FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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Washington, D.C. 20004

MAR 19 2014

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2013-301
Petitioner	:	A.C. No. 01-00851-315187-01
	:	
	:	Docket No. SE 2013-352
v.	:	A.C. No. 01-00851-317727
	:	
	:	Docket No. SE 2013-368
	:	A.C. No. 01-00851-319550
OAK GROVE RESOURCES, LLC,	:	
Respondent	:	Docket No. SE 2013-399
	:	A.C. No. 01-00851-320606-01
	:	
	:	Mine: Oak Grove Mine

ORDER SCHEDULING BRIEFING

Before: Judge Feldman

The hearing in the captioned civil penalty matters filed against Oak Grove Resources, LLC ("Oak Grove") is currently scheduled for September 16, 2014, in Birmingham, Alabama. Docket No. SE 2013-368 concerns 104(d)(2) Order No. 8520664,[1] issued on October 3, 2012. The order alleges a repeated flagrant violation under Section 110(b)(2) of the Federal Mine Safety and Health Act of 1977 ("the Act"), 30 U.S.C. § 820(b)(2), of the mandatory safety standard in section 75.400, that is attributable to high negligence.[2] Section 110(b)(2) provides:

[1] Docket Nos. SE 2013-301, SE 2013-352 and SE 2013-399 have been consolidated with Docket No. SE 2013-368 because they contain citations that are relevant to Order No. 8520664.

[2] Section 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.

30 C.F.R. § 75.400.

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000.[3] 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).

Although the Commission addressed questions concerning appropriate considerations for determining repeated flagrant violations in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013), many issues concerning the application of section 110(b)(2) essentially are matters of first impression and remain unresolved. In *Wolf Run*, the Commission concluded that the plain language of section 110(b)(2) supports that past violative conduct may be considered in determining whether a cited condition represents a "repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard . . . ." 35 FMSHRC at 541, *citing* 30 U.S.C. § 820(b)(2). However, the Commission did not address whether such previous violations must concern unwarrantable violations of the same mandatory standard, as well as the time period for the occurrence of such previous violations. The Commission had no basis for doing so as the Secretary did not clearly articulate during oral argument the required parameters concerning prior conduct.[4]

In *Wolf Run*, the Commission noted the Secretary's obfuscation. The Commission stated:

> The Secretary's interpretation [of a repeated flagrant violation] has changed several times during the course of this litigation . . . . [W]hile still before the judge, the Secretary broadened the proposed standard to include previous non-S&S and non-unwarrantable failure violations, and also seemingly narrowed the standard to require that at least some of the previous violations be "substantially similar" . . . . His interpretation before the Commission has evolved again . . . . [The Secretary's briefing now includes a] "fail[ure] to make reasonable efforts to eliminate at least one previous violation prior to failing to make reasonable efforts to eliminate the violation alleged to be flagrant."

35 FMSHRC at 539 n. 5. The absence of a clearly articulated proffered standard for determining a repeated flagrant violation based on prior conduct precluded the Commission from addressing whether the Secretary's application of section 110(b)(2) was a reasonable interpretation of its

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[3] The maximum civil penalty for a violation that is not designated as flagrant is $70,000.00. 30 U.S.C. § 820(a)(1).

[4] In *Wolf Run*, the Commission remanded the proceeding to Commission ALJ Barbour. The parties now have advised Judge Barbour that they have reached a settlement agreement.

provisions, or whether the Secretary's enforcement standard required a notice and comment rulemaking.

The subject Order No. 8520664, alleging a repeated flagrant violation, 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 Pieces 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.

