FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

June 12, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	Docket No. SE 2013-301
	:	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 REQUIRING SECRETARY'S PRE-HEARING STATEMENT

Before: Judge Feldman

These proceedings require a determination of the evidentiary criteria that must be demonstrated to support the imposition of enhanced civil penalties provided in 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 ("Act" or "New Miner Act"), for an alleged repeated flagrant violation. 30 U.S.C. § 820(b)(2). Section 110(b)(2), which became effective on August 17, 2006, following the Sago and Darby Mine disasters, increases the maximum civil penalty for extremely hazardous violations deemed "flagrant." 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).

A primary subject in these matters is 104(d)(2) Order No. 8520664 in Docket No. SE 2013-368, issued on October 3, 2012.[1] The order alleges a repeated flagrant violation under section 110(b)(2) of the Act based on an alleged violation of the mandatory safety standard in section 75.400 of the Secretary's regulations that is attributable to high negligence.[2] 30 C.F.R. § 75.400. Order No. 8520664 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.

Section 75.400, which prohibits combustible coal dust accumulations, is the most frequently cited mandatory standard in underground coal mines. 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).

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[1] Docket Nos. SE 2013-301, SE 2013-352 and SE 2013-399 have been consolidated with Docket No. SE 2013-368 for judicial efficiency and because included therein is a citation that the Secretary relies on as a predicate for the alleged flagrant violation in 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.

I. Background

Section 8(b) of the New Miner Act required the Secretary to "promulgate final regulations with respect to penalties" to codify the new enhanced penalty structure. Pub. L. 109-236, § 8(b), 120 Stat. 501 (2006). To implement special assessments for flagrant violations, MSHA issued notices of proposed rulemaking for section 100.5(e) in the Secretary's Part 100 Criteria and Procedures for Proposed Assessment of Civil Penalties. 30 C.F.R. §100.5(e), 71 Fed. Reg. 53054 (Sept. 2006); 71 Fed. Reg. 62572 (Oct. 2006). The notice-and-comment provisions of the APA require the Secretary to provide "[an adequate] description of the subjects and issues involved" to support a flagrant violation. 5 U.S.C. § 553(b)(3). On March 22, 2007, MSHA issued a final rule regarding its procedures for proposing enhanced civil penalties under the New Miner Act. 30 C.F.R. §100.5(e). However, the final provisions of section 100.5(e) merely repeat the statutory language in section 110(b)(2), without providing adequate notice with respect the evidentiary criteria necessary to support a flagrant designation .[3] 72 Fed. Reg. at 13622.

The Commission has previously had the question of the required elements for a repeated flagrant violation before it on several occasions based on requests for review of interlocutory decisions of Commission Judges who had addressed this issue. *Conshor Mining, LLC*, 34 FMSHRC 349 (Feb. 2012) (granting interlocutory review); *Wolf Run Mining Company*, 35 FMSHRC 536 (Mar. 2013) (remanding for reconsideration of whether a violation was properly designated as flagrant). On each occasion, the Secretary removed the subject flagrant violation designation, thus precluding a final Commission ruling on this question. *Conshor*, 34 FMSHRC 571 (Mar. 2012) (vacating the order granting interlocutory review); *Wolf Run*, __ FMSHRC __ (Apr. 14, 2014) (ALJ) (approving settlement). However, in its remand order in *Wolf Run*, prior to the withdrawal of the relevant flagrant designation, the Commission concluded that the plain language of section 110(b)(2) supports that past violative conduct may be considered in determining whether to cite a condition as a repeated flagrant violation. 35 FMSHRC at 541, *citing* 30 U.S.C. § 820(b)(2).

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[3] Section 100.5(e), as promulgated, provides:

> Violations that are deemed to be flagrant under section 110(b)(2) of the Mine Act may be assessed a civil penalty of not more than $220,000. For purposes of this section, a flagrant 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 C.F.R. §100.5(e).

