

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

July 30, 2018

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 2015-0509
A.C. No. 46-01968-374332

Docket No. WEVA 2015-0632
A.C. No. 46-01968-377533

Mine: Monongalia County Mine (formerly
Blacksville No. 2)

DECISION

Appearances: John Nocito, Esq., Helga Spencer, Esq., U.S. Department of Labor, Office of the Solicitor, Philadelphia, Pennsylvania for Petitioner;
Jason Hardin, Esq., Artemis Vamianakis, Esq., Fabian VanCott, Salt Lake City, Utah for Respondent.

Before: Judge Feldman

The captioned civil penalty proceedings are before me based upon Petitions for Assessment of Civil Penalty filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 (“Act,” “Mine Act,” or “New Miner Act”), 30 U.S.C. § 815(d), against the Respondent, Monongalia County Coal Company (“Monongalia”).¹ The hearing in these matters was held on March 7, 2017, through March 9, 2017, in Morgantown, West Virginia.² The parties’ post-hearing briefs have been considered in the disposition of these matters.

¹ Monongalia County Coal Company does not dispute that it is a proper party based on its role as successor in interest in Consolidation Coal Company. Resp’t Post-Hr’g Br. at 1-2. For purposes of this decision, the Respondent shall be referred to as Monongalia, and the mine site shall be referred to as the Monongalia County Mine. *Id* at n.1.

² The issuance of this decision has been delayed due to a medical leave of absence.

At issue in WEVA 2015-0632 is 104(d)(2) Order No. 8059209, which alleges a violation of the mandatory safety standard in section 75.400 as a result of impermissible combustible coal accumulations along the 5 West No. 1 belt.³ Resp't Ex. 1. The Secretary seeks to impose an enhanced civil penalty of \$121,300.00 under the "repeated" flagrant provisions of section 110(b)(2) of the New Miner Act. This statutory provision provides:

Violations . . . 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).

In *American Coal Company*, the Commission crafted two interpretations of the "repeated" language in section 110(b)(2), one "narrow" and one "broad." *American Coal Co.*, 38 FMSHRC 2062 (Aug. 2016). Under the "narrow" interpretation, a violation can be designated as flagrant if the duration of the violation, without regard to a history of violations, is sufficient to warrant a "repeated" designation. *Id.* at 2065. Thus, the Commission's "narrow" interpretation of the flagrant provisions of the Act concerns a discrete ongoing violation. *Id.* In contrast, the Commission articulated that its "broad" approach involves a recurrent-type violation analysis, i.e., analysis of several discrete yet similar violations. *Id.* This approach allows for a "repeated" flagrant violation based on a relevant history of similar violations.

Monongalia has stipulated to the fact of the violation of section 75.400 and to the significant and substantial ("S&S") nature of the violation.⁴ Resp't Post-Hr'g Br. at 2 n.3. However, Monongalia challenges that the subject violation was attributable to an unwarrantable failure, and that the violation constitutes a "repeated" flagrant violation. Resp't Post-Hr'g Br. at 3, 39. The Secretary asserts that the accumulations violation cited in Order No. 8059209 can be designated as "repeated" based on either the Commission's "broad" or "narrow" interpretation. Sec'y Post-Hr'g Br. at 39, 49.

³ 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.

⁴ As a general matter, a violation is properly designated as S&S if there is a reasonable likelihood that the hazard against which the mandatory safety standard is directed will result in an occurrence that is reasonably likely to cause injury of a reasonably serious nature. *Newtown Energy, Inc.*, 38 FMSHRC 2033, 2037-38 (Aug. 2016).

Also before me is 104(d)(2) Order No. 8059212 in Docket No. WEVA 2015-0509 that alleges a violation of section 75.360(a)(1) of the Secretary's regulations for a failure to conduct an adequate preshift examination of the 5 West No. 1 belt during the preceding midnight shift for the day shift of July 30, 2014.⁵ The Secretary proposes a civil penalty of \$40,300.00 for Order No. 8059212. Resp't Ex. at 6. Monongalia has not challenged the fact of the violation or the S&S designation. Resp't Post-Hr'g Br. at 58-62. However, Monongalia disputes, in essence, that the cited inadequate preshift examination is attributable to an unwarrantable failure. *Id.*

I. Procedural History

The Secretary has identified three non-flagrant predicate 104(d) orders, contained in Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, in support of his flagrant designation in Order No. 8059209 under the "broad" approach. Given the Secretary's asserted relevance of the alleged predicates, these predicate dockets were consolidated with the captioned dockets and stayed on May 12, 2016, pending final disposition of *Oak Grove Res., LLC*, 38 FMSHRC 957 (May 2016) (ALJ). *Oak Grove* addressed the evidentiary requirements for a "repeated" flagrant designation with respect to an alleged violation of section 75.400. After the 30-day appeal period for the May 3, 2016, *Oak Grove* decision had expired, the predicate dockets in WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473 were severed on June 14, 2016. *Consolidation Coal Co.*, 38 FMSHRC 1573 (June 2016) (ALJ).⁶

Oak Grove recognized that the Commission had held "that past [relevant] violative conduct may be considered in determining whether a condition can be cited as a 'repeated' flagrant violation." *Oak Grove*, 38 FMSHRC at 964, n.6 (citing *Wolf Run Mining Co.*, 35 FMSHRC 536, 541 (Mar. 2013)). However, *Oak Grove* held that a violative condition that does not otherwise meet the statutory definition of flagrant cannot be elevated to flagrant status simply based on a history of violations. *Id.* 38 FMSHRC at 960-61. Consequently, in an interlocutory

⁵ Section 75.360(a)(1) states, in pertinent part:

[A] certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

30 C.F.R. § 75.360(a)(1).

⁶ The transcript for the three-day hearing consists of three volumes, each volume beginning at page one. Transcript references shall be cited by volume followed by page number. At trial, Monongalia moved to replace Consolidation Coal Company as its successor in interest. Tr. I 31-33. The Secretary did not oppose Monongalia's motion. *Id.* at 33. Citations to *Consolidation Coal Co.* are for pre-trial orders issued prior to Monongalia's substitution as the successor in interest.

order, the flagrant designation in *Oak Grove* was deleted based on the Secretary's failure to demonstrate the subject accumulations could reasonably have been expected to proximately cause death or serious bodily injury. *Oak Grove Res.*, 37 FMSHRC 1311, 1321 (June 2015) (ALJ). The Secretary did not appeal the interlocutory order.

Simply put, *Oak Grove* held that, while a history of violations may be a relevant consideration in assessing a civil penalty, predicate violations are not dispositive of whether an alleged flagrant violation is properly designated as "repeated." *Oak Grove Res.*, 38 FMSHRC at 960-61. The ALJ holding in *Oak Grove* was rejected in the *American Coal* remand, in which the Commission concluded that a history of similar recurring violations can satisfy the "repeated" element for a flagrant violation. 38 FMSHRC at 2065. However, the Commission did not specify the exact role played by a violation history in a "broad" "repeated" flagrant analysis. Consequently, on remand the Commission directed the ALJ to fashion his own interpretation of section 110(b)(2), which permits the Secretary to establish a "repeated" flagrant violation "by taking the operator's history of previous accumulations violations into account." *Id.* at 2082.

As the significance of a relevant violation history remained unclear following *American Coal*, the parties were advised that the March 7, 2017, hearing in these matters would be limited to the Commission's "narrow" analysis. *Consolidation Coal Co.*, 39 FMSHRC 423, 425 (Feb. 22, 2017) (ALJ). The parties were invited to address, in their post-hearing briefs, whether Monongalia's two-year history of 147 section 75.400 violations is sufficient to support a "repeated" flagrant designation under the "broad" approach. *Id.* The parties have addressed this issue. Sec'y Post-Hr'g Br. at 46; Resp't Post-Hr'g Br. at 37.

II. Stipulations

At trial the parties agreed on the following stipulations:⁷

1. Monongalia is an "operator," as defined by § 3(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 803(d), of the coal mine at which the Orders at issue in this proceeding were issued.
2. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge pursuant to sections 105 and 113 of the Mine Act.
3. True copies of the Orders at issue in this proceeding were served on Monongalia as required by the Mine Act.
4. The Orders contained in Exhibit "A" attached to the Secretary's Petition in the subject dockets are authentic copies of the Orders at issue in this proceeding.
5. The imposition of the proposed penalties will not affect Monongalia's ability to continue in business.

⁷ Stipulations 1-7 are set forth at Tr. I 30-31. Stipulations 8-10 are set forth at Tr. II 120-21, 228-29, 233.

6. The Mine Operator engaged in mining operations in the United States and its mining affects interstate commerce.
7. The Blacksville No. 2 Mine now operates as The Monongalia County Mine.
8. The conditions described in Order No. 8059209 constitute a violation of 30 C.F.R. § 75.400, and the violation was S&S and reasonably likely to result in an injury or illness affecting one miner.
9. The conditions described in Order No. 8059212 constitute a violation of 30 C.F.R. § 75.360(a)(1).
10. The conditions described in Order No. 8059212 were S&S and reasonably likely to result in an injury or illness affecting one miner.

III. Order No. 8059209

Findings of Fact

The Monongalia County Mine is a large underground coal mine located in the Pittsburgh coal seam. Tr. I 67. MSHA records reflect that, as of July 30, 2014, the date of the subject mine inspection, more than 3 million tons of coal had been extracted from the Monongalia Mine. Sec’y Pet. for Assessment of Civil Penalties, Docket Nos. WEVA 2015-0509 and WEVA 2015-0632, Ex. A.

At all times relevant to these proceedings, Monongalia was operating four mechanized mining units (“MMU”): two for the main section, one in the development section, and one for the longwall section. Tr. I 67, 151-52; Resp’t Ex. 19. Mine operations were performed during three daily production shifts. Tr. I 68. The day shift was conducted from 8:00 a.m. through 4:00 p.m.; the afternoon shift was conducted from 4:00 p.m. through 12:00 a.m.; and the midnight shift was conducted from 12:00 a.m. to 8:00 a.m. *Id.* at 69.

There are approximately 12-and-a-half miles of belt lines in the Monongalia County Mine. *Id.* at 158. Coal production from the 20W Headgate and 13W Longwall MMUs was carried outby from the 5 North and 5 South belts toward the 5 North/5 South belt transfer point, where the coal was transferred onto the 5 West No. 2 belt. *Id.* at 163. The 5 West No. 2 conveyor belt travels outby from the 5 North/5 South belt transfer point to the 5 West No. 2 belt transfer point located at the 59 block, where it dumps onto the 5 West No. 1 belt, the site of the subject accumulations. *Id.* at 163-4. The 5 West No. 1 belt is approximately 75,000 feet long. *Id.* at 174. The 5 West No. 1 belt transfers coal onto the 6 North belt at the 5 West No. 1 transfer located at the 1 block. *Id.* at 91, 164; Resp’t Exs. 19, 20; Sec’y Ex. 45 (denoted in blue).

