

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 4, 2015

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

v.

OAK GROVE RESOURCES, LLC,
Respondent

CIVIL PENALTY PROCEEDINGS

Docket No. SE 2013-301
A.C. No. 01-00851-315187-01

Docket No. SE 2013-352
A.C. No. 01-00851-317727

Docket No. SE 2013-368
A.C. No. 01-00851-319550

Docket No. SE 2013-399
A.C. No. 01-00851-320606-01

Mine: Oak Grove Mine

ORDER SCHEDULING ORAL ARGUMENT

Order No. 8520664, issued on October 3, 2012, concerns an alleged flagrant violation of the mandatory safety standard in 30 C.F.R. § 75.400. This mandatory standard prohibits the accumulation of coal dust and coal fines in active workings. Assuming the significant and substantial (S&S) violation of section 75.400 in fact occurred, and that it was properly characterized as unwarrantable, the central issue in this proceeding is whether the hard packed coal fines and float coal dust accumulations, as cited by the Secretary, can constitute a “flagrant violation” under section 110(b)(2). Section 110(b)(2) of the Act provides:

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

Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 (“Mine Act” or “the Act”), 30 U.S.C. § 820(b)(2) (emphasis added).

Specifically, Order No. 8520664 in Docket No. SE 2013-368 states:

Combustible material in the form of float coal dust and dry hard packed coal fines were allowed to accumulate on the roof, ribs, footwall, and belt structure of the Main North 3 belt entry. *The hard packed coal fines were in contact with moving roller[s] on the belt line in multiple locations along the belt entry.* The float coal dust existed on the roof, ribs, footwall, and belt structure from the Main North 3 Tail Piece extending outby to crosscut 27. This is an approximate distance of 2100 feet. Due to the extensive amount of accumulations and that this belt is examined every shift this constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory health and safety standard. Standard 75.400 was cited 92 times in two years at mine 0100851 (91 to the operator, 1 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

(Emphasis added).

The Secretary seeks to designate the cited condition in Order No. 8520664 as a repeated flagrant violation based on two prior violations of section 75.400.¹ Obviously, all flagrant violations are S&S in nature. However, the overwhelming majority of S&S violations do not rise to the level of a flagrant violation. In this regard, the threshold for an S&S violation is whether there is a reasonable likelihood that the hazard *contributed to by the violation* will result in a reasonably serious injury. In contrast, to demonstrate a flagrant violation, it must be shown that it is reasonably expected that *the violation has, or will, directly and proximately cause* serious injury or death.

¹ The predicate citations identified by the Secretary are Order Nos. 4694424 and 8519255. Order No. 4694424 was issued on September 25, 2012, and is part of captioned Docket No. SE 2013-399. Order No. 8519255, in Docket No. SE 2012-537, issued on December 22, 2012, was settled without modification. Judge Zielinski approved Oak Grove's agreement to pay the \$70,000.00 civil penalty proposed by the Secretary. Unpublished Decision Approving Partial Settlement, dated Feb. 18, 2014.

The Commission has concluded that past violative conduct may be considered in determining whether to cite a condition as a repeated flagrant violation. *Wolf Run Mining Company*, 35 FMSHRC 536, 541 (Mar. 2013) (remanding for reconsideration of whether a violation was properly designated as flagrant). Clearly, a history of violations may affect the appropriate civil penalty to be assessed. However, the Commission has not articulated under what circumstances, if any, a history of violations can elevate a violation, not otherwise meeting the statutory criteria for a flagrant designation, to a repeated flagrant violation.²

Consequently, the parties were ordered to brief the question of the circumstances, if any, under which an S&S violation that will contribute to, rather than proximately cause, serious bodily injury or death, could be elevated to a flagrant violation. *See Order Scheduling Briefing*, 36 FMSHRC 815 (Mar. 2014) (ALJ). Notably, the Secretary conceded in his response brief that “[b]oth reckless and repeated flagrant designations require violations that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.” *Sec’y of Labor’s Response to Order Scheduling Briefing*, at 6 (Apr. 22, 2014). In other words, a violative condition that cannot reasonably be expected to be the proximate cause of serious injury or death cannot be elevated to a flagrant violation simply based on previous violations.