However, in *Wolf Run*, the Commission did not address: whether such previous violations must be unwarrantable; whether the prior violations must have violated the same mandatory standard as the condition alleged to be flagrant; and whether there is a specified time period for the occurrence of such previous violations. The Commission had no basis for doing so as the Secretary did not clearly articulate in his opening brief, or during oral argument, the relevant parameters concerning prior conduct. The Secretary avers that any parameters for predicates that he considers for a repeated flagrant violation are merely guidelines for enforcement personnel. Sec'y Resp. at 9. As such, the guidelines are not based on the Secretary's statutory interpretation and are beyond the scope of this proceeding.[4]

The Commission also has never addressed the requisite degree of gravity necessary for a flagrant designation. The degree of gravity is determined by the seriousness of the violation. *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) (citations omitted). In this regard, the Secretary acknowledges that "gravity is essentially a function of (1) the potential for injury and (2) the likely nature of such injury." Sec'y Resp. at 3.

Even if the Secretary ultimately prevails in this matter with respect to the issues of the fact of the violation and the significant and substantial ("S&S") and unwarrantable designations in Order No. 8520664, a hearing cannot proceed without determining the proper evidentiary requirements for demonstrating a repeated flagrant violation under the statutory provisions of section 110(b)(2). Consequently, on March 19, 2014, an Order Scheduling Briefing ("Order") was issued requesting the Secretary to address a number of substantive issues concerning the criteria necessary to support a repeated flagrant violation. 36 FMSHRC 815 (Mar. 19, 2014) (ALJ).[5] The Secretary's response was filed on April 22, 2014. Oak Grove's reply to the Secretary's response was filed on May 8, 2014.[6]

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[4] Guidelines, such as those contained in Procedure Instruction Letters ("PILs"), that provide guidance to enforcement personnel are not mandatory standards. Such PILs do not establish a binding norm and therefore are not subject to the APA. Consequently, given the advisory nature of the Secretary's parameters for charging that a flagrant violation is repeated in nature, a rulemaking proceeding is not required. 5 U.S.C. § 553(b)(3)(A); *see also*, *Nat'l Mining Ass'n*, 589 F.3d 1368, 1371 (11th Cir. 2009).

[5] Included among the issues the Secretary was directed to address was whether a notice-and-comment rulemaking was necessary if the Secretary was proposing a binding norm with respect to the parameters for predicates for repeated flagrant violations. 38 FMSHRC at 820. The Secretary has not proposed a binding norm with respect to whether predicate violations must have violated the same standard as that alleged to be flagrant, and whether there is a specific time period for, or frequency of, such prior violations. In the absence of a binding norm, a rulemaking is not required. Accordingly, this Order deals solely with a *Chevron* analysis of whether the Secretary's interpretation of section 110(b)(2) is reasonable. *See* page 5-6, *infra*.

[6] Oak Grove's reply has been considered, although not specifically referenced in this Order. The focus of this Order is the reasonableness of the Secretary's interpretation and application of the evidentiary burden that must be met to support a repeated flagrant designation under the provisions of section 110(b)(2).

In response to the March 19, 2014, Order, the Secretary agreed that "both 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 Resp. at 6. In other words, the Secretary acknowledges that a violation which 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. With respect to the requisite degree of gravity, the Secretary has departed from his prior position that a flagrant violation requires a likelihood of injury of at least a permanently disabling nature,[7] now arguing that most lost workday injuries are sufficient to support a flagrant violation. Sec'y Resp. at 3.

With respect to distinguishing the terms "flagrant" and "S&S," obviously, all flagrant violations are S&S, however, not all S&S violations are flagrant.[8] The Secretary fails to adequately distinguish violations that are only S&S from S&S violations that are properly designated as flagrant. In so doing, the Secretary seeks to greatly expand the scope of the flagrant provisions of section 110(b)(2) beyond that contemplated by Congress. Consequently, as discussed below, the Secretary's interpretation of the section 110(b)(2) criteria for a flagrant violation is unreasonable.

II. Chevron Framework

A definitive articulation of the elements necessary for a repeated flagrant violation that is consistent with the statutory language and the legislative intent is essential for implementing the flagrant provisions of section 110(b)(2). The Commission has traditionally established the parameters for the Secretary's burden of proof with respect to charges brought under the Act. *Berwind Natural Resources Corp.*, 21 FMSHRC 1284, 1317 (Dec. 1999) (noting longstanding caselaw reflecting the Commission's authority to interpret the Mine Act and adopt specific tests or standards for adjudication, such as the evidentiary requirements for S&S designations and for personal liability) (citations omitted). The vague and inconsistent criteria proffered by the Secretary for demonstrating a repeated flagrant violation has created a void that must be filled by the Commission. As the factors considered by the Secretary with respect to timeframe, number of previous violations, and whether such previous violations must cite the same mandatory standard, are merely guidelines, the focus shifts to whether the Secretary's interpretation of the statutory gravity criteria for a flagrant violation is both reasonable and consistent with the relevant legislative history.

