip op. at 9 (citing 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*, at 621 (1978)). The Commission thus found that a relatively flexible definition of pattern was appropriate, whereby "[n]o particular number of S&S violations is required." *Id.* at 11.

The Commission's decision is binding on the case at hand. Therefore, I find that the Secretary did not violate the due process rights of Pocahontas by failing to provide a formal definition of "pattern" in his regulations, and that the absence of such a definition does not preclude the Secretary from proving a pattern of violations.

II. The Secretary's POV Procedures

The Secretary implemented the most current rule regarding pattern of violations in March 2013. 78 Fed. Reg. 5056, 5056 (Jan. 23, 2013). The rule provides that at least once each year, MSHA will review the compliance and accident, injury, and illness records of mines to determine if any meet the POV screening criteria. 30 C.F.R. § 104.2. The standard establishes eight factors for MSHA to review in deciding whether a mine has a pattern of violations.[2] The

[2] The eight factors 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.

30 C.F.R. § 104.2(a).

first six of the factors relate to enforcement actions against the mine, and the last two involve additional information about health and safety problems at the mine and mitigating circumstances. *Id.* The standard also refers parties to the MSHA website for the "specific pattern criteria." 10 C.F.R. § 104.2(b). The website provides two sets of screening criteria that will trigger consideration for an NPOV, each of which is based on the number and severity of safety and health violations at the mine. Mine Safety and Health Administration, Pattern of Violations Screening Criteria (2013), www.msha.gov/POV/POVScreeningCriteria2013.pdf [hereinafter MSHA, POV Screening Criteria].

A computerized screening was done in September 2013 of the 14,600 mines in MSHA's jurisdiction for the period from September 1, 2012, through August 31, 2013. Three mines, including Affinity Mine, met one of the screening criteria for that period. In accordance with MSHA procedures, the MSHA Administrator for Coal, Kevin Stricklin, notified the district manager, David Mandeville, that Affinity Mine had met the screening criteria and was being considered for the POV. Mandeville in turn notified and met with representatives from the mine. The mine provided a written response outlining why it should not receive an NPOV. The letter described the mine's Corrective Action Program and measures it had taken to increase safety after two fatalities occurred in February 2013. The mine did not dispute any of the data concerning the number and severity of citations at the mine from the MSHA data system, but rather submitted potential mitigating factors. After meeting with mine representatives and reviewing the letter, Mandeville completed a mitigating factors form and submitted it to the POV Review Panel. The panel, chaired by Jay Mattos, Director of the Office of Assessments, reviewed the citations and orders issued during the relevant period of time, accident and injury information, and mitigating circumstances including the Corrective Action Program. It submitted a memo with its findings to Stricklin. Around the same time, the district office and the regional Solicitor's office worked together to review the citations and orders contained in the initial screening and compiled two lists of citations that constituted two separate patterns. Stricklin reviewed the findings of the panel and the proposed pattern lists and determined that the mine should receive an NPOV. Stricklin sent the notice to the district office, along with a cover letter, to be presented to the mine.

Pocahontas makes several challenges to the Secretary's procedures in issuing the NPOV, arguing that the Secretary cannot meet his burden of proving the validity of the notice, and, accordingly, that summary decision should be entered in favor of the mine and the NPOV vacated. Specifically, Pocahontas alleges that MSHA improperly applied the screening criteria as a binding norm and disregarded Pocahontas's due process rights in imposing the POV sanction and retroactively applying the rule to citations and orders issued before the rule went into effect. The Commission addressed most of these issues in *Brody Mining, LLC*, 36 FMSHRC 2027 (Aug. 2014) ("*Brody I*"). The remaining challenges I find to be without merit. I therefore deny Pocahontas's motion for summary judgment on these grounds.

a. Notice & Comment Procedures

Section 104.2 of the POV rule describes the Secretary's criteria for a pattern of violations and states that "MSHA will post the specific pattern criteria on its Web site." 30 C.F.R. § 104.2.

The criteria posted on the website are the numeric "screening criteria" that MSHA used to generate the computer report identifying three mines for consideration for a POV. *See* Ex. 6. Pocahontas argues that MSHA applied the screening criteria as a "binding norm," and that the criteria were therefore subject to the requirements for notice and comment rulemaking under the Administrative Procedure Act ("APA"). *See* 5 U.S.C.§ 553.

The Commission addressed this argument in *Brody I*, rejecting the contention that the screening criteria were applied as a binding norm. 36 FMSHRC at 2047-51. The Commission explained that "the screening criteria assist MSHA in ascertaining how it will 'concentrate enforcement efforts' regarding POV enforcement." *Brody I*, 36 FMSHRC at 2049 (quoting *Am. Hosp. Ass'n v. Bowen*, 834 F.2d 1037, 1056 (D.C. Cir. 1987)). Rather than automatically singling out mines to receive the NPOV, the screening criteria were used as the initial step in a process of further review. *Id.* The Commission thus concluded that the criteria were a "general statement of policy" rather than a "legislative rule," and so did not require notice and comment rulemaking procedures. *Id.* at 2049-51. The Commission's decision is a binding precedent, and therefore I find that MSHA did not violate the APA in establishing its screening criteria without using notice and comment rulemaking.

b. Retroactivity

MSHA's current POV rule went into effect on March 25, 2013. 78 Fed. Reg. 5056, 5056 (Jan. 23, 2013). One significant change in the new rule is that it allows MSHA to consider violations that are not yet final orders when determining whether a mine has a pattern of violations; the previous POV rule limited MSHA to considering final orders. *Id.* at 5056; *Brody I*, 36 FMSHRC at 2030. MSHA applied the new POV rule in issuing the NPOV to Pocahontas. Thus, some of the violations contained in the NPOV were not final orders when the NPOV was issued. Moreover, some of those violations occurred before the effective date of the new POV rule. Pocahontas argues that the inclusion of these non-final orders on the NPOV increases the mine's liability for past conduct, and is thus an impermissibly retroactive application of the new POV rule.

