FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 15, 2017

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. LAKE 2009-0035 A.C. No. 11-02752-164722
v.	
THE AMERICAN COAL COMPANY, Respondent	Mine: Galatia Mine

DECISION AND ORDER ON REMAND

Appearances: Travis W. Gosselin, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner

Jason W. Hardin, Esq., & Mark E. Kittrell, Esq., Salt Lake City, Utah, for Respondent

Before: Judge McCarthy

This case is before me upon a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) ("the Mine Act" or "the Act"). This docket involves two section 104(d)(2) orders issued to Respondent, American Coal Company ("Respondent"), for violations of 30 C.F.R. § 75.400 at Respondent's Galatia Mine.[1] For both Order No. 7490584 and Order No. 7490599, the Petitioner proposed the assessment of "flagrant" penalties under the "repeated failure" provision of section 110(b)(2) of the Act.

I. STATEMENT OF THE CASE ON REMAND

A hearing was held in Henderson, Kentucky on August 23-24, 2011. During the hearing, the parties offered testimony and documentary evidence.[2] Witnesses were sequestered. I issued

[1] 30 C.F.R. § 75.400 governs accumulations of combustible materials in underground coal mines. The regulation provides that "coal dust, including float coal dust deposited on rock-dusted surfaces, and other combustible materials, shall be cleaned up immediately and not be permitted to accumulate in active workings, or on diesel-powered and electrical equipment therein."

[2] In this decision, "Tr.I-#" and "Tr. II-#" refer to the first and second volumes of hearing transcripts, "P. Ex. #" refers to the Petitioner's exhibits, and "R. Ex. #" refers to the

my initial Decision and Order on July 30, 2013. *American Coal Co.*, 35 FMSHRC 2208 (July 2013) (ALJ).[3] For Order No. 7490584, I affirmed the Secretary's significant and substantial (S&S), unwarrantable failure, and flagrant designations. *Id.* at 2226-30, 2240-41, 2264-65. I modified Order No. 7490584 to reduce the likelihood of injury or illness from "highly likely" to "reasonably likely," and to reduce the injury that could reasonably be expected to occur from "fatal" to "lost workdays or restricted duty." *Id.* at 2226-30. I assessed a civil penalty of $101,475. *Id.* at 2266-68. For Order No. 7490599, I also affirmed the Secretary's S&S, unwarrantable failure, and flagrant designations. *Id.* at 2230-31, 2240-41, 2264-65. I modified Order No. 7490599 to reduce the level of negligence from "high" to "moderate" and to reduce the likelihood of injury or illness from "highly likely" to "reasonably likely." *Id.* at 2230-31, 2241. I assessed a civil penalty of $77,737. *Id.* at 2266-68.

Both the Secretary and Respondent filed Petitions for Discretionary Review, which the Commission granted on September 4, 2013. The parties submitted briefs, and the Commission held an open meeting on June 3, 2015. The Commission issued its decision on August 30, 2016. *American Coal Co.*, 38 FMSHRC 2062 (Aug. 2016).

The Commission affirmed all of my holdings regarding Order No. 7490584. For Order No. 7490599, the Commission affirmed my gravity and unwarrantable failure findings, and vacated, in part, my determinations regarding both Respondent's negligence and the Secretary's flagrant designation. Specifically, then-Chairman Jordan, Commissioner Nakamura, and Commissioner Cohen found that substantial evidence supported my determination that the accumulations presented a smoke hazard that could reasonably be expected to cause death or serious bodily injury. *Id.* at 2078-29. Commissioner Young disagreed, and, joined by Commissioner Althen, wrote separately to recommend that that issue be remanded to me for further findings of fact in the first instance. *Id.* at 2079 n.22. Commissioners Young and Cohen also found that my determination regarding Respondent's knowledge of the accumulations cited in Order No. 7490599 was not supported by substantial evidence. *Id.* at 2080. Commissioner Althen joined in that finding, but wrote separately to argue that section 110(b)(2) requires actual knowledge, and not merely constructive knowledge. *Id.* at 2081 n.27; *see infra* pp. 19-20. Then-Chairman Jordan and Commissioner Nakamura dissented from the majority on the issue of Respondent's knowledge, and wrote separately to affirm my finding that Respondent had knowledge of the cited accumulations. 38 FMSHRC at 2080 n.25. Although Commissioner Cohen concurred with all parts of the majority opinion, he wrote separately to state his view concerning the broad interpretation of section 110(b)(2). Commissioner Young joined this concurring opinion. 38 FMSHRC at 2086.

Respondent's exhibits. Petitioner's Exhibit Nos. 1-31 and Respondent's Exhibit Nos. 1-43 were received into evidence at the hearing.

[3] This docket was stayed during the Commission's interlocutory review of *Wolf Run Mining Co.*, in which the Commission considered whether an operator's past violation history can be used to support allegations of "repeated" flagrant violations under section 110(b)(2). *American Coal Co.*, 35 FMSHRC at 2209; *see also Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013).

In sum, a majority of the Commission remanded this docket to me for further consideration of three issues: (1) whether the Secretary established that Order No. 7490599 was a flagrant violation; (2) the level of Respondent's negligence in connection with the violation; and, if necessary, (3) reassessment of the civil penalty in accordance with my findings on remand. *American Coal Co.*, 38 FMSHRC at 2085 (Jordan, Chairman; Cohen, Young, Nakamura, Althen, Comm'rs). After reconsideration of these issues on remand, I affirm the Secretary's original high negligence and flagrant designations for Order No. 7490599. I assess a civil penalty of $112,380.

II. PRINCIPLES OF LAW

A. "Repeated Flagrant" Designations under Section 110(b)(2) of the Act

Section 110(b)(2) of the Mine Act provides:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000. 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).[4] In light of the statutory language, the Commission has determined that there are five elements the Secretary must establish to uphold a flagrant designation: (1) there was a condition that constituted a violation of a mandatory health or safety standard; (2) the violation was "known" by the operator; (3) the violation either (a) substantially caused death or serious bodily injury, or (b) reasonably could have been expected to cause death or serious bodily injury; (4) there was a failure on the part of the operator to make reasonable efforts to eliminate the violation; and (5) that failure was either "reckless" or "repeated." *American Coal*, 38 FMSHRC at 2066.[5] Thus, all violations designated as flagrant fall into one of two categories: they are either "reckless" flagrant violations, or "repeated" flagrant violations. In the instant case, the Secretary alleged that Order No. 7490599 was a "repeated" flagrant violation, rather than a "reckless" flagrant violation.

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[4] Section 110(b)(2) was added to the Mine Act with the passage of the Mine Improvement and New Emergency Response Act of 2006 (the MINER Act), which Congress passed on August 17, 2006, following the Aracoma and Sago mine disasters. *Mine Improvement & New Emergency Response Act of 2006*, Pub. L. No. 109-236, sec. 8(a)(2), § 110(b)(2), 120 Stat. 493, 501 (June 15, 2006).

[5] In my initial Decision and Order, I found that the Secretary must prove the following elements in order to establish a repeated flagrant violation: (1) a repeated failure, (2) to make reasonable efforts to eliminate, (3) a known violation of a mandatory health or safety standard, (4) that substantially and proximately caused or reasonably could have been expected to cause, (5) death or serious injury. 35 FMSHRC at 2258 (citing *Wolf Run Mining Co.*, 35 FMSHRC 734, 735 (Mar. 2013) (ALJ); *Wolf Run Mining Co.*, 34 FMSHRC 337, 345 (Jan. 2012) (ALJ); *Stillhouse Mining LLC*, 33 FMSHRC 778, 802 (Mar. 2011) (ALJ)).

The Commission has recognized that the Secretary can prove repeated flagrant violations under either a "broad" or a "narrow" interpretation of section 110(b)(2). The Commission has described "broad" repeated flagrant violations as "recurrent-type violation[s]." *Wolf Run Mining Co.*, 35 FMSHRC at 543 n.15. Under the broad interpretation, the Secretary may introduce an operator's history of violations to show that the alleged violation was "repeated." The Secretary therefore establishes a "broad" repeated flagrant violation where he shows that the operator "failed to make reasonable efforts to eliminate at least one previous known violation that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury, prior to failing to make reasonable efforts to eliminate the known violation alleged to be flagrant." 35 FMSHRC at 2248.

