FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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AUG 30 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. LAKE 2009-35
v.	:	
THE AMERICAN COAL COMPANY	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). Under review are rulings the Administrative Law Judge made in affirming two orders alleging flagrant violations of 30 C.F.R. § 75.400.[1] 35 FMSHRC 2208 (July 2013) (ALJ).

The Commission granted cross-petitions for discretionary review from American Coal Company ("AmCoal") and the Secretary of Labor. AmCoal, on multiple grounds, challenges the Judge's determinations that the violations constituted "flagrant" violations, as that term is used in the Mine Act's penalty provisions. The Secretary petitioned for review of the Judge's determination that, in connection with the second violation, there was a lesser degree of negligence on the part of AmCoal, which provided a basis for the Judge's reduction in the amount of the penalty he assessed for the violation relative to that proposed by the Secretary.

For the reasons that follow, we affirm the Judge's "flagrant" determination with respect to the first violation. We vacate and remand certain of the Judge's determinations with respect to the second violation for further proceedings consistent with this decision.[2]

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[1] Section 75.400 provides that "[c]oal 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."

[2] A majority of the Commissioners join in each section of the unsigned opinion, and therefore it constitutes the Commission's decision in this case. Those sections in which not all Commissioners join in either result or rationale, and thus one or more Commissioners write separately, include footnotes identifying a Commissioner's departure.

I.

General Factual and Procedural Background

The two violations occurred five days apart in September 2007 at AmCoal's Galatia Mine, a large underground coal mine in Saline County, Illinois. There, a complex system of conveyor belts transports coal for many miles from mine face to portal. The mine was subject to five-day spot inspections by MSHA due to the amount of methane it liberated daily.[3]

The orders in this case were issued due to accumulations of loose coal and float coal dust at two separate belt transfer points. Specifically, on September 18, Steven Miller, the lead inspector at the mine from the Department of Labor's Mine Safety and Health Administration ("MSHA"), issued Order No. 7490584 for accumulations of those materials occurring approximately four miles outby the working section, near the location where the Flannigan #1 belt transferred coal to the Northwest #3 belt. Am. Ex. 5, at 3-4 (maps). The order alleged that the violation was both significant and substantial ("S&S") and attributable to AmCoal's unwarrantable failure to comply with section 75.400.[4]

On September 23, Inspector Miller issued Order No. 7490599 for accumulations of loose coal and float coal dust near the transfer point between a "pony" belt — a shorter, temporary belt at the working section in the northwest area of the mine — and the larger Flannigan Tailgate belt. Am Ex. 4, at 5 (map). This order also alleged that the violation was both S&S and attributable to AmCoal's unwarrantable failure.

MSHA subsequently proposed penalties for the two alleged violations. Significantly, both violations were assessed as "flagrant" under section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(b)(2), which at that time permitted penalties of up to $220,000 per violation to be imposed for flagrant violations.[5] For the first order, MSHA proposed a penalty of $179,300, while for the second it proposed $164,700.

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[3] Section 103(i) of the Act provides in pertinent part that a mine liberating in excess of one million cubic feet of methane or other explosive gases during a 24-hour period is subject to a minimum of one spot inspection every five working days. 30 U.S.C. § 813(i).

[4] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard." The unwarrantable failure terminology is taken from the same section, and establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards."

[5] Section 8(a) of the Mine Improvement and New Emergency Response ("MINER") Act amended section 110 of the Mine Act to create a "flagrant" violation designation and to provide for the assessment of an enhanced penalty. Pub. L. No. 109-236, 120 Stat. 498, 500 (2006).

A. Introduction - Flagrant Violations

The MINER Act's "flagrant" provision 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).[6]

In this case, the Secretary of Labor alleges that the operator's "failure" was of the "repeated" variety, not the "reckless" variety. As described in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013), a "repeated" failure to make reasonable efforts to eliminate certain violations may be proven in two different ways.