In *Brody I*, the Commission found that application of the current rule to violations occurring before the effective date of the rule was not impermissibly retroactive. 36 FMSHRC at 2051-53. The Commission rejected the argument that application of the rule increases the mine's liability for past conduct. *Id.* at 2052. It explained that "section 104(a) may be analogized to 'repeat offender' provisions under which an enhanced penalty is not an 'additional penalty for the earlier crimes,' but rather was a 'stiffened penalty for the latest crime, which is considered to be an aggravated offense because [it is] a repetitive one.'" *Id.* at 2052 (quoting *Gryger v. Burke*, 334 U.S. 728, 732 (1948)) (alteration in original). The Commission also noted that the current rule does not impair vested rights that the mine held under the prior rule, because the rule does not affect the mine's right to contest the citations listed in the NPOV or the assessed penalties. *Id.* I apply the same reasoning to the case at hand and find that the inclusion in the NPOV of non-final citations and orders issued prior to the effective date of the new POV rule did not amount to a retroactive application of the rule.

c. Due Process

Pocahontas additionally argues that "the 'ad hoc' process utilized by MSHA to impose the POV sanction in respect of the Affinity Mine evades a plethora of basis [sic] due process procedural protections." Resp. Memo. 39. The mine lists numerous perceived defects in the procedure through which the NPOV was issued, including that the POV Review Panel chairman may have had a conflict of interest; that the panel failed to review all the relevant information, and failed to give adequate weight to the mine's Corrective Action Program; that the panel's deliberations were too brief; and that there were no records kept of the panel's deliberations.

The Commission addressed a due process challenge to MSHA's current POV procedures in *Brody I*, 36 FMSHRC at 2041-47. It applied the Supreme Court's test for evaluating procedural due process protections, which balances (1) the private interest affected, (2) the risk of erroneous deprivation through the procedures used and the value of additional procedural safeguards, and (3) the government's interest. *Id.* at 2042 (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). The Commission found that a mine operator has a significant property interest in the continued operation of the mine, though it noted that the impact does not occur when the NPOV is issued, but rather when the mine remains "on the 'chain' of withdrawal liability until the chain is broken by a clean inspection." *Id.* On the other hand, MSHA has a "paramount" interest in protecting public health and safety "which justifies summary administrative action." *Id.* (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 300 (1981)). With regard to the second factor, the Commission held that MSHA's pre- and post-deprivation procedures adequately addressed the risk of erroneous deprivation. *Id.* at 2044-47. The protections it considered were that MSHA provides an online monitoring tool that gives operators notice that they might be subject to consideration for an NPOV; operators may submit mitigating circumstances to the District Manager at any time; operators may implement a Corrective Action Program ("CAP") to reduce S&S violations at any time; MSHA reviews mitigating circumstances, the CAP, and other information before issuing the notice; operators may request expedited hearings of S&S citations and orders if they are approaching consideration for an NPOV; and after the NPOV is issued, operators may seek temporary relief from section 104(e) withdrawal orders or expedited proceedings of contests of those orders. *Id.* at 2045-46.

The procedures that the Commission found in *Brody I* to adequately safeguard the mine's property interest were all applied here. Pocahontas had access to the online monitoring tool for POVs. It had an opportunity to implement a CAP and submit mitigating circumstances, both of which it did. MSHA reviewed the CAP and the mine's mitigating circumstances before issuing the notice. Finally, Pocahontas had access to expedited proceedings for the citations underlying the NPOV and for subsequent withdrawal orders. I do not find that any of the procedural complaints cited by Pocahontas, including the affiliations of panel members, length of the review panel proceedings, and recordkeeping, undermined these procedures. While Pocahontas argues that the panel did not give adequate weight to the mine's CAP, there is no dispute that the panel reviewed and rejected the CAP as a mitigating circumstance. Statement of Facts ¶ 19. Pocahontas's argument is a substantive disagreement with MSHA and not relevant to procedural due process. Thus, I hold that MSHA's procedures satisfied due process.

III. The Pattern of Violations

The Secretary argues that partial summary decision should be entered in his favor and Written Notice No. 7219153 should be affirmed. He argues that the citations and orders listed on the NPOV constitute two patterns of violations, the first relating to roof and rib hazards, and the second relating to escape way and emergency preparedness hazards. He notes that those citations and orders are now final orders of the Commission, and thus argues that he has established a pattern of violations.

a. Abuse of Discretion

The Commission has not articulated the exact extent to which the agency's actions in issuing the NPOV are subject to judicial review. The Secretary argues that his decision to issue the NPOV is an exercise of his prosecutorial discretion and therefore subject only to limited judicial review. Sec'y Supp. Br. 2-4. In *Brody II*, the Commission similarly commented that "evidence should not be developed, nor should discovery be permitted, regarding MSHA's prosecutorial discretion in issuing a POV notice." *Brody II*, slip op. at 16. Under that system, due process review of agency procedures would still be available and the POV itself would be reviewed de novo by the judge, but the agency's decision-making process would not be otherwise examined. Pocahontas argues, however, that the agency's actions in issuing the NPOV should be reviewed for whether they were arbitrary and capricious. Resp. Supp. Memo. 8-10. As explained below, I find that MSHA's actions should be reviewed for abuse of discretion, but find that the agency did not abuse its discretion here.[3]