The Monongalia County Mine is classified as a gassy mine in that it liberates between six and seven million cubic feet of methane in a 24 hour period. Tr. I 69-70. As such, the mine is subject to a five-day spot inspection in accordance with section 103(i) of the Act. *Id.* at 70; 30 U.S.C § 103(i). On July 30, 2014, MSHA Inspector Tyler Peddicord (“Peddicord”) arrived at the Monongalia Mine at approximately 7:30 a.m. to conduct an E02 methane spot inspection and a regular E01 inspection at the 13W Longwall section. Tr. I 70-71. Prior to traveling underground, Peddicord reviewed the preshift, on-shift, and electrical examination records for the 13W Headgate, the area of the mine he planned to inspect as part of his E01 inspection. *Id.* at 71. After reviewing the examination book, Peddicord met with miners’ representative Chad Newbraugh and mine representative Doug Moyer to discuss his planned inspection for the day. *Id.* at 72.

Peddicord entered the mine accompanied by Newbraugh and Moyer to perform an E02 section 103(i) methane spot inspection in the 13 W Headgate section. *Id.* at 71, 74, 147; Tr. II 27-28. They traveled by mantrip. Tr. I 73. However, due to obstructions present at the entry of the 5 West track, the inspection party was not immediately able to advance to the 13W Headgate via mantrip. *Id.* at 73. As a result, the inspection party exited the mantrip, whereupon Peddicord decided to conduct an E01 inspection of the 5 West No. 1 conveyor belt, which had not yet been subject to an MSHA quarterly inspection. *Id.* at 74. The Secretary has proffered a map denoting the area inspected by Peddicord in the 5 West No. 1 belt entry. Sec’y Ex. 45 (denoted in orange).

Peddicord began his inspection at the 1 block, where 5 West No. 1/6 North transfer was located, and proceeded to travel inby by up to the 40 block. *Id.* at 93; Sec’y Ex. 45; Resp’t Exs. 19, 20. In the course of his travels, he observed extensive accumulations of coal dust covering the mine floor, roof, ribs, belt structures, waterlines, and power cables, starting at the 6 block and extending inby. *Id.* at 95-96, 107; Sec’y Ex.1; Resp’t Ex. 1. The coal dust accumulations he observed were black in color and measured approximately 1/8 inch for a distance of approximately 3400 feet, measured from the 6 block to 34 the block. Tr. I 95, 106-07, 133-35. In addition to the 1/8 inch depth of accumulations, there were ten discrete locations, several of which were located in the vicinity of the 27 block where the misaligned belt was located, that measured 16 to 24 inches in depth. *Id.* at 104-06; Sec’y Exs. 4, 6. At these locations there were a total of 19 rollers turning in coal. Tr. I 107. Each location measured approximately two to three feet in length and three feet in width. *Id.* at 104-6. Thus, these locations totaled approximately 25 to 33 feet in length. *Id.* at 79, 109, 200; *see* Sec’y Exs. 1, 8, 45.

Of the nineteen rollers turning in coal, there was one broken roller at the 7 block and one frozen roller at the 29 1/2 block. Tr. I at 93, 105, 109-10, 112-13; Tr. II 65, 91; Sec’y Exs. 3,11. The broken roller at the 7 block made substantial noise as a result of metal-to-metal contact and had heated to the point that it steamed when water was applied. Tr. I at 78, 114; Sec’y Ex. 3. In addition, a belt misalignment approximately fifty feet in length, starting at the 27 block, caused the belt conveyor to rub against six bottom roller cradles,⁸ all of which were covered in coal dust. Tr. II 69; Sec’y Ex. 4. The continued rubbing between the belt conveyor and cradles created friction sufficient to completely remove the top paint coating from all six cradles revealing the “shiny metal” underneath. Tr. I 117. Inspector Peddicord was concerned that continued rubbing between the belt and roller cradles would cut into the belt and result in a tear. *Id.* Based on his observations, Peddicord initially informed Moyer that he was issuing a 104(a) citation alleging a violation of section 75.400. Tr. I 96, 107.

As the inspection party continued inby, additional accumulations were observed, extending to the 34 block that were in proximity to the two damaged rollers noted above. Sec’y Ex. 1; Resp’t Ex 1. Peddicord also observed a portion of misaligned belt measuring approximately 50 feet in length. Tr. I 96-107; Sec’y Exs. 8, 45. Peddicord believed there were numerous points of contact that could create friction that would generate heat, causing an ignition hazard which could ignite a fire. Tr. I 78, 108-11, 128; Tr. II 146, 147-49. There were no active workings in proximity to the cited accumulations along the 5 West No. 1 belt. Tr. I 170. In fact, the 5 West No. 1 belt entry, which was ventilated with fresh air, was located approximately three and a half miles from the working long wall face. *Id.* at 167; Tr. II 30. Consequently, Peddicord testified that his major concern was ignition (combustion) of the coal accumulations rather than propagation. Tr. I 78. In this regard, the Secretary’s counsel conceded that he was asserting that Peddicord’s concern was “a mine fire hazard and not an explosion hazard.” Tr. II 29.

Peddicord concluded that the totality of the circumstances necessitated the removal of the 5 West No. 1 conveyor belt from service in order to repair and replace the damaged rollers, realign the belt, shovel underneath the nineteen bottom rollers turning in coal and apply rock dust in the belt entry. Tr. II at 62, 66, 140, 143. Consequently, Peddicord ultimately informed Moyer that he was issuing a 104(d) order instead of a 104(a) citation. Tr. I 143. It took fifteen to twenty miners approximately 10 hours to abate the cited conditions. *Id.* at 141; Sec’y Ex. 8 at 29.

⁸ In Order No. 8059212, issued for the alleged preshift violation, Peddicord noted the misaligned belt contributed to the bottom belt contacting seven consecutive bottom roller cradles at the 27 block. Sec’y Ex. 6. However, Citation No. 8059211, issued by Peddicord for the misaligned belt referenced in the subject accumulation citation in Order No. 8059209, notes that the belt misalignment contributed to belt contact with six bottom roller cradles. Sec’y Ex. 4. Citation No. 8059211, not a subject of this proceeding, is discussed *infra*. At trial, Peddicord also testified that the misaligned belt caused belt contact with six bottom roller cradles. Tr. I 116. Consequently, all references to this issue will be to six bottom roller cradles.

Based on his observations, Peddicord issued Order No. 8059209 alleging a violation of section 75.400. The order states:

Accumulations of combustible material is allowed to accumulate over previously rock dusted surfaces on the 5-West company #1 belt conveyor in the following locations: 1) Accumulations of loose coal, and coal fines is allowed to exist from 6 block to 34 block. The accumulations measured 16 feet wide, 1/8 inch thick, and approximately 3400 feet long. These accumulations are located on the mine floor, roof, ribs, and belt structure. The accumulations are dark brown in color. 2) Accumulations are present 10 1/2 block and in contact with both bottom rollers. These accumulations of coal fines/belt fines measured 3 feet wide, 2 foot long, and 16 inches deep. 3) Also, accumulations of dry coal fines/belt fines are present at the 12 1/4 block and in contact with both bottom rollers. These accumulations measure 3 feet long, 3 feet wide, and 24 inches deep. 4) Accumulations of loose coal, and coal fines is present at 12 1/2 block, and are in contact with on bottom roller that is turning in accumulations. These accumulations measured 3 feet long, 3 1/2 feet wide, and 20 inches high. 5) Also, accumulations of coal fines, and loose coal is in contact with bottom roller at 17 1/2 block. These accumulations measured 1 foot wide, 2 feet long, and 20 inches deep. 6) Also, accumulations of coal fines/belt fines is present at 21 3/4 block and contacting both bottom rollers. These accumulations measured 2 feet wide, 2 feet long, and 22 inches high. 7) Also, accumulations just inby 23 block are in contact with inside part of both bottom rollers, allowing rollers to turn in accumulations. These accumulations are coal fines, and belt fines. These accumulations measured 3 feet long, 1 foot wide, and 10 inches deep. 8) Also, accumulations of coal fines/belt fines is in contact with both bottom rollers at 23 1/2 block. The accumulations measured 2 feet wide, 2 foot long, and 12 inches deep. 9) Also, accumulations of coal fines/belt fines is present at 24 block and in contact with both bottom rollers. These accumulations measured 3 feet long, 1 foot wide, and 10 inches wide. These accumulations were dry and black in color. 10) Also, accumulations of dry coal fines/belt fines are in contact with 2 consecutive bottom rollers at 25 1/2 block. The accumulations measured 3 feet wide, 1 1/2 wide, and 10 inches deep in both locations. 11) Also, accumulations of coal fines/belt fines is allowed to exist on mine floor, and in contact with bottom roller. Accumulations measured 1 1/2 feet wide, 1 foot long, and 18 inches deep at 19 3/4 block. This mine is on a 5-day 103(I) spot inspection for liberating over 1 million cubic feet of methane in a 24 hour period. Citation #8059210, and Citation #8059211 are issued in conjunction with this order for damaged rollers, and belt rubbing metal components in same areas as cited accumulations. This creates a confluence of factors. Miners work and travel in these areas each shift in performance of their duties. There is evidence that these accumulations have existed for an extended period of time, due to the amount of the accumulations present, and foot prints in the walkway through the accumulations. A certified mine examiner travels this belt conveyor 3 times a day, and should have been aware that these conditions were present. Accumulations/roller spillage was visible to the most casual observer.

Examinations are the first line of defense for the health and safety of the miners. These conditions were obvious and extensive and should have been reported and corrected. History has shown that frictional heat sources such as belt rubbing structure causes mine fires. If normal mining operations were to continue and these conditions were left unabated it is reasonably likely that friction sources present will ignite accumulations, and/or contribute to a fire and/or explosion occurring nearby. The operator removed the belt from service to correct ignition sources. Numerous 75.400 citations have been issued at this mine in the past. This is the third 75.400 order issued on belt conveyors at this mine in the past 6 months. The operator has engaged in aggravated conduct constituting more than ordinary negligence. The belt was in operation at time of issuance. A mine fire occurred at this mine on 3-12-12. This violation is an unwarrantable failure to comply with a mandatory health and safety standard.

Sec'y Ex. 1; Resp't Ex. 1.

In addition to Peddicord noting the broken roller at the 7 block and the frozen roller at the 29 1/2 block in Order No. 8059209, Peddicord issued Citation No. 8059210, which is not a subject of this proceeding, citing the two malfunctioning rollers as an S&S violation of section 75.1731(a). Sec'y Ex. 3; Resp't Ex. 2. The mandatory standard in section 75.1731(a) requires damaged rollers that pose a fire hazard to be immediately repaired or replaced. 30 C.F.R. § 75.1731(a). Peddicord designated this damaged roller violation as reasonably likely to cause an injury leading to lost workdays or restricted duty. Sec'y Ex. 3; Resp't Ex. 2. He attributed the violation to a moderate degree of negligence. *Id.* The Secretary proposed a civil penalty of \$1203.00 for Citation No. 8059210. Sec'y Post-Hr'g Br. at 8.