Following consideration of the parties’ briefs, an Order Requiring Secretary’s Prehearing Statement (“Oak Grove Order”) was issued that identified the requisite criteria for establishing a repeated flagrant violation under section 110(b)(2) of the Mine Act. Specifically, the requisite criteria are as follows:

1. A repeated flagrant violation is a flagrant violation that is demonstrated by either:
 - a. A repeated failure to eliminate the violation properly designated as flagrant, or
 - b. A relevant history of violations that also meet the requirements for a flagrant violation with respect to knowledge, causation and gravity, as enumerated below.

² The Secretary now asserts that a relevant history of violations also meeting the requirements for a flagrant violation with respect to gravity and negligence can serve as the basis for a repeated flagrant violation. *Sec’y Resp. to Order Scheduling Briefing*, at 11 (Apr. 22, 2014). The gravity penalty criterion under section 110(i) of the Mine Act is often viewed in terms of the seriousness of the violation. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294-95 (March 1983), *aff’d*, 736 F.2d 1147 (7th Cir. 1984); *Youghiogeny & Ohio Coal Co.*, 9 FMSHRC 673, 681 (April 1987). Obviously, the gravity of a flagrant violation, which requires the violation to be the substantial and proximate cause of death or serious bodily injury that had occurred, or could be reasonably expected to occur, is greater than the gravity associated with the vast majority of violations.

2. A flagrant violation must be a known violation that is conspicuously dangerous, in that it cannot reasonably escape notice.
3. A flagrant violation must be the substantial and proximate cause of death or serious bodily injury that has occurred or can reasonably be expected to occur.
 - a. A substantial and proximate cause is a dominant cause without which death or serious bodily injury would not occur.
 - b. A serious bodily injury is a grave injury that results in significant debilitating and/or permanent impairment.
 - c. Such injury is reasonably expected to occur if there is a significant probability of its occurrence.

36 FMSHRC 1777, 1789-90 (Jun. 2014) (ALJ).³ The Oak Grove Order required the Secretary to file a prehearing brief addressing whether the cited violative condition in Order No. 8520664 satisfied the above criteria for repeated flagrant violation. The Secretary responded:

Because the accumulations included float coal dust and coal dust, they constituted a significant and immediate source of fuel for a mine fire or an immediate source of fuel for a coal dust explosion. An operating conveyor belt system in an underground coal mine is an obvious and significant source of sparking and burning hazards because of the presence of the belt conveyor, belt rollers and other proximate sources of friction heat and ignition. In the present case, hard packed coal fines were in contact with moving rollers on the belt line in multiple locations along the belt entry. Given these ignition sources, it is reasonably expected that, *as normal operations continued*, serious and/or deadly injures from burns and smoke inhalation would result from a fire or explosion. These injuries would be the proximate and direct result of the fire or explosion because the accumulations would be the necessary fuel source that, when combined with oxygen and an ignition source, would cause the fire or explosion. Because the

³ In his response brief, the Secretary asserted that violations that expose miners to only “lost workdays or restricted duty” can be designated as flagrant. Oak Grove Order, 36 FMSHRC at 1787 (citing *Sec’y of Labor’s Response to Order Scheduling Briefing*, at 3). The Secretary also argued that whether a violation itself will proximately cause serious injury or death, or whether a violation will contribute to a hazard that will cause serious injury or death, is a distinction without a difference that only shifts the burden of proof. *Id.* at 1785 (citing *Sec’y of Labor’s Response to Order Scheduling Briefing*, at 4). The Oak Grove Order declined to afford the Secretary *Chevron* deference because the Secretary’s statutory interpretation regarding the degree of causation and gravity necessary to designate a violation as flagrant was determined to be unreasonable. *Id.* at 1786-88. The Secretary did not seek interlocutory appeal of the denial of *Chevron* deference.

accumulations existed over a number of shifts and were known to multiple agents of the operator, this violation standing alone constitutes a repeated flagrant violation.