The Commission reviews agency actions under the arbitrary and capricious or abuse of discretion standard in a number of contexts, including the promulgation of regulations, approval of plans, and issuance of imminent danger and failure to abate orders. *See e.g. Twentymile Coal Co.*, 30 FMSHRC 736, 748 (Aug. 2008) (applying arbitrary and capricious standard of review to Secretary's approval of an emergency response plan); *Emerald Coal Res., LP*, 29 FMSHRC 956, 966 (Dec. 2007) (same); *Brody I*, 36 FMSHRC at 301-04 (reviewing the validity of the Secretary's POV rule under an arbitrary and capricious standard); *Energy W. Mining Co.*, 18 FMSHRC 565, 569 (Apr. 1996) (reviewing an inspector's decision to issue a failure to abate order for abuse of discretion); *Pattison Sand Co.*, LLC, 688 F.3d 507, 512-13 (8th Cir. 2012) (reviewing issuance of section 103(k) order under arbitrary and capricious standard); *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2164 (Nov. 1989) ("*R&P Coal*") (reviewing inspector's issuance of imminent danger order for abuse of discretion). In these cases, the nature of MSHA's action makes it appropriate for the judge to defer to the agency's judgment. *See e.g. R&P Coal*, 11 FMSHRC at 2164 ("Since he must act immediately, an inspector must have considerable discretion in determining whether an imminent danger exists."); *Energy W. Mining*, 18 FMSHRC at 269 ("The Act does not address the extent of an inspector's inquiry in making the determination of whether abatement time should be extended."). In the plan approval

[3] The draft of this decision was being finalized at the time *Brody II* was issued. After reading the Commission decision regarding the review of prosecutorial discretion, it was unclear if the Secretary's discretion should be reviewed at all. Because the parties had developed extensive evidence on the topic, and after a great deal of consideration, it was decided that a review is appropriate.

context, the Seventh Circuit has explained that the deferential arbitrary and capricious standard is appropriate because plan approval is essentially a policymaking activity, an area in which the Secretary has special expertise that the Commission lacks. *Mach Mining, LLC v. Secretary of Labor, Mine Safety & Health Administration*, 728 F.3d 643, 646-58 (7th Cir. 2013) (analogizing plan approval to rulemaking, which is subject to deferential review, and contrasting this with enforcement actions, which are subject to "full review on the merits").

Nevertheless, the Commission has also reviewed select enforcement decisions for abuse of discretion, including the Secretary's decision to cite an operator for its independent contractor's violations. *See Twentymile Coal Co.*, 27 FMSHRC 260, 265-66 (Mar. 2005). In these cases, the Secretary's action is subject to heightened rather than deferential review: the Secretary must justify both that the citation is valid and that he did not abuse his discretion in issuing it. In this case of first impression, I find that this two-level form of review, one for the issuance of the notice and a separate for the pattern itself, is appropriate in the case of the NPOV. Notably, MSHA has issued detailed procedures governing its own enforcement decision-making in the POV context. The Supreme Court has held that, "Where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). In view of the discretion available to the Secretary in deciding which mines are subject to the NPOV and the seriousness of the penalty at stake, I find that it is appropriate to examine whether the Secretary followed his own procedures or otherwise abused his discretion in issuing the notice.

The Commission articulated the scope of review under the arbitrary and capricious standard in *Twentymile Coal*:

> The scope of review under the arbitrary and capricious standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made. In reviewing the explanation, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

30 FMSHRC 736, 754-55 (quoting *Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

I find that MSHA followed all statutory, regulatory, and internal procedural requirements and considered all relevant information, and that therefore the Secretary's actions in issuing the notice were not arbitrary or capricious.

The first stage in MSHA's procedures for issuing the NPOV is a computerized review of the enforcement data of every mine subject to MSHA's jurisdiction. 30 C.F.R. § 104.2; MSHA, POV Screening Criteria; MSHA, POV Procedures Summary 1 (Ex. 14). MSHA has posted two sets of screening criteria on its website. MSHA, POV Screening Criteria. If a mine meets either set of criteria, it is selected for further consideration for an NPOV.[4] *Id.* Affinity Mine was selected under the first set of criteria: it had at least 124 S&S citations or orders issued during the twelve-month period at issue; twenty-five percent of those citations and orders had a degree of negligence of high or reckless disregard; 1.49 elevated citations or orders were issued per 100 inspection hours; and the mine's Injury Severity Measure of 5,665.03 was greater than the industry average of 438.85. MSHA, POV Screening Results (Ex. 5).

Pocahontas takes issue with the application of the criterion regarding high negligence citations. Resp. Mot. 44-45. It notes that three of the mine's citations from the twelve-month period were eventually modified from high negligence to moderate negligence, bringing the total below the twenty-five percent necessary for the mine to meet the screening criteria. MSHA, POV Screening Criteria. It thus argues that MSHA's actions were arbitrary and capricious because the agency did not have adequate factual support for its decision. Resp. Memo. at 45 (citing *Twentymile Coal*, 30 FMSHRC at 753-54).

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[4] The two sets of screening criteria are as follows.

> Mines meeting all of the following four criteria:
>
> 1. At least 50 citations/orders for significant and substantial (S&S) violations issued in the most recent 12 months.
> 2. A rate of eight or more S&S citations/orders issued per 100 inspection hours during the most recent 12 months OR the degree of negligence for at least 25 percent of the S&S citations/orders issued during the most recent 12 months is "'high" or "reckless disregard."
> 3. At least 0.5 elevated citations and orders [issued under section 104(b); 104(d);104(g); or 107(a) of the Mine Act] issued per 100 inspection hours during the most recent 12 months.
> 4. An Injury Severity Measure (SM) for the mine that is greater than the overall Industry SM for all mines in the same mine type and classification over the most recent 12 months.
>
> *Or*
>
> Mines meeting both of the following criteria:
>
> 1. At least 100 S&S citations/orders issued in the most recent 12 months.
> 2. At least 40 elevated citations and orders [issued under section 104(b); 104(d);104(g); or 107(a) of the Mine Act] issued during the most recent 12 months.

MSHA, POV Screening Criteria.

The Commission addressed a similar argument in *Brody I*, in which it held that MSHA was not arbitrary and capricious in relying on non-final S&S citations to establish a pattern of violations. *Brody I*, 36 FMSHRC at 2038-40. The Commission noted that "[i]f 20%, or even 33%" of the citations listed on Brody's NPOV were to "lose their S&S designation after litigation, it would still leave a significant number of S&S violations on which a pattern of violations could be found." *Id.* at 2039. Like the S&S analysis, there is no requirement in the statute or regulations that twenty-five percent of the mine's violations be high negligence. I thus find Pocahontas's argument unpersuasive. Given that the mine does not dispute the substance of the screening criteria or the accuracy of MSHA's enforcement records, I therefore find that MSHA did not abuse its discretion at this step of the POV procedure.