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[7] The Secretary's initial guidelines for repeated flagrant violations required that the cited condition pose a potential injury or illness of at least a permanently disabling nature. *Conshor*, 33 FMSHRC 2917, 2920 (Nov. 28, 2011) (ALJ) (citing PIL Nos. I06-III-04, I08-III-02). The Secretary has also departed from his initial guidelines requiring at least two prior unwarrantable failure violations of the same mandatory standard that were cited within the fifteen month period preceding the issuance of the alleged flagrant violation. *Id.*

[8] Judge Paez has similarly noted that the 'significantly and substantially contribute to a hazard' language in section 104(d)(1), that provides a basis for an S&S designation, is notably different from the provisions of section 110(b)(2) that provide a basis for the gravity element of a flagrant designation. *Stillhouse Mining, LLC*, 33 FMSHRC 778, 800 (March 28, 2011) (ALJ).

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If a statute is clear and unambiguous, effect must be given to its language. *Id.* at 842-43. Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). Traditional tools of construction, including examination of a statute's text and legislative history, may be employed to determine whether "Congress had an intention on the precise question at issue," which must be given effect. *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989) (citations omitted). The examination to determine whether there is a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *Id.; see Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996); *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).

If, however, the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Thunder Basin*, 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13. Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994). The agency's interpretation of the statute is entitled to affirmance as long as that interpretation is one of the permissible interpretations the agency could have selected. *See Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

A. **Chevron I** - Congress has directly addressed that flagrant violations can only be reserved for the most blatant and egregious violations

The operative statutory definition of "flagrant" provided by Congress is:

> [T]he 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).

Placing the statutory definition in the context of the legislative history, although enhancement of safety is a fundamental concern, it is clear that the intent of the New Miner Act, which was enacted in the aftermath of the Sago and Darby Mine disasters, was to address, and hopefully prevent, violations that could proximately cause future tragedies. The Senate Report that accompanied the New Miner Act stated:

> The year 2006 began with the tragic loss of 12 miners at the Sago Mine in West Virginia, followed closely by the deaths of two miners at the Alma Mine, also in West Virginia; and some 4 months later by the deaths of 5 miners at the Darby Mine in Harlan County, Kentucky. The death toll in the first 5 months of the year was nearly 50 percent higher than the entire previous year. Additionally, the rise in coal production in the last few years raises the committee's concerns that there is the potential for a return to higher numbers of accidents and fatalities. Improvements in safety come about because of a continued re-examination and revision of safety and regulatory practices in light of experience. These tragedies serve as a somber reminder that even that which has been done well can always be done better.

Committee on Health, Education, Labor, and Pensions, S. Rep. No. 109-365, *Mine Improvement and New Emergency Response Act of 2006*, at 2 (Dec. 6, 2006).

In construing statutory language, it is fundamental that:

> A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section to produce a harmonious whole.

2A *Sutherland Statutory Construction* § 46:5 (7th ed.). In this regard, 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). Thus, the Act provides increasingly severe sanctions: for S&S violations cited under section 104(a); for violations attributable to unwarrantable failures under section 104(d) which subject operators to a maximum penalty of $70,000.00; and for flagrant violations under section 110(b)(2) which subject operators to a maximum penalty of $220,00.00.

The fact that Congress intended that it is only the most blatant and egregious violations that can be cited under section 110(b)(2) is clear from the language of the statute that characterizes the subject violation as "flagrant." A flagrant act is defined as conduct that is "[c]onspicuously bad, offensive, or reprehensible." *The American Heritage Dictionary* 667 (4th ed. 2009). The American Heritage Dictionary includes the following discussion of relevant synonyms:

> *flagrant, glaring, gross, egregious, rank*: [t]hese adjectives refer to what is conspicuously bad or offensive. *Flagrant* applies to what is so offensive that it cannot escape notice: *flagrant disregard for the law*. What is *glaring* is blatantly and painfully manifest: *a glaring error; glaring contradictions*. *Gross* suggests a magnitude of offense or failing that cannot be condoned or forgiven: *gross*

> *ineptitude; gross injustice*. What is *egregious* is outrageously bad: *an egregious lie*. *Rank* implies that the term it qualifies is as indicated to an extreme, violent, or gross degree: *rank stupidity; rank treachery*.

