FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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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

AMENDED CERTIFICATION FOR INTERLOCUTORY REVIEW

Before: Judge Feldman

This matter concerns certification for interlocutory review, pursuant to Commission Rule 76(a)(1)(i), of an Order Requiring Secretary's Pre-Hearing Statement ("Oak Grove Order"). 36 FMSHRC __, slip op. (June 12, 2014) (ALJ), in the above-captioned proceedings involving Oak Grove Resources, LLC. 29 C.F.R. § 2700.76(a)(1)(i). The Oak Grove Order concerns the long-standing and controlling question of law regarding the requisite evidentiary parameters for imposing enhanced civil penalties under the flagrant violation provisions of section 110(b)(2) of the 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").[1] 30 U.S.C. § 820(b)(2).

[1] 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).

The Oak Grove Order addresses an alleged flagrant violation of section 75.400[2] cited in 104(d)(2) Order No. 8520664 in Docket No. SE 2013-368. The cited condition concerns float coal dust on the roof, ribs, footwall, and belt structure, and hard packed coal fines in contact with moving belt rollers, in the Main North 3 belt entry. Order No. 8520664 does not identify any ignition sources, such as defective rollers or misaligned belts, in proximity to the cited accumulations. The Oak Grove Order is incorporated by reference. The Oak Grove Order noted that the Secretary has acknowledged that a violation that does not otherwise satisfy the gravity requirements in section 110(b)(2) cannot be elevated to a flagrant violation solely based on prior predicate violations.[3] *Oak Grove Order*, 36 FMSHRC __, slip op. at 5 (*citing Sec'y of Labor's Resp. to Order Scheduling Briefing* at 5-6 (Apr. 22, 2014)).

With respect to gravity, in preparation for a hearing, to avoid unnecessary proof and to advance rulings on the admissibility of evidence, the Oak Grove Order required the Secretary to present a pre-hearing statement that was consistent with the flagrant provisions of section 110(b)(2). 29 C.F.R. § 2700.53(a)(1),(a)(2). Namely, the Oak Grove Order required the Secretary to explain why he believed the cited violative condition could not reasonably escape notice because it was conspicuously dangerous, and whether the cited condition could reasonably be expected to be the "substantial and proximate cause" of "death or serious bodily injury," rather than a contributing cause of an injury of a reasonably serious nature. *Oak Grove Order*, 36 FMSHRC __, slip op. at 13-14.

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[2] 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.

[3] Although the Secretary acknowledges that a violation, that does not otherwise satisfy the gravity requirements in section 110(b)(2), cannot be elevated to a flagrant violation solely based on prior predicate violations, the Commission has determined that a history of prior violations is a relevant consideration. *See Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013). Consequently, the Secretary relies on two violations in the present consolidated cases to serve as predicates for Order No. 8520664: namely, Order Nos. 4694424 in Docket No. SE 2013-399 and 8524255 in Docket No. SE 2013-301, with proposed penalties of $32,800.00 and $9,800.00, respectively. *Sec'y's Pre-Hearing Statement* at 3-4 (Aug. 7, 2014). These proposed penalties are significantly less than the maximum civil penalty of $70,000, adjusted for inflation, available under section 110(b)(1).

As noted, a flagrant violation is one "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 contrast, it is well-settled that a violation is significant and substantial ("S&S") when there is a "reasonable likelihood that the hazard *contributed to* by the violation will result in an event in which there is an *injury* [*of a reasonably serious nature*]." *U.S. Steele Mining*, 6 FMSHRC 1834, 1836 (Aug. 1984); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). Obviously, all violations properly designated as flagrant are S&S in nature. As flagrant violations are reserved for only the most serious conditions that *are both* obvious and extremely dangerous, clearly most violations designated as S&S cannot properly be designated as flagrant.

In response to the Oak Grove Order, the Secretary submitted his Pre-Hearing Statement on August 7, 2014. However, the Secretary's Pre-Hearing statement failed to differentiate the criteria for demonstrating a S&S violation from the evidentiary requirements necessary to support a section 110(b)(2) flagrant violation. The Secretary's Pre-Hearing Statement provided the following justification for his alleged flagrant designation:

> 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 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).

The Secretary's position is problematic in that it obfuscates rather than clarifies the controlling question of law in this matter. Section 75.400, which prohibits combustible coal dust accumulations, is the most frequently cited mandatory standard in underground coal mines.[4]

[4] For example, citations concerning section 75.400 violations constituted 10.47 percent of all citations issued in 2013, and currently constitute 10.61 percent of all citations issued in 2014. MSHA, Most Frequently Cited Standards, www.msha.gov/stats/top20viols/top20viols.asp (accessed June 12, 2014).