Peddicord also issued Citation No. 8059211, also not a subject of this proceeding, citing an S&S violation of section 75.1731(b) as a result of the approximately fifty feet of misaligned belt that he had observed. Sec'y Ex. 4; Resp't Ex. 3. The mandatory standard in section 75.1731(b) prohibits improperly aligned conveyor belts. 30 C.F.R. § 75.1731(b). Peddicord designated the cited violation as reasonably likely to result in lost workdays or restricted duty. Sec'y Ex. 4. Peddicord attributed the violation to a low degree of negligence. *Id.* The Secretary proposed a civil penalty of \$585.00 for Citation No. 8059211. Sec'y Post-Hr'g Br. at 8.

Citation Nos. 8059210 and 8059211 were the subjects of a Joint Motion to Approve Settlement in Docket No. WEVA 2015-0033. Sec'y Ex. 5. The settlement terms were that Monongalia accepted Citation Nos. 8059210 and 8059211 as unmodified and agreed to pay the initially proposed civil penalties of \$1203.00 and \$585.00, respectively. *Id.* These settlement terms were approved in a Decision Approving Settlement issued on April 21, 2016. Sec'y Ex. 5; Tr. I 116.

Monongalia does not dispute that the cited accumulations in Order No. 8059209 constitute a section 75.400 violation. Resp't Post-Hr'g Br. at 49. However, Monongalia alleges several mitigating factors with respect Order No. 8059209. *Id.* at 40-44. With respect to the presence of potential ignition sources, Monongalia argues that Peddicord only found two out of 4000 rollers to be defective and fifty feet out of 5000 feet of belt to be misaligned. *Id.* at 40; Tr. I 197-200. With regard to the length of time the violative conditions existed, Monongalia argues that the ten discrete areas of deeper accumulations were the result of broken chains on the belt and that these accumulations existed for less than a day. Resp't Post-Hr'g Br. at 40. Furthermore, Monongalia alleges that it was engaging in an ongoing process of repairing chains and cleaning the associated accumulations. *Id.*

With respect to the risk of danger the violative conditions posed, Monongalia argues that there was no methane in the belt entry and that the cited accumulations were not in contact with the cited ignition sources. *Id.* at 41-2; Tr. I 180-1; Tr. II 168-9. Additionally, Monongalia argues that the distance of the accumulations from the mining face, and the Secretary's characterization of no more than lost workdays resulting from the risk posed by the defective rollers and misaligned belt undermine the Secretary's assertion in Order No. 8059209 that the accumulations will result in a fatality. Resp't Post-Hr'g Br. at 42; Tr. I 166-7.

With respect to knowledge and obviousness, Monongalia does not dispute that it was aware of the cited accumulations. Resp't Post-Hr'g Br. at 43. In this regard, Monongalia was on notice that greater efforts were required to comply with section 75.400 by virtue of the reported capital expenditures it incurred to improve the conditions in 5 West No. 1 belt entry. Tr. II 161-62. In addition, Monongalia asserts that it had made efforts to eliminate the violative conditions by rock dusting and repairing broken belt chains. Tr. II 313, 321.

Disposition

a. S&S

Monongalia does not contest the cited accumulation violation, Citation No. 8059209, or that the violation was properly designated as S&S. Sec'y Post-Hr'g Br. at 3-4. However, an understanding of the S&S legal framework is helpful in providing context to the parties' stipulations.

The Mine Act describes an S&S violation as one "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated as S&S in nature if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard

contributed to by the violation will result in an injury or an illness of a reasonably serious nature. *Cement Div., Nat'l Gypsum*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, (Jan. 1984), the Commission explained:

In order to establish that a violation of a mandatory safety standard is S&S under *National Gypsum*, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

Id. 6 FMSHRC at 3-4; *see also Austin Powder Inc. v. Sec'y of Labor*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (Dec. 1987) (approving the *Mathies* criteria).

Once the fact of a violation has been established under step one of *Mathies*, the second *Mathies* step addresses the extent to which the violation contributes to a particular hazard. In a change to the Commission's long-standing interpretation of the *Mathies* criteria, the Commission now has opined that the second step analysis is "primarily concerned with likelihood of the occurrence of the hazard against which a mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC at 2037 (citing *Knox Creek Coal Corp. v. Sec'y of Labor*, 811 F.3d 148, 163 (4th Cir. 2016)). Thus, step two of the *Mathies* test now involves a two-part analysis: first, identification of the hazard created by the subject violation of the safety standard; and second, "a determination of whether, based on the particular facts surrounding the violation, there exists a reasonable likelihood of occurrence of the hazard against which the mandatory safety standard is directed." *Newtown Energy*, 38 FMSHRC at 2038. Consideration must be given to both the time frame that a violative condition existed prior to the issuance of a citation, and the time that it would have existed if normal mining operations had continued. *Bellefonte Lime Co.*, 20 FMSHRC 1250, 1255 (Nov. 1998) (citing *Rushton Mining Co.*, 11 FMSHRC 1432, 1435 (Aug. 1989)); *Halfway, Inc.*, 8 FMSHRC 8, 12 (Jan. 1986).

Under the Commission's analysis in *Newtown Energy*, when evaluating the third *Mathies* criterion, the analysis assumes that the hazard identified in step two has been realized, and then considers whether the hazard would be reasonably likely to result in injury, again, in the context of "continued normal mining operations." *Newtown Energy*, 38 FMSHRC at 2038 (citing *Knox Creek Coal Corp.*, 811 F.3d at 161-62); *Peabody Midwest Mining, LLC*, 762 F.3d 611, 616 (7th Cir. 2014); *Buck Creek Coal*, 52 F.3d 133 at 135; *U.S. Steel Mining Co.*, 6 FMSHRC 1573, 1574 (July 1984)). In sum, while the methodology for analyzing S&S under the long-standing *Mathies* criteria has been modified by *Newtown Energy*, the Commission acknowledged that "the ultimate inquiry has not changed." 38 FMSHRC at 2038, n.8.

Given the fact that section 75.400 violations are the most commonly cited, the Commission has identified the elements necessary to create a fire or explosion hazard. Resp't Ex. 15; *Most Frequently Cited Standards for 2014, Underground Coal, Jan. 1, 2014 – Dec. 31, 2014*, MSHA, <https://arlweb.msha.gov/stats/top20viols/top20home.asp> ("Most Commonly Cited Standards"). When analyzing the degree of hazard posed by section 75.400 violations, the

Commission looks to whether the particular facts surrounding the violation can create a “confluence of factors” that can result in an ignition. *Texasgulf, Inc.*, 10 FMSHRC 498, 501 (Apr. 1988). These factors include “a sufficient concentration of methane in the atmosphere . . . and ignition sources.” *Id.* The confluence of factors can create a fire and/or explosion. *Id.* In this case, the Secretary asserts that there was a confluence of factors that created a fire hazard. Tr. II 29-30. As previously noted, Monongalia does not dispute that the subject accumulation violation was properly designated as S&S. However, the Secretary does not assert that the cited accumulations created a propagation hazard given their distance from the face. *Id.* at 30-31; Sec’y Post-Hr’g Br. at 18.

b. Unwarrantable Failure

The Commission summarized the characteristics of an unwarrantable failure in *IO Coal Co.*, 31 FMSHRC 1346 (Dec. 2009). The Commission stated:

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Id.* at 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Id. at 1350.

Thus, whether conduct is “aggravated” in the context of unwarrantable failure is determined by considering the facts and circumstances of each case to determine if aggravating or mitigating factors exist. *Id.* at 1351. These factors include: (1) the extent of the violative condition, (2) the length of time that the violative condition existed, (3) whether the violation posed a high degree of danger, (4) whether the violation was obvious, (5) the operator's knowledge of the existence of the violation, (6) the operator's efforts in abating the violative condition, and (7) whether the operator had been placed on notice that greater efforts were necessary for compliance. *See id.* at 1350-51; *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999). These factors must be viewed in the context of the factual circumstances of a particular case. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Accordingly, Commission judges are not required to give equal weight to the above factors. *Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987). Thus, the unwarrantable failure question is resolved based on whether there are mitigating factors that outweigh any aggravating factors. As discussed below, although the aggravating factors outnumber the mitigating factors, the weight given to the mitigating factors precludes a finding of an unwarrantable failure.

i. Obviousness and Extent of the Violative Condition

Turning to the relevant factors identified by the Commission, with respect to obviousness and extent, the accumulations were readily observable given the 1/8 inch in depth of coal dust that was deposited on “the mine roof, ribs, belt structure, [and in] multiple crosscuts” in the 5 West No.1 belt entry for a length of approximately 3400 feet. Tr. I 107. In addition to the 1/8-inch depth of accumulations, there were 10 discrete locations, each measuring approximately three feet long by three feet wide, where the accumulations measured 16 to 24 inches in depth. *Id.* at 104-06. At these locations there were a total of 19 rollers turning in coal. *Id.* at 107. Thus, these locations totaled approximately 33 feet in length. *Id.* at 79, 109, 200; *see also* Sec’y Exs. 1, 8, 45. The discrete areas of greater accumulations apparently were significantly affected by the misaligned belt at the 27 block. Sec’y Ex. 6; Resp’t Ex. 4.

However, there were only two malfunctioning rollers out of the approximately 4000 properly functioning rollers that were operating within the 3400-foot expanse inspected by Peddicord in the belt entry. *Id.* at 199-200. Similarly, there was only approximately 50 feet of misaligned belt in the vicinity of the 27 block out of 3400 feet of beltline inspected by Peddicord. Tr. I 199-201. The misaligned rollers and malfunctioning belt were located a distance of approximately three-and-a-half miles from the working face. *Id.* at 167. Although the potential ignition sources relied on by the Secretary were less obvious, on balance, the obvious nature and extent of the accumulations are aggravating factors. *See E. Assoc. Coal Corp.*, 32 FMSHRC 1189, 1195 (Oct. 2010) (citing *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992)); *Quinland Coals, Inc.*, 10 FMSHRC 705, 708 (June 1988).

ii. Duration of the Violative Condition

Monongalia’s self-serving assertion that a significant portion of the cited accumulations occurred as a result of broken conveyor chains that purportedly occurred only hours before Peddicord’s inspection is unavailing. Resp’t Post-Hr’g Br. at 40. Rather, I credit Peddicord’s testimony that a substantial portion of the accumulations existed for at least three shifts. Tr. I 135. I reach this conclusion based on the extensive nature of the accumulations as well as Peddicord’s observation of footprints tracking through the accumulations, which is further evidence of their duration. *Id.* at 136. Moreover, the preshift examination records further support Peddicord’s opinion that the accumulations existed for at least several shifts. Resp’t. Ex. 25. Namely, the examination book reflects relevant accumulations located in the 5 West No. 1 belt entry, from the 25 block to the 34 block, that were noted during the preshift examination conducted from 1:00 p.m. to 3:00 p.m. on July 29, 2014. *Id.* This preshift examination was conducted three shifts prior to the issuance of Order No. 8059209 at 9:30 a.m. on July 30, 2014. Resp’t. Ex. 25.