Id. (emphasis in original). As discussed below, it is the conspicuously bad, offensive, or reprehensible nature of the cited violation with respect to its significant risk of causing death or serious bodily injury that warrants designating the violation as flagrant. However, although the plain language of section 110(b)(2) requires that the violation be egregious, the specific threshold criteria to warrant a designation of a flagrant violation requires interpretation of the statutory provisions.

B. **Chevron II** - The Secretary's interpretation of the gravity requirements in section 110(b)(2) with respect to the causation, likelihood, and severity of injury, is unreasonable

In *Wolf Run*, the Secretary alluded to any "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" as an adequate predicate for a repeated flagrant designation. 35 FMSHRC at 539 n. 5 (citing S. Opening Br. at 17). In his response to the March 19, 2014, Order, the Secretary now asserts that in order to demonstrate a repeated flagrant violation, it must be demonstrated that the operator:

> (1) Knew of one or more [. . .] predicate violations, (2) failed to make reasonable efforts to eliminate the prior violation(s) known to the operator, and (3) that one or more of these [prior] violations reasonably could have been expected to cause death or serious bodily injury.

Sec'y Resp. at 10. Thus, the Secretary now asserts that any predicate violation relied upon to support a repeated flagrant violation must be a known violation that satisfies the "threshold gravity and negligence required by section 110(b)(2)." *Id.* at 11. As the Commission has determined that the previous violation history is a relevant consideration, and the Secretary has acknowledged that the requisite degree of gravity for reckless and repeated flagrant violations is the same, the only remaining issue for resolution is the degree of gravity required to satisfy a repeated flagrant violation. *See* pages 3-4, *supra.*

1. The March 19, 2014 Order

As a general matter, the Order required the Secretary to compare the degree of gravity required for a flagrant designation under section 110(b)(2) with the degree of gravity required for the statutory term "significant and substantial" contained in section 104(d)(1) of the Act,

the criteria for which has been articulated in *Mathies* and its progeny.[9] 36 FMSHRC at 817-18, *citing Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). In this regard, the Order directed the Secretary to consider the distinction, if any, between the Commission's determination that an S&S finding "requires that the *hazard contributed to* [by the violation] will result in an event in which there is an injury," with the language of section 110(b)(2) that the *violation itself* must be the actual or expected proximate cause of death or serious bodily injury. *Id.* at 818, *citing U.S. Steel Mining,* 6 FMSHRC 1834, 1836 (Aug. 1984) (citing 3 FMSHRC at 3-4) (emphasis added); *see also Musser Eng'g, Inc.*, 32 FMSHRC 1257, 1280-81 (Oct. 2010) (holding that the third element of *Mathies* only requires the Secretary to prove a reasonable likelihood that the hazard contributed to by the violation will cause injury, not that the violation itself will cause injury). In briefing this matter, the Secretary was also directed to be mindful of the fact that an S&S analysis is based on a variety of changing conditions normally encountered during continued mining operations in the presence of an unabated hazard. 36 FMSHRC at 818, *citing U.S. Steel Mining,* 7 FMSHRC 1125, 1130 (Aug. 1985) (citing 6 FMSHRC 1573, 1574 (July 1984)).

2. The Secretary's Proffered Interpretation in Response

As previously noted, the Secretary has acknowledged that gravity is a function of the likelihood and seriousness of an injury. Sec'y Resp. at 3. With respect to the potential likelihood of injury, the Secretary argues there is essentially no distinction between routine S&S and flagrant gravity requirements. In this regard, the Secretary states "there is no material distinction between the 'reasonably likely to result' inquiry [under the third element of *Mathies*] and the 'reasonably could have been expected to cause' inquiry under section 110(b)(2)." *Id.*

