

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

MAY 22 2019

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

v.

THE MONONGALIA COUNTY COAL
COMPANY, successor to
CONSOLIDATION COAL COMPANY,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 2015-0074
A.C. No. 46-01968-361667

Docket No. WEVA 2015-0425
A.C. No. 46-01968-371547

Docket No. WEVA 2015-0473
A.C. No. 46-01968-373553

Mine: Monongalia County Mine

**ORDER DENYING SECRETARY'S MOTION
TO CONTINUE STAY
AND
ORDER LIFTING STAY**

Before: Judge Feldman

Before me is the Secretary's Motion to Continue the Stay in the captioned proceedings. The captioned matters concern the term "repeated" as contemplated by the flagrant provisions of section 110(b)(2) of Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 (the "Mine Act"), 30 U.S.C §820(b)(2). Section 110(b)(2) provides, in pertinent part:

[T]he term "flagrant" with respect to a violation means a [1] reckless or *repeated failure* to make reasonable efforts to eliminate a [2] known [3] violation of a mandatory health or safety standard that [4] substantially and proximately caused, or reasonably could have been expected to cause, [5] death or serious bodily injury.

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

The Commission has recognized alternative interpretations of the term “repeated” in section 110(b)(2) for accumulation violations of section 75.400, one “narrow” and one “broad.”¹ *Sec’y of Labor v. The American Coal Co.*, 38 FMSHRC 2062, 2064-65 (Aug. 2016) (“*American Coal*”). Under the narrow interpretation discussed in *American Coal*, an alleged flagrant violation can be characterized as “repeated” if the duration of the accumulation violation, without regard to a history of violations, is sufficient to satisfy the “repeated” statutory criterion. *Id.* at 2065. Thus, the Commission’s narrow interpretation of the term “repeated” concerns a discrete ongoing accumulation violation. *Id.* In contrast, the Commission articulated that under its broad approach an alleged flagrant violation of section 75.400 can be characterized as “repeated” based on a recurrent-type violation analysis, i.e., analysis of a history of several discrete yet similar violations. *Id.* at 2064.

The captioned proceedings are related to an alleged “repeated” flagrant accumulation violation of section 75.400, cited in Order No. 8059209 in Docket No. WEVA 2015-0632, based on both the narrow and broad approach. *See Secretary of Labor v. Monongalia County Coal Co.*, 40 FMSHRC 1234 (July 2018) (ALJ) (“*Monongalia*”). The captioned matters concern three alleged “predicate” accumulation violations that the Secretary relies on to support the “repeated” characterization under the broad approach for the alleged flagrant accumulation violation that is the subject of Order No. 8059209 in *Monongalia*.

Monongalia and the three captioned proceedings were consolidated and stayed on May 12, 2016, pending a final decision in *Secretary of Labor v. Oak Grove Resources*, 38 FMSHRC 957 (May 2016) (ALJ) (“*Oak Grove*”), which concerned an alleged “repeated” flagrant accumulation violation. Unpublished Consolidation Order and Stay Order (May 2016) (ALJ). The flagrant designation was deleted by an interlocutory order on June 1, 2015, as *Oak Grove* stood for the proposition that violative accumulations that cannot be reasonably expected to proximately cause serious bodily injury or death cannot be elevated to flagrant status simply because the violations are characterized as “repeated” based on a history of violations.² *See Oak Grove*, 38 FMSHRC 957, 960; Order Deleting Flagrant Designation, 37 FMSHRC 1311 (ALJ). *Oak Grove* became final after neither the interlocutory order nor the decision after hearing was appealed. Consequently, the stay in *Monongalia* was lifted on June 14, 2016. Severance Order and Prehearing Order, 38 FMSHRC 1573 (ALJ). However, the stay of the captioned “predicate proceedings” remained in effect. *Id.*

¹ Section 75.400 provides:

Coal dust, including float coal dust deposited on rock-dusted surfaces, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electrical equipment therein.

30 C.F.R. § 75.400.

² The May 3, 2016, decision in *Oak Grove* preceded the Commission’s August 30, 2016, *American Coal* discussion of alternative broad and narrow analyses for demonstrating the “repeated” element of a flagrant violation.