Sec'y Pre-Hearing Statement, at 2 (Aug. 7, 2014) (emphasis added). The Secretary's response did not directly address the central question in this proceeding in that it conflates the current presence of ignition sources with the potential for future ignition sources, as well as the concepts of contributory and proximate causes of injury. In essence, the Secretary's response supports the conclusion that virtually all prohibited coal dust accumulations in proximity to conveyor belts can be properly designated as flagrant violations given potential ignition sources that may arise during the course of continued mining operations.

The Commission has been precluded from addressing the necessary criteria for demonstrating a flagrant violation on several occasions. For example, in *Conshor*, the Commission unanimously granted interlocutory review of the criteria for demonstrating a repeated flagrant violation under section 110(b)(2). *See Conshor Mining LLC*, 34 FMSHRC 349 (Feb. 2012). However, the Commission subsequently granted the Secretary's motion to vacate the order granting interlocutory review after the Secretary deleted the subject flagrant designations. 34 FMSHRC 571 (Mar. 2012). Similarly, in *Wolf Run*, the Commission was prevented from ultimately addressing the requirements for a repeated flagrant violation after the Secretary agreed in settlement to modify the subject order by removing the flagrant designation. Unpublished Decision on Remand Approving Settlement in *Wolf Run Mining Company*, Docket No. WEVA 2008-1565, dated Apr. 14, 2014; *see also Wolf Run*, 35 FMSHRC 536 (Mar. 2013).

Given the Secretary's repeated failure in this proceeding to meaningfully address the controlling question of law concerning the threshold requirements for a flagrant designation in his briefing and prehearing statements, I certified to the Commission for interlocutory review the order requiring briefing with respect to the Secretary's burden of proof for demonstrating a repeated flagrant violation. *Cert. for Interloc. Rev.*, 36 FMSHRC 2397 (Aug. 2014) (ALJ); 29 C.F.R. § 2700.76(a)(1)(i). On September 9, 2014, the Commission denied interlocutory review because the request for review concerned the propriety of ordering the Secretary to submit a prehearing statement, rather than a controlling question of law. 36 FMSHRC 2412 (Sept. 2014). Thus, the Commission concluded that granting review at that time would amount to "an advisory opinion on an abstract legal principle." *Id.* at 2411.

Consequently, the threshold issue remains whether the accumulation conditions, as cited in Order No. 8520664, satisfy the above-enumerated criteria necessary to demonstrate a repeated flagrant violation under section 110(b)(2). A further delay of a binding appellate resolution of this important question is neither in the Secretary's nor the mining industry's best interest. This issue, which concerns a controlling question of law that will materially advance the ultimate disposition of these proceedings, can best be resolved through oral argument. As such, this issue **IS HEREBY SCHEDULED for oral argument on Wednesday, March 4, 2015, at 10:00 a.m.** The oral argument will be held at the Commission's headquarters in Washington, DC, at the following address:

Federal Mine Safety and Health Review Commission
Richard V. Backley Hearing Room
Fifth Floor, Room 511N
1331 Pennsylvania Avenue, NW
Washington, DC 20004

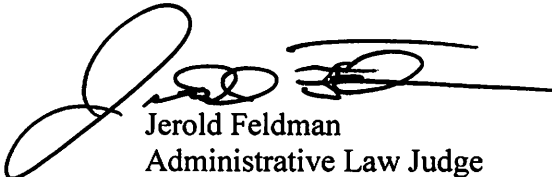
In preparing for oral argument, the parties should assume that the facts are viewed in a light most favorable to the Secretary with regard to the nature and extent of the cited accumulations in Order No. 8520664. In this regard, the issue is whether the cited accumulations in Order No. 8520664 state a cause of action for a flagrant violation under the aforementioned criteria. In particular, the parties should be prepared to discuss the following:

