

Federal Mine Safety and Health Review Commission Decision on Pattern of Violations

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The Federal Mine Safety and Health Review Commission issued its decision in the appeal of an ALJ's dismissal of a POV charge against Brody Mining. The ALJ ruling was based upon MSHA's failure and/or refusal to identify, prior to a hearing on the merits of the § 104(e) POV Notice, what exactly constitutes a pattern of violation (i.e., How many violations? Must they all be of the same mandatory standard?). The ALJ ruled that Brody's due process rights were violated by MSHA's inability to define a pattern because Brody was not placed on notice of the conduct it must engage in to be deemed a pattern violator.

The Commission overturned the ALJ's decision. It held:

- A "pattern of violations" is established by an inspection history of recurrent S&S violations of a nature and relationship to each other such that the violations demonstrate a **mine operator's disregard for the health and safety of its miners**.
- No particular number is required.
- No element of intent or state of mind of the operator is required to be proved.
- The criteria in the new POV rule (which are tracked on MSHA's POV tool*), including mitigation and CAP plan efforts, are highly relevant in making the determination.
- MSHA has to disclose its theory on how a group of violations constitutes a pattern in pre-hearing discovery, through depositions or contention interrogatory answers.
- The Commission anticipates MSHA proving a POV by calling inspectors or District Managers "who will testify about how the S&S violations constitute a POV."

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Basically, this opinion provides no more clarity on what MSHA must prove at a pattern hearing. Instead, the only restriction on MSHA's ability to define a pattern is that it must do so prior to a hearing and relate it to the screening criteria in the new POV rule.

As practical advice, operators should, in addition to monitoring the POV criteria, pay close attention to RPID, and be sure to keep good notes showing violations are not connected to one another (different personnel, different area of the mine, efforts to correct since last violation, etc.).

*In shorthand: The number of S&S violations; the number of elevated enforcement actions (104(b), (d), (g), and 107(a) orders); accident rates; and other enforcement applied at the mine, such as (k) or (j) orders; or § 108 injunctions.

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