

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 1, 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

CERTIFICATION FOR INTERLOCUTORY REVIEW

Before: Judge Feldman

This matter concerns the certification for interlocutory review, pursuant to Commission Rule 76(a)(1)(i), of the Order Deleting Flagrant Designation (“Order”), in the above-captioned proceedings, which was issued contemporaneously with this Certification on June 1, 2015. 29 C.F.R. § 2700.76(a)(1)(i). The Order deleted a section 110(b)(2) flagrant designation of an alleged violation of section 75.400 for prohibited coal dust accumulations.¹

In *Utah Power & Light Co.*, 13 FMSHRC 1617 (Oct. 1991), the Commission addressed the fact that extremely hazardous conditions identified by provisions of the Mine Act for special enforcement should not be “interpreted to include any hazard that has the potential to cause a serious accident at some future time” to ensure the integrity of the distinction between such extremely hazardous conditions and routine safety S&S violations. 13 FMSHRC at 1622.

¹ 30 C.F.R. § 75.400 provides:

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

Section 110(b)(2) 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.*

30 U.S.C. § 820(b)(2) (emphasis added). In this matter, the Secretary asserts, in essence, that a flagrant designation only requires that the violation could reasonably be expected to contribute to serious bodily injury or death, in the context of the unabated violation continuing to exist during the course of continued mining operations. This assertion blurs the distinction between flagrant violations and S&S violations.

Consistent with *Utah Power & Light*, to preserve the congressional mandate to assess enhanced penalties for only the most serious of violations, thus preserving the distinction between properly-designated flagrant violations and the vast majority of S&S violations, the Secretary’s flagrant designation in Order No. 8520664 was deleted. This deletion was based on the application of relevant principles of statutory construction to the facts surrounding the subject section 75.400 violations cited in Order No. 8520664. The Order held, with respect to violations concerning accidents that have not yet occurred, that it must be reasonably expected that a flagrant violation could proximately cause death or serious bodily injury. Specifically, the Order determined that the subject coal dust accumulations violation could not reasonably be expected to be the proximate cause of death or serious bodily injury because the Secretary admits that the cited accumulations were not then in proximity to any ignition sources.²

Commission Rule 76(a)(1)(i) provides that a judge may certify, upon his own motion, that his interlocutory ruling involves a controlling question of law and immediate review will materially advance the final disposition of the proceeding. 29 C.F.R. § 2700.76(a)(1)(i). The question of whether a flagrant violation must be capable of proximately causing death or serious bodily injury based on the facts surrounding the violation, rather than future intervening events that may occur during the course of continued normal mining operations, is a novel and unresolved question of law.³ Commission review of this issue hopefully will now materially

² Throughout this proceeding, the Secretary conflates a potential ignition source with an actual (present) ignition source. A potential ignition source requires a traditional S&S analysis with respect to consideration of continued mining operations. In insisting on the relevance of continued mining operations, the Secretary conflates an S&S violation with a flagrant violation.

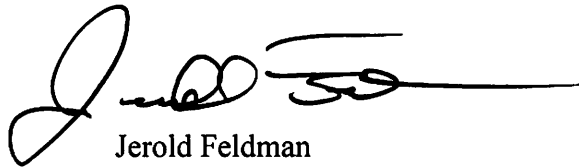
³ Currently on appeal before the Commission is *American Coal Co.*, 35 FMSHRC 2208 (July 2013) (ALJ McCarthy). Although *American Coal* involves the merits of a repeated flagrant violation, the question of whether a flagrant violation must be reasonably expected to proximately cause death or serious bodily injury without regard to continued mining operations is not before the Commission.

advance the final disposition of these proceedings, as well as other flagrant cases, an issue that has yet to be resolved despite the promulgation of the amended provisions of section 110(b)(2) in 2006. Needless to say, a resolution in this matter that will define the Secretary's burden for demonstrating a flagrant violation will facilitate a judge's responsibility to regulate the course of a hearing and make rulings on the admissibility of relevant evidence, as required by Commission Rule 55. 29 C.F.R. § 2700.55. In addition, resolution of this long-standing unresolved question may result in the settlement of this case, as well as other cases that have been stayed pending a determination of the relevant evidentiary criteria for a flagrant designation.

In certifying this issue for interlocutory review, I am not alone in seeking clarity from the Commission. In this regard, both Judge Barbour and I have certified similar issues to the Commission that ultimately eluded Commission disposition because the Secretary withdrew the subject flagrant designations. *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013); *Conshor Mining, LLC*, 34 FMSHRC 571 (Mar. 2012). The Administrative Law Judges' collective need for Commission guidance on this issue is emphasized by Judge Zielinski's opinion in *American Coal Co.*, 36 FMSHRC 1311 (May 2014) (ALJ), which deleted flagrant designations alleged by the Secretary. In his opinion, Judge Zielinski thoughtfully summarized his consternation, as well as that of several other judges, with the Secretary's unreasonable attempts to broaden the scope of the flagrant provisions of section 110(b)(2). *See id.* at 1356-58.

ORDER

In view of the above, the June 1, 2015, Order Deleting Flagrant Designation in Order No. 8520664 is certified for interlocutory review pursuant to Commission Rule 76(a)(1)(i).



Jerold Feldman
Administrative Law Judge

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