In addition, the misaligned belt observed by Peddicord caused the belt conveyor to rub against six bottom roller cradles, all of which were covered by coal dust. Tr. II 69. The continued rubbing between the belt conveyor and cradles created friction sufficient to remove the top coating of paint from all six cradles revealing a “shiny metal” surface. *Id.* at 117. The friction-related damage reflects that the accumulations in the cradles developed over a significant period of time. *Id.* Peddicord’s observation of friction-related damage in the areas of these accumulations also undermines Monongalia’s assertion that these accumulations had recently

occurred. Resp't Post-Hr'g Br. at 43. Consequently, the record supports the Secretary's contention that the cited accumulations existed for at least several shifts, and, as such, is an aggravating factor.

iii. Operator's Knowledge of the Violative Condition

The Commission has held that knowledge is established by showing the failure of an operator to abate a violation that it knew or reasonably *should have known* existed. *See Emery Mining*, 9 FMSHRC at 2002-03; *IO Coal*, 31 FMSHRC at 1356-57 (holding that an operator "reasonably should have known of a violative condition"); *Drummond Co.*, 13 FMSHRC 1362, 1367-68 (Sept. 1991) (quoting *Eastern Assoc. Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991)).

As noted, Monongalia had knowledge of the cited accumulations as reflected by the preshift examination records that recorded relevant accumulations from the 25 to the 34 block in the preshift examination conducted during the afternoon shift on July 29, 2014. Resp't. Ex. 25. Moreover, it is reasonable to conclude that belt examiners had previously observed the subject accumulations as evidenced by Peddicord's testimony of footprints in the accumulations located in the inspected area. Tr. I 136. Thus, Monongalia's actual or constructive knowledge of the cited accumulations is an aggravating factor that weighs in favor of finding an unwarrantable failure.

iv. Operator's Notice that Greater Compliance Efforts Are Required

The Commission has noted that repeated similar violations can constitute an aggravating factor that is relevant to an unwarrantable failure determination in that they serve to put an operator on notice that greater efforts are necessary for compliance with the cited standard. *See IO Coal*, 31 FMSHRC at 1353-55; *Amax Coal Co.*, 19 FMSHRC 846, 851 (May 1997); *see also Consolidation Coal Co.*, 23 FMSHRC 588, 595 (June 2001). Thus, a relevant excessive history of similar violations is a significant element of an unwarrantable failure designation. In this case, Monongalia had been cited for 147 violations of section 75.400 in the two years preceding the issuance of the subject accumulation violation. Sec'y Ex. 39. Based on this fact alone, it is clear that Monongalia was aware that greater compliance efforts were required for its adherence to the mandatory safety standard in section 75.400.

The Commission has also recognized that "past discussions with MSHA" about a problem "serve to put an operator on heightened scrutiny that it must increase its efforts to comply with the standard." *San Juan Coal*, 29 FMSHRC 125, 131 (Mar. 2007) (citing *Consolidation Coal*, 23 FMSHRC at 595). Peddicord testified that in addition to the subject accumulation violation citation issued on July 30, 2014, there were two additional similar accumulation violation citations issued in April and May of 2014. Tr. I 140-41. Peddicord further testified without contradiction that during closeout conferences, mine inspectors counsel mine operators on how to best avoid the future occurrence of similar violations. *Id.* at 141. As previously noted, in recognition of its belt problems, Monongalia reportedly made significant upgrades and capital improvements to the 5 West No. 1 belt "to enhance the tracking . . . [in an effort] to reduce spillage in and along the beltlines and drive areas." Tr. III 54-56; Resp't Ex. 36. Thus, Monongalia's significant history of relevant violations, its relevant capital expenditures, and its prior closeout conferences with MSHA clearly demonstrate that it was on notice that greater efforts were required to avoid accumulation violations of section 75.400.

v. *Operator's Efforts in Abating the Violative Condition*

When considering a mine operator's efforts to eliminate the subject violative condition, the Commission focuses on compliance efforts made prior to the issuance of a citation or order. *Enlow Fork Mining*, 19 FMSHRC 5, 17 (Jan. 1997). The 5 West No. 1 belt extends in an outby direction from the headpiece at the 59 block to the tailpiece at the 1 block. Sec'y Ex. 45. This matter concerns accumulations cited by Peddicord from the 6 block to the 34 block in the 5 West No. 1 belt entry. Sec'y Ex. 1. The preshift and on-shift reports for the 5 West No. 1 belt preceding the preshift examination conducted from 5:00 a.m. to 7:16 a.m., immediately prior to Peddicord's inspection at 9:00 a.m. on July 30, 2014, are instructive. The notations in these reports reflect corrective actions for numerous accumulation-related conditions concerning bad top and bottom rollers and broken chains. Resp't Ex. 25. The examination records also reflect notations for spillage and accumulations in need of cleaning or rock dusting. *Id.* Many of the accumulation-related conditions were beyond the area inspected by Peddicord, located from the 41 block to the 59 block. *Id.* As a general proposition, these notations and corrective actions reflect that the operating conditions in the 5 West No. 1 belt entry were not being ignored. *Id.*

More specifically, the examination reports reflect notations and corrections taken immediately prior to the subject inspection in the area observed by Peddicord. *Id.* For example, during the preshift examination conducted from 9:00 p.m. to 11:00 p.m. on July 29, 2014, a bad top roller located at the 22 block was noted in addition to dark gray accumulation present from the 25 block to the 34 block. *Id.* The midnight on-shift report of July 30, 2014, reflects corrective action for broken chains located at the 36, 37, and 39 blocks. *Id.* Although Peddicord observed a hot roller at the 7 block and a frozen roller at the 29 1/2 block, his observations did not include a bad top roller located at the 22 block or broken chains at the 36, 37, or 39 blocks. Sec'y Ex. 3. Consequently, Peddicord's failure to cite these conditions leads to the reasonable conclusion that corrective actions may have been taken immediately prior to Peddicord's inspection.

Although Monongalia's efforts to prevent the subject accumulation violation were unsuccessful, it is apparent remedial actions were being taken during the shifts immediately preceding the subject inspection. Resp't Ex. 25. Thus, I view Monongalia's attempt to improve the accumulation conditions in the 5 West No. 1 belt entry prior to Peddicord's inspection as a mitigating factor.

vi. *Degree of Danger Posed by the Violative Condition*

The degree of hazard posed by accumulation violations must be viewed in the context of the fact that fire, smoke, and the danger of an explosion are the natural consequences of combustion. The D.C. Circuit held that the existence of an emergency should be assumed in evaluating the degree of hazard for determining whether a violation is properly designated as S&S. *Cumberland Coal Res., LP*, 717 F.3d 1020, 1024 (D.C. Cir. 2013) (holding that an emergency necessitating an evacuation should be assumed in evaluating whether an improperly hung lifeline constitutes an S&S violation). However, to assume the occurrence of a fire-related emergency to determine whether a violation constitutes an unwarrantable failure would conflate S&S designations with unwarrantable failures, thus rendering the majority of section 75.400 violations as unwarrantable. Such a result is problematic as section 75.400 is the most

commonly cited mandatory safety standard. For example, in the year 2014, section 75.400 violations comprised 10.73% of all cited mandatory safety standards. Resp't Ex. 15; *Most Commonly Cited Standards*, MSHA, *supra* page 11. Rather, a reasoned analysis should be employed to distinguish those accumulation violations that are unwarrantable from those that are not.

As previously noted, in *Texasgulf* the Commission noted the degree of hazard associated with a section 75.400 violation is based on an inquiry as to whether the circumstances surrounding the cited combustible accumulations create a confluence of factors, such as explosive levels of methane in proximity to ignition sources that can cause a fire or explosion. See 10 FMSHRC at 501. With respect to a confluence of factors, it is important to distinguish accumulations remotely located in belt entries from those that pose a propagation risk by virtue of their proximity to working places where mining crews are present and dangerous levels of methane and ignition sources are more prevalent.⁹

The Commission's decision in *Twentymile* is instructive in illustrating the significance of the location of accumulations. *Twentymile Coal Co.*, 36 FMSHRC 1533 (June 2014). In *Twentymile*, the Commission considered the gravity of two separate violations of section 75.400. *Id.* The first violation concerned black coal dust accumulations and dark float coal dust located in the tailgate extending 1700 feet outby into a return entry. *Id.* at 1534. The Commission concluded that the subject accumulations were S&S in nature because "there was ample reason to fear a methane ignition at the face" that would propagate an explosion fed by the dangerous accumulations of float coal dust. *Id.* at 1536.

The second violation in *Twentymile* concerned accumulations near the portal in the belt entry extending 3400 feet inby. *Id.* at 1540. The accumulations of coal dust were "very fine" in nature. *Id.* These accumulations were located approximately seven miles from the longwall face. *Id.* at 1543. The judge concluded that the accumulations were S&S because "a methane explosion at the [longwall] face can travel 'long distance[s]' down mine entries, 'for a considerable distance beyond the presence of the methane.'" *Id.* at 1543 (quoting *Twentymile Coal Co.*, 32 FMSRC 1431 (Oct. 18, 2010) (ALJ)). The Commission vacated the S&S designation based on its finding that "[t]here [was] no record evidence that the explosive forces would travel so far in the mine in question," and remanded the S&S issue for further consideration. *Id.* at 1543, 1544.

Here, risk posed by the potential ignition sources relied on by the Secretary cannot be disassociated from degree of danger posed by the cited accumulations. The Secretary has attributed the degree of negligence for the defective rollers and misaligned belt in Citation Nos. 8059210 and 8059211 to moderate and low negligence, respectively. Sec'y Exs. 3, 4. The

⁹ A working place is defined as "Any place in a coal mine where *miners are normally required to work or travel.*" 30 C.F.R. § 75.2 (emphasis added).