With respect to causation as it relates to the likelihood of injury, the Secretary acknowledges that a prerequisite for a flagrant violation is that "*the violation itself*" must be reasonably expected to cause death or serious injury. Sec'y Resp. at 4 (emphasis in original). The Secretary distinguishes this from an S&S violation, which only requires that "*the hazard contributed to by the violation*" must be reasonably likely to contribute to an event that causes injury of a reasonably serious nature. *Id.* (emphasis in original). However, the Secretary maintains that this distinction is not substantive, and only shifts the burden of proof. *Id.* Rather, the Secretary argues that, "[n]evertheless, this distinction does not support a conclusion that [flagrant] violations require greater gravity than [S&S] violations." *Id.*

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[9] In order to establish that a violation is properly designated as S&S, the Secretary must prove:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to [by the violation] will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

6 FMSHRC at 3-4; *see also Austin Power Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

With respect to the severity of the potential injury, the Secretary argues that "most injuries that result in lost work days/restricted duty" can be properly designated as flagrant violations. Sec'y Resp. at 3. Obviously, all injuries involving serious bodily injury are injuries of a reasonably serious nature. However, as discussed below, the question is whether lost workday injuries that do not result in any residual debilitating and/or permanent impairment constitute serious bodily injuries as contemplated by section 110(b)(2).

The Secretary argues that his litigating position in administering the Mine Act before the Commission is entitled to full *Chevron* deference. Sec'y Resp. at 14. However, the Secretary's litigating position is only entitled to *Chevron* deference if his trial strategy is based on a reasonable interpretation and application of the subject statutory provisions.[10] In this matter, an analysis is required to determine whether deference is owed to the Secretary's proffered interpretation with respect to his comparison of the degree of gravity required for a violation that is only S&S in nature and a violation that is properly designated as both S&S and flagrant. In determining whether the Secretary's statutory interpretation is reasonable, it is essential to distinguish the terms 'proximate cause,' 'reasonably be expected to cause,' and 'serious bodily injury' as they relate to flagrant violations, from the terms 'contributing cause,' 'reasonable likelihood,' and 'injury of a reasonably serious nature,' that are hallmarks of an S&S designation.

3. Disposition

a. Proximate Cause vs. Contributing Cause

In addressing the meaning of proximate cause in section 110(b)(2), it is necessary to differentiate a proximate cause from a contributing cause. A flagrant designation requires the subject violation to be the substantial and proximate cause of a death or serious bodily injury that has occurred, or could be reasonably expected to occur. 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). Synonyms include "direct cause," "primary cause" and "legal

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[10] The Secretary's reliance on *Excel* and *Simola* for the proposition that the Secretary's litigation position is entitled to *Chevron* deference is misplaced. *Secretary of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003); *Bill Simola, employed by United Taconite, LLC*, 34 FMSHRC 539, 543 (Mar. 2012). In both *Excel* and *Simola*, the Secretary's legislative stance was adopted on appeal because it was based on his reasonable interpretation of statutory provisions that was consistent with the legislative history and goals of the Mine Act. In *Excel*, the Court found that the Secretary's interpretation of the appropriate methodology for calculating average dust concentrations was reasonable in view of the text of the relevant provision, the role of the provision in the overall enforcement of the Act, and the "longstanding duration" of the interpretation. 334 F.3d at 7-11. Similarly, in *Simola*, the Commission concluded that the Secretary's proffered interpretation with respect to the applicability of the personal liability provisions of Section 110(c) of the Act to agents of limited liability corporations was "consistent with the text of section 110(c)" and "fully consistent with the legislative history." 34 FMSHRC at 550.

cause." *Id.* The magnitude of the seriousness of a flagrant violation, given its close causal connection to death or serious bodily harm, or the reasonable expectation thereof, differentiates a flagrant violation from an S&S violation.

A contributing cause is "a factor that – though not the primary cause – plays a part in producing a result." *Id.* at 212. An S&S finding "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 at 1836. Thus, unlike a flagrant violation which is a primary cause of the potential injury itself, an S&S violation is a contributing cause to the existence of a hazard that may ultimately result in injury. This is a significant substantive distinction, rather than only a manifestation of the required burden of proof as asserted by the Secretary. Sec'y Resp. at 4. This substantive distinction, which the Secretary denies, renders the Secretary's interpretation of the gravity requirements in section 110(b)(2) unreasonable.