The second stage in MSHA's POV procedures is a review of mitigating circumstances by the POV Review Panel. MSHA, POV Procedures Summary 1 (Ex. 14); *see also* 30 C.F.R. § 104.2. In the third and final stage, the Administrator for Coal considers the recommendations of the panel along with the mine's record of violations and decides whether to issue the notice. MSHA's internal policies indicate that potential mitigating circumstances to be considered by the panel and the administrator include an approved and implemented Corrective Action Program (CAP); a bona fide change in mine ownership resulting in improvements in compliance; and the mine becoming inactive. MSHA, Mitigating Circumstances Guidance 2 (Ex. 12); *see also* 78 Fed. Reg. 5056, 5063. Here, the district manager gathered information from the mine regarding these factors prior to issuing the NPOV, and the POV Review Panel addressed them in its recommendations to Kevin Stricklin. POV Review Panel Recommendations 4-7 (Ex. 9). Pocahontas argues, however, that the panel was arbitrary and capricious in its consideration of the mine's CAP. Resp. Memo. 45.

Pocahontas submitted its proposed CAP on August 6, 2013, and submitted a revised version on August 14, 2013. MSHA approved the revised CAP on September 23, 2013. The POV Review Panel reviewed the CAP, but concluded that it was not a sufficient mitigating factor because the mine did not implement the CAP until six months after the two fatalities had occurred at the mine. The panel also noted that the number of S&S violations increased in the last two months of the review period. Pocahontas argues that the panel should not have rejected the CAP as a mitigating circumstance based on its date of submission: the mine points out that MSHA has not provided guidance to operators as to when a CAP should be implemented, and that the plan for Affinity was submitted before the mine actually met the POV screening criteria. Resp. Memo. 47. Pocahontas also argues that MSHA failed to conduct a complete inspection of the mine after the CAP was implemented. *Id.* MSHA's Mitigating Circumstances Guidance provides that "In rare cases, postponement of a POV Notice could be appropriate where an operator has implemented a CAP in a timely fashion, but there has been insufficient time for MSHA to conduct an inspection to evaluate the CAP's effectiveness in reducing S&S violations." MSHA, Mitigating Circumstances Guidance 3 (Ex. 12). The Secretary contends that the fatalities at the mine put the mine on notice that it had a safety problem, and that it should have implemented a CAP sooner than six months after the fatalities. POV Panel Recommendations 5-7 (Ex. 9). In other words, the CAP was not implemented "in a timely fashion" and so did not justify postponing the NPOV.

I find MSHA adequately considered the CAP as a mitigating circumstance, and that it was not arbitrary and capricious in finding that the CAP did not justify postponing the NPOV. As explained above, when deciding whether an agency's actions are arbitrary and capricious, a court looks to whether the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfr's Ass'n,* 463 U.S. at 43. I find that MSHA has done so here. The agency considered the mine's record of violations and injuries over a twelve-month period and its efforts to implement a CAP. The agency was well within its discretion to conclude that the CAP implemented at the end of the review period did not mitigate the mine's record of violations over the past year. MSHA was under no obligation to wait and see whether the CAP would reduce the number of violations at the mine. It was within the agency's discretion to move forward with the NPOV as a means of addressing safety issues at the mine.

Pocahontas additionally argues that the agency was arbitrary and capricious in considering the two fatalities at the mine as part of its decision to issue the NPOV, given that the fatalities were unrelated to the issues of roof and rib control and escape way hazards described in the NPOV. Resp. Memo. 47-48. It argues that the agency disregarded the CAP because it perceived that, in view of the fatalities, Pocahontas was a "bad actor." *Id.* at 3. I find this argument to be without merit. The agency primarily considered the two fatalities with respect to the timeline for implementing a CAP, finding that the fatalities put the operator on notice of safety issues at the mine and the need for corrective action. This information was relevant as to whether there were mitigating circumstances at the mine, and the agency was right to consider it. Therefore, the agency did not abuse its discretion.

b. The Pattern

In order to succeed on summary judgment, the Secretary must prove that a pattern of violations existed at the Affinity Mine. The Act requires that, when an operator has a pattern of S&S violations of mandatory health or safety standards, the Secretary shall issue written notice to the operator that a pattern exists. 30 U.S.C. § 814(e)(1). The Act does not define the term "pattern of violations." Rather, as explained in *Brody I*, Congress has "expressly delegated to the Secretary responsibility for determining when a pattern of violations exists." *Brody I*, 36 FMSHRC at 2036. While the Secretary's regulations identify criteria that MSHA must consider when determining whether an operator has engaged in a pattern of violations, they do not provide a formal definition of a pattern of violations, either. 30 C.F.R. §§ 104.1-104.2.

The Commission, however, recently addressed the meaning of a "pattern of violations" in *Brody II*:

> [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. The eight criteria listed in section 104.2(a) are relevant to the determination of whether a pattern of violations exists.

Brody II, slip op. at 11. The criteria in § 104.2(a) are the record of serious enforcement actions at the mine, including S&S citations, orders for failure to abate an S&S violation, unwarrantable failure citations and orders, imminent danger orders, and withdrawal orders for training violations; other enforcement measures that have been applied at the mine; other information demonstrating a serious safety or health management problem at the mine, such as accident, injury, and illness records; and mitigating circumstances. 30 C.F.R. § 104.2(a). The preamble to the POV regulations indicates that "other information that demonstrates a serious safety or health management problem" can include evidence of the mine operator's lack of good faith in correcting the problem that resulted 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; and S&S violations that contribute to accidents and injuries. 78 Fed. Reg. 5056, 5062 (Jan. 23, 2013); *see also Brody II*, slip op. at 11 n.17. The Commission in *Brody II* also mentioned eight additional factors proposed by the Secretary that "may be helpful interpretive tools" in deciding whether a pattern exists: the nature and seriousness of the hazards; the timing of the violations; the location of the violations; trends with regard to injuries and accidents; involvement of management personnel; the standards violated; the operator's response to the violations; and "any other factor that is revealed by the evidence to establish a mode or series of acts that are recognizably consistent." *Id.* at 12 (internal quotations admitted).