A hearing in *Monongalia* was conducted in March 2017. Despite the Secretary's alternative reliance on a broad approach, the scope of the hearing in *Monongalia* was limited to whether the violation in Order No. 8059209 was properly characterized as "repeated" under a narrow analysis, as it was reasonably likely that the Secretary could demonstrate a prima facie case that the cited accumulations existed for several shifts.³ Order, 39 FMSHRC 423, 425 (Feb. 2017) (ALJ). Although the decision found that the violation was "repeated" under the narrow approach, the flagrant designation in *Monongalia* was deleted because the evidence failed to establish that the cited accumulations could be reasonably expected to proximately cause serious bodily injury or death, as required by the statute. 40 FMSHRC at 1257. The Secretary's appeal of *Monongalia* is currently before the Commission. Unpublished Direction for Review (Sept. 6 2018).⁴

Following the July 2018, initial decision on the merits in *Monongalia*, conference calls were conducted on October 2, and December 4, 2018, to determine if the stay of the captioned proceedings should be lifted as the "repeated" element had been demonstrated under a narrow analysis. Despite my reservations, the parties expressed their desire to continue the stay pending the resolution of the *Monongalia* appeal. Consequently, the Secretary filed a motion in support of the continuation of the stay on November 6, 2018 and a supplemental brief in support of the stay on January 16, 2019. Given its unopposed nature, a ruling on the parties' request to continue the stay has been held in abeyance.

The Secretary's motion to continue the stay pending the Commission's review of *Monongalia* is based on the mistaken belief that the Secretary's predicate theory was rejected in *Monongalia* at the trial level. See Sec'y's Mot. to Continue the Stay. at 2; see also n. 4, *infra*. As noted, the evidentiary requirements for a broad analysis are not before the Commission as *Monongalia* explicitly noted that this question was moot as a consequence of a "repeated" finding under a narrow analysis. 40 FMSHRC at 1258.

It is true that I considered the Secretary's predicate theory to be legally flawed based on a number of concerns. *Id.* at 1258-60. However, the discussion was dicta in view of the Commission's prior expression of interest in considering the "Judge's input with respect to fashioning the criteria for a 'broad' analysis of the 'repeated' provision as it applies to accumulation violations." *Id.* (citing *Secretary of Labor v. The American Coal Co.*, 38 FMSHRC 2062, 2082 (Aug. 2016)).

³ Order No. 8059209 notes that the subject accumulations were extensive in nature and contained footprints in areas traveled by belt examiners three times each day. *Monongalia*, 40 FMSHRC at 1241.

⁴ The Commission's unpublished September 6, 2018, Direction for Review denied *Monongalia's* Petition for Discretionary Review ("PDR"). Although the Commission granted the Secretary's Amended PDR concerning the deletion of the flagrant designation, the deletion was not based on the Secretary's failure to demonstrate the "repeated" element. Consequently, satisfaction of the "repeated" element is not before the Commission on review in *Monongalia*.

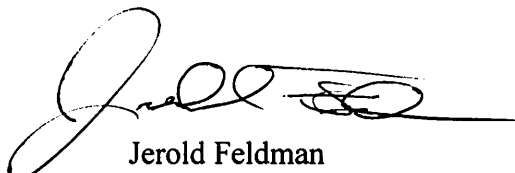
While I am reticent to deny an unopposed motion to stay, there is no basis for further delaying disposition of the 104(d) orders that are the subjects of the captioned matters. The Secretary has failed to demonstrate that he will be prejudiced by lifting the stay in these civil penalty proceedings. Moreover, avoiding further delay of the disposition of the captioned cases may expedite future proceedings in the unlikely event that a broad “repeated” analysis becomes relevant.

With the benefit of hindsight, I regret not having lifted the lengthy stay in the captioned proceedings. As previously noted, it was clear that the Secretary could present a prima facie case that the cited accumulations in Order No. 8059209 in *Monongalia* satisfied the “repeated” element under a narrow approach. *See* n. 3, *supra*. Thus, to facilitate the disposition of *Monongalia*, I saw no need to take evidence with respect to the yet-to-be-decided criteria for establishing a “repeated” accumulation violation of section 75.400 under a broad approach. However, I did not foresee the Secretary’s insistence in continuing to advance his predicate theory in furtherance of demonstrating the “repeated” element under a broad analysis.

It has been more than 12 years since the flagrant provisions have been added to the Mine Act. During this period, the Secretary, the Commission, and Commission judges have failed to fashion criteria for satisfaction of the “repeated” element under an alternative broad approach for section 75.400 accumulation violations. With the exception of violations caused by spillage, accumulation violations are “repeated” by nature in that they develop and remain unabated for several shifts. Consequently, continued efforts to identify the criteria necessary for demonstrating the “repeated” element under a broad approach may be a search for a solution to a non-existent problem. As evidenced by the lengthy stay in these proceedings brought about by the unsuccessful efforts to identify the requisite criteria for demonstrating “repeated” under a broad analysis, perhaps the time has come to reconsider the propriety of continuing this longstanding uncertainty.

ORDER

In view of the above, the Secretary’s request to continue the stay **IS DENIED**. Consequently, **IT IS ORDERED** the stay in the captioned matters **IS HEREBY LIFTED**. A hearing date in the captioned proceedings will be specified in a subsequent order.


Jerold Feldman
Administrative Law Judge

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