At hearing in the instant matter, the Secretary argued that both Order No. 7490584 and Order No. 7490599 were repeated flagrant violations by virtue of Respondent's past history of similar section 75.400 violations. 35 FMSHRC at 2254-55. In essence, the Secretary adopted the broadest possible interpretation of section 110(b)(2), taking the position that the mere existence of one or more prior similar violations may be sufficient to support a flagrant designation under the broad interpretation of "repeated." 35 FMSHRC at 2247. I noted that in addition to advancing "constantly evolving interpretations of section 110(b)(2) in litigation before the Commission and its judges," the Secretary failed to engage in substantive notice and comment rulemaking regarding the flagrant provision's meaning. I therefore declined to defer to the Secretary's interpretation.[6] 35 FMSHRC at 2253-58; *see also Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

Although the Commission's decision in *Wolf Run* established that an operator's history of violations is relevant to proving a "repeated" flagrant violation, the precise contours of the broad interpretation remain unsettled. *See* 38 FMSHRC at 2100 n.4 (Comm'r Althen, dissenting); *see, e.g.*, *Blue Diamond Coal Co.*, 36 FMSHRC 541, 550 (Feb. 2014) (ALJ) ("[T]he narrow, interlocutory nature of the Commission's *Wolf Run* decision leaves open the level of similarity and or pervasiveness necessary for past conduct to prove a present violation as a repeated failure under section 110(b)(2) of the Mine Act."). I determined in my initial Decision and Order that the broad interpretation requires the Secretary to show that the prior violation or violations introduced as part of an operator's past violation history must have been "known" to the operator and either killed or seriously injured a miner, or reasonably could have been expected to kill or seriously injure a miner. 35 FMSHRC at 2248-49. I suggested that the Secretary could demonstrate an operator's knowledge of a prior violation through "a high negligence stipulation or proof of knowledge in the unwarrantable failure analysis." *Id.* at 2249. Likewise, the Secretary could demonstrate the requisite gravity by showing that a prior violation was

[6] In their concurring opinion, Commissioners Cohen and Young also declined to extend *Chevron* deference to the Secretary's broad interpretation of section 110(b)(2). They found that the Secretary's formulation "offered no principled basis for making the determination" regarding whether and when a prior violation would be sufficient to support a finding that a subsequent violation amounted to a repeated flagrant violation. They thus concluded that the Secretary's formulation "lacks practical utility for Commission judges." 38 FMSHRC at 2087-88.

designated as "permanently disabling" or "fatal," i.e., the violation reasonably could have been expected to cause death or serious bodily injury. *Id.*

The majority of the Commission, perhaps failing to reach a consensus, did not address the approach to the broad interpretation that I detailed in my initial Decision and Order. Instead, the majority directed that I fashion my own broad interpretation "which permits the Secretary to establish a violation as flagrant by taking the operator's history of previous accumulations violations into account." 38 FMSHRC at 2082. Although the Commission majority declined to provide guidance relating to the broad interpretation, three Commissioners wrote separately to provide their views on the broad interpretation. Commissioner Cohen, joined in his concurring opinion by Commissioner Young, recognized that "the essence of a repeated violation is a condition which threatens miners with serious bodily injury or death and which has been ignored or disregarded often enough to demonstrate intolerable irresponsibility." 38 FMSHRC at 2087 (Cohen & Young, Commr's, concurring). Commissioners Cohen and Young found my characterization of the broad interpretation to be too narrow, and disagreed that the Secretary must prove the knowledge element for each prior citation or order introduced into the record to support the flagrant designation at issue. *Id.* Thus, "while a mere listing of violations of the same standard may be insufficient to establish repetition, evidence of a large number of substantially similar violations arising from general practices or neglect, or a smaller number of violations that may be shown to share a common cause that was known and disregarded, may meet the statutory criteria." *Id.*

Although Commissioners Jordan and Nakamura did not directly address the broad interpretation, they stated that they nevertheless felt "constrained to comment on the substance of [Commissioner Cohen's and Commissioner Young's] suggested approach" because it "raises as many questions as it strives to answer." *Id.* at 2095 (Chairman, Jordan and Comm'r, Nakamura, concurring and dissenting). They noted, for example, that their colleagues' guidance did not clearly delineate how the Secretary would prove that prior violations amounted to a "known pattern" or were "substantially similar" to the subsequent violation, and they wondered whether the Secretary would be compelled to produce specific evidence on all of the prior violations. In other words, they seemed skeptical of an approach that would require the Secretary to litigate aspects of prior violations. Despite this apparent skepticism, Chairman Jordan and Commissioner Nakamura did not explicitly opine on whether a known history of similar violations, without more, could be enough to support a repeated flagrant finding. *Id.* at 2096.

Then-Commissioner Althen (now Acting Chairman Althen) also addressed the broad interpretation in his concurring and dissenting opinion.[7] He made two arguments: first, the plain language of section 110(b)(2) refers to a single, specific violation, *id.* at 2108-09 (Althen, Comm'r, concurring in part and dissenting in part); and second, the practical application of the Commission's interpretation of section 110(b)(2), as presented in its *Wolf Run* decision, raises insurmountable procedural concerns relating to fair notice and due process. *Id.* at 2111-12. As a result, Commissioner Althen concluded that an operator's history of prior violations is not relevant to a flagrant determination, and only single, continuing violations may be designated as flagrant. *Id.* at 2108.

[7] Acting Chairman Althen did not join the Commission until August of 2013, and therefore did not participate in the Commission's *Wolf Run* decision. 35 FMSHRC 536 (Mar. 2013).

Commissioner Althen argues first that the plain language of section 110(b)(2) refers to "a single, specific violation—"a known violation."" *Id.* at 2108. This plain language construction is supported by "the uniqueness of a flagrant violation" in the Mine Act's enforcement scheme:

> Congress has established a scheme of "increasingly severe sanctions for increasingly serious violations of operator behavior." At the far end, those progressive sanctions apply to violations resulting from [the] highest levels of negligence—that is, gross negligence or reckless disregard (unwarrantable failures) and violations that could contribute significantly and substantially to the likelihood of serious injuries (S&S violations). For unwarrantable failure violations, the progressive discipline culminates in a difficult to break chain of withdrawal orders under section 104(d). For S&S violations, the progressive discipline culminates in a perhaps more difficult to break chain of withdrawal orders under section 104(e). Such violations carry a maximum civil penalty of slightly less than $70,000.

38 FMSHRC at 2101 (internal citations omitted).

Recognizing that the MINER Act was passed in direct response to serious mine disasters, Commissioner Althen argues that section 110(b)(2) was enacted to "penalize severely any violations where operator conduct goes substantially beyond violations previously established in the Mine Act." *Id.* at 2105. Thus, the gravity aspect for flagrant violations (death or serious bodily injury) goes beyond the gravity required for S&S violations (reasonably likely to result in a reasonably serious injury). *Id.* at 2105. Likewise, "[a] flagrant violation . . . goes beyond the level of extreme negligence or reckless disregard already dealt with as unwarrantable failures and the requirement of reasonable expectation of death or serious bodily injury essentially reaches the gravity level necessary for an imminent danger." *Id.* at 2105. Commissioner Althen recognizes that "clearly, a uniquely violative circumstance is at the heart of a 'flagrant' violation[:] ... failing repeatedly to correct a specific violation of which the operator has knowledge and is so serious that it creates a reasonable expectation of death or serious injury." *Id.* at 2109. Commissioner Althen therefore argues that allowing the use of an operator's history of violations renders section 110(b)(2) a duplicative enforcement mechanism to those contained in sections 104(e) and 110(b)(1), both of which deal with an operator's failure to abate already-cited conditions.[8] Unlike section 104(e) and section 110(b)(1), Commissioner Althen argues that

[8] Section 104(e)(1) provides:

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

the plain language of section 110(b)(2) does not require that the "known violation" must be a violation which has already been cited. 38 FMSHRC at 2110 n.9 (Althen, Comm'r, concurring and dissenting). Thus, when viewed as part of the Mine Act's progressively severe enforcement scheme, the plain language of Section 110(b)(2) does not permit the consideration of an operator's past violation history, in Commissioner Althen's view.