The Secretary argues that the citations and orders listed in the NPOV establish two patterns of violations, the first based on S&S violations that contributed to roof and rib hazards, and the second based on S&S violations that contributed to emergency preparedness and escape way hazards. The NPOV as issued listed thirty-six S&S citations and orders. Two of those citations, Nos. 8155043 and 7276516, were subsequently modified to non-S&S; I rely on the remaining thirty-four citations and orders in my analysis of whether a pattern exists. The remaining violations are twenty-four citations and orders involving roof and rib hazards and sixteen involving emergency preparedness and escape way hazards. Six of the violations involve both types of hazard. All of these violations occurred within a twelve-month period and are now final orders. I find that that these citations and orders demonstrate the operator's disregard for the safety of miners and, therefore, establish a pattern of violations.

I first address the alleged pattern of roof and rib support violations. A key factor in the POV analysis is the mine's enforcement record of serious violations, which the Secretary has addressed in the NPOV. *See Brody II*, slip op. at 11; 30 C.F.R. § 104.2(a)(1)-(5). The NPOV lists twenty-four S&S citations and orders involving roof and rib hazards. Ex. 2. These include four violations of the mine's roof control plan; one failure to identify a dangerous roof condition in a pre-shift examination; two instances of a generally unsupported or loose roof; one instance of loose ribs; seven unsupported brows; eight unsupported kettle bottoms; and one excessively wide crosscut. Sec'y Mot. 13-21. Twenty-two of these violations were cited as S&S violations under section 104(a) of the Mine Act, and the remaining two were cited in unwarrantable failure

orders under section 104(d)(2). These violations are indicative of an obvious and recurring problem with roof and rib support at the mine.

In addition to the mine's enforcement record, the Secretary may also produce "[o]ther information that demonstrates a serious safety or health management problem at the mine." 30 C.F.R. § 104.2(a)(7). A table of accidents and injuries at the mine during the review period was included in the memo from the POV Review Panel to Kevin Stricklin. Ex. 6. The table indicates that eleven accidents occurred at the mine between September 1, 2012, and August 31, 2013. *Id.* While the Secretary has not produced evidence about the circumstances surrounding these accidents, the number of accidents does indicate some measure of indifference toward safety and health. The record also includes reports of investigations into two fatalities at the mine that occurred during the review period. Exs. 22, 23.

The Secretary has not produced evidence relating to all of the potential POV factors listed by the Commission in *Brody II*, but rather focuses on the fact that there were "[r]epeated S&S violations of a particular standard or standards related to the same hazard." Sec'y Mot. 29-30; 78 Fed. Reg. 5056, 5062 (Jan. 23, 2013); *Brody II*, slip op. at 11 n.17. He also makes reference to the "nature and seriousness of the hazards presented," *Brody II*, slip op. at 12 n.19, noting that "falls of the roof, face and ribs pose one of the most serious hazards in the coal mining industry." Sec'y Mot. 29 (citing *United Mine Workers of America v. Dole*, 870 F.2d 662, 669 (D.C. Cir. 1989)). Indeed, both the Commission and Congress have acknowledged the high degree of danger posed by roof, face, and rib falls, which have historically been one of the leading causes of injury and death in underground mining. Safety Standards for Roof, Face and Rib Support, 53 Fed. Reg. 2354, 2354, 2369 (Jan. 27, 1998); *Elk Run Coal Co.*, 27 FMSHRC 899, 904 (Dec. 2005); *Cyprus Plateau Mining Corp.*, 16 FMSHRC 1610, 1616 (Aug. 1994).

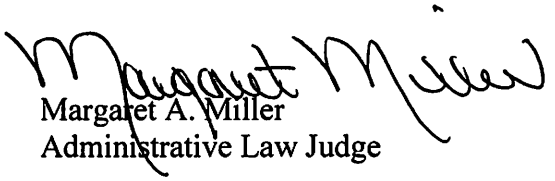
The mine's safety record shows repeated violations involving the same hazard of roof and rib falls, a serious threat to the safety of miners. I do not find that there were mitigating circumstances to show that the mine was taking steps to correct this problem on its own. Rather, I find that the Secretary has demonstrated the operator's disregard for the safety of miners who could be injured by a roof fall or similar accident, and therefore has established a pattern of violations.

With regard to the sixteen violations listed in the NPOV involving emergency preparedness and escape way issues, I also find that the Secretary has demonstrated the operator's disregard for the safety of miners. The violations listed in the NPOV include a failure to provide a lifeline to an alternate refuge; a failure to provide an up-to-date escape way map on an active section; a failure to maintain positive pressure in the primary intake escape way; five unsupported kettle bottoms in escape ways or near lifelines; five instances of mud, rock, or water impeding travel in an escape way or near a lifeline; an unsupported brow in an escape way; a failure to provide reflective material on a lifeline; and damaged airlock doors in an escape way. Sec'y Mot. 22-27. Fourteen of these were cited under section 104(a), and two were cited in section 104(d)(2) unwarrantable failure orders. These violations all relate to escape way and emergency preparedness hazards, and indicate a recurring problem. The Secretary has not produced evidence that these violations led to any accidents or injuries. However, he notes that the Commission, in the context of the S&S analysis, has held that the seriousness of emergency

Mot. 30-31 (citing *Black Beauty Coal Co.*, 36 FMSHRC 1121, 1123-24 (May 2014)). In the context of an emergency, these violations could delay or prevent miners from evacuating the mine, potentially causing injury or death. As with the roof and rib control violations, I do not find that the mine's conduct was mitigated by the CAP or other safety measures it advances: the violations occurred continuously throughout the review period, indicating that any corrective measures the mine took were not effective. I find that the violations show the clear tendency of the mine to disregard the safety of miners, and thus that these violations also constitute a pattern of violations.