Secretary proposed civil penalties of \$1203.00 for the malfunctioning rollers and \$585.00 for the misaligned belt. Sec’y Ex. 5. These citations were the subjects of a Joint Motion to Approve Settlement that was approved in a December, 22, 2015, Decision Approving Settlement in Docket No. WEVA 2015-0033, which required Monongalia to pay the proposed penalties. Sec’y Ex. 4; Tr. I 116. The Secretary’s attribution for the unaddressed potential ignition sources to only low or moderate negligence undermines the unwarrantable failure designation. It is true that the Commission in *Twentymile* affirmed the unwarrantable failure for the remotely located accumulations near the portal. 36 FMSHRC at 1546. However, *Twentymile* is distinguishable in that it did not involve the presence of violative ignition sources that have been attributed to low and moderate negligence, and for which the Secretary has proposed relatively low civil penalties.

In this case, although Monongalia has stipulated to the fact of the accumulation violation, the Secretary has admitted that the cited accumulations located approximately three-and-a-half miles from the face did not constitute a propagation hazard. Sec’y Post-Hr’g Br. at 4-5; Tr. I 78. Thus, the Secretary has, in effect, conceded that the danger posed by the cited accumulations was less than it would have been had the accumulations posed a propagation risk.

While I may have favorably entertained a timely motion to amend Citation Nos. 8059210 and 8059211 with respect the degree of negligence alleged, the Secretary failed to do so. In the absence of a showing of prejudice, had the Secretary filed a timely motion, I may have been inclined to find an unwarrantable failure.

Despite the rather de minimis penalty for the defective roller and misaligned belt, the Secretary now seeks to impose a civil penalty of \$121,300.00 for the subject accumulations cited in Order No. 8059209. Resp’t Ex. 6. Notwithstanding the absence of a propagation hazard, the Secretary’s attribution of a relatively low degree of negligence attributable to Monongalia’s failure to address the potential ignition sources relied on by the Secretary undermines his assertion that the accumulations are attributable to aggravated conduct. Resp’t Exs. 2, 3; Sec’y Ex. 6.

Despite the distance of the accumulations from the face, Monongalia cannot escape the fact that the accumulation conditions in the 5 West No. 1 belt entry were obvious, known, and extensive. Moreover, Monongalia was on notice that greater efforts were necessary for compliance given the capital expenditures it incurred to address accumulation problems in its Monongalia County Mine. Consequently, the Secretary has demonstrated that the cited accumulations are attributable to Monongalia’s high degree of negligence.

However, it is not uncommon for the Secretary to issue 104(a) citations, rather than 104(d) citations, for violations that are attributable to a mine operator’s high degree of negligence. See *Original Sixteen to One Mine, Inc.*, 36 FMSHRC 2224, 2229 (Aug. 2014) (ALJ) (upholding the inspector’s issuance of a 104(a) citation due to the operator’s high degree of negligence); *Taft Production Co.*, 35 FMSHRC 965, 971 (Apr. 2013) (ALJ) (upholding the inspector’s issuance of a 104(a) citation due to the operator’s high degree of negligence); *Black Beauty Coal Co.*, 34 FMSHRC 1733, 1574-5 (Aug. 2012) (remanding an ALJ’s affirmation of an unwarrantable failure designation); *Black Beauty Coal Co.*, 35 FMSHRC 401, 410 (Feb. 2012) (ALJ) (finding the violation was due to an operator’s high negligence but did not constitute an

unwarrantable failure); *Bachman Sand and Gravel*, 34 FMSHRC 226, 233 (Jan. 2012) (ALJ) (modifying a 104(d)(1) citation issued due to the operator's high degree of negligence to a 104(a) citation at hearing); *Cloverlick Coal Co*, 31 FMSHRC 1377, 1381 n.2 (Nov. 2009) (ALJ) (modifying a 104(d)(1) order issued due to the operator's high degree of negligence to a 104(a) citation).

Although the subject accumulations are attributable to a high degree of negligence, the issue is whether Monongalia's conduct can be properly characterized as aggravated or indifferent. The relevant preshift examination records for the shifts preceding Peddicord's inspection on the morning of July 30, 2014, fail to reveal a level of indifference. Rather, they reflect that Monongalia took actions, albeit unsuccessfully, to address the accumulation conditions in the 5 West No. 1 belt entry. Resp't Ex. 25. Consequently, consistent with Commission case law, although Monongalia's negligence was high, the Secretary has failed to demonstrate that it rose to the level of aggravated or unjustified conduct indicative of an unwarrantable failure. **Accordingly, Order No. 8059209 shall be modified to a 104(a) citation to reflect that the cited accumulation violation is not unwarrantable.**

c. Flagrant

Congress provided a not so subtle clue for the proximate cause requirement for imposition of enhanced civil penalties by specifying what a flagrant violation means. Section 110(b)(2) provides:

[T]he 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 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).

Prior to the passage of section 110(b)(2), the most severe sanction under the Act was a withdrawal order issued pursuant to section 104(d) that subjects an operator to a maximum penalty of \$70,000.00.¹⁰ *Greenwich Collieries*, 12 FMSHRC 940, 945 (Nov. 2011) (citing *UMWA v. FMSHRC*, 768 F.2d 1477, 1479 (D.C. Cir. 1985)); 30 U.S.C § 814(d). Withdrawal orders are issued solely as a consequence of an operator's unwarrantable conduct evidencing more than ordinary negligence, without regard to the degree of hazard posed by the subject violation. Thus, 104(d) withdrawal orders can be issued for non-S&S violations.

¹⁰ The issuance of 104(d) withdrawal orders can also result in an interruption of production. In this case, production was halted from 12:30 p.m. to 8:00 p.m. on July 30, 2014, to abate the accumulations violation cited in Order No. 8059209. During that period, approximately 10,000 tons of raw materials resulting in 7000 tons of clean coal would have been extracted. At a market value of \$60.00 per ton, the approximate eight-hour interruption in mining activities resulted in an approximate loss of revenue of \$420,000.00. Tr. II 178-80.

Similar to the provisions of section 104(d), the flagrant provisions amended the Mine Act to allow for the imposition of enhanced civil penalties for dangerous violations that are attributable to reckless or repeated conduct, also demonstrating more than ordinary negligence. 30 U.S.C. § 820(b)(2). However, unlike section 104(d) withdrawal orders, which may be issued for non-S&S violations that do not pose a high degree of danger, Congress added the “proximate cause” and “death or serious bodily injury” provisions as prerequisites for a flagrant designation. *Id.* Consistent with the Mine Act’s graduated enforcement scheme, section 110(b)(2) provides for enhanced civil penalties for flagrant violations of up to \$220,000.00, adjusted for inflation. *Id.*; *Nat’l Gypsum Co.*, 3 FMSHRC at 828 (holding that the Mine Act provides for increasingly severe sanctions for increasingly severe violations).

In *American Coal*, the Commission remanded a Judge’s flagrant analysis of an accumulation violation for further consideration of the application of the Commission’s “narrow” and “broad” interpretations of section 110(b)(2) of the Act. 38 FMSHRC at 2085. As noted, if appropriate, the Commission directed the Judge “to fashion an interpretation of the flagrant violation provision . . . which permits the Secretary to establish a violation as flagrant by taking the operator’s history of previous accumulation violations into account.” *Id.* at 2082. On remand, the judge found the subject accumulation violation satisfied the flagrant provision under a “narrow” analysis. *American Coal Co.*, 39 FMSHRC 1247, 1265 (June 15, 2017) (ALJ). Thus, the Commission’s “broad” interpretation with respect to “repeated” flagrant designations for accumulation violations remains unresolved. While I am adjudicating the propriety of the “repeated” flagrant designation under the “narrow” approach, I will endeavor to address the differing relevant considerations associated with a “narrow” and “broad” analysis that uniquely apply to accumulation violations.

In *American Coal*, the Commission chose to rely on the degree of negligence demonstrated by an operator’s failure to address a known violation rather than “the degree of danger posed by a violation,” to distinguish a flagrant violation. 38 FMSHRC at 2070. However, the Commission could not have intended to disregard two inviolate principles of law. The first is that it is axiomatic that the degree of danger posed by a hazard and the degree of care required to avoid that hazard are inextricably intertwined. In other words, the duty to remedy increasingly dangerous conditions requires an increasingly higher standard of care. *See Peklun v. Tierra Del Mar Condominium Assc.*, 119 F.Supp.3d 1361(S.D. Fla. 2015); *Manchenton v. Auto Leasing Corp.*, 605 A.2d 208 (N.H. 1992); *Richardson v. Gregory*, 281 F.2d 626 (D.C. Cir 1960); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (1928).

The second inviolate principle is that “proximate cause,” as contemplated by section 110(b)(2) of the Act, is “[a] cause that directly produces an [injury] and without which the [injury] would not have occurred.” BLACK’S LAW DICTIONARY 213 (7th ed. 1999). In keeping with these principles, the flagrant provisions of the Act are intended to address the most dangerous of violations – those that are known yet remain unabated despite the fact that they can be reasonably expected to proximately cause death or serious bodily injury.

The Commission tracked the provisions of section 110(b)(2) in identifying the elements for establishing a flagrant violation. These elements are:

(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 [and proximately] caused death or serious bodily injury, or (b) reasonably could have been expected to [substantially and proximately]¹¹ 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 2066-67.

With the exception of the “repeated” criterion in element number five, the Commission did not differentiate between the remaining elements necessary for demonstrating a “repeated” flagrant violation under a “narrow” analysis from those required under a “broad” analysis. *Id.* Thus, with the exception of “repeated,” the remaining statutory provisions of section 110(b)(2) apply to both a “broad” and “narrow” approach. A “narrow” analysis is a traditional application of statutory provisions to the facts surrounding a discrete alleged violation. It is only when the alleged flagrant violation is neither “reckless” nor “repeated” under a traditional analysis that a history of violations may become material in designating a violation as “repeated flagrant.”¹²

¹¹ It is fundamental that:

A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.

2A Sutherland Statutory Construction § 46:5 at 189-201 (7th ed.).

The Commission did not explicitly include the substantial and proximate cause requirement for instances where death or serious bodily injury has not yet occurred in the elements required to establish a flagrant violation. Absent a Commission directive to the contrary, the proximate cause terminology must be inferred with respect to accidents that have not yet occurred.

¹² The untraditional nature of a “broad analysis” is reflected by the Commission’s *American Coal* remand instructing the judge “to fashion an interpretation of the flagrant violation provision . . . which permits the Secretary to establish a violation as flagrant by taking the operator’s history of previous accumulation violations into account.” 38 FMSHRC at 2082 (emphasis added).

i. Narrow Interpretation

Turning to the Commission's elements with respect to a "narrow" interpretation, element one is satisfied as the accumulations constituted a violation as reflected by their nature and extent as well as Monongalia's stipulation. As previously discussed, the evidence reflects element two with respect to knowledge is satisfied by virtue of the footprints in the accumulations and notations in the preshift examination records. Resp't Ex. 25; Tr. I 136. That Monongalia failed to make reasonable efforts to eliminate the violative accumulations despite being aware of them satisfies element number four. Resp't Ex. 25.