While Commissioner Cohen and Commissioner Young argue that an operator's history of violations may be introduced to show a pattern of neglect or a common, disregarded cause of similar violations, Commissioner Althen recognizes that using an operator's history of violations for this purpose presents concerns regarding fair notice and due process. As the Commission has acknowledged, its broad interpretation of section 110(b)(2) provides no notice to operators regarding the "number, type, or similarity of prior violations that would be necessary for prior violations to sustain a flagrant penalty." *Id.* at 2111. Commissioner Althen also observed (as I did in my initial Decision and Order) that

> a new violation could only "repeat" a prior violation if such prior violation and the new violation share the same fundamental elements. Here, that means that in the prior violation the operator (1) failed to eliminate a known violation that (2) could reasonably be expected to cause death or serious injury. . . . [T]he vast majority of prior violations do not demonstrate either that the operator had knowledge of the violation or that the prior violation created a reasonable expectation of death or serious bodily injury.

Id. at 2114; *see also* 35 FMSHRC at 2249. As Commissioner Althen argues, the mere occurrence of a prior violation, "standing alone," does not demonstrate the requisite negligence and gravity elements required for a flagrant violation, i.e., an S&S violation need not necessarily be expected to cause "death or serious bodily injury," and an unwarrantable failure designation does not necessarily require that the violation was "known" to the operator. *See* 38 FMSHRC at 2115. Consequently, the "vast majority of prior violations do not demonstrate either that the operator had knowledge of the violation or that the prior violation created a reasonable expectation of death or serious bodily injury." *Id.* at 2114. Commissioner Althen therefore concludes that "the clear purpose of section 110(b)(2) is to incentivize operators strongly to

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> by such violation, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

30 U.S.C. § 814(e)(1). Section 110(b)(1) provides:

> Any operator who fails to correct a violation for which a citation has been issued under section 814(a) of this title within the period permitted for its correction may be assessed a civil penalty of not more than $7,500 for each day during which such failure or violation continues.

30 U.S.C. § 820(b)(1).

eliminate known violations reasonably expected to cause serious injury without waiting for an inspector to discover the violative condition." *Id.* at 2110.

I find Commissioner Althen's reasoning to be clear, sensible, and highly persuasive. He additionally noted that Judge Barbour and Judge Feldman have also persuasively explained that "the plain statutory language in section 110(b)(2) with respect to 'repeated conduct' refers to a single known violation, rather than a series of recurring violations." *Id.* at 2109 (citing *Conshor Mining, LLC*, 33 FMSHRC 2917, 2927-28 (Nov. 2011) (ALJ Feldman)); *see also Wolf Run Mining Co.*, 34 FMSHRC 337, 346 (Jan. 2012) (ALJ Barbour), *rev'd*, 35 FMSHRC 536 (Mar. 2013). After reconsideration of this issue, and after considering the Commissioners' separate comments on the broad interpretation, including several Commissioners' rejection of my efforts to fashion a broad interpretation consistent with the statutory language of section 110(b)(2) after *Wolf Run*, I decline to address the broad interpretation.[9]

As an alternative to the "broad" interpretation, the Commission adopted my characterization of the second approach to establishing repeated flagrant violations as the "narrow" interpretation of section 110(b)(2). Under that interpretation, the Secretary is

> required to show that the cited and assessed violation, discreetly [sic] and without reference to the operator's past violation history . . . was a single, continuing violation serious in nature that the operator could or should have become aware of at some point, i.e. known, such that it had multiple opportunities to address the condition, but did not avail itself of those opportunities (repeated failure to take reasonable steps to eliminate).

American Coal Co., 38 FMSHRC 2063, 2065 (Aug. 2016); *see also Wolf Run Mining Co.*, 35 FMSHRC 536, 543 n.14 (Mar. 2013). In other words, the broad interpretation involves multiple, separate instances of recurring violations, whereas the narrow interpretation involves only a single, ongoing violation.

B. Negligence Principles

Negligence is not defined in the Mine Act. The Commission has found that "[e]ach mandatory standard thus carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to satisfy the appropriate duty can lead to a finding of negligence if a violation of the standard occurred." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983) (citations omitted). In determining whether an operator meets its duty of care under the cited standard, the Commission considers what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring Secretary to show that operator failed to take specific action required by the standard violated); *Spartan Mining Co.*, 30 FMSHRC 669, 708 (Aug. 2008) (negligence

[9] If I were writing on a clean slate, I would be inclined to concur with the well-reasoned opinions of Commissioner Althen, Judge Feldman, and Judge Barbour that a series of separate, recurring violations should not constitute the basis for a finding of a repeated flagrant violation.

inquiry is circumscribed by the scope of duties imposed by the regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015) (*citing Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

Commission judges are not required to apply the level-of-negligence definitions in the Part 100 penalty regulations and *may* evaluate negligence from the starting point of a traditional negligence analysis rather than from the Part 100 definitions. *Brody Mining*, 37 FMSHRC at 1701; *accord Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016). Thus, in making a negligence determination, a Commission judge is not limited to an evaluation of alleged mitigating circumstances, but may consider the totality of the circumstances holistically. Under such an analysis, an operator is negligent if it fails to meet the requisite high standard of care under the Mine Act. *Brody Mining*, 37 FMSHRC at 1701.

C. Penalty Assessment Principles

Under the Mine Act's bifurcated penalty assessment process, the Secretary initially proposes a penalty. 30 U.S.C. § 815(a). The operator has the right to contest the Secretary's proposed penalty assessment. *Id.* This contest results in a penalty proceeding before the Commission. There is no requirement in the Mine Act or its regulations mandating that the Secretary explain the basis for his proposed penalty when he makes the discretionary decision to specially assess a penalty. 30 C.F.R. § 100.5.

An Administrative Law Judge has the independent authority to assess all penalties. 30 U.S.C. § 820(i). In so doing, he or she must consider the six statutory criteria set forth in section 110(i) and the deterrent purpose of the Mine Act. The six statutory criteria are: 1) the operator's history of previous violations; 2) the appropriateness of the penalty to the size of the business; 3) the operator's negligence; 4) the operator's ability to stay in business; 5) the gravity of the violation; and 6) any good-faith compliance after notice of the violation. *See e.g.*, *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600 (May 2000); 30 U.S.C. § 820(i). Equal weight need not be given to each criterion. *Spartan Mining*, 30 FMSHRC at 723.

Commission Judges are not bound by the Secretary's proposed assessment or by his Part 100 regulations governing the penalty proposal process. *American Coal Co.*, 38 FMSHRC 1987, 1993-94 (Aug. 2016) (citing *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1150-51 (7th Cir. 1984)); *Mach Mining, LLC*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016) (MSHA Part 100 regulations are not in any way binding in Commission proceedings). The Judge must provide an explanation for a substantial divergence between the Secretary's proposed penalty and the Judge's assessed penalty. *Sellersburg Stone* Co., 5 FMSHRC 287, 290-94 (Mar. 1983). The Commission reviews a Judge's civil penalty assessment under an abuse of discretion standard. *Douglas R. Rushford Trucking*, 22 FMSHRC at 601.

In another recent *American Coal* decision, the majority of Commissioners (Young, Cohen and Althen), observed that

> [f]or either regular or special assessments, the Secretary's proposal is not a baseline from which the Judge's consideration of the appropriate penalty must start. The Judge's assessment is made independently, and, regardless of the

> Secretary's proposal, the Judge must support the assessment based on the penalty criteria and the record.

38 FMSHRC 1987, 1995 (Aug. 2016). In that decision, MSHA issued a special assessment without explaining the basis for the special assessment in its Narrative Findings. *Id.* at 1996. The majority noted that the Secretary bears the burden of "providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria." *Id.* at 1993. "When a violation is specially assessed, that obligation may be considerable." *Id.* While the Secretary may provide an explanatory narrative to support the special assessment sought, Judges must "be attentive to the rationale and facts and circumstances supporting the decision to seek a special assessment, so that the ultimate assessed penalty conforms to the Judge's findings and conclusions." *Id.*

III. FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW ON REMAND

MSHA inspector Steven Miller issued Order No. 7490599 on September 23, 2007, alleging a violation of 30 C.F.R. § 75.400 based on the following condition:

> Float coal dust, a distinct black in color, and loose coal were allowed to accumulate under and around the energized tail roller of the Flannigan Tailgate conveyor belt. The accumulations measured approximately 6 inches to 14 inches in depth. Loose coal and coal float dust also extended outby the tail roller approximately 450 feet as well. The area was black and the turning tail roller was suspending float coal dust into the atmosphere. The bottom belt and bottom rollers were in contact with these accumulations.