Furthermore, the terms "sources of ignition" and "potential sources of ignition" are not synonymous. It is the ignition, rather than the fuel, that is the proximate cause of a fire or explosion. Thus, the Oak Grove Order stands for the proposition that it is the presence of an ignition source that supports a reasonable expectation that death or serious bodily injury will occur. While presuming the presence of an ignition source based on a future malfunction that may occur during the course of continued mining operations may support an S&S designation, it is not an adequate basis for demonstrating a flagrant violation. To assume ignition sources, such as defective heat-producing rollers, misaligned friction-producing belts, or defective methane monitors that may proximately cause an explosion that can be propagated by the subject cited coal dust accumulations, would render the vast majority of section 75.400 violations as flagrant under section 110(b)(2).

It is not uncommon for coal dust to accumulate on the mine floor along conveyors and in proximity to belt rollers. Significantly, although a portion of the subject coal dust accumulations was allegedly touching rollers, the Secretary does not allege any relevant defects in the rollers or belt alignment. Surely, the Secretary would be reticent to concede that accumulations in proximity to, or that are touching, properly-functioning rollers constitute per se flagrant violations. However, when reduced to its core, the Secretary, in essence, is masking a per se approach by utilizing a traditional *Mathies* S&S analysis that would permit the vast majority of unwarrantable section 75.400 violations to be designated as flagrant. For it is axiomatic that an S&S designation requires consideration of 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 (Nov. 1998). Indistinguishable from this traditional S&S analysis, the Secretary avers that to support a flagrant designation potential ignition sources should be viewed in the context of continued normal mining operations. *Sec'y Pre-Hearing Statement* at 2 (Aug. 7, 2014).

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 issue presented in the Oak Grove Order is whether the traditional S&S analysis under *Mathies* can be used to support a flagrant designation under section 110(b)(2), and, if not, what the proper analysis should be. Resolution of this issue will materially advance the final disposition of these proceedings, as well as other flagrant cases. 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 on this issue. 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 Judge's collective need for Commission guidance on this issue is emphasized by Judge Zielinski's recent opinion in *American Coal Co.*, 36 FMSHRC 1311 (May 2014) (ALJ), which deleted flagrant

designations alleged by the Secretary.[5] 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):

> As noted in *Wolf Run*, section 110(b)(2) should be interpreted consistent with the Mine Act's graduated enforcement scheme. 35 FMSHRC at 541. The Commission held in *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Mine Act's enforcement scheme, provides for "increasingly severe sanctions for increasingly serious violations or operator behavior." 9 FMSHRC at 2000 (quoting *Cement Div. Nat'l. Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981). In *Stillhouse*, Judge Paez noted that "[i]n *Emory Mining*, the Commission interpreted the unwarrantable failure language of section 104(d) citations and orders in light of th[e graduated enforcement] scheme of escalating sanctions. Here, if a violation is determined to be flagrant, then the Commission is authorized to impose the highest amount of civil penalties available under the Mine Act, up to $220,000 per violation." 33 FMSHRC at 802.
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> The substantial civil penalties that can be imposed for flagrant violations are several rungs up the graduated enforcement ladder from even more serious violations charged under section 104(d). Accordingly, flagrant violations should denote conspicuously bad, offensive, or outrageous conduct. As Judge Paez noted in *Stillhouse*, "[t]he only thing that is apparent from the [limited] legislative history is that Congress and the President intended flagrant violations to target particularly severe violations of the mine safety and health regulations in order to promote regulatory compliance and miner safety." 33 FMSHRC at 799. In that regard, I agree, in principle, with Judge Feldman's analysis in *Conshor Mining, LLC*, 33 FMSHRC 2917, (Nov. 2011), that a flagrant violation must be conspicuous and egregious, and the fact that Congress did not simply amend section 110(a) of the Act to raise the general statutory penalty ceiling evidences something considerably more than an intent to deter repeated unwarrantable failure violations.
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> The cases brought by the Secretary and that have been decided by ALJs thus far, at least under the "reckless" prong of the statute, have involved truly outrageous conduct. *Stillhouse* involved egregious conduct by several mine management personnel who ignored prior warnings from MSHA and deliberately violated the mine's approved ventilation plan on more than one occasion. Their actions created a serious risk of a mine disaster and threatened the lives of the entire mining crew, which was left underground to produce coal while the main mine fan was turned off, and then restarted. Three mine managers plead guilty to criminal felony

[5] The Secretary filed Petition for Discretionary Review (PDR) of Judge Zielinski's *American Coal Co.* decision on June 17, 2014. However, the PDR was limited to Judge Zielinski's deletion of the unwarrantable failure designations concerning the subject violations. Thus, the Secretary has once again eluded Commission review of the criteria for a flagrant violation by declining to appeal Judge Zielinski's deletion of the subject flagrant designations.

charges for their conduct. In *Roxcoal, Inc.*, 35 FMSHRC 625 (Mar. 2013), a flagrant violation was affirmed under the "reckless" prong of the statute where an operator's chief electrician deliberately circumvented safety measures by taping down a switch that could deenergize power, and then assigned miners to work on the equipment in close proximity to 7,200 volts of electric power. He also failed to take any steps to eliminate the violation and the extremely hazardous condition. As a result, a miner suffered an injury resulting in permanent disability.

