

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

June 14, 2016

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

v.

CONSOLIDATION COAL COMPANY,  
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. WEVA 2015-74  
A.C. No. 46-01968-361667

Docket No. WEVA 2015-425  
A.C. No. 46-01968-371547

Docket No. WEVA 2015-473  
A.C. No. 46-01968-373553

Docket No. WEVA 2015-509  
A.C. No. 46-01968-374332

Docket No. WEVA 2015-632  
A.C. No. 46-01968-377533

Mine: Blacksville No. 2

**SEVERANCE ORDER**  
**AND**  
**PREHEARING ORDER**

Before: Judge Feldman

The captioned matters are before me upon petitions for assessment of civil penalties filed by the Secretary of Labor (“Secretary”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Mine Act”), 30 U.S.C. § 815(d). The focus of these proceedings is Order No. 8059209 in Docket No. WEVA 2015-632, issued on July 30, 2014, which has been designated as a repeated flagrant violation under section 110(b)(2) of the Mine Act.<sup>1</sup> Order No. 8059209 alleges extensive accumulations of loose coal and coal fines, many of which were in

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<sup>1</sup> 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. 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).

contact with turning rollers, in violation of the mandatory standard in 30 C.F.R. § 75.400. The Secretary proposes a \$121,300.00 enhanced civil penalty for Order No. 8059209. Specifically, Order No. 8059209 provides:

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 dry in spots, and very dry on 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 12 1/4 block and in contact with both bottom rollers. These accumulations measured 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 the same areas as the 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 amount of accumulations present, and foot prints in the walkway through 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 the 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.

Also at issue in this proceeding is Order No. 8059212 in Docket No. WEVA 2015-509, which alleges a failure to conduct an adequate examination with respect to the cited violative accumulation condition in Order No. 8059209. The Secretary seeks a civil penalty of \$40,300.00 for Order No. 8059212.

The Secretary has identified three predicate 104(d) orders contained in Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, in support of his repeated flagrant designation in Order No. 8059209. The Secretary does not assert that the alleged predicate violations in Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, are themselves flagrant in nature. The Respondent objects to the Secretary's consideration of these predicates as arbitrary and immaterial.

Given the Secretary's asserted relevance of the alleged predicates, the five captioned dockets were consolidated and stayed on May 12, 2016, pending the final disposition of *Oak Grove Res., LLC*, 38 FMSHRC \_\_\_, slip op. (May 3, 2016) (ALJ) ("*Oak Grove*"), which addressed the evidentiary requirements for a repeated flagrant designation with respect to an alleged violation of section 75.400.<sup>2</sup> *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.* at 4. Thus, *Oak Grove* stands for the proposition that, although a history of violations may be a relevant consideration with respect to the appropriate civil penalty, individual alleged predicate violations are not dispositive of the question of whether a cited condition is properly designated as flagrant. As petitions for discretionary review were not filed in *Oak Grove*, the May 3, 2016, decision in *Oak Grove* constitutes a final ALJ decision.

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<sup>2</sup> The May 12, 2016, stay of the captioned dockets will remain in effect pending the parties' responses to this Order.

In view of the finality of the ALJ holding in *Oak Grove* that individual alleged predicates, alone, are not a prerequisite for a repeated flagrant designation, Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473, which contain violations alleged to be predicates supporting the flagrant designation in Order No. 8059209, shall be severed from WEVA 2015-509 and WEVA 2015-632. Severance will permit the focus to be on the principle issue in this matter: whether the cited accumulation condition in Order No. 8059209 is properly designated as flagrant.

Section 75.400 is the most frequently cited mandatory standard in underground coal mines. For example, section 75.400 violations constituted eleven percent of all citations issued at underground coal mines in 2015. MSHA, Most Frequently Cited Standards, <http://arlweb.msha.gov/stats/top20viols/top20viols.asp> (last visited June 10, 2016). As such, *Oak Grove* further stands for the proposition that the vast majority of routine section 75.400 coal dust accumulations violations that do not involve proximity to existing ignition sources cannot be properly designated as flagrant. However, *Oak Grove* also noted:

There may be exceptional cases where the depth of prohibited coal dust accumulations and their contact with multiple turning rollers causes demonstrable suspension of coal dust that could be construed as reasonably expected to be the proximate cause of propagation and resultant serious bodily injury or death, thus satisfying the statutory definition of flagrant.

38 FMSHRC \_\_\_, slip op. at 7 n.4.

Specifically, *Oak Grove* noted the following criteria necessary for a repeated flagrant designation:

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.<sup>3</sup>
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.

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<sup>3</sup> This criterion that predicate violations must also meet the requirements for a flagrant violation was included at the suggestion of the Secretary. See *Oak Grove* Order, 36 FMSHRC 1777, 1789 n.13 (June 2014) (ALJ). However, under certain circumstances, I believe a history of relevant violations can provide a basis for a “repeated” designation for a violation otherwise properly designated as flagrant, regardless of whether the previous violations satisfy the statutory definition of flagrant.

- 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.

*Id.* at 5.

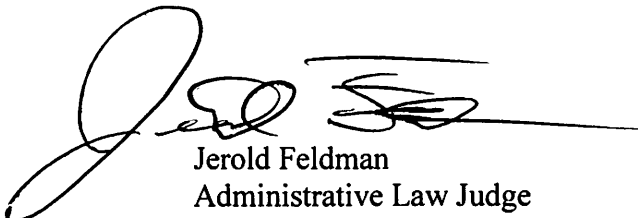
### **ORDER**

In view of the above, **IT IS ORDERED** that Docket Nos. WEVA 2015-74, WEVA 2015-425, and WEVA 2015-473 **ARE SEVERED** from WEVA 2015-509 and WEVA 2015-632.

Furthermore, assuming the accumulations conditions cited in Order No. 8059209 accurately reflect the conditions as they existed when Order No. 8059209 was issued on July 30, 2014, IT IS FURTHER ORDERED that the Secretary should address in writing, **on or before July 15, 2016**, whether the cited accumulation violation is properly designated as flagrant, in that it satisfies the criteria in (2) and (3) above.

With respect to the Secretary's alleged repeated designation, MSHA's database reflects that in the two years preceding the July 30, 2014, issuance of Order No. 8059209, the Respondent received 147 citations and orders for violations of section 75.400 at its Blacksville No. 2 mine. Of these 147 violations, five were attributed to an unwarrantable failure, and 64 were designated as significant and substantial. (Three of these five 104(d) violations are pending in the captioned proceedings.) Consequently, **IT IS FURTHER ORDERED** that the Secretary should address whether the Respondent's history of previous section 75.400 violations provides an adequate basis for designating Order No. 8059209 as a repeated flagrant violation. *See* footnote 3, *supra*.

**IT IS FURTHER ORDERED** that the Respondent file a written response to the Secretary's submission **on or before August 5, 2016**.

  
Jerold Feldman  
Administrative Law Judge

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