P. Ex. 3. As noted above, I found in my initial Decision and Order that the cited accumulations constituted a violation of the mandatory safety standard at § 75.400. I found the violation to be S&S and reasonably likely to result in serious and possibly fatal injuries, including injuries from smoke inhalation, carbon monoxide poisoning, burns, or entrapment, to the six miners working inby the hazard. I further found that the violation constituted an unwarrantable failure to comply with the cited standard. These findings were not disturbed on appeal.

The sole matters I must address on remand are the "flagrant" designation, the operator's degree of negligence, and the penalty. 38 FMSHRC at 2085.

A. The Violation in Order No. 7490599 Reasonably Could Have Been Expected to Cause Death or Serious Bodily Injury

In my initial Decision and Order, I found that the accumulations at the pony belt and Flannigan tailgate intersection were reasonably likely to contribute to a mine fire that would result in serious and possibly fatal injuries to the six miners on the working section inby the belts:

> In the condition cited in Order No. 7490599, the accumulations were much closer inby [than the conditions cited in Order No. 7490584], only a few crosscuts removed from the working section. Tr. I-121. There appears to be no stoppings

> that would isolate escaping miners from the effects of a fire. *See* R. Ex. 4, at 5. As the miners would be exposed to an unmitigated smoke hazard, I affirm Miller's determination that any injuries that were to occur from a fire could reasonably be expected to result in serious, possibly fatal injuries. In addition, based on Miller's uncontroverted testimony that only the miners working inby the Flannigan Tailgate would be exposed to the hazardous condition, I find that the number of miners affected is six. Tr. I-121.

35 FMSHRC at 2231.

Respondent challenged my findings, arguing on appeal that substantial evidence did not support my determination. Respondent specifically argued that Respondent's Exhibit 4, a mine map used to illustrate witness testimony at trial, was not prepared for use as evidence regarding the existence and location of stoppings, and that I therefore erred in relying on that exhibit to support my finding that there were no stoppings isolating miners from the potential ignition source at the belt intersection. 38 FMSHRC at 2078.[10]

In its decision on appeal, the Commission majority of then-Chairman Jordan, Commissioner Nakamura, and Commissioner Cohen accepted Respondent's argument regarding Respondent's Exhibit 4, without critique, and found that my possible misuse of the mine map constituted harmless error.[11] The Commission majority concluded that substantial evidence

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[10] Absent a limited proffer or stipulation that has been received into evidence, I am aware of no evidentiary principle that restricts an Administrative Law Judge from interpreting a document consistent with its markings and witness testimony, as I did here with the testimony of foreman Raney. *See* Tr. II-20-46, 101-102. Respondent made no such limited proffer at hearing regarding the use of Respondent's Exhibit 4, nor did the Secretary and Respondent offer any agreed-upon stipulations regarding any of the exhibits received into evidence at the hearing. Tr. I-28-33. I also note that the Federal Rules of Evidence do not directly apply to Commission proceedings. *Leeco, Inc.*, 38 FMSHRC 1634, 1639 (July 2016).

[11] Commissioner Young dissented, and took issue with the majority's decision (at the Secretary's request) to make a discrete "finding in support of their conclusion that death or serious injury to miners could reasonably be expected to result from the accumulations [at issue] here." 38 FMSHRC at 2092. He argued that "where the Judge errs in failing to understand the evidence presented . . . our standard practice is to remand the case to him to make the necessary findings of fact in the first instance, using a correct understanding of the evidence." *Id.* (citing *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1676-77 (Dec. 2010) (vacating Judge's affirmance of citation and remanding for factual determination and to address operator's argument erroneously unaddressed)). Commissioner Young further stated that "remand on the issue of the gravity [of the violation in Order No. 7490599] was clearly necessary" since my findings rested on "clear error." *Id.* Commissioner Althen joined in Commissioner Young's partial dissent on this issue. *Id.* at 2079 n.22.

supported my findings regarding the section crew's exposure to the possible smoke hazard. 38 FMSHRC at 2078-79.[12]

In any event, Respondent is enjoined by the law of the case as set forth in the Commission majority opinion from re-litigating this issue on any appeal from this Decision and Order on Remand. Nevertheless, given the split Commission and the expiration of Commissioner Nakamura's term, I write briefly here to clarify my factual findings.

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[12] The majority opinion also stated that "[t]he Secretary concedes that the Judge misconstrued the evidence and that there were in fact stoppings between the primary and secondary escapeways on the Flannigan Tailgate belt." 38 FMSHRC at 2078 (citing S. Br. at 21, Tr. II-37-46; R. Ex. 4 at 5). That is an overstatement. In his Response Brief on appeal, the Secretary stated, in full:

> American Coal asserts that the ALJ erroneously relied on a "demonstrative exhibit" to find that there were no stoppings that would isolate escaping miners from the smoke generated by a fire. R. Br. at 49-52. That finding, American Coal contends, is "wholly inconsistent with testimony and other evidence adduced at trial on this very issue." *Id.* at 49. The Secretary does not dispute that stoppings isolated the belt entry from the primary and secondary escapeways in the Flannigan Tailgate. The pony belt, however, was not located in the Flannigan Tailgate, but rather was located in the set-up area for the longwall panel. Tr. II-37-42; R. Ex. 4 at 5. The pony belt intersected the belt in the Flannigan Tailgate at a 90 degree angle. *Id.*; *see also* Tr. I-356; R. Ex. 4. at 5. In testifying that stoppings isolated the belt entry in the Flannigan Tailgate from the primary and secondary escapeways in the Flannigan Tailgate, Section Foreman Rocky Raney specifically emphasized that he was not talking about the pony belt. Tr. II-101-102. Raney's testimony is consistent with the "demonstrative exhibit" the ALJ relied on in finding no stoppings isolating the pony belt entry from the adjacent entry where the crew was working in the longwall set-up area. R. Ex. 5. Raney's testimony is also consistent with American Coal's approved ventilation plan, which required stoppings separating intake and return air courses "up to an[d] including fourth connecting crosscut outby the working faces." R. Ex. 18 at TACC001635. Under that plan, stoppings were not required between the pony belt entry in the longwall panel set-up area and the adjacent entry in which the crew was working at the face, which was approximately six cross-cuts inby the site of the violation and approximately four cross-cuts inby the feeder for the pony belt. Tr. II-42; R. Ex. 4 at 5.

S. Resp. Br. at 21 (footnotes omitted). In my opinion, this is not a concession by the Secretary that I misconstrued the evidence, but an argument that the operator has misconstrued my findings. While the Secretary agrees that stoppings separated the escapeways *at the Flannigan Tailgate*, he argues that the evidence supports my determination that there were no stoppings isolating the working miners from the cited accumulations and potential ignition sources *at the pony belt*. I therefore respectfully disagree with the Commission majority's characterization of the Secretary's argument as a concession that I misconstrued the evidence.

In my initial Decision and Order, I stated that "[t]here appear to be no stoppings to isolate escaping miners from the effects of a fire. *See* R. Ex. 4 at 5." 35 FMSHRC at 2231. Having reviewed the record on remand, I recognize that that statement was perhaps overbroad. As the Respondent argued, the record demonstrates that stoppings *do* isolate the primary and secondary escapeways from the potential ignition point at the Flannigan Tailgate and pony belt intersection. R. Ex. 5 at 1-2; R Ex. 4 at 5. The primary and secondary escapeways, however, are located *outby* the belt intersection where the accumulations were discovered. R. Ex. 4, at 5. The section crews were working *inby* the ignition point at the belt intersection, no more than two or three crosscuts outby the working face. R. Ex. 20 at 33, 35, 37, 39, 41, and 43; R. Ex. 5 at 1-2; R. Ex. 4 at 5. While the stoppings separating the primary and secondary escapeways would have isolated evacuating miners from smoke once they passed outby the belt intersection, there were no stoppings inby that point. Respondent's "approved ventilation plan only required stoppings separating [the] intake and return air course[s] up to and including the fourth connecting cross-cut outby the working faces." 38 FMSHRC at 2078 (citing R. Ex. 18 at 7). While evacuating miners would have been isolated from the effects of a fire once they reached the primary or secondary escapeway, they would have been exposed to the effects of a fire until they reached the escapeways.