When we first considered proof of flagrant violations, on interlocutory review in *Wolf Run*, we held that the graduated enforcement scheme of the Mine Act and other reasons allowed an operator's violation history to be taken into account in determining whether its "failure to take reasonable steps to eliminate a" serious "known violation" was a "repeated" one. *Id.* at 541-43.[7] This is best described as a recurrent-type violation, and was referred to by the Judge in his decision as the "broad" interpretation of the flagrant provision for repeated violations.[8]

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[6] Congress divided section 110(b) into two subsections, with the new language set forth above included within section 110(b)(2). Pub. L. No. 109-280, 120 Stat 1108 (2006). MSHA subsequently added identical language to its penalty regulations. *See* 30 C.F.R. § 100.5(e). The language of section 110(b) that existed prior to the MINER Act was placed in section 110(b)(1) of the Mine Act. Section 110(b)(1) now provides that "[a]ny operator who fails to correct a violation for which a citation has been issued under section 814(a) of this title within the period permitted for its correction may be assessed a civil penalty of not more than $5,000 for each day during which such failure or violation continues." 30 U.S.C. § 820(b)(1). These are essentially the penalties for failure to abate orders issued under section 104(b), 30 U.S.C. § 814.

[7] Commissioner Althen, who was not on the Commission at the time *Wolf Run* was issued, disagrees with this holding, for the reasons discussed in his separate opinion. Slip op. at 50-55. His four colleagues have considered his arguments, and affirm the holding in *Wolf Run*.

[8] Because of the interlocutory nature of the proceedings in *Wolf Run*, we found that it was inappropriate to address which prior violations were relevant in that instance. As a result, we offered no view on the reasonableness of the specific interpretation proffered by the Secretary's appellate counsel in that case. *Id.* at 543 & n.15. On remand, the parties settled the

We also made passing reference to a second approach to establishing a repeated failure in *Wolf Run* (35 FMSHRC at 543 n.14), which was referred to as the "narrow" interpretation of the flagrant provision by the Judge, who applied it to both orders in this case. The Judge held that to establish a "repeated failure to make reasonable efforts to eliminate" a serious, known violation under this approach, the Secretary would be required to show that the cited and assessed violation, discreetly and without reference to the operator's past violation history, met the requirements for a flagrant violation. In other words, there was a single, continuing violation serious in nature that the operator could or should have become aware of at some point, i.e., known, such that it had multiple opportunities to address the condition, but did not avail itself of those opportunities (repeated failure to take reasonable steps to eliminate).[9]

B. The Proceeding Below

This case was tried below in August 2011 under the first approach, with the Secretary focusing on AmCoal's past history of section 75.400 violations. In the two years leading up to September 2007, MSHA had issued the Galatia Mine a large number of citations and orders for accumulations violations. At the hearing, the Secretary introduced evidence in particular of citations and orders issued in the 12 months preceding September 2007 for accumulations of coal, lump coal, coal dust, float coal dust, and coal fines on or around conveyor belts.

In his decision,[10] the Judge rejected the interpretation of the flagrant provision proffered by the Secretary which relied upon AmCoal's history of past violations (the "broad" approach). After an extensive analysis, he concluded that he could defer to the Secretary's interpretation only to the extent that it had the power to persuade, and that here he was "not persuaded by the Secretary's shifting and inconsistent reasoning, including the addition of requirements not present in the statutory language." *Id.* at 2242-49, 2253-58.

The Judge nevertheless held that both accumulations violations were flagrant under the second approach — the "narrow" interpretation — as the evidence established that the violations fell within the express terms of the statutory language. *Id.* at 2258-67. He assessed penalties of $101,475 and $77,737, respectively, for the orders. Thus, the penalty amounts exceeded the

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case. The flagrant designation was removed and a penalty of $70,000 was assessed, which was a little less than half of the $142,900 penalty that the Secretary proposed. Order, Docket No. WEVA 2008-1265 (Apr. 14, 2014) (ALJ).

[9] In *Wolf Run*, the Commission intimated that such conduct may be considered as both "reckless" and "repeated" under the terms of the statute. 35 FMSHRC at 543 n.14.

[10] By order dated February 28, 2012, the Judge stayed this proceeding while the Commission considered the issue of the interpretation of the flagrant penalty provision. Upon issuance of the Commission's decision in *Wolf Run*, the Judge lifted the stay and took further briefing regarding the Commission's decision. *See* Order dated April 1, 2013.

maximum penalties for non-flagrant violations, but were less than the Secretary's requested amounts. *Id.* at 2266-69.