- 1) A proximate cause is “a cause that directly produces an event and without which the event would not have occurred.” *Black’s Law Dictionary* 213 (7th ed. 1999). As such, can the coal dust accumulations in proximity to properly-functioning conveyer belts, as cited in Order No. 8520664, be the *proximate cause* of a fire or explosion? In answering this question, the parties should address:
 - a. The distinction, if any, between “sources of ignition” and “potential sources of ignition.” *See* Oak Grove Order, 35 FMSHRC at 1790;
 - b. Whether the cited coal dust accumulations themselves, rather than the ignition and resultant combustion of such accumulations, can be properly considered to be the proximate cause of a fire or explosion;
 - i. In addressing (b), the parties should consider the distinction, if any, between a violation that *contributes to* a hazard, as required to support an S&S designation, from a violation that, *in and of itself*, is a substantial, proximate, and dominant cause of potential death or serious bodily harm. *Musser Eng’g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (holding that the test for S&S is whether there is a reasonably likelihood that the hazard contributed to by the violation will cause injury, and that the Secretary need not prove a reasonable likelihood that the violation itself will cause injury);
 - c. Whether propagation of the cited coal dust accumulations can be the proximate cause of an explosion, or whether such propagation would be a post-explosion event;
 - d. Given the absence of a present ignition source due to a conveyer belt malfunction, as reflected by Order No. 8520664, whether potential ignition sources (such as defective heat-producing rollers or misaligned friction-producing belts) that occur during the course of continued mining operations are sufficient to satisfy the proximate cause criteria in section 110(b)(2);

- e. Violations of Section 75.400 are the most frequently cited violations of mandatory safety standards in underground coal mines.⁴ Therefore, if the answer to (d) is “yes,” the parties should address whether the vast majority of section 75.400 violations satisfy the flagrant criteria in section 110(b)(2);
- 2) It is not uncommon for accumulations to contact rollers given the rollers’ close proximity to the ground. As such, do “[t]he hard packed coal fines [that] were in contact with [properly-functioning] moving roller[s] on the belt line in multiple locations along the belt entry,” as cited in Order No. 8520664, provide an adequate basis for a flagrant designation?
 - a. If the answer is “no,” under what circumstances can accumulations along and under conveyer belt structures be properly designated as flagrant violations?
 - b. In addressing this question, the parties should be mindful of section 75.1731(a), which provides that *damaged rollers* or conveyer belt components *that pose a fire hazard* must be *immediately* repaired or replaced;
- 3) The parties should endeavor to stipulate to the location of the cited accumulations in Order No. 8520664 with respect to their distance from the working face. In this regard, the parties should submit a pertinent mine map;
- 4) Assuming the accumulations cited in Order No. 8520664 are conspicuously dangerous because they can proximately cause substantial bodily injury or death, the Secretary should address why the violation was attributed to high negligence, rather than reckless conduct. And;
- 5) In the final analysis, the parties should address whether designating the coal dust accumulations cited in Order No. 8520664 as flagrant, conflates the requirements for S&S and unwarrantable conduct with the requirements for flagrant designations.

The parties may present any additional facts, arguments, or case law that they deem appropriate.

Any person who plans to attend this oral argument and requires special accessibility features and/or any auxiliary aids, such as sign language interpreters, must request them in advance (subject to the limitations set forth in § 2706.160(d)).



Jerold Feldman
Administrative Law Judge

⁴ Citations concerning section 75.400 violations constituted approximately 10 percent of all citations issued in 2013 and 11 percent of all citations issued in 2014. MSHA, Most Frequently Cited Standards, www.msha.gov/stats/top20viols/top20viols.asp (accessed January 28, 2015).

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