Even if the Secretary ultimately prevails with respect to the issues of the fact of the violation and the significant and substantial ("S&S") and unwarrantable designations for the cited condition in Order No. 8520664, the hearing in this matter cannot proceed without determining the proper evidentiary requirements for demonstrating a repeated flagrant violation under the statutory provisions of section 110(b)(2). Determining the evidentiary requirements for a repeated flagrant violation will materially advance the disposition of these matters. Accordingly, **IT IS ORDERED** that the Secretary file a brief addressing in detail the following questions:

(1) **The degree of gravity is determined by the seriousness of the violation. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citations omitted). Is the degree of gravity required for a flagrant designation under section 110(b)(2) of the Act, 30 U.S.C. § 820(b)(2), greater than the degree of gravity required for an S&S designation under section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1)?**

The Commission long ago noted that the "Act's overall enforcement scheme . . . provides for the use of increasingly severe sanctions for increasingly serious violations or operator behavior." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981). Section 104(d)(1) provides, in pertinent part, that an S&S violation is any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." Section 110(b)(2) provides, in pertinent part, that a flagrant violation is "a known violation . . . that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury."

The Secretary should address the distinction, if any, between the statutory language in sections 110(b)(2) and 104(d)(1). In addressing this issue, the Secretary should be mindful of the Commission's S&S criteria in *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). The Commission noted the proper analysis under its third *Mathies* criterion concerning the likelihood of injury "requires that the *hazard contributed to* [by the violation] will result in an event in which there is an injury." *U.S. Steel Mining,* 6 FMSHRC 1834, 1836 (Aug. 1984), *citing* 3 FMSHRC at 3-4 (emphasis added). This analysis is based on a variety of changing conditions normally encountered during continued mining operations in the presence of an unabated hazard. *U.S. Steel Mining,* 7 FMSHRC 1125, 1130 (Aug. 1985), *citing* 6 FMSHRC 1573, 1574 (July 1984).

In addressing the difference, if any, between the degrees of gravity associated with S&S and flagrant violations, the Secretary should address whether a flagrant violation must constitute a clear and present danger that requires more than considerations with respect to continued mining operations. In this regard, the Secretary should be mindful of the Commission's holding in *Musser Eng'g, Inc.*, 32 FMSHRC 1257 (Oct. 2010), discussing the indicia for an S&S designation:

> The test under the third element [of *Mathies*] is whether there is a reasonable likelihood that the hazard contributed to by the violation . . . will cause injury. The Secretary need not prove a reasonable likelihood that the violation itself will cause injury . . . .

32 FMSHRC at 1280-81.

(2) **Is the degree of gravity the same for both reckless designations and for repeated designations under section 110(b)(2)?**

The Secretary should address whether his reliance on a history of previous violations as a predicate for a repeated flagrant violation relieves the Secretary's burden of demonstrating that the subject violation was, or reasonably could have been expected to be, the substantial and proximate cause of death or serious bodily injury.

(3) **Can a repeated flagrant violation be attributed to less than a reckless degree of negligence in view of the statutory language requiring that it be a *known violation* that will substantially and proximately cause death or serious bodily harm?**

In addressing this question, the Secretary should consider whether the *inexcusable failure* (as required for unwarrantability) to eliminate a known violation that can reasonably be expected to cause death or serious bodily injury can be attributable to less than a reckless disregard. *See Emery Mining Corp.*, 9 FMSHRC 1997, 2001 (Dec. 1987) (defining unwarrantable conduct as "not justifiable" or "inexcusable").

(4) **What parameters does the Secretary propose for determining which violations serve as predicates for a repeated flagrant designation?**

In this matter, the Secretary alleges that the subject flagrant violation is based on a history of previous violations.[5] The Secretary should address, with specificity, his proposed parameters for previous violations with respect to: whether such violations must be attributable to an unwarrantable failure; whether the violations must be of the same mandatory standard; whether settled violations lacking an evidentiary record with regard to their nature and extent are appropriate predicates; and the operative time period during which these prior violations must have occurred.