I therefore conclude, as did the majority of Commissioners, that "the evidence demonstrates that the pony belt entry, which ran from its intersection with the Flannigan Tailgate to the set-up area for the longwall panel[,] lacked stoppings," and therefore the miners working inby the pony belt and Flannigan Tailgate belt intersection would be exposed to smoke in the event of an ignition resulting from the accumulations at issue in Order No. 7490599. 38 FMSHRC at 2078; *see* Tr. II-42, R. Ex. 4 at 5. In these circumstances, I reaffirm my finding that the smoke to which the miners were reasonably likely to be exposed in the event of an ignition could reasonably have been expected to cause death or serious bodily injury. 30 U.S.C. § 820(b)(2).

B. The Violation in Order No. 7490599 Resulted from Respondent's Repeated Failure to Make Reasonable Efforts to Eliminate a Known Violation

Commissioners Young, Cohen, and Althen, writing for the Commission majority, also remanded the issue of whether Respondent repeatedly failed to make reasonable efforts to eliminate a known violation. In my initial Decision and Order, I credited inspector Miller's testimony that the accumulations existed for at least two shifts. Tr. I-108; 35 FMSHRC at 2236. In addition, I relied on Respondent's printed production and delay ("P&D") reports and testimony from section foreman Rocky Raney to infer that Respondent had constructive knowledge of the cited accumulations for at least two shifts prior to the Order's issuance, but nevertheless failed to address them. 35 FMSHRC at 2239, 2259, and 2265; *see also* Tr. II-66-68. The printed P&D reports document the electrical issues with the pony belt that caused it to intermittently start and stop during the five shifts preceding the issuance of Order No. 7490599. R. Ex. 21. Raney testified that the pony belt's starting and stopping problems could cause spillage and float coal dust accumulations around the belt. Tr. II-66-69. Based on the pony belt's documented electrical issues and Raney's acknowledgment that such issues can cause accumulations, I concluded that Respondent "knew or should have known that the violation existed for at least two shifts." 35 FMSHRC at 2265.

The Commission majority found that my "analysis of the evidence of [Respondent's] knowledge of the accumulations was insufficient."[13] 38 FMSHRC at 2080. The Commission majority characterized my reliance on Respondent's printed P&D reports as "problematic," because, in contrast to the handwritten P&D reports created by the section foremen during their shifts, the printed P&D reports were not "printed until the morning of September 24, the day after [Respondent] was cited for the accumulations." *Id.* at 2080; *see also* R. Exs. 20 (handwritten P&D reports) & 21. In addition, the Commission majority noted that the cited accumulations were not recorded in the pre-shift and on-shift examination books. *See* R. Ex. 25. The Commission recognized that inspector Miller did not "issue a citation or order to [Respondent] for having failed to conduct a proper examination of the belts during the preceding shifts," despite his opinion regarding the duration of the accumulations and the lack of any record of them in the belt examination books. 38 FMSHRC at 2080. Although I credited Miller's testimony regarding the duration of the violation and consequently inferred from the P&D reports and Raney's testimony that Respondent "knew or should have known" about them prior to the issuance of Order No. 7490599, the Commission majority concluded that it could not determine whether my inference was reasonable because I did not give consideration to possible alternative conclusions regarding why Miller failed to cite Respondent for an inadequate belt exam. Therefore, in addition to reviewing the record evidence to "determine at what point, prior to Miller's discovery of the accumulations, [Respondent] should have become aware of the accumulations," the Commission majority directed that I also consider: (1) whether the accumulations were not included in the belt examination records because they did not exist at the time the exams were conducted, or (2) whether "Miller, exercising his discretion, decided not to cite [Respondent] for failure to conduct a proper belt examination." 38 FMSHRC at 2080-81.

I begin my review of the record with the handwritten P&D reports. Both the printed and the handwritten P&D reports generally identify the same delays, but the handwritten P&D reports contain the exact start and stop times for each delay (e.g., from 1:15 a.m. to 1:45 a.m.), while the printed P&D reports record only the length of the delay (e.g., 30 minutes). *See* R. Exs. 20 & 21. The handwritten P&D reports also contain additional information, including the time the crew arrived and departed the section, when and where each cut was made, and when the first and last shuttle cars of coal were loaded onto the belt. *See, e.g.* R. Ex. 20 at 32.

Galatia North mine operated three shifts: foreman Jim Gass's shift from 12:00 a.m. to 8:00 a.m., foreman Randy Robertson's shift from 8:00 a.m. to 4:00 p.m., and foreman Rocky Raney's shift from 4:00 p.m. to 12:00 a.m. Although the shifts began at 12:00 a.m., 8:00 a.m., and 4:00 p.m., respectively, the crews were "hot-seating" each shift, meaning the working crew

[13] Chairman Jordan and Commissioner Nakamura dissented from this holding, and wrote separately to affirm the flagrant determination for Order No. 7490599. They found that "substantial evidence supports [my] decision regarding the extent to which AmCoal was or should have been aware of the accumulations." *American Coal Co.*, 38 FMSHRC at 2093 (Jordan, Chairman & Nakamura, Comm'r, dissenting). Commissioner Althen joined in the majority decision to remand the issue, but also wrote separately to express his opinion that the plain language of section 110(b)(2) requires that the operator have actual knowledge (rather than constructive knowledge) of the violation. 38 FMSHRC at 2099 (Althen, Comm'r, concurring and dissenting).

would wait on the section until replaced by the next crew. Due to the hour-long travel time from the mine portal to the working section, the shift crews would change at approximately1:00 a.m., 9:00 a.m., and 5:00 p.m., respectively. *See* R. Ex. 20; Tr. II-303-04. Respondent entered into the record handwritten P&D reports for the five shifts preceding the issuance of Order No. 7490599, and for the shift during which Miller issued Order No. 7490599. I summarize the relevant information for each shift below.

The handwritten reports indicate that the pony belt was already experiencing electrical issues when foreman Jim Gass arrived on the section with his crew at 1:15 a.m. on September 22, 2007. There were four pony belt delays (resulting in a total of 122 minutes of downtime for the pony belt) during Gass's eight-hour shift. The belt was down for 30 minutes from 1:15 a.m. until 1:45 a.m., for another 30 minutes from 1:46 a.m. to 2:16 a.m., for 55 minutes from 4:10 a.m. to 5:05 a.m., and for seven minutes from 8:23 a.m. until 8:30 a.m. The notation recorded next to the 55-minute delay explains that the "unit pony belt would not stay running," indicating that the belt may have been subject to additional starts and stops beyond the four recorded. Gass and his crew left the section at 9:15 a.m. R. Ex. 20 at 32.

The pre-shift examination for the shift following Gass's (headed by section foreman Randy Robertson) was conducted concurrently with the last part of Gass's shift from 4:00 a.m. to 8:00 a.m. on September 22, 2007. R. Ex. 25 at 1. The pre-shift examiner noted that the head area of the Flannigan Tailgate belt was "sloppy." *Id.* The subsequent on-shift examination report indicates that the belt head area was cleaned by Robertson and his section crew during the subsequent shift. R. Ex. 25 at 2. This entry, made more than 36 hours before Miller issued Order No. 7490599, is the only indication that accumulations existed around the belt area prior to the issuance of Order No. 7490599.

The P&D reports show that there were two pony belt outages totaling 80 minutes of downtime during the shift following Gass's. Robertson and his section crew arrived on the section at 9:15 a.m., indicating that Gass's crew waited until Robertson's crew arrived before leaving the working section.[14] The first pony belt stoppage lasted for 50 minutes, from 1:50 p.m. until 2:40 p.m. The second stoppage lasted for 30 minutes, from 4:20 p.m. until 4:50 p.m. Robertson's crew dumped the last shuttle car of coal onto the belt at 5:05 p.m. and departed the section at 5:10 p.m. R. Ex. 20 at 34.

The P&D report for the final shift on September 22, 2007 also shows two pony belt outages. Raney's crew arrived on the section at 5:15 p.m., and the first pony belt outage occurred about two hours and forty-five minutes later from 8:00 p.m. until 8:30 p.m. due to a problem with the pony belt's ground fault. *See* R. Ex. 21 at 2; R. Ex. 20 at 36. The second outage began at 11:50 p.m. and continued until the end of the shift when Raney's crew left the section at 1:00 a.m. R. Ex. 20 at 36.