II.

Order No. 7490584

AmCoal is appealing the Judge's determination that the violation in Order No. 7490584 was established as "flagrant." It argues that the Judge's "narrow" interpretation of the term "repeated" is incorrect, that substantial evidence does not support the Judge's findings under a number of the elements of the definition,[11] and that AmCoal was deprived of due process because it had no notice of the interpretation.

In response, the Secretary urges that the Judge's flagrant determination under the narrow interpretation of the statute be affirmed, or that if it is not, the Commission reverse the Judge on the question of the reasonableness of the broader interpretation and find that the violation was established as flagrant under that alternative interpretation of the statutory definition.

Order No. 7490584, also referred to herein as "the first violation," states:

> Float coal dust, a distinct black in color, and loose coal were allowed to accumulate under and around the energized tail roller of the Northwest Number 3 conveyor belt. The accumulations measured approximately 6 inches to 29 inches in depth. Accumulations of coal that had been removed from under this tail roller in the past had been stock pile[d] behind the tail roller guard and measured approximately 6 feet in width, 2 feet in depth, and 8 feet in length. Loose coal and coal float dust also extended outby the tail roller approximately 150 feet as well as 40 feet inby the tail roller. This area was black and the turning tail roller was suspending float coal dust into the atmosphere. This condition has been on the books for the last four shifts.

Gov't Ex. 2. 35 FMSHRC at 2211-12.

According to the terms of section 110(b)(2), to establish a "flagrant" violation, the Secretary must demonstrate on the operator's part "a reckless or repeated failure to make

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[11] When reviewing an Administrative Law Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

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." Thus, for a flagrant violation, it must be established that: (1) there was a condition that constituted a violation of a mandatory health or safety standard, (2) the violation was "known" by the operator; (3) the violation either (a) substantially caused death or serious bodily injury, or (b) reasonably could have been expected to cause death or serious bodily injury; (4) there was a failure on the part of the operator to make reasonable efforts to eliminate the violation; and (5) that failure was either "reckless" or "repeated." In this instance AmCoal challenges the Judge's determinations with respect to a number of the elements of the flagrant standard.

A. A Known Violation of Section 75.400

The Judge found that AmCoal conceded both violations. He concluded that a violation is considered to be "known" if the operator has actual or constructive knowledge of the violative condition. 35 FMSHRC at 2259-60.

With regard to the first violation, the Judge found actual knowledge of the accumulations, in that there were references made in the examination books for the three previous shifts to the belt area at issue being "dirty" and "black." *Id.* at 2212-14, 2238 (unwarrantable failure analysis), 2264-65.

AmCoal does not challenge the Judge's application of "known" in this instance, nor does it challenge his reliance on the preshift reports with respect to the first violation. Those reports document the accumulations over the course of four shifts. Am. Ex. 22, 23. Consequently, substantial evidence supports the Judge's conclusion that there was a known violation of section 75.400.[12]

B. Reasonable Expectation of Death or Serious Bodily Injury

A violation can be found to be flagrant if it is established that there was a reasonable expectation of death or serious bodily injury from the violation and the operator's failure to eliminate it. Here, the Judge determined that the grinding of the tail roller in the loose coal was a potential ignition source, 35 FMSHRC at 2227, and that the known accumulation violation contributed to the hazard of a mine fire, which could have been expected to cause severe and serious injuries due to smoke inhalation. *Id.* at 2265. Substantial evidence supports his determination.

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[12] While, as he discusses in his separate opinion, Commissioner Althen would apply a more stringent standard to the "knowledge" element of the flagrant provision than the Judge did in this case, he notes that applying that standard results in the same conclusion with respect to this violation. Slip op. at 40.

In finding that there was a reasonable expectation of serious bodily injury from the violation, the Judge relied upon his determination that the violation was S&S. On review, AmCoal does not challenge the Judge's finding with respect to the violation being S&S.