b. Reasonably Expected vs. Reasonable Likelihood

The term "reasonably," as in "reasonably expected" for a flagrant designation, or "reasonably likely" for an S&S designation, in context, means "rationally," "adequately," or "sufficiently." *Roget's 21st Century Thesaurus* (3rd ed. 2009), *available at* http://thesaurus.com. The comparison between the terms "expected" and "likely" is a matter of degree. Synonyms for "expected" include "certain," "about to happen," and "impending." *Id.* Synonyms for "likelihood" include "chance," "possibility," "prospect," "tendency," and "trend." *Id.* In other words, an expected event is much more certain to occur than a likely event. It is clear that the probability of injury is far greater when miners are exposed to flagrant violations as compared to violations that are only S&S, particularly in view of the proximate causal role played by such egregious violations. Thus, the Secretary's contention that there is no material difference between the "reasonably likely to result" standard under *Mathies* and the "reasonably could have been expected to cause" standard under section 110(b)(2) is unpersuasive. *See*, Sec'y Resp. at 3.

c. Bodily Injury vs. Injury of a Reasonably Serious Nature

Although the Secretary now argues that a potential injury associated with a flagrant violation need only result in lost workdays, it is significant that the Secretary initially believed that the potential injury must be evaluated as at least permanently disabling. *See* Sec'y Resp. at 3; *see also* n. 7, *supra.* Moreover, the degree of severity of injury contemplated by the statute must be viewed in the context of well-accepted principles of statutory construction. The meaning of doubtful words in an ambiguous statute may be determined by "the coupling of words denot[ing] that they should be understood in the same general sense." 2A *Sutherland Statutory Construction* § 47.16 (7th ed.). Associating the expectation of a "serious bodily injury" with the expectation of death evidences a Congressional intent that only grave injuries, or the reasonable expectation of such injuries, are contemplated by section 110(b)(2). When read in context, the statute clearly contemplates a grave injury resulting in either a significantly debilitating and/or a permanently disabling injury, as evidenced by a life altering or life threatening condition. Such injuries must be distinguished from acute and transitory injuries which resolve within a reasonable period of time.

Moreover, although there are material differences, it is significant that both a section 107(a) imminent danger order and a section 110(b)(2) flagrant violation require the same degree of injury, i.e., one that can be reasonably expected to cause death or serious bodily injury. *Wyoming Fuel Company*, 14 FMSHRC 1282, 1291 (Aug. 1992) (holding that an imminent danger order requires an expectation of "death or serious physical harm" before the hazardous condition can be eliminated). It is noteworthy that section 104(d)(1) provides that if an inspector finds that "conditions created by [a] violation do not cause imminent danger, the violation [could still be of] such nature as could significantly and substantially contribute to the cause or effect of a coal or other mine safety or health hazard." In promulgating section 110(b)(2), Congress required that a flagrant violation must pose the same risk of death or serious bodily injury as required for an imminent danger, rather than an injury of a reasonably serious nature as required for an S&S violation. Thus, Congress, in effect, recognized that flagrant violations are significantly more serious than most S&S violations. Consequently, the Secretary's interpretation that most actual or potential lost workday injuries satisfy the requisite severity of injury required by section 110(b)(2) is unreasonable.

It is noteworthy that imminent danger orders and flagrant violations do not conflict with, nor are they substitutes for, each other. While both require remedial urgency, an imminent danger requires a miner's actual exposure to the danger posed by the hazardous condition. Moreover, unlike a flagrant violation, an imminent danger order may be issued regardless of the obviousness of the hazard, and without regard to whether the hazard is attributable to the negligence of the mine operator. In addition, an imminent danger order may be issued even if the hazardous condition does not constitute a violation of a safety standard. In fact, the plain language of section 107(a) states that imminent danger orders can be issued in conjunction with citations seeking a penalty under the provisions of Section 110.[11]

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[11] Section 107(a) provides:

> If, upon any inspection or investigation of a coal or other mine . . . the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. *The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.*

30 U.S.C. 817(a) (emphasis added).

As a final note, limiting the flagrant provisions of section 110(b)(2) to only the most serious of violations, as intended by Congress, will not materially adversely affect deterrence. The most effective means of achieving compliance is the deterrent effect of 104(d)(1) withdrawal orders issued under the Mine Act that explicitly require stoppages of production until abatement is achieved. *See, Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC __, slip op. at 13 (May 2014) (dissenting), *citing Amax Lead Co.*, 4 FMSHRC 975, 978-79 (June 1982) (holding that unwarrantable failure withdrawal sanctions are among the strongest compliance incentives provided by the Act's enforcement scheme). A significant loss of production is a far greater economic loss, particularly for moderate and large operators, than civil penalties proposed under the Act. Although the deterrent effect of civil penalties must not be trivialized, the more important role of a flagrant violation charge is that it hopefully will shock the conscience of, if not disgrace, a recalcitrant mine operator. Such designations may also expose operators to greater civil liabilities for the death or serious injuries that such violations may cause.

