

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

February 22, 2017

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

v.

CONSOLIDATION COAL COMPANY,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 2015-509
A.C. No. 46-01968-374332

Docket No. WEVA 2015-632
A.C. No. 46-01968-377533

Mine: Blacksville No. 2

ORDER

Before: Judge Feldman

The captioned matters are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor (“Secretary”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”), 30 U.S.C. § 815(d). A hearing is scheduled for March 7, 2017, in the vicinity of Morgantown, West Virginia.

These matters concern two 104(d)(2) orders. Order No. 8059209 in Docket No. WEVA 2015-632 alleges extensive accumulations of loose coal and coal fines, many of which were in contact with turning rollers, in violation of the mandatory standard in 30 C.F.R. § 75.400. The Secretary has designated Order No. 8059209 as a repeated flagrant violation under section 110(b)(2) of the Mine Act.¹ Additionally, Order No. 8059212, which has not been designated as flagrant, alleges that the Respondent failed to conduct an adequate pre-shift examination relevant to the accumulations cited in Order No. 8059209.

The Secretary relies on three alleged predicate 104(d) orders contained in Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, in support of his repeated flagrant

¹ Section 110(b)(2) provides:

Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than \$220,000 [adjusted for inflation]. For purposes of the preceding sentence, the term “flagrant” with respect to a violation means a reckless or *repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.*

30 U.S.C. § 820(b)(2) (emphasis added).

designation in Order No. 8059209. However, the Secretary does not assert that these alleged predicate violations are themselves flagrant in nature.

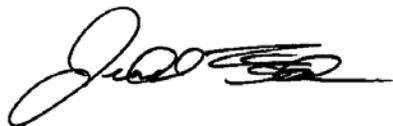
On May 3, 2016, I issued a decision in *Oak Grove Resources, LLC*, 38 FMSHRC 957 (May 2016) (ALJ), which held, given the Secretary's acknowledgment that a violation cannot be elevated to a flagrant designation based solely on a history of violations, that alleged predicate violations, alone, are not dispositive of the question of whether a cited condition is properly designated as flagrant. *Id.* at 960-64. Consequently, on June 14, 2016, Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, were severed from the captioned proceedings in order to focus on whether Order No. 8059209 satisfies the statutory requirements for a flagrant designation.²

The Commission subsequently identified separate "narrow" and "broad" analyses for evaluating repeated flagrant designations. *The American Coal Co.*, 38 FMSHRC 2062 (Aug. 2016). Although the Commission addressed the criteria for establishing a repeated flagrant designation under its "narrow" approach, the Commission declined to specify the criteria relevant to its "broad" approach with respect to a history of violations. *Id.* at 2066, 2082.

During a February 21, 2017, conference call, the parties were advised that the scheduled March 7 hearing would continue to be limited to the "narrow" analysis outlined by the Commission in *American Coal*. In response, the Secretary's counsel expressed concern that this limitation would preclude her from introducing evidence regarding the Commission's alternative "broad" approach analysis.

ORDER

IT IS ORDERED that the scheduled March 7, 2017, hearing will be limited to evidence relevant to the "narrow" analysis. However, **IT IS FURTHER ORDERED** that the parties will be provided the opportunity to address in their post-hearing briefs whether Consolidation Coal Company's relevant history of section 75.400 violations supports the alleged repeated flagrant designation under the "broad" approach.³



Jerold Feldman
Administrative Law Judge

² Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473 are currently stayed pending disposition of the captioned proceedings.

³ Specifically, the parties will be requested to address whether the 147 citations and orders issued for violations of section 75.400 at the Blacksville No. 2 Mine in the two years preceding the July 30, 2014, issuance of Order No. 8059209, including 15 citations and orders issued within 90 days prior to July 30, 2014, satisfy the Secretary's repeated flagrant designation under the "broad" approach.

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