Thus, the remaining elements for a "narrow" flagrant violation require an analysis of the term "repeated" in element five and the term "proximate cause" in element three, as contemplated by the statute. In addressing a "narrow" interpretation of the term "repeated" based on a repeated failure to address violative accumulations, it is helpful to distinguish between section 75.400 violations that concern accumulations that by nature occur over a period of time from spillage that occurs spontaneously.

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 (emphasis added).

As a general proposition, while the Mine Act is a strict liability statute, strict liability cannot create liability for conduct that does not otherwise violate a mandatory safety standard. Pragmatically speaking, accumulations of coal dust and coal fines that occur over a period of less than one shift may not constitute a violation of section 75.400. I reach this conclusion for two reasons. Such accumulations of coal particles that have occurred over a brief period of time may not be of sufficient depth to require rock dusting or removal. Obviously, there must be a minimum depth requirement to constitute a violation of section 75.400. Assuming the bare minimum depth of such short-term accumulations is sufficient to require removal, the Secretary would have difficulty demonstrating that the operator "permitted" the accumulations to occur in that the operator may not have had a reasonable period of time to address them.

However, Monongalia's stipulation to the fact of the violation constitutes its admission that it permitted the combustible accumulations to occur without addressing them within a reasonable period of time. Notwithstanding the stipulation, the evidence reflects that the subject accumulations existed for at least three shifts based on the nature and extent of the accumulations, the notations in the preshift examination reports, as well as Peddicord's observation of footprints left in the accumulations. Resp't Ex. 25; Tr. I 136. Having existed for at least three shifts, the accumulations satisfy the "narrow" interpretation of "repeated" based on the duration of the subject accumulations, without regard to a history of relevant similar violations that are necessary under the "broad" approach.

Having determined that the duration of the accumulations satisfies the “repeated” fifth element under the “narrow” approach, we turn to the issue of proximate cause under the third element. The proximate cause element is essential in demonstrating a flagrant accumulation violation. Thus, the focus shifts to whether the violative accumulations could be reasonably expected to cause a fire that will “proximately cause death or serious bodily injury.” As previously noted, the D.C. Circuit has concluded that an underground mine fire caused by violative accumulations should be assumed in evaluating whether the violation is properly designated as S&S. *Cumberland Coal*, 717 F.3d at 1027. However, the question is whether this presumed fire gives rise to an assumption that the fire is reasonably expected to substantially and proximately cause death or serious bodily injury, as required by statute.

In *American Coal*, the Commission concluded that a potential injury from smoke inhalation as a result of a mine fire constitutes “a serious bodily injury” as contemplated by the flagrant provisions. 38 FMSHRC at 2070. However, the flagrant provisions require a showing that serious smoke inhalation injury or death is “reasonably expected” to occur. 30 U.S.C. § 820(b)(2). The distinction between the likelihood of the occurrence of a “lost workday” injury and a “permanently disabling” or “fatal” injury with respect to smoke inhalation requires consideration of the location of the victim. For while fires produce smoke, not all fires pose a significant risk of grave smoke inhalation injuries. To assume otherwise would render the majority of frequently cited violations of section 75.400 as flagrant.

The history of fatal or serious injuries associated with belt fires reflects that victims were located in working places where mine crews were assigned as distinguished from injuries to belt examiners traveling in entries located in remote areas of the mine. There were 65 reportable fires from 1980 to 2007, nearly all of which involved mine conveyor belts. Flame-Resistant Conveyor Belt, Fire Prevention and Detection, and Use of Air from the Belt Entry, 73 Fed. Reg. 80,580, 80,606 (Dec. 31, 2008) [*herein after* Conveyor Belt Rulemaking]. During this 27-year period, these fires resulted in three deaths and approximately two dozen injuries. *Id.*

Of the three deaths, two occurred at the Aracoma Alma No. 1 Mine on January 19, 2006. MINE SAFETY AND HEALTH ADMIN., U.S. DEP’T OF LABOR REPORT OF INVESTIGATION FATAL UNDERGROUND COAL MINE FIRE ARACOMA ALMA MINE #1 (2007).¹³ The deaths occurred when a twelve-member crew performing roof-bolting and assorted tasks in a return entry attempted to escape smoke emanating from a longwall belt takeup storage unit in the headgate by entering the primary escapeway. *Id.* 7, 9-10. However, missing stoppings caused the primary escapeway to be inundated with thick black smoke. *Id.* at 36-37. Ten of the crewmembers escaped the mine by entering into a personnel door that allowed them to access the secondary escapeway. *Id.* at 12. However, the two fatalities occurred when the victims became disoriented and

¹³ Public documents published by MSHA are subject to judicial notice. *Brody Mining, LLC*, 36 FMSHRC 2027, 2030 n.4 (Aug. 2014) (citing *Jim Walter Res., Inc.*, 7 FMSHRC 1348, 1355 n.7 (Sept. 1985)); *Black Diamond Constr., Inc.*, 21 FMSHRC 1188, 1189 n.3 (Nov. 1999) (citing *Jim Walter Res., Inc.*, 7 FMSHRC at 1355 n.7).

continued to travel in the primary escapeway toward the origin of the smoke. *Id.* at 12-13. The remaining fatality occurred at the Florence No. 1 Mine on November 27, 1986, when a mine foreman suffered a fatal heart attack while fighting a belt fire. Conveyor Belt Rulemaking, 73 Fed. Reg. at 80,606.

The remaining relevant accumulation-related fatalities occurred at the Upper Big Branch Mine on April 5, 2010. MINE SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LABOR, REPORT OF INVESTIGATION FATAL UNDERGROUND MINE EXPLOSION UPPER BIG BRANCH MINE-SOUTH 1 (2010). The fatalities occurred as a result of a methane ignition located near a longwall tailgate. *Id.* at 2. The ignition was caused by worn shearer bits that likely created an ignition source when the shearer came into contact with sandstone. *Id.* at 7. The initial methane ignition at the tailgate ignited a larger accumulation of methane that caused a massive explosion engulfing an extremely large area of the mine. *Id.* As a consequence, 29 miners lost their lives. *Id.*

As a result of its investigation, MSHA concluded the Upper Big Branch Mine disaster was attributable to violations of a variety of safety standards. *Id.* at 4-10. These violations included, inter alia, performing perfunctory mine examinations; failing to maintain the longwall shearer in satisfactory condition creating an ignition source for accumulated methane; and failing to remove or rock dust extensive areas of coal dust accumulated throughout the mine, which provided the fuel source for a massive explosion. *Id.* at 9. The investigation also determined that the mine operator's failure to abide by its roof control and ventilation plans, contributed to the fall of the tailgate roof, which in turn restricted airflow to the longwall face. *Id.* at 6. The reduced airflow permitted dangerous levels of methane to accumulate in the tailgate without being diluted. *Id.*

The fatal belt fire at Aracoma and the fatalities caused by the massive explosion at Upper Big Branch are distinguishable from the risk posed to a belt examiner who is inspecting conveyors in remote areas of a mine. Rather, the smoke inhalation risk posed to belt examiners is a matter of degree. Belt entries are ventilated with fresh air. Tr. I 129; Conveyor Belt Rulemaking 73 Fed. Reg. at 80591. A belt examiner traveling in an outby direction, approaching the cited accumulations, would become aware of any smoky conditions prior reaching the origin of the fire, thus avoiding significant exposure to smoke emanating from the cited accumulations. Similarly, a belt examiner traveling in an inby direction would not be exposed to a significant risk of serious smoke inhalation as any smoke would be carried away from him in an inby direction. The greatest risk of a significant smoke inhalation injury to a belt examiner is if the examiner happened to be at the location of the cited accumulations at the moment of ignition, a circumstance that is not "reasonably expected" to occur. Finally, any belt maintenance performed by mine crews in the belt entry would require de-energizing the conveyor, thus eliminating the risk of fire. 30 C.F.R. § 75.511.

The Commission has noted the Secretary's citation characterizations of "lost workdays or restricted duty," "permanently disabling," and "fatal" cannot be relied upon by operators "to circumscribe the definition of 'serious bodily injury' . . . in interpreting the flagrant penalty provisions." *American Coal*, 38 FMSHRC at 2069 (citing *Brody Mining, LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015)). So too, the Commission is not bound by the degree of negligence attributed to mine operators by the Secretary. *Id.* at 2083. Rather, the Commission's negligence

determinations should be based upon “the totality of the circumstances holistically.” *Id.* at 2083, (quoting *Brody Mining*, 37 FMSHRC at 1702). Thus, Commission judges retain the de novo discretion, based on the particular circumstances of a case, to credit or reject the gravity and/or negligence characterizations in contested citations.

In this case, that potentially deadly smoke inhalation should not be presumed regardless of the location of the combustible accumulations, is illustrated by the Secretary’s citations for the non-functioning rollers and misaligned belt. These citations reflect that the potential ignition sources exposed the belt examiner to no more than injuries that would result in lost workdays or restricted duty. Sec’y Exs. 3, 4. Thus, the Secretary, in essence, acknowledges that accumulations located in belt entries several miles from working sections may not pose a significant smoke inhalation risk.

Here, the subject accumulations are approximately three-and-a-half miles from the working section where mining crews are assigned. Tr. II 167-68. I do not construe the Commission’s express concern over the serious consequences of smoke inhalation to apply to situations where the combustible accumulations are remotely located in belt entries many miles from the working face, where serious or fatal injuries are not reasonably expected to occur. Consequently, the evidence, when viewed in its entirety, reflects that the Secretary has failed to satisfy his burden of demonstrating that a fire caused by the cited accumulations could be reasonably expected to proximately cause death or serious bodily injury to a belt examiner. **Therefore, the flagrant designation shall be deleted.**

Make no mistake. I am not trivializing the inhalation risk to miners in general and to belt examiners specifically. However, despite MSHA’s well-meaning intentions, confidence in the implementation of the Act is undermined by attempts to broaden the reach of the statutory flagrant provisions provided by Congress. *See Drummond Co.*, 14 FMSHRC 661, 674-75 (May 1992) (holding that the Commission’s adjudicative powers are a means to enhance public confidence in the implementation of the Mine Act). I am only suggesting that Congress could not have contemplated that the majority of frequently cited section 75.400 violations should be designated as flagrant simply by assuming grave smoke inhalation injuries occurring as a consequence of an assumed fire without due regard to the specifics of a particular case.

ii. Broad Interpretation

Spillage, by nature, occurs suddenly. Consequently, a spillage violation may not satisfy the Commission’s “narrow” duration criteria for a “repeated” flagrant violation. Under the Commission’s broad approach, an accumulation violation may be designated as a “repeated” flagrant violation based on a relevant history of similar violations. While a history of violations is one of many considerations in an unwarrantable failure analysis, consistent with *Wolf Run*, as elaborated in *American Coal*, a relevant recurrent history of violations may provide the sole basis for a “repeated” designation of a spillage violation under a “broad” analysis. Under such circumstances, Monongalia’s 147 violations of section 75.400 in the two years preceding the issuance of a citation for an alleged spillage violation may constitute the requisite recurrent history under a broad analysis.