[14] Robertson appears to have been misidentified as section foreman Rocky Raney in the printed P&D report for the second shift on September 22, 2007. R. Ex. 21 at 2. The handwritten report, however, indicates that Robertson, and not Raney, was the section foreman for that shift. R. Ex. 20 at 34. Since the handwritten reports were prepared by the section foreman over the course of the shift, I rely on the handwritten P&D report.

On September 23, 2007, the day Order No. 7490599 was issued, the handwritten P&D reports show that there were a total of four pony belt outages equaling a total of 195 minutes of belt downtime during Jim Gass's shift.[15] Gass and his crew arrived on the section at 1:15 a.m., 15 minutes after Raney's crew departed the section. The first three outages, totaling 75 minutes of downtime, occurred as a result of problems with the "pony belt ground fault." Those outages occurred from 2:00 a.m. to 2:25 a.m., from 4:00 a.m. to 4:30 a.m., and from 5:15 a.m. to 5:35 a.m. During the remaining 120 minutes of outage, which occurred from 7:00 a.m. until 9:00 a.m., the "pony belt would not run for more than 2-3 min[utes] and [then] kick [the] breaker." R. Ex. 20 at 38. Gass also included a notation in the handwritten P&D report that the section crew "scooped and dusted and serviced equip[ment] during [the] downtime."[16] *Id.* Gass and his crew left the section at 9:15 a.m. *Id.* Inspector Miller testified that the accumulations existed at least as early as this shift. Tr. I-108.

Robertson and his crew arrived on the section at 9:15 a.m. on September 23, 2007. His handwritten P&D report shows two pony belt delays: a 30-minute delay from 9:15 a.m. to 9:45 a.m. resulting from a bad ground monitor card, and a 30-minute delay from 12:50 p.m. to 1:20 p.m. resulting from an issue with the AMR, a type of electrical card. R. Ex. 20 at 40; Tr. II-65. Raney testified that Robertson's shift "found the problem" and fixed the pony belt electrical issue. Tr. II-65. Neither the handwritten nor the printed P&D reports show ongoing issues with the pony belt after Robertson and his crew left the section at 5:15 p.m. on September 23, 2007. Raney also confirmed that the P&D reports (both handwritten and printed) do not reflect any pony belt issues after he and his crew arrived on the section at 5:15 p.m. R. Ex. 20 at 42; R. Ex. 21 at 3; Tr. II-66. As noted above, Order No. 7490599 was issued at 6:45 p.m. on September 23rd, about an hour and a half after Raney arrived on the section with his crew.

The handwritten and printed P&D reports demonstrate that mine management was well-aware that the pony belt was having significant electrical and operational issues during the five shifts preceding issuance of Order No. 7490599. These electrical problems led to multiple instances where the pony belt was starting and stopping intermittently over the course of each shift. R. Exs. 20, 21. Foreman Jim Gass's September 22 shift experienced four pony belt delays,

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[15] The printed P&D report for Gass's shift on September 23 consolidates the first three outages into one entry indicating a 75-minute outage, but otherwise corroborates the information contained in the handwritten report. R. Ex. 21 at 2.

[16] Gass's crew "scooped & dusted & serviced equip[ment]" during the two-hour delay that occurred from 7:00 a.m. to 9:00 a.m. on September 23. This notation is included in the P&D report section titled "Explanation of Delays." R. Ex. 20 at 38. Immediately above that section, in the "Comments" section for the entries to "Mining Details," Gass made the following notation: "Dusted Unit, Scooped Unit, Serviced Equipment During [Down] Time." (Instead of the word "down," the actual notation contains an arrow pointing down. I interpret the arrow to mean "down.") *Id.* I infer that "unit" refers to "mechanized mining unit," or MMU, a commonly-used mining term. I therefore conclude that "unit" refers to the MMU, or the equipment at the working face, rather than the pony belt and Flannigan Tailgate belt intersection outby the working section.

which resulted in 122 minutes of downtime. Foreman Randy Robertson's September 22 shift experienced two delays, which resulted in 80 minutes of downtime. Foreman Raney's September 22 shift experienced two delays, which resulted in 140 minutes of downtime. On September 23, Gass's shift experienced four delays, which resulted in 195 minutes of downtime, and Robertson's shift experienced two delays, resulting in 60 minutes of downtime. R. Ex. 20 at 32-42, R. Ex. 21 at 8-10. As then-Chairman Jordan and Commissioner Nakamura emphasized in their dissenting opinion, "the daily reports indicate electrical and breaker problems with the belt during all three shifts on September 22nd, which grew worse during the first two shifts on September 23rd, before repairs were made on the second shift." 38 FMSHRC at 2094 (citing Tr. II-61-66, R. Ex. 20 at 8-10).

Foreman Raney admitted that the recurrent stopping and starting that characterized the pony belt delays on September 22 and 23 could cause spillage from the pony belt and float coal dust accumulations around the belt, especially if the coal had been sitting on the belt for an extended period of time and had consequently dried out. Tr. II-68, 70. As the handwritten P&D reports show, there was, in fact, coal sitting on the belt during the production delays. *See* R. Ex. 20 at 38-43. During Robertson's September 23rd shift (the shift before Miller and Meyer observed the accumulations), the crew dumped 18 shuttle cars of coal prior to 4:00 p.m., despite the two separate pony belt delays from 9:15 a.m. to 9:45 a.m. and from 12:50 p.m. to 1:20 p.m. R. Ex. 20 at 41. During Gass's shift on September 23 (the shift identified by Miller as the latest point in time when the accumulations would have been present), the crew loaded ten shuttle cars of coal onto the belt between 6:00 a.m. and 7:00 a.m. The belt then went down for two hours and the crew was subsequently unable to get the belt to run for more than two to three minutes at a time. R. Ex. 20 at 39.

Raney also testified that the feeder, if not manually turned off during belt stoppages, would continue to grind the coal stalled on the belt, creating float coal dust that would be suspended in the air once the belt was turned back on and coal was transferred from the pony belt to the Flannigan Tailgate belt. Tr. 68-69.[17] Although there was no specific testimony regarding whether Respondent had a policy or practice of turning off the feeder during belt delays, Miller observed loose coal and float coal dust extending 450 feet outby the tail roller. P. Ex. 3. In addition, Miller found that the bottom belt and bottom rollers of the pony belt were in contact with the accumulations, and determined that "the tail roller was suspending float coal dust into the atmosphere," which would take at least more than one shift to occur. P. Ex. 3; Tr. I-206-07. Given the frequency of belt delays during the five shifts preceding Order No. 7490599 and the fact that Miller observed rollers in contact with accumulations, I find that the manual feeder was grinding coal during the pony belt production delays over several shifts, which likely contributed to the extensive float coal dust cited in Order No. 7490599.

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[17] Raney testified that the feeder has a water spray that normally keeps the coal wet as it is loaded into the feeder, moves past the choke breaker, and onto the belt. Tr. II-69. However, the spray normally operates only when the belt is "completely full of coal." If there are interruptions in the coal being fed through the feeder, the spray will turn off and on. Tr. II-69-70. Coal that is sitting on the stagnant belt may dry out if the belt is down for a long enough period of time. Tr. II-70.

Despite the progressively worsening problems with the pony belt documented in the handwritten P&D reports, the pre-shift and on-shift examination reports from September 22 and September 23 make no mention of accumulations around the intersection of the Flannigan Tailgate belt and the nearby pony belt. R. Ex. 25. The only notation regarding accumulations contained in those records is from the pre-shift examination conducted from 4:00 a.m. to 8:00 a.m. on September 22nd, which states that the Flannigan Tailgate head area was "sloppy." R. Ex. 25 at 1. The pre-shift notation regarding the sloppy head area on the Flannigan Tailgate belt coincides with the 55-minute production delay because the "pony belt would not stay running," as documented in Gass's September 22 P&D report. R. Ex. 20 at 32. The following on-shift examination record indicated that the belt head area had been cleaned. R. Ex. 25 at 2. Thereafter, there are no references to accumulations near the pony belt or Flannigan Tailgate belt in the pre-shift or on-shift examination records for the final two shifts on September 22, or in the examination records from the first two shifts prior to the issuance of Order No. 7490599 on September 23. R. Ex. 25 at 2-10.