(5) **The provisions of section 110(b)(2) of the Act are essentially repeated in section 100.5(e) of the Secretary's implementing regulations. 30 C.F.R. § 100.5(e). The Commission traditionally resolves questions of deference by applying the two step test in *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984). Are section 110(b)(2) of the Act and section 100.5(e) of the regulations ambiguous, and if so, is the Secretary's interpretation reasonable?**

The "flagrant" penalty assessment provision of section 110(b)(2) of the Mine Act was added by section 8(a) of the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"). Section 8(b) of the MINER Act required the Secretary to promulgate rules to implement the provision. Pub. L. No. 109-236, § 8, 120 Stat. 493 (2006). On March 22, 2007, the Department of Labor's Mine Safety and Health Administration ("MSHA") published a final rule revising its penalty regulations and "implement[ing] the civil penalty provisions of the [MINER Act]." 72 Fed. Reg. 13592. Although the Secretary has been delegated with the authority to promulgate a regulation implementing section 110(b)(2), section 100.5(e) of the regulations simply reiterates the language of section 110(b)(2) of the Act. In addressing the appropriate level of deference to be accorded to the Secretary's interpretation of section 100.5(e) given that it repeats the statutory language, Commission ALJ McCarthy has noted:

> An agency deserves no deference for an interpretation of its own regulation when the regulation merely parrots the language of the statute, without implementing it. *Gonzales, supra*, 546 U.S. at 257 (2006). In such cases, the agency is not using its expertise to interpret the law. It is merely copying or paraphrasing the statutory language. *Id.* at 258.

American Coal Co., 35 FMSHRC 2208, 2257 (July 30, 2013) (ALJ), *citing Gonzales v. Oregon*, 546 U.S. 243 (2006). As previously noted, in *Wolf Run* the Commission did not

[5] Although the Secretary has identified three prior alleged generic unwarrantable failure violations of section 75.400, two of which have settled, the Secretary has not articulated why these violations were selected as predicates with regard to the nature and extent of the violations and the time period for their occurrence.

address the reasonableness of the Secretary's criteria for considering prior conduct. Assuming section 110(b)(2) is ambiguous with respect to the necessary predicates for a repeated flagrant violation, the Secretary should address the reasonableness of his proffered interpretation.

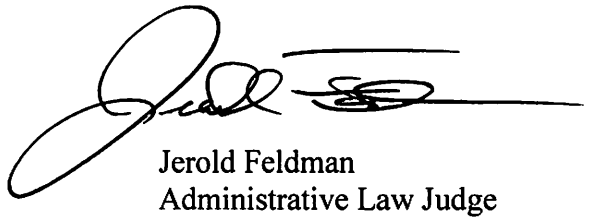
(6) **Does implementation of the Secretary's proffered criteria with respect to predicates for a repeated flagrant violation require a notice and comment rulemaking?**

It is well established that a notice and comment rulemaking is required where a regulation is substantive as opposed to procedural. *See Drummond Co.*, 14 FMSHRC 661, 683-85 (May 1992) (noting that, pursuant to 5 U.S.C. § 553(b)(3)(A), substantive or legislative rules require advance notice and public comment, while interpretative rules, general statements of policy, or rules of agency procedure or practice do not). The Secretary should address whether his proffered basis for a repeated flagrant violation is substantive or procedural.

ORDER

IT IS ORDERED that the Secretary shall provide a response to the above questions within 30 days from the date of this Order. **IT IS FURTHER ORDERED** that Oak Grove shall respond to the Secretary's submission within 21 days thereafter. **IT IS FURTHER ORDERED** that the Secretary shall have leave to file a reply within 21 days of Oak Grove's response. The parties should provide case law, regulatory provisions, and legislative history to support their respective positions. The parties may provide any relevant additional arguments outside the parameters of the above questions that they deem relevant.

As a final matter, the MINER Act was promulgated in June 2006. Despite having had more than seven years to do so, to my knowledge the Secretary has yet to present a cogent and/or consistent interpretation of the requisite factors contemplated by section 110(b)(2) to establish a repeated flagrant violation. Consequently, requests for extension of this briefing schedule may not be favorably entertained.



Jerold Feldman
Administrative Law Judge

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