

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

SEP 04 2019

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

v.

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

## CIVIL PENALTY PROCEEDINGS

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

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

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

Mine: Monongalia County Mine

### DECISION APPROVING SETTLEMENT

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”). The captioned proceedings concern citations/orders issued for alleged violations of the Secretary’s mandatory safety standard in 30 C.F.R. § 75.400 that prohibits mine operators from allowing combustible materials to accumulate in active workings. The Secretary had sought to rely on these alleged violations of section 75.400 as predicates to demonstrate a “repeated” flagrant violation under a “broad” analysis. These matters had been scheduled for hearing on September 10, 2019 in the vicinity of Morgantown, West Virginia. The Secretary has now filed a joint motion to approve settlement.

The flagrant provisions of section 110(b)(2) of the Mine Act provide:

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

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

As previously explained by me in a related matter:

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.

*Secretary of Labor v. Monongalia County Coal Co.*, 40 FMSHRC 1234, 1235 (July 2018) (ALJ) (“*Monongalia*”).

As noted above, the captioned proceedings concern accumulation violations that the Secretary alleges are predicates under a “broad” analysis to support the Secretary’s alleged “repeated” flagrant” accumulation violation of section 75.400, cited in Order No. 8059209 in Docket No. WEVA 2015-0632. *Id.* The captioned matters were consolidated with *Monongalia* and stayed on May 12, 2016, pending a final decision in *Secretary of Labor v. Oak Grove Resources*, 38 FMSHRC 957 (May 2016) (ALJ) (“*Oak Grove*”). The repeated flagrant designation in *Oak Grove* was subsequently deleted by an interlocutory order on June 1, 2015. *See Oak Grove*, 38 FMSHRC 957, 960; Order Deleting Flagrant Designation, 37 FMSHRC 1312 (ALJ). When neither the interlocutory order nor the decision after hearing was appealed, *Oak Grove* became final. Consequently, the stay in *Monongalia* was lifted on June 14, 2016. Severance Order and Prehearing Order, 38 FMSHRC 1573 (ALJ). However, the stay of the captioned predicated proceedings remained in effect. *Id.*

A hearing in *Monongalia* was conducted in March 2017. The post-hearing decision found that the violation was “repeated,” based on a narrow analysis given the discrete nature of the accumulation violation with regard to its extensiveness and its repeated references in onshift examination books. However, the flagrant designation in *Monongalia* was deleted because the evidence failed to establish that the cited accumulations could be reasonably expected to proximately cause serious bodily injury or death as contemplated by the flagrant provisions of section 110(b)(2) of the Act. 40 FMSHRC at 1257. The Secretary’s appeal of *Monongalia* is currently before the Commission. Unpublished Direction for Review (Sept. 6 2018).

Following the initial decision on the merits in *Monongalia*, conference calls were conducted on October 2, and December 4, 2018 to determine if the stay of the captioned proceedings should be lifted. The parties expressed their desire to continue the stay pending the resolution of the *Monongalia* appeal. The Secretary filed a motion in support of the continuation of the stay on November 6, 2018, and a supplemental brief in support of the stay on January 16, 2019.

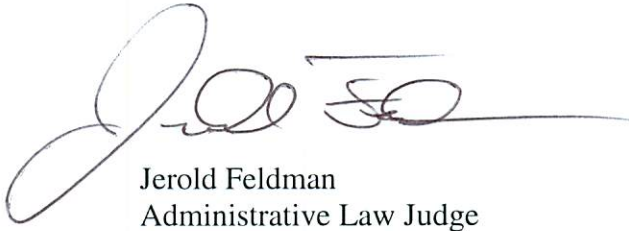
Given its unopposed nature, a ruling on the parties' request to continue the stay had been held in abeyance. However, on May 22, 2019, I denied the Secretary's Motion to Continue the Stay in the captioned proceedings, finding no basis for further delaying the disposition of the 104(d) orders that are the subjects of the captioned matters. The stay was lifted, as the finding of a "repeated" violation based on a "narrow" analysis mooted the Secretary's reliance on predicates to support a "broad" analysis.

Despite the fact that the cited accumulation violations in 104(d) citation/order Nos. 8052882, 8052909, and 8059200 are indicative of moderately low gravity in that the violations pose hazards that are reasonably expected to result in injuries requiring no more than lost workdays or restricted duty, the Secretary has alleged that the subject predicate violations satisfy the requirements for a flagrant violation. *Monongalia*, 40 FMSHRC at 1258 n.14. As noted below, the parties now agree to settlement terms that reduce the initial total civil penalty from \$120,100.00 to \$40,500.00. The reduction in civil penalty is based on modifying the type of action from 104(d) Order Nos. Nos. 8052910 and 8059203 to 104(a) citations to reflect that the cited inadequate belt examinations were not attributable to unwarrantable failures, and to reduce the penalties for all five alleged violations. The reduction in proposed penalty is further supported by the Secretary's apparent acknowledgment of the low to moderate gravity with respect to the accumulation violations specified in citation/order Nos. 8052882, 8052909, and 8059200. The settlement amounts are:

<b>Citation/Order Number</b>	<b>Proposed Penalty</b>	<b>Settlement Amount</b>
<b>WEVA 2015-0074</b>		
8052882	\$30,200.00	\$9,300.00
<b>Subtotal:</b>	\$30,200.00	\$9,300.00
<b>WEVA 2015-0425</b>		
8052909	\$35,500.00	\$10,400.00
8052910	\$12,900.00	\$5,200.00
<b>Subtotal:</b>	\$48,400.00	\$15,600.00
<b>WEVA 2015-0473</b>		
8059200	\$27,900.00	\$10,400.00
8059203	\$13,600.00	\$5,200.00
<b>Subtotal:</b>	\$41,500.00	\$15,600.00
<b>TOTAL:</b>	<b>\$120,100.00</b>	<b>\$40,500.00</b>

**ORDER**

I have considered the representations and documentation submitted in this case, and I conclude that the proffered settlement is appropriate under the criteria set forth in section 110(i) of the Act. **WHEREFORE**, the motion for approval of settlement **IS GRANTED**. **IT IS ORDERED** that Order Nos. 8052910 and 8059203 are modified to 104(a) citations. It is **FURTHER ORDERED** that the operator pay a penalty of \$40,500.00 within 30 days of this order.<sup>1</sup> This case **IS DISMISSED** upon timely receipt of the civil penalty. In view of the above, it is **ORDERED** that the previously scheduled hearing is cancelled.

  
Jerold Feldman  
Administrative Law Judge

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<sup>1</sup> Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390. Please include the Docket No. and A.C. No. noted in the above Caption on the payment check. Pay online: [www.pay.gov](http://www.pay.gov)