On the other hand, virtually all coal dust accumulation violations that are not caused by spillage satisfy the “narrow” “repeated” element because they must have developed and gone unaddressed for at least more than one shift. Consequently, the question of whether violative accumulations not caused by spillage can be a “repeated” flagrant violation under the “broad” approach is moot.

Notwithstanding the moot nature of the “broad” analysis, in *American Coal* the Commission sought the Judge’s input with respect to fashioning the criteria for a “broad” analysis of the “repeated” provision as it applies to accumulation violations. 38 FMSHRC at 2082. In this case, rather than relying on a general history of violations, the Secretary asserts that “predicate” violations that satisfy the requirements for a flagrant violation, but have not been designated as flagrant,¹⁴ may serve as the basis for demonstrating a “repeated” flagrant violation under a “broad” analysis.¹⁵ Sec’y Post-Hr’g Br. at 46-47.

The Commission has the unquestioned adjudicative authority to resolve disputes concerning the validity of enforcement actions. *Freeman United Coal Co.*, 6 FMSHRC 1577, 1580-81 (July 1984). In addressing its adjudicative function, the Commission has stated:

The Mine Act expressly empowers the Commission to grant review of “question[s] of law, policy or discretion,” and to direct review *sua sponte* of matters that are “contrary to ... Commission policy” or that present a “novel question of policy....” Since Congress authorized the Commission to direct such matters for review, we infer that Congress intended the Commission to possess the necessary adjudicative power to resolve them. The reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program. *Addressing claims of arbitrary enforcement by the Secretary is at the heart of [the Commission’s] adjudicative role.*

Drummond Co., 14 FMSHRC at 674-75 (emphasis added) (footnote omitted) (citations omitted). Consistent with *Drummond*, section 706(2)(A) of the Administrative Procedure Act (“APA”) requires setting aside agency action that is arbitrary, capricious, or an abuse of discretion. 5 U.S.C. § 706(2)(A).

Although the Commission has concluded that a “broad” analysis is a viable option, the Secretary’s reliance on predicates in a “broad” analysis must be rejected for several reasons. As

¹⁴ The Secretary alleges that the relied upon predicate violations “were the result of Respondent’s failures to make reasonable efforts to eliminate known violations of a mandatory health or safety standard that reasonably could have been expected to cause death or serious bodily injury.” Sec’y Post-Hr’g Br. at 46-47.

¹⁵ As previously noted, application of the Secretary’s “repeated” predicate theory in instances where the discrete violation is not of significant duration, would still require satisfaction of all other elements identified by the Commission for a flagrant designation.

an initial matter, the Secretary's failure to designate the purported predicate violations as flagrant, even though they allegedly satisfy the flagrant provisions, is the epitome of arbitrary and capricious enforcement action that must be rejected. For it is odd that the Secretary would propose that alleged predicates that meet the criteria for a flagrant violation, but are not designated as such, would serve as a basis for designating a subsequent violation as flagrant even though the violation does not otherwise meet the "reckless" or "repeated" statutory criteria.

Moreover, the Secretary seeks to impose his "predicate" framework on mine operators without having engaged in a relevant notice and comment rulemaking. The Commission noted in *Drummond*, that while the APA does not require adherence to the notice and comment process for interpretive rules or general statement of policy, a formal notice and comment rulemaking is required for agency actions that affect substantive rights.¹⁶ 5 U.S.C. § 553; *Drummond Co.*, 14 FMSHRC at 690, (holding a Program Policy Letter that that affects substantive rights requires a notice and comment rulemaking under the APA). Clearly, the "predicate" framework that exposes operators to liability for enhanced penalties under the flagrant provisions affects substantive rights. *See id.*

Finally, and perhaps most significantly, the Secretary has failed to successfully demonstrate a "repeated" flagrant designation based on predicate violations despite having repeatedly attempted to do so. In this regard, in accumulations cases before the Commission, the Secretary has consistently sought to settle his "broad" flagrant enforcement positions by withdrawing his "repeated" flagrant designations. *See, e.g., American Coal Co.*, 40 FMSHRC 330, 332 (Mar. 2018); *Oak Grove Res.*, 38 FMSHRC at 964; *Conshor Mining, LLC*, 37 FMSHRC 1845, 1846 (Aug. 2015) (ALJ); *Wolf Run Mining Co.*, 31 FMSHRC 479, 479 (Apr. 2009) (ALJ).

Most recently, in *American Coal*, the Secretary agreed to amended settlement terms for consideration by the Commission that withdraw the "repeated" flagrant designation for an accumulations violation. Amended Jt. Mot. to Approve Settlement, Docket No. LAKE 2009-0035 (May 18, 2018). In so doing, the Secretary agreed to a reduction in the degree of gravity to reflect that the violation initially designated as "flagrant" will result in no more than a "lost workday or restricted duty" injury. *Id.* Having moved for the deletion of the flagrant designation, the Secretary agreed to reduce the initial proposed penalty of \$164,700.00 to \$11,307.00. *Id.* In an order issued June 15, 2018, the amended settlement terms deleting the flagrant designation, reducing the level of gravity, and substantially reducing the assessed

¹⁶ It is not uncommon for Congress, through enabling statutes, to delegate to administrative agencies the authority to establish policy through either rulemaking or adjudication. *See, e.g., City of Arlington, Tex. v. F.C.C.*, 668 F.3d 229, 240 (Jan 2012) (holding that the Federal Communications Commission has the discretion to announce rules through either adjudication or rulemaking). However Congress, in the Mine Act, delegated to the Commission the exclusive authority to resolve questions of law and policy through adjudication. 30 U.S.C. § 823(a); *see Thunder Basin Coal Co.* 510 U.S. 200, n.9 (Jan. 1994); *see also* S. REP. NO. 95-181, at 47-48 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 3401, 3446-47. Consequently, the Mine Act precludes the Secretary from circumventing the rulemaking requirements in section 553 of the APA as he lacks the authority to unilaterally set policy through adjudication.

penalty were approved by the Commission. Order, 40 FMSHRC ___ (Mar. 2018). Suffice it to say, the Secretary's persistent removal of flagrant designations reflects a lack of confidence in his reliance on the suitability of predicates as a basis for demonstrating a "repeated" flagrant designation in accumulations cases.

d. Civil Penalty

The Commission outlined the parameters of its responsibility for assessing civil penalties in *Douglas R. Rushford Trucking*, 22 FMSHRC 598 (May 2000). The Commission stated:

The principles governing the Commission's authority to assess civil penalties *de novo* for violations of the Mine Act are well established. Section 110(i) of the Mine Act delegates to the Commission "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a) and 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. §§ 2700.28 and 2700.44. The Act requires that, "[i]n assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect of the operator's ability to continue in business, [5] the gravity of the violations, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

22 FMSHRC at 600 (citing 30 U.S.C. § 820(i)). The Commission has noted that *de novo* consideration of the appropriate civil penalties does not require "that equal weight must be assigned to each of the penalty assessment criteria." *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is bounded by proper consideration for the statutory criteria and the deterrent purposes of the Mine Act. *Id.* at 294; *Cantera Green*, 22 FMSHRC 616, 620 (May 2000).

The maximum penalty for a violation attributable to an unwarrantable failure is \$70,000.00. 30 U.S.C. § 820(a)(1). The maximum penalty for a violation properly designated as flagrant is \$220,000.00, adjusted for inflation. 30 U.S.C. § 820(b)(2). The Secretary seeks to impose a civil penalty of \$121,300.00 for the subject accumulations violation based on the assertion that the violation is attributable to an unwarrantable failure, and that it is properly designated as a flagrant violation.

Turning to the civil penalty criteria in section 110(i) of the Act, the evidence reflects that Monongalia is a large mine operator. Monongalia has stipulated, in essence, that the Secretary's proposed penalty in this matter is not disproportionate to the size of its business and would not impede its ability to remain in business. *See* stipulation number 5, *supra* page 4. Monongalia made good faith efforts to address the cited accumulations after notification of the violation. While Monongalia's history of 147 section 75.400 violations issued in the two years preceding the issuance of the subject citation is not exemplary, the violation history must be viewed in the context of the large size of the Monongalia County Mine that contains approximately 12 miles of beltline.

The deletion of the unwarrantable failure and flagrant designations with respect to the subject accumulations reflects a meaningful reduction in the gravity of the violation as well as Monongalia's degree of negligence. Nevertheless, although the flagrant and unwarrantable designations shall be deleted, the degree of Monongalia's negligence remains high given the duration and extent of the subject accumulations. **Consequently, a civil penalty of \$60,000.00 shall be imposed for modification of 104(d)(2) Order No. 8059209 to a 104(a) citation.**

IV. Order No. 8059212

Findings of Fact

After observing the accumulation conditions in the 5 West No. 1 belt entry from the 6 to the 34 block, Peddicord continued to travel inby to the 40 block. Tr. II 52. At the 41 block Peddicord traveled through a personnel door where he determined that there was no longer an obstruction that precluded him from traveling by mantrip to the 13 West headgate section, the area he initially intended to inspect. *Id.* Peddicord's inspection of the 13 West headgate section did not disclose any violations of mandatory safety regulations. *Id.* 52-53.

Upon completion of his inspection, Peddicord exited the mine and traveled to the mine office where he issued citations for the violative accumulation conditions he observed in the 5 West No. 1 belt entry. *Id.* at 53-54. Although Peddicord reviewed the preshift examination book for the 13 West headgate section prior to entering the mine, upon returning to the surface, Peddicord reviewed the preshift examination book for the 5 West No. 1 belt entry. Peddicord determined that the preshift examination of the belt entry conducted during the midnight shift between 5:00 a.m. to 7:16 a.m. for the oncoming day shift on July 30, 2014, was inadequate. Resp't Ex. 4.