In order for the lack of notations regarding the accumulations in the September 23 pre-shift and on-shift examination records to be accurate, the accumulations must have occurred after the last examinations were conducted, i.e., between the time the examiners signed off on the examination record books and when the accumulations were discovered by inspector Miller. Respondent's examination records state that the last on-shift examination before Miller issued Order No. 7490599 was conducted by Raney over the course of eight hours from 4:00 p.m. on September 23 to 12:00 a.m. on September 24. In that on-shift examination, Raney described the Flannigan Tailgate belt area as "safe." R. Ex. 25 at 10. However, the on-shift examination records do not indicate the exact time that Raney examined the Flannigan Tailgate. Since the accumulations were discovered at 6:50 p.m. (about three hours after Raney started his on-shift examination), it is possible that Raney examined the Flannigan Tailgate after he and his crew cleaned up the accumulations and abated the violation. If such was the case, then Raney's "safe" notation would be accurate.

The last pre-shift examination before the discovery of the accumulations was conducted from 12:00 p.m. to 4:00 p.m. R. Ex. 25 at 9. The pre-shift mine examiner signed off on the examination records at 3:47 p.m. on September 23, about three hours before Miller discovered the accumulations. *Id.* The record for that pre-shift examination makes no mention of any accumulations near the Flannigan Tailgate and pony belt intersection. In order for that examination record to be accurate, the accumulations must have occurred within the brief three-hour window between when the pre-shift examiner signed the records at 3:47 p.m. and when Miller discovered the accumulations at 6:50 p.m.

I find it unlikely that the accumulations occurred in the short, three-hour window between the last pre-shift examination and the issuance of Order No. 7490599. When asked why the examinations records might not reflect accumulations that existed at the time the examinations were conducted, inspector Miller stated that each examiner reported hazardous conditions differently, and that examiners exercise some level of discretion when conducting their examinations. Tr. I-358-59. Miller also opined that the accumulations had existed for at least two shifts. R. Ex. 25 at 1-2; Tr. I-108, 314. Miller emphasized that the loose coal accumulations were a "distinct black in color," or "jet black," rather than the "red-brown" or "shiny," "glaze[d]"

color of fresh coal.[18] Tr. I-108, 314-15; P. Ex. 4 at 8. Miller also testified that there was float coal dust on top of the accumulations. He testified that as float coal dust settles on rock-dusted surfaces, those surfaces change from white, to gray, to black. Tr. I-71-72, 315. In addition, Respondent's safety director, Joseph Myers, who accompanied Miller on his inspection, testified that the conditions were "obvious," and that he was "upset at the conditions that [they] found." Myers "immediately shut down the pony belt to correct the situation" after Miller issued Order No. 7490599. Tr. II-143-44.

Based on the printed and handwritten P&D reports and the testimony of Miller, Raney, and Myers, I find that the accumulations existed for at least two shifts, and Respondent knew or should have become aware of the accumulations no later than foreman Gass's 12:00 a.m. to 8:00 a.m. shift the morning of September 23. I also conclude that Miller exercised discretion when he failed to cite Respondent for the inadequate belt examinations on September 23. As noted above, Raney admitted that the belt's intermittent starting and stopping could cause accumulations, and the section foremen (including Raney) were aware of the progressively serious pony belt delays occurring on September 22 and 23, since the shift foremen themselves were responsible for creating the handwritten P&D reports. Tr. II-461-62; *see* R. Ex. 20. As then-Chairman Jordan and Commission Nakamura noted in their dissenting opinion, "[a] knowing violation occurs when an individual 'in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition.'" 38 FMSHRC at 2095 (*citing Cougar Coal Co.*, 25 FMSHRC 513, 517 (Sept. 2003) (quoting *Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied* 461 U.S. 928 (1983)). In addition, and apart from troubleshooting the electrical issues with the pony belt, both Gass's and Robertson's section crews were actively mining in the Nos. 1, 2, and 3 entries on September 23, only five cross cuts inby the belt intersection where the accumulations were found. R. Ex. 20 at 37, 39. As noted in my initial Decision and Order, "given the scope of the condition cited, it seems difficult to believe that reasonably attentive on-shift examiners would not have reported this condition." 35 FMSHRC at 2239.

The accumulations at issue here existed for more than two shifts. During those shifts, multiple belt examinations were conducted, and mine foreman were traveling past the accumulations with their section crews as they traveled to and from the working face. Respondent clearly had multiple opportunities to discover, document, and correct the violative conditions, but nonetheless failed to take action. I therefore conclude that the accumulations resulted from Respondent's repeated failure to make reasonable efforts to eliminate a known violation that existed for at least two shifts.

Although the Commission's majority decision declined to address whether constructive knowledge is sufficient for a flagrant designation, then-Chairman Jordan and Commissioner

[18] Miller also testified that float coal dust is usually black, and that a "reddish-brown" cast to the float coal dust indicates that the dust "has been there for quite some time." Tr. I-64, 206. In contrast, newly-mined loose coal on the belt is "reddish-brown" in color or has a shiny, glazed cast to it because it has been sprayed with water as it travels through the feeder and onto the belt. Tr. I-314-15.

Nakamura found that Respondent had actual knowledge of the violation. 38 FMSHRC at 2093 (Chairman, Jordan, and Nakamura, Comm'r, concurring and dissenting). Commissioner Althen, in his dissent, thoughtfully discusses the Commission's jurisprudence regarding negligence, unwarrantable failures, and the standard of knowledge required under the plain language of section 110(b)(2). He notes the subtle difference between actual implied knowledge and constructive knowledge, and concludes that the plain language of Section 110(b) requires actual knowledge on the part of the operator:

> The notion of constructive knowledge comprehends the notion of a "legal" duty to make an inquiry. If an actor has a duty to undertake an inspection for example, the actor may have constructive knowledge of an event he should have discovered by performing his duty. In such instance, the actor "should have known" certain facts but did not know those facts because of his failure to meet a legal duty of care. . . . . The notion of implied actual knowledge, on the other hand, is a factual construct based upon information of which the actor actually was aware. Thus, if an actor performing an inspection actually detects facts (former facts) that would have led a reasonable actor to learn of a specific problem (latter facts), a court may infer actual knowledge of the latter facts due to the actor's express knowledge of the former facts.

38 FMSHRC at 2104 n.7 (Althen, Comm'r, concurring and dissenting).

While recognizing the difference between actual implied and constructive knowledge in the abstract, I note that the practical application of these definitions to the facts at issue here yields the same substantive outcome: the mine foremen knew that the pony belt delay *could* cause accumulations, and therefore had a duty to inspect and determine whether accumulations *had* occurred; or, alternatively, the mine foremen knew that the pony belt was experiencing delays, knew that the such delays might cause accumulations (former facts), and therefore a reasonable foreman would have learned of the accumulations (latter facts). Either way, the Respondent knew (had actual implied knowledge) or should have known (had constructive knowledge) of the accumulations. Although I found in my initial Decision and Order that Respondent had constructive knowledge of the accumulations, *see* 35 FMSHRC at 2239 ("[T]he Secretary has shown that Respondent knew or should have known of the accumulation problem."), my review of the record on remand leads me to conclude that Respondent also had actual implied knowledge of the accumulations for at least two shifts.

As I have concluded as a matter of law that the violative conditions in Order No. 7490599 satisfy the requirements of the "narrow" interpretation of section 110(b)(2)'s repeated flagrant designation, I decline to address whether the violative conditions were also "flagrant" under the broad interpretation of section 110(b)(2).

C. The Violation in Order No. 7490599 was the Result of Respondent's High Negligence

In determining whether an operator meets its duty of care under the cited standard, I consider what actions would have been taken under the same or similar circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the

protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984); *see also Jim Walter Res., Inc.*, 36 FMSHRC 1972, 1975-77 (Aug. 2014) (requiring the Secretary to show that the operator failed to take specific action required by the standard violated); *Spartan Mining*, 30 FMSHRC 669, 708 (Aug. 2008) (negligence inquiry circumscribed by scope of duties imposed by regulation violated). In this regard, the gravamen of high negligence is "an aggravated lack of care that is more than ordinary negligence." *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015) (citing *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998)).