ORDER

In view of the above, **IT IS ORDERED** that, in order for the Secretary to establish that the cited condition in Order No. 8520664 constitutes a repeated flagrant violation under section 110(b)(2), the Secretary must bear the burden of demonstrating the following criteria:

(1) A repeated flagrant violation is a flagrant violation[12] 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.[13]

(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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[12] A condition designated as a repeated flagrant violation may also be attributable to reckless conduct. Such violations may warrant higher civil penalties under section 110(b)(2).

[13] This criterion adopts the Secretary's belief that a previous violation relied upon as a predicate must "demonstrate the threshold gravity and negligence required by section 110(b)(2)." *See* page 8, *supra, citing* Sec'y Resp. at 11.

(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.

The Commission's rules authorize the Judge to require parties to submit pre-hearing statements that will avoid unnecessary proof, advance rulings on the admissibility of evidence, and aid in the expedition of the hearing or the disposition of the case. *See* 29 C.F.R. §§ 2700.53(a)(2), (a)(6) and (b). Accordingly, **IT IS ORDERED** that the Secretary provide, **in writing, within 21 days of the date of this Order**, a statement regarding whether or not the conditions cited in Order No. 8520664, as well as the conditions in any predicate citations the Secretary relies on to establish the subject repeated flagrant violation, satisfy each of the above enumerated evidentiary criteria.[14]

With regard to elevating the cited condition to flagrant, the Secretary should state why the subject condition and its predicate conditions are so conspicuously bad and hazardous that they cannot reasonably escape notice. In this regard, the Secretary's position that the subject conditions could be reasonably expected to substantially and proximately cause death or serious bodily injury should be supported by identification of sources of ignition,[15] if any, that are located in proximity to the cited accumulations. The Secretary should also identify any other aggravating factors deemed relevant.

In specifically describing the aggravating factors relied upon, the Secretary should be mindful of MSHA's Program Policy Manual concerning enforcement of section 75.400, which states, in pertinent part:

> Accumulations of coal dust, loose coal, or the combination of the two offer serious fire and explosion hazards and must be removed from the mine if, in the judgment of the inspector, they would lead to an intensification or spreading of a fire or an explosion. In evaluating whether the coal dust and loose coal would lead to an

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[14] The failure to timely provide the requested detailed pre-hearing statement may result in deletion of the repeated flagrant designation.

[15] The terms "sources of ignition" and "potential sources of ignition" are not synonymous. It is not uncommon for coal dust to accumulate on the mine floor along conveyors and in proximity to belt rollers. I assume that the Secretary is not arguing that violations of section 75.400 based on accumulations in proximity to, or that are touching, properly functioning rollers constitute *per se* flagrant violations.

> intensification or spreading of a fire or an explosion, *the inspector should consider all the facts concerning the deposit. For example, float coal dust, loose coal and/or coal dust deposited near working faces and in active haulage entries, where sources of ignition are likely to be, are more hazardous than similar deposits in back entries. . . .*
>
> In citing a violation, the inspector should describe fully the conditions and practices, such as the location, dimensions, etc. Imminent danger conditions normally can be considered to exist when *accumulations of coal dust*, float coal dust, loose coal, and other combustible materials are *exposed to probable explosion and fire ignition sources, and the conditions observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous conditions are eliminated.* There may be times when the inspector's interpretation of what is an accumulation of float coal dust, loose coal and coal dust and/or other combustible materials will differ with the opinion of others. However, the inspector should base his decision upon the facts surrounding each occurrence, and document such facts as the dimensions, type, specific location, and all other related factors. The inspector's decision as to what is an accumulation must be an objective one based on the facts or circumstances surrounding each occurrence.

V MSHA Program Policy Manual, Sec. 75.400, at 46-47 (Feb. 2003) (updated Feb. 2014) (emphasis added).

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Administrative Law Judge

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