Consequently, Peddicord issued Order No. 8059212 for an alleged inadequate preshift examination in violation of the mandatory safety standard in 30 C.F.R. § 75.360(a)(l) that he attributed to an unwarrantable failure. Order No. 8059212 states:

The operator failed to conduct an adequate preshift examination for the 5-West Company #1 belt conveyor on the examination conducted on midnight shift for dayshift of 7-30-2014. A D-2 order #8059209 was issued for accumulations of combustible material being in numerous locations from 6 block to 34 block on this belt. Citation #8059210 was issued for damaged rollers being present along

this belt conveyor in the same location as cited accumulations. One of these rollers emitted visible steam when water was applied. Belt was in operation at time of inspection. Also, Citation #8059211 was issued for bottom belt contacting 7 consecutive bottom roller cradles at 27 block, which is also in the same area as the cited accumulations. Accumulations were obvious and extensive and in contact with many bottom rollers. Accumulations were dark brown in color and easily visible. The accumulations were over 3400 feet long. The person conducting this examination failed to report and/or record any of the conditions discovered during inspection. These conditions were obvious and extensive and should have been reported and corrected. These areas are required to be preshifted each shift by a certified mine examiner, because this is an active belt conveyor, and miners are scheduled to work and travel in these areas. A prudent examination of these areas would have resulted in the condition being found and reported. Proper examinations are the first line of defense for the health and safety of the miners. Foot prints were also observed through the cited accumulations along the cited accumulation areas. This mine is on a 5- day 103 (I) spot inspection for liberating over 1 million cubic feet of methane in a 24 hour period. Discovering and reporting hazardous conditions to mine management is one of the lines of defense for the health and safety of the miners. If normal mining operations were to continue and inadequate examinations were to continue it is reasonably likely that miners will suffer injuries from being exposed to unknown hazardous conditions. This condition is an unwarrantable failure to comply with a mandatory health and safety standard. This violation is an unwarrantable failure to comply with a mandatory standard.

Sec’y Ex. 6; Resp’t Ex. 4

Disposition

a. Unwarrantable Failure

The cited mandatory safety standard in section 75.360(a)(1), provides, in pertinent part:

(a)(1) [A] certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval.

30 C.F.R. § 75.360(a)(1).

In determining whether a violation of section 75.360(a)(1) has occurred, the Commission looks to whether the preshift examination was “adequate” in identifying hazardous conditions. *See, e.g., RAG Cumberland Resources LP*, 26 FMSHRC 639, 648 (Aug. 2004), *aff’d*, 171 Fed. Appx. 852 (D.C. Cir. 2005). Here, it is undisputed that the preshift examination was inadequate as evidenced by Monongalia’s stipulation to the fact of the violation as well as the S&S

designation. Tr. II 233. However the extent of inadequacy with respect to an unwarrantable failure is a matter of degree. Although the general factors of an unwarrantable failure have previously been discussed, the dispositive issue is whether the cited preshift examination was so perfunctory or otherwise ineffective that it evidences a degree of negligence that rises to the level of “aggravated conduct” or “indifference.” *Emery Mining Corp.*, 9 FMSHRC at 2003.

As a preliminary matter, an element of the preshift violation cited in Order No. 8059212 is the failure of the belt examiner to note the conditions cited in Citation No. 8059211 “for bottom belt contacting [six] consecutive bottom rollers at the 27 block, which is also in the same area as the cited accumulations.” Sec’y Ex. 6. Specifically, misaligned belt Citation No. 8059211 states, “The 5-West Company # 1 belt conveyor is not properly aligned to prevent the moving belt conveyor from contacting belt components in the 27 block[.]” Sec’y Ex. 4. Permitting the misaligned belt condition at the 27 block to remain uncorrected was attributed to a low degree of negligence. *Id.* Yet, the Secretary seeks to rely on Monongalia’s failure to note this condition in the preshift examination to support his assertion that the violation is attributable to aggravated conduct. Sec’y Ex. 6; Resp’t Ex. 4.

Viewing Order No. 8059212 in its entirety, the violation is predicated on the alleged inadequacy of the preshift examination conducted from 5:00 a.m. to 7:16 a.m. on July 30, 2014, rather than on an alleged series of inadequate preshift examinations. Resp’t Ex. 4. Thus, evaluating the degree of inadequacy of the subject examination requires consideration of the preshift examiner’s notations holistically to determine the extent to which relevant hazardous conditions, located between the 6 and 34 blocks, were noted or overlooked. In this regard, the preshift examiner made several significant relevant notations concerning the belt entry conditions in the area inspected by Peddicord. Resp’t Ex. 25. These relevant notations are: a bad top roller at the 23 block; dark gray accumulations at the 25 block through the 34 block; and spillage at the 16 block through the 25 block. *Id.* Thus, while the subject preshift examination was inadequate, the relevant accumulation-related conditions noted by the examiner, including accumulations from the 15 block to the 34 block, reflect that the examination was neither perfunctory nor so ineffective as to render it meaningless.

In addition, the cited preshift examination conducted from 5:00 a.m. to 7:16 a.m. reflects notations for numerous conditions with regard to the belt entry conditions in areas that were not inspected by Peddicord. *Id.* Specifically, the preshift examiner noted: broken chains at blocks 96, and 97; bad top rollers at blocks 40, 55, and 63; bad bottom rollers at blocks 41, 47, 63, and 91; and water and spillage at the No. 1 tailpiece and No. 2 tailpiece. *Id.*

In addition to examining the adequacy of the subject preshift examination, the adequacy of the preshift examinations preceding the subject examination is relevant. The numerous notations contained in the preceding preshift examinations demonstrate that Monongalia was aware of its obligation to conduct meaningful preshift examinations pursuant to section 75.360(a)(1). *Id.* For example, the following notations were recorded: July 27, 2014, preshift

records contain notations for broken chains at blocks 26, 38, 39, and 40; July 28, 2014, preshift examination records contain notations for broken chains at blocks 36 through 40 and spillage at blocks 25 through 35; and July 29, 2014, preshift records contain notations for broken chains at blocks 36 through 40, bad top rollers at blocks 22 and 32, accumulations at blocks 25 through 34, and spillage at blocks 16 through 25. *Id.*

Consequently, the multiple relevant notations in the preshift examinations immediately preceding the subject examination support the inference that Monongalia was aware of, and was not indifferent to, its responsibility to conduct effective preshift examinations. *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2153 (Nov. 1989) (holding that reasonable inferences may be drawn if there is a “rational connection between the evidentiary facts and the ultimate fact to be inferred”).

Significantly, the Secretary has failed to present any evidence of a relevant history of section 75.360(a)(1) violations that would have placed Monongalia on notice that greater efforts to perform thorough examinations were required. Sec’y Ex. 40. On balance, although inadequate, the relevant notations with regard to accumulation conditions between the 6 block and 34 block, made during the subject preshift examination, reflect that the inadequacy is attributable to no more than a moderately high degree of negligence. Accordingly, the Secretary has failed to demonstrate that the subject preshift examination rises to the level of aggravated conduct evidencing “reckless disregard,” “intentional misconduct,” “indifference,” or a “serious lack of reasonable care.” *Emery Mining Corp.*, 9 FMSHRC at 2001. **Therefore, 104(d)(2) Order No. 8059212 shall be modified to a 104(a) citation to reflect that the cited preshift examination violation is not attributable to an unwarrantable failure.**

b. Civil Penalty

The Secretary seeks to impose a civil penalty of \$40,300.00 for the subject preshift examination violation. Sec’y Ex. 7. Applying the penalty criteria in section 110(i) of the Act, the evidence reflects Monongalia is a large mine operator. Monongalia has stipulated, in essence, that the Secretary’s proposed penalty in this matter is not disproportionate to the size of its business and would not impede its ability to remain in business. *See* stipulation number 5, *supra* page 4. While the preshift examination was inadequate with respect to accumulation conditions between the 6 and 34 blocks, there were numerous notations in the examination book along the entire length of the 5 West No. 1 belt entry. Resp’t Ex. 25. It is an additional mitigating factor that the ignition sources that concerned Peddicord, that were overlooked by the preshift examiner, were attributed to low or moderate negligence. Resp’t Exs. 2, 3; Sec’y Exs. 3, 4. Significantly, the relevant history of violations proffered by the Secretary reflects that it is a neutral factor in that there were no citations issued for inadequate preshift examinations in the two years preceding the issuance of Order No. 8059212. Sec’y Ex. 40; *JWR, Inc.*, 28 FMSHRC 983, 995 (Dec. 2006) (holding that a general history of violations is sufficient to defeat an operator’s claim that an absence of a history of similar violations is a mitigating circumstance with respect to the appropriate civil penalty). Finally, the deletion of the unwarrantable failure designation reflects a meaningful reduction in Monongalia’s degree of negligence.

Despite the numerous notations concerning accumulations and conveyor conditions along the entire length of the 5 West No. 1 belt entry, the belt examiner's failure to adequately note the accumulations-related conditions between the 6 and 34 blocks during the preshift examination from 5:00 a.m. to 7:16 a.m. on July 30, 2014, evidences a moderately high degree of negligence. **Given the nature and extent of the unrecorded accumulations, a civil penalty of \$22,200.00 shall be imposed for modified 104(a) Citation No. 8059212.**

ORDER

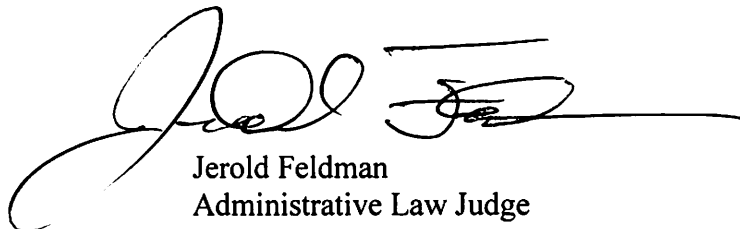
IT IS ORDERED that Order No. 8059209 **IS MODIFIED** to a 104(a) citation to reflect that the unwarrantable failure and flagrant designations **ARE DELETED**.

IT IS FURTHER ORDERED that Order No. 8059212 **IS MODIFIED** to a 104(a) citation to reflect that the unwarrantable failure designation **IS DELETED**.

IT IS FURTHER ORDERED that the significant and substantial designations in 104(a) Citation Nos. 8059209 and 8059212 **ARE AFFIRMED**.

IT IS FURTHER ORDERED that The Monongalia County Coal Company shall pay a civil penalty of \$60,000.00 in satisfaction of 104(a) Citation No. 8059209, and a civil penalty of \$22,200.00 for 104(a) Citation No. 8059212.

IT IS FURTHER ORDERED that The Monongalia Coal Company pay, within 40 days of the date of this decision, a total civil penalty of \$82,200.00 in satisfaction of the two citations at issue.¹⁷


Jerold Feldman
Administrative Law Judge

¹⁷ Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include the Docket Nos. and A.C. Nos. noted in the above caption on the check.

Distribution:

John A. Nocito, Esq., Suite 630E, The Curtis Center, 170 S. Independence Mall West,
Philadelphia, PA 19106-3306 nocito.john@dol.gov

Helga P. Spencer, Esq., Suite 630E, The Curtis Center, 170 S. Independence Mall West,
Philadelphia, PA 19106-3306 spencer.helga.p@dol.gov

Jason W. Hardin, Esq., 215 South State Street, Suite 1200, Salt Lake City, UT 84111-2323
jhardin@fabianvancott.com

Artemis Vamianakis, Esq., 215 South State Street, Suite 1200, Salt Lake City, UT 84111-2323
avamianakis@fabianvancott.com