The Secretary's ventures into the "repeated failure" prong of the flagrant statute have often strayed from the egregious conduct principle and have met with less success. As noted above, the Secretary voluntarily withdrew the ""repeated failure" flagrant allegations in *Wolf Run* and *Conshore Mining.* Alleged repeated failure flagrant violations were rejected in *Bowie Resources* and *Blue Diamond.* The "screening factors," now broadened considerably by the Secretary's evolving interpretation of the statute, appear to sweep within their ambit a substantial portion, if not a vast majority, of [S&S] violations cited under section 104(d) of the Act. The result is that substantial penalties have been assessed under section 110(b)(2) for violations that are very similar, if not identical, to violations for which penalties have been assessed under section 110(a)(1) that have not even reached the maximum amount allowed under that section.

The Secretary's lone success was the *American Coal* case, in which two repeated failure violations were held to be flagrant under a narrow reading of the statute. Order No. 7490584, charged an S&S and unwarrantable failure violation of the accumulations standard, 30 C.F.R. 75.400, that was found to have been the result of the operator's high negligence, and was reasonably likely to have resulted in lost work days or restricted duty injuries to more than 10 persons. The conditions were found to have existed for at least three shifts, and were known to the operator because they had been noted on reports of required examinations during those shifts, but had not been corrected. The operator's failure to eliminate the known violation during each of the three shifts was held to satisfy the repeated failure element, and the violation was found to be flagrant.

Order No. 7490599, also charged an S&S and unwarrantable violation of the accumulations standard. It was found to have been the result of the operator's moderate negligence, and was reasonably likely to have resulted in serious or fatal injuries to 6 persons. It was found that the accumulations likely "began building up about two shifts before the violation was cited" and the violation was found to have existed "for two shifts." 35 FMSHRC at 2236. The conditions had not been noted on reports of examinations. However, it was found that the operator knew or should have known of the violation because the conditions were obvious and should have been discovered during required examinations. Its failure to eliminate the violation during either of the two shifts was held to satisfy the repeated failure element.

> While I agree with much of Judge McCarthy's analysis in *American Coal*, I am concerned that it could be read to include a large number of violations that were never intended to be addressed by the statute. Can constructive knowledge of a violation that existed for the better part of two shifts, resulting in a finding that the operator was moderately negligent, be squared with the concept that the statute was intended to address egregious conduct, or particularly severe violations? Are those valid conclusions regarding the intent of Congress? Similarly, can a violation that was reasonably expected to result in lost work days or restricted duty injuries, and that would not have passed the Secretary's screening device requirement for at least a permanently disabling injury, be said to be expected to result in death or serious bodily injury within the meaning of the statute? Hopefully, these and other questions will soon be answered by the Commission.
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> Even in the absence of a review of all reported decisions involving accumulations violations cited under section 104(d), I am confident that it would be difficult to identify more than a handful that did not involve an opinion by the issuing inspector that the conditions had existed for two shifts or longer, and that injuries at least as severe as lost work days were reasonably expected.[41] Could all such violations be classified as repeated failure flagrant violations, and assessed penalties nearly four times higher than the most serious non-flagrant violations?

American Coal Co., 36 FMSHRC at 1356-58.

ORDER

In view of the above, the June 12, 2014, Order Requiring Secretary's Pre-Hearing Statement setting forth the evidentiary criteria for a flagrant designation under section 110(b)(2) of the Act is certified for interlocutory review pursuant to Commission Rule 76(a)(1)(i).[6] [7]

Jerold Feldman
Administrative Law Judge

[6] My certification for interlocutory review under Commission Rule 76(a)(1)(i) was held in abeyance to provide an opportunity for the Secretary to seek interlocutory review of the Oak Grove Order. After the Secretary was granted a 30-day extension to respond to the Oak Grove Order, the Secretary filed the required pre-hearing statement on August 7, 2014. My certification was further delayed by the parties' representation that they were engaging in settlement negotiations, which have not been fruitful.

[7] The hearing in these matters, scheduled for September 16, 2014, has been stayed pending the disposition of this Certification for Interlocutory Review.

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