As AmCoal recognizes, the fourth and final finding necessary for concluding that a violation is S&S under the Commission's S&S test is similar, though not exactly identical to, the language describing the degree of injury necessary for a flagrant violation to be established.[13] While there is no legislative history addressing the flagrant violation provision (*see Wolf Run*, 35 FMSHRC at 541 n.8), it nevertheless appears that Congress, when it enacted the MINER Act and the flagrant provision, may have been looking to established Mine Act principles, such as the Commission's interpretation and application of S&S in *Mathies* and subsequent cases.[14]

On appeal, AmCoal argues that, with regard to whether the violation here qualifies as "flagrant," the Judge erred, on both legal and substantial evidence grounds, in finding that the violation had the potential for "death or serious injury." It first contends that the statutory flagrant language establishes a more stringent standard than does the fourth *Mathies* element, in that the statute requires that a reasonable expectation of death or serious bodily injury be

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[13] A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies Coal Co.*, 6 FMSHRC 1 (Jan. 1984), the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor 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 will result in an injury; and (4) a reasonable likelihood *that the injury in question will be of a reasonably serious nature.*

Id. at 3-4 (footnote omitted) (emphasis added); *accord Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1995); *Austin Power, Inc. v. Sec'y of Labor*, 861 F.2d 99, 103 (5th Cir. 1988) (approving *Mathies* criteria).

[14] As he notes in his separate opinion, Commissioner Althen finds that it is more likely that the phrase "reasonable expectation of serious bodily injury from the violation" was drawn from Commission cases interpreting the Mine Act's imminent danger provision, 30 U.S.C. § 817, and thus does not join his colleagues in interpreting and applying that language with reference to the Commission's S&S precedent. *See* slip op. at 42; 30 U.S.C. § 802(j) (defining "imminent danger" as "the existence of any condition or practice in a . . . mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated").

established, and not just the reasonable likelihood of an injury "of a *reasonably* serious nature" that satisfies *Mathies*. Relying on the terms MSHA uses in its penalty proposal regulations in expressing degrees of gravity, AmCoal would have flagrant violations limited to those that are reasonably likely to result in "fatal" or "permanently disabling" injuries, and not include the next lower level of injuries under those regulations, those resulting in "lost work days or restricted duty." *See* 30 C.F.R. § 100.3(e).[15]

However, those regulations are only applicable at the start of the penalty process, and then are only employed by MSHA when it proposes a penalty pursuant to section 105(a) of the Act, 30 U.S.C. § 815(a). Section 110(i) of the Mine Act ultimately authorizes the assessment of penalties for violations of the Act, and it assigns that responsibility to the Commission. *See* 30 U.S.C. § 820(i) ("The Commission shall have authority to assess all civil penalties provided in this Act."). Included as one of the criteria the Commission is required to consider in assessing a penalty is "the gravity of the violation." *Id.*

We thus reject AmCoal's reliance on the Part 100 penalty regulations — with their division of the severity of injuries into the three categories of "lost work days or restricted duty," "permanently disabling," and "fatal," 30 C.F.R. § 100.3(e) — to circumscribe the definition of "serious bodily injury." *See Mach Mining, LLC v. Sec'y of Labor*, 809 F.3d 1259, 1263-64 (D.C. Cir. 2016); *Brody Mining LLC*, 37 FMSHRC 1687, 1701 (Aug. 2015)). Consequently, we decline to look to the Part 100 regulations in interpreting elements of the flagrant penalty provision.

AmCoal also argues that the higher penalties for flagrant violations indicate that, under the Mine Act's graduated enforcement scheme, something more is required than under the scheme as it existed prior to the MINER Act amendments, and that therefore something more than an S&S finding is necessary before a violation can be found to be flagrant. It submits that the omission in the flagrant provision of the term "reasonably" from the *Mathies* fourth element of "injuries of a reasonably serious nature" further supports this argument.