IV. Conclusion

In view of the foregoing, I find that the Secretary has proven that a pattern of violations existed at Affinity Mine. Accordingly, Pocahontas Coal Company's Motion for Summary Decision is **DENIED**. The Secretary's Motion for Partial Summary Decision is **GRANTED** and the POV Written Notice No. 7219153 is upheld as validly issued. The validity of the violation cited in the one 104(e) order remains in issue.



Margaret A. Miller
Administrative Law Judge

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APPENDIX I

- Exhibit A. Copies of the citations and orders listed on Pattern of Violations Written Notice No. 7219153.
- Exhibit 1. News release from the U.S. Department of Labor announcing the issuance of three POV notices.
- Exhibit 2. Pattern of Violations Written Notice No. 7219153.
- Exhibit 3. Cover letter sent to Affinity Mine with the Notice of Pattern of Violations.
- Exhibit 4. Deposition of Jay Mattos, Director of the Office of Assessments, Accountability, Special Enforcement, and Investigation (OAASEI), Mine Safety and Health Administration.
- Exhibit 5. Computer printout of screening criteria results for Pattern of Violations for Affinity Mine.
- Exhibit 6. Memorandum from Jay Mattos to Kevin Stricklin listing the three mines that met the initial POV screening criteria. Attachments include a list of the citations and orders at each mine and a table of accidents and injuries at each mine.
- Exhibit 7. Deposition of David Scott Mandeville, District Manager for District Four, Mine Safety and Health Administration.
- Exhibit 8. Deposition of David Morris, Assistant District Manager for District Four, Mine Safety and Health Administration.
- Exhibit 9. Memorandum from Jay Mattos to Kevin Stricklin presenting the recommendations of the Pattern of Violations Review Panel.
- Exhibit 10. Letter from John Schroder, General Manager, Pocahontas Coal Company, Affinity Mine Division, to David Mandeville describing mitigating circumstances at the mine to be considered in the POV review process.
- Exhibit 11. Pattern of Violations Mitigating Circumstances Determination Form for Affinity Mine.
- Exhibit 12. Mine Safety and Health Administration Mitigating Circumstances Guidance.
- Exhibit 13. Pocahontas Request for Production of Documents.
- Exhibit 14. Mine Safety and Health Administration Pattern of Violations Procedures Summary.
- Exhibit 15. Corrective Action Program for Affinity Mine with approval letter from MSHA.
- Exhibits 16, 18 & 20. Emails between Kevin Stricklin, David Morris, and others discussing language to include in the Notice of Pattern of Violations and cover letter.
- Exhibit 17. Draft of the Notice of Pattern of Violations for Affinity Mine.
- Exhibit 19. Draft of the Notice of Pattern of Violations cover letter.
- Exhibit 21. Pocahontas Discovery Request
- Exhibit 22. Mine Safety and Health Administration Report of Investigation into fatal accident at Affinity Mine on February 7, 2013.
- Exhibit 23. Mine Safety and Health Administration Report of Investigation into fatal accident at Affinity Mine on February 19, 2013.
- Exhibit 24. Decisions Approving Settlement for seven of the citations and orders listed on the Notice of Pattern of Violations.

- Exhibit 25. Affidavit of Gary B. Chilcot, consultant with United Coal Company, LLC, regarding the potential impact of a Notice of Pattern of Violations on Affinity Mine.
- Exhibit 26. Briefs relating to the Notice of Pattern of Violations issued to Brody Mining, LLC.
- Exhibit 27. Federal court documents for a case involving the validity of Pattern of Violations Procedures.
- Exhibit 28. Transcript of oral arguments in the Brody Mining, LLC, Pattern of Violations dispute.
- Exhibit 29. Secretary of Labor's Motion to Limit Discovery
- Exhibit 1a. Deposition of Kevin Stricklin, Administrator for Coal Mine Safety and Health, Mine Safety and Health Administration
- Exhibit 1b. Deposition of Sabian Scott VanDyke, Field Office Supervisor, Mine Safety and Health Administration.
- Exhibit 2b. Table of communications between Sabian Scott VanDyke, attorneys at the Office of the Solicitor, and others.
- Exhibit 3b. Transcript of the Status Conference for this case on June 25, 2015, before Judge Miller.
- Exhibit 30. Memorandum from Kevin Stricklin to David Mandeville notifying Mandeville that mines in his district had met the screening criteria and directing him to review the violations listed and obtain information on mitigating circumstances.
- Exhibit 31. Table of citations and orders at Affinity Mine.
- Exhibit 32. Declaration of Sabian Scott VanDyke, Field Office Supervisor, Mine Safety and Health Administration.

EXHIBIT 2

NOTICE

1. Enclosed is a copy of a decision by an Administrative Law Judge of the Federal Mine Safety and Health Review Commission. The issuance date of this decision appears on the first page of the Decision.

   THIS DECISION MUST BE POSTED ON THE MINE BULLETIN BOARD BY THE OPERATOR.

2. You may petition for review of this decision by the Commission. A PETITION FOR DISCRETIONARY REVIEW must be received by the Commission within thirty (30) calendar days after the issuance date of the decision to be considered [29 C.F.R. § 2700.5(d) and .70(a)]. If this decision is an ORDER OF TEMPORARY REINSTATEMENT, the Petition for Review must be received within 5 days of the receipt of the order [29 C.F.R. § 2700.45(f)]. Petitions are accepted by facsimile. If you mail the petition, you should allow enough time for delivery by the thirtieth day. Petitions (original plus six copies) should be filed at:

   DOCKET OFFICE
   FEDERAL MINE SAFETY AND HEALTH
   REVIEW COMMISSION
   1331 Pennsylvania Ave., N.W., Suite 520N
   WASHINGTON, D.C. 20004-1710
   telephone No. (202) 434-9950
   fax no. (202) 434-9954

3. The Federal Mine Safety and Health Review Commission's Rules of Procedure specify that a petition may be filed only on one or more of the following grounds:

   A. A finding or conclusion of material fact is not supported by substantial evidence.
   B. A necessary legal conclusion is erroneous.
   C. The decision is contrary to law or to the duly promulgated rules or decision of the Commission.
   D. A substantial question of law, policy or discretion is involved.
   E. A prejudicial error of procedure was committed.