In my initial Decision and Order, I found that the cited accumulations were not reported in the examination record books by the mine examiners, who are the agents charged with responsibility for identifying hazardous conditions and ensuring that they are addressed in a timely manner. Thus, the accumulations were not reported to mine management through the normal channels by which such conditions would be identified and addressed. I viewed this as a mitigating factor. Accordingly, I reduced the negligence designation from "high" to "moderate." 35 FMSHRC at 2241.

On appeal, the Commission took issue with my finding that the presence of a mitigating factor reduced the negligence, and instructed me to reevaluate the degree of negligence "from the starting point of a traditional negligence analysis." 38 FMSHRC at 2083. The Commission also pointed out that the negligence of a mine examiner is imputable to the mine operator. *Id.* Accordingly, I reevaluate Respondent's degree of negligence, taking into account the culpability of Respondent's shift examiners regarding their knowledge of the violative accumulations. 38 FMSHRC at 2083.

I also found in my initial Decision and Order that Order No. 7490599 was the result of Respondent's unwarrantable failure to comply with section 75.400. Unwarrantable failure is aggravated conduct characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." 35 FMSHRC at 2240, 2231 (citing *Emery Mining Corp.*, 9 FMSHRC 1997, 2003-04 (Dec. 1987)). I found that the six-to-fourteen-inch-deep accumulations of loose coal around the tailgate roller and the 450 feet of loose coal and float coal dust extending outby the tailgate were extensive, obvious, and dangerous. 35 FMSHRC at 2231. I noted that "the size and location of the accumulations, in addition to the fact that the area was not isolated from active workings, contributed to the likely risk of a serious and possibly fatal injury to miners working inby." 35 FMSHRC at 2238. I have credited Miller's testimony that the accumulations were present for at least two shifts. As stated in my initial Decision and Order, "given the scope of the condition cited, it seems difficult to believe that reasonably attentive on-shift examiners would not have reported this condition." 35 FMSHRC at 2239. The Commission has long recognized that mine foremen, who conduct pre-shift and on-shift examinations, are agents of the mine operator. *See, e.g.*, *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1463–64 (Aug. 1982) ("It is well established that the negligent actions of an operator's foremen, supervisors, and managers may be imputed to the operator in determining the amount of a civil penalty."). In addition, I found that mine management had both actual implied knowledge and constructive knowledge of the accumulations and repeatedly failed to make reasonable efforts to eliminate them over the course of at least two shifts.

Respondent was also on notice that greater efforts were necessary in order to comply with section 75.400. I found in my initial Decision and Order that "the record establishes that Respondent was warned repeatedly through meetings, training sessions, and prior citations [and] orders[] about belt accumulation problems . . . ." 35 FMSHRC at 2237 (citing Tr. I-86-90, 123). In addition, I noted Respondent's efforts to abate belt accumulation violations:

> [A] group of MSHA employees came from Beckley, West Virginia to train Respondent's examiners; [] Respondent held special safety talks and manager meetings; [] changes were made in the work force allocation to increase belt examinations; and [] Respondent created PowerPoint training guidelines on July 7, 2007.

35 FMSHRC at 2240 (citing Tr. I-123, 448-49, 455-56; R. Ex. 16). Despite these efforts, Respondent repeatedly continued to violate section 75.400. *Id.* at 2237. Respondent violated section 75.400 approximately 162 times in the fifteen months preceding Order No. 7490599. MSHA Mine Data Retrieval System, available at https://arlweb.msha.gov/drs/ASP/MineAction.asp (last accessed Mar. 6, 2017); *see also* 35 FMSHRC at 2267. Moreover, out of the 361 violations of section 75.400 that Respondent received in the twenty-four months preceding the issuance of Order No. 7490599, seventy-seven of the violations were designated as S&S, and eleven of the violations were designated as unwarrantable failures to comply with section 75.400. P. Ex. 1; *see also* 35 FMSHC at 2211.

For the reasons stated above, I find that the violation in Order No. 7490599 was the result of Respondent's high negligence.

D. Penalty Assessment

The Secretary has proposed a specially assessed penalty of $164,700 for the violation alleged in Order No. 7490599. Because the Secretary has proposed a penalty substantially higher than would have been proposed under the regular assessment system, I look to the record to determine whether the Secretary introduced evidence to support an elevated assessment under the rationale and facts supporting the Secretary's decision to seek a special assessment. I then assess the penalty independently in light of my findings of fact, analysis, and conclusions of law on remand about the record evidence concerning Section 110(i) criteria and the deterrent purposes of the Act.

The Secretary's narrative findings for the special assessment contain terse support for the specially-assessed proposed penalty. The Secretary states that the violation was "flagrant" and that the gravity was "serious." Narrative Findings for a Special Assessment, *Petition for the Assessment of Civil Penalties*, Docket No. LAKE 2009-0035. After my review of the record on remand, I have affirmed these findings.[19] Respondent is a large operator, and mined seven

[19] The Secretary originally designated the accumulations as contributing to a hazard that was highly likely to lead to a reasonably serious injury. P. Ex. 3. In my initial Decision and Order, I affirmed the Secretary's S&S designation for Order No. 7490599, but found that the accumulations contributed a hazard that was reasonably likely and not highly likely to lead to an injury of a reasonably serious nature. 35 FMSHRC at 2225; *see Mathies Coal Co.*,

million tons of coal in 2007. MSHA Mine Data Retrieval System, available at https://arlweb.msha.gov/drs/ASP/MineAction.asp (last accessed Mar. 6, 2017). The parties stipulated that the proposed special assessment will not affect Respondent's ability to stay in business. The parties made no stipulation regarding good faith abatement, but the record demonstrates that the violation was abated in good faith. *See also* 35 FMSHRC at 2267.

I have found that the violation in Order No. 7490599 was S&S, an unwarrantable failure resulting from Respondent's high negligence, and a repeated flagrant violation. In addition, as noted in my initial Decision and Order,

> [i]n the twelve months preceding the issuance of Order No. 7490599, Respondent was issued twenty-seven citations/orders for alleged violations of [section] 75.400 involving accumulations of coal, lump coal, coal dust, float coal dust, and coal fines on and around conveyor belts and belt structures in the Galatia Mine. P. Exs. 5-31. Nineteen of the aforementioned citations/orders were issued as S&S violations. P. Ex. 5, 8, 10-12, 14, 15-18, 20, 22, 25-31. In the twenty-four months preceding [Order No. 7490599], Respondent was cited for violations a total of 361 times. P. Ex. 1. Among those 361 citations and orders, seventy-seven were issued as S&S violations and eleven were issued as unwarrantable failure violations under Section 104(d) of the Mine Act. P. Ex. 1.

35 FMSHC at 2211.

Given Respondent's repeated and extensive violation history under section 75.400, it cannot be gainsaid that non-flagrant civil penalty assessments under the progressive enforcement scheme of the Mine Act, including 77 penalties for S&S violations and 11 penalties for unwarrantable failures, have not deterred Respondent from continuing to violate the cited standard. In Order No. 7490599, the Secretary demonstrated that the Respondent repeatedly failed for at least two shifts to make reasonable efforts to eliminate known accumulations which could reasonably be expected to cause death or serious bodily injury to six miners. As Commissioners Cohen and Young recognized, "the essence of a repeated violation is a condition which threatens miners with serious bodily injury or death and which has been ignored or disregarded often enough to demonstrate intolerable irresponsibility." 38 FMSHRC at 2087 (Cohen & Young, Comm'rs, concurring). As Commissioner Althen concluded, "the clear purpose of section 110(b)(2) is to incentivize operators strongly to eliminate known violations reasonably expected to cause serious injury without waiting for an inspector to discover the violative condition." 38 FMSHRC at 2110 (Althen, Comm'r, concurring and dissenting). Based upon my consideration of the section 110(i) penalty criteria and the deterrent purposes of the Act, a "repeated flagrant" penalty assessment is warranted here under the Mine Act's progressive enforcement scheme. I assess a penalty of $112,380.

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6 FMSHRC 1, 3-4 (Jan. 1984). The Commission did not disturb that finding when remanding this matter.

IV. ORDER

Order No. 7490599 is **AFFIRMED**, including the S&S, high negligence, unwarrantable failure, and flagrant designations. Respondent American Coal Company is **ORDERED** to pay a total civil penalty of $112,380 within thirty days of this Decision and Order on Remand.[20]

Thomas P. McCarthy

Thomas P. McCarthy
Administrative Law Judge

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/ccc

[20] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.