We agree with AmCoal in part with respect to its first argument. Clearly, the maximum penalty that can be imposed under the MINER Act for the new classification of a "flagrant" violation far exceeds the penalty that can be imposed for a non-flagrant violation under the other provisions of the Mine Act.[16] Accordingly, it is reasonable to expect that flagrant violations be

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[15] AmCoal points out that MSHA issued two Procedural Instructional Letters in the first two years after the enactment of the flagrant provision. *See Procedures for Evaluating Flagrant Violations* (PIL Nos. I06-III-04 and I08-III-02); Am. Ex. 27. In both, MSHA indicated that "serious bodily injury" meant an injury evaluated to be at least permanently disabling. However, the last of the effective PILs expired in 2010, and the Secretary has since disavowed them as his definitive interpretation of the flagrant provision.

[16] Section 110(a)(1) of the Mine Act provides for a penalty of up to $50,000 for each violation of the Act. 30 U.S.C. § 820(a)(1). In 2008, the maximum was adjusted to $70,000 through rulemaking to account for inflation, pursuant to the Federal Civil Penalties Inflation

of a type that was not addressed in the original Mine Act. Otherwise, Congress could have simply increased the maximum amount at which a penalty can be assessed and avoided creating a new statutory classification of violation.

However, it does not necessarily follow that a flagrant violation must have a potential for a greater degree of gravity than that of an S&S non-flagrant violation. Rather, the distinguishing characteristic of a flagrant violation is most evident in those terms of the provision that previously were not part of the Mine Act. Foremost, in light of the Act's framework of escalating sanctions, is the language targeting a "repeated or reckless failure to make reasonable efforts to eliminate a known violation."

Under the Mine Act, section 104(d)(1) already provided for the inclusion of a special finding in citations and orders regarding an operator's "unwarrantable failure" to comply with the mandatory health or safety standard violated. The Commission has determined that "unwarrantable failure" is aggravated conduct constituting more than ordinary negligence, such that it encompasses "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC 1997, 2001, 2003-04 (Dec. 1987); *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d at 136 (approving Commission's unwarrantable failure test). Under well-established Commission case law, facts regarding the extent of an operator's knowledge of the conditions that constitute a violation, and the operator's behavior in light of that knowledge — particularly what it did to address the conditions — are key components in determining whether a violation is attributable to an operator's unwarrantable failure. *See, e.g., Consolidation Coal Co.*, 35 FMSHRC 2326, 2331-32 (Aug. 2013); *Manalapan Mining Co.,* 35 FMSHRC 289, 295-97 (Feb. 2013); *IO Coal Co.,* 31 FMSHRC 1346, 1353-55 (Dec. 2009).

Nevertheless, with the addition of the flagrant provision, Congress in the MINER Act chose, in the statute itself, to expressly and more forcefully focus upon violations known by operators and behavior indicative of a failure to address such violations. These factors, and not the degree of danger posed by a violation, are what distinguish the flagrant provision from the previous enforcement mechanisms available to MSHA.

As for the potential injuries from a mine fire, smoke inhalation clearly is a "serious bodily injury" under the terms of the flagrant provision. In *Wal-Mart Stores, Inc. v. Secretary of Labor*, 406 F.3d 731 (D.C. Cir. 2004), a case arising out of an alleged safety violation in a retail store stockroom, the court quoted approvingly from an Occupational Safety and Health Review Commission decision that "[c]learly, burns, smoke inhalation, and other potential injuries caused by delays in exiting the workplace during an emergency fall within the meaning of 'serious

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Adjustment Act of 1990 (Pub. L. No. 101-410, 104 Stat. 890 (28 U.S.C. § 2461 note)), as amended by the Debt Collection Improvement Act of 1996 (Pub. L. No. 104-134, Title III, Apr. 26, 1996, 110 Stat. 1321) and the Federal Reports Elimination Act of 1998 (Pub. L. No. 105-362, Title XIII, Nov. 10, 1998, 112 Stat. 3280). *See* 30 C.F.R. § 100.3(a); 73 Fed. Reg. 7206, 7207-08 (Feb. 7, 2008).

physical harm.'" *Id.* at 735-36 (quoting *Tree of Life, Inc.*, 19 OSH Case (BNA) 1535 (2001); *see also Knox Creek Coal Corp.*, 36 FMSHRC 1128, 1141 (May 2014) (potential for smoke inhalation from mine fire constitutes serious injury and thus compels conclusion that violation was S&S), *aff'd*, 811 F.3d 148 (4th Cir. 2016). Due to the long