   Each issue shall be separately numbered and plainly and concisely stated, and shall be supported by detailed citations to the record when assignment of error are based on the record. Statutes, regulations or principal authorities shall be relied upon. Except for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge has not been afforded an opportunity to pass. For further details on the filing of documents and the review process, see 30 U.S.C. § 823(d) and Commission rules 5 through 9 and .70 through .78 [29 C.F.R. §2700.5-.9 and .70-.78].

4. A Petition for Review must be served on the opposing party.

5. If a petition is filed, each party will be notified of the Commission's action on the petition.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th STREET, SUITE 443
DENVER, CO 80202-2536
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

December 24, 2015

POCAHONTAS COAL COMPANY, LLC Contestant	CONTEST PROCEEDING
v.	Docket No. WEVA 2014-395-R Order No. 3576153; 12/19/2013
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	Mine: Affinity Mine Mine ID: 46-08878
SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDINGS Docket No. WEVA 2014-1028 A.C. No. 46-08878-350475
v.	Docket No. WEVA 2015-854 A.C. No. 46-08878-382268
POCAHONTAS COAL COMPANY, LLC, Respondent	Mine: Affinity Mine

SUMMARY DECISION

Before: Judge Miller

These cases are before me on petitions for penalty filed by the Secretary of Labor and a notice of contest filed by Pocahontas Coal Company LLC pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c) ("the Act"). Docket No. WEVA 2014-1028 contains eighteen citations and orders, seventeen of which were issued pursuant to section 104(a) of the Act and one of which was issued pursuant to section 104(e)(2). The Secretary proposed penalties totaling $17,251.00 for the eighteen citations and orders. The seventeen 104(a) citations were resolved in an Order Approving Partial Settlement issued by this court on May 6, 2015. The remaining Order No. 9001636 is the subject of the present order. Dockets Nos. WEVA 2015-854 and WEVA 2014-395-R both involve a single order, Order No. 3576153, which was issued pursuant to section 104(e)(1). The Secretary has proposed a penalty of $5,600.00 for that order.

The parties have filed a Joint Motion to Consolidate these dockets, which is hereby **GRANTED**. The parties have also filed a Joint Motion for Summary Decision. The purpose of the motion is to complete these two penalty dockets so that the parties may file an appeal with regard to the order granting summary decision on the issue of the validity of the notice of pattern of violations. That order disposed of most of the issues in these cases and this order disposes of the remaining issues.

Commission rules provide that summary decision is appropriate when the entire record shows "(1) That there is no genuine issue as to any material fact; and (2) That the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b). Based upon the stipulations of the parties and a review of the entire record, I find that there is no genuine issue as to any material fact. I conclude that, for the reasons stated below, the Secretary of Labor is entitled to summary decision as a matter of law.

Procedural Background

On October 24, 2013, the Mine Safety and Health Administration ("MSHA") notified Pocahontas Coal Company, LLC, ("Pocahontas") that MSHA had determined that a pattern of violations existed at Pocahontas's Affinity Mine and issued Written Notice No. 7219153 ("the NPOV") pursuant to section 104(e)(1) of the Mine Act. That notice was upheld as validly issued in an order issued by this court on November 3, 2015. Order No. 3576153 was a section 104(e)(1) order predicated on the NPOV. It was issued on December 19, 2013, and alleged a violation of 30 C.F.R. § 75.370(a)(1). Pocahontas filed a Notice of Contest for that order on January 3, 2014, which was docketed as WEVA 2014-395-R. The Secretary filed a Petition for Assessment of Civil Penalty on August 27, 2015, for WEVA 2015-854, which included Order No. 3576153. Order No. 9001636 is a section 104(e)(2) order predicated on the NPOV. It was issued on March 26, 2014, and alleged a violation of 30 C.F.R. § 75.517. The Secretary filed a Petition for Assessment of Civil Penalty on July 15, 2014, for WEVA 2014-1028, which included Order No. 9001636. The docket, WEVA 2014-1028 and the contest WEVA 2014-395-R are the cases in which an order was entered upholding the validity of the NPOV issued to the mine. The addition of the last penalty makes the record complete.

Joint Stipulations of Fact

The parties entered into the following stipulations of fact for purposes of summary judgment:

1. Section 104(e)(1) Order No. 3576153 was issued by an authorized representative of the Secretary on December 19, 2013.
2. Order No. 3576153 alleges a violation of 30 C.F.R. Section 75.370(a)(1) as follows:

> The operator failed to follow the safety precautions listed on page 1 of a revision to the ventilation plan for the slope fill construction project. When observed, the operator failed to install an adequate fall barrier on top the support structure at the Beckley Seam level and along the elevated walkways leading to the support structure. The fall barrier along the front of the structure was made of loose rebar, which did not span the full length of the opening on front of the structure, and red caution tape stretched across the area. The railing installed along elevated walkways was also not sufficient to prevent persons from falling. The railing was measured and found to be less than 28" high at its highest point. Standard 75.370(a)(1) was cited 38 times in two years at mine 4608878 (38 to the operator, 0 to a contractor).

The Parties agree that inspector saw the condition as outlined in Order No. 3576153.

3. The authorized representative determined that in Order No. 3576153 the gravity was reasonably likely, the injury or illness could reasonably be expected to be permanently disabling, and the hazard would affect one (1) person. The parties agree that the inspector properly marked Order No. 3576153 as reasonably likely, permanently disabling, and affecting one person.
4. The authorized representative determined that Order No. 3576153 was significant and substantial. The parties agree that Order No. 3576153 was properly cited as significant and substantial.
5. The authorized representative determined that the negligence in Order No. 3576153 was moderate. The parties agree that Order No. 3576153 was properly cited with moderate negligence.
6. The Office of Assessments assessed a civil penalty in the amount of $5,600.00 for Order No. 3576153. The Parties agree that the assessed civil penalty of $5,600.00 is proper given the following factors:
    a. The proposed penalty is appropriate given the operator's history of previous violations;
    b. The proposed penalty is appropriate to the size and business of the operator charged;
    c. The proposed penalty is appropriate based on the level of negligence alleged;
    d. The proposed penalty will not affect the operator's ability to continue in business;
    e. The proposed penalty is appropriate based on the gravity of the violation; and
    f. The proposed penalty is appropriate based on the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.
7. Section 104(e)(2) Order No. 9001636 was issued by an authorized representative of the Secretary on March 26, 2014.
8. Order No. 9001636 alleges a violation of 30 C.F.R. § 75.517 as follows:

> The power wire for the AL LEE Forklift Co. #3 S/N E11858, is not being maintained fully insulated and adequately protected. The Forklift is being used outby the No. 2 section and has damage at the Anderson plug exposing an uninsulated energized power conductor. Standard 75.517 was cited 14 times in two years at mine 4608878 (14 to the operator, 0 to a contractor).

The parties agree that the inspector saw the condition as outlined in Order No. 9001636.

9. The authorized representative determined that in Order No. 9001636 the gravity was reasonably likely, the injury or illness could reasonably be expected to be permanently disabling, and the hazard would affect one person. The parties agree that the inspector properly marked Order No. 9001636 as reasonably likely, permanently disabling, and affecting one person.
10. The authorized representative determined that Order No. 9001636 was significant and substantial. The parties agree that Order No. 9001636 was properly cited as significant and substantial.
11. The authorized representative determined that the negligence in Order No. 9001636 was moderate. The parties agree that the order was properly cited with moderate negligence.

12. The Office of Assessments assessed a civil penalty in the amount of $764.00 for Order No. 9001636. The Parties agree that the assessed civil penalty of $764.00 was proper given the following factors:
    a. The proposed penalty is appropriate given the operator's history of previous violations;
    b. The proposed penalty is appropriate to the size and business of the operator charged;
    c. The proposed penalty is appropriate based on the level of negligence alleged;
    d. The proposed penalty will not affect the operator's ability to continue in business;
    e. The proposed penalty is appropriate based on the gravity of the violation; and
    f. The proposed penalty is appropriate based on the operator's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Order No. 3576153 alleges a violation of 30 C.F.R. § 75.370(a)(1). That standard requires that operators "develop and follow a ventilation plan approved by the district manager." 30 C.F.R. § 75.370(a)(1). The parties have stipulated that fall barriers installed on top of a support structure and elevated walkways at the mine did not comply with requirements included in a revision of the mine's ventilation plan. Jt. Stips. ¶ 2. The parties have further stipulated that the violation was reasonably likely to cause a permanently disabling injury; that it would affect one person; that it was significant and substantial; and that it was the result of moderate negligence. Jt. Stips. ¶¶ 3-5. They agree that the proposed penalty of $5,600.00 is appropriate in view of the operator's history of violations, its size, the gravity of the violation, and the negligence involved; that the penalty will not affect the operator's ability to continue in business; and that the operator demonstrated good faith in abating the violation. Jt. Stips. ¶ 6.

Order No. 9001636 alleges a violation of 30 C.F.R. § 75.517. That standard requires that "Power wires and cables, except trolley wires, trolley feeder wires, and bare signal wires, shall be insulated adequately and fully protected." 30 C.F.R. § 75.517. The parties have stipulated that at the time of the inspection, the power wire for the cited forklift had damage at the Anderson plug exposing an uninsulated energized power conductor. Jt. Stips. ¶ 8. Thus, the power cord was not "insulated adequately and fully protected" as required by the standard. *Id.* The parties have further stipulated that the violation was reasonably likely to cause permanently disabling injury; that it would affect one person; that it was significant and substantial; and that it was the result of moderate negligence. Jt. Stips. ¶¶ 9-11. They agree that the proposed penalty of $764.00 is appropriate in view of the operator's history of violations, its size, the gravity of the violation, and the negligence involved; that the penalty will not affect the operator's ability to continue in business; and that the operator demonstrated good faith in abating the violation. Jt. Stips. ¶ 12.

The two orders at issue here were both issued pursuant to section 104(e) of the Mine Act. Order No. 3576153 was issued pursuant to section 104(e)(1) and Order No. 9001636 was issued pursuant to section 104(e)(2). Sections 104(e)(1) and 104(e)(2) grant the Secretary the authority to issue withdrawal orders for significant and substantial (S&S) violations when a mine has received notice that a pattern of S&S violations exists at the mine. 30 U.S.C. § 814(e). Thus, for

an order to be properly issued under either of those sections, the operator must have received a notice of pattern of violations (NPOV) as described in section 104(e)(1). *Id.* The NPOV underlying the two orders here was Written Notice No. 7219153, which was issued to Pocahontas on October 24, 2013. Pocahontas does not concede that the NPOV was validly issued or that a pattern of violations existed at the mine, and thus argues that these two citations should have been issued as 104(a) citations rather than 104(e) orders. Jt. Memo. at 7. However, the issue of the validity of the NPOV was already decided by order granting partial summary decision to the Secretary on November 3, 2015. Therefore, Orders No. 9001636 and 3576153 were properly issued as 104(e) orders.

In view of the entire record, I find that there is no genuine issue remaining as to any material fact. Based on the stipulations of the parties, I find that both violations occurred and that the proposed penalties are appropriate under the criteria set forth in section 110(i) of the Act. I therefore find that the Secretary is entitled to summary decision as a matter of law.

II. ORDER

For the reasons set forth above, the motion for summary decision is **GRANTED**, the notice of contest is **DISMISSED,** and Respondent is hereby **ORDERED** to pay the Secretary of Labor the sum of $6,364.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

Distribution: (U.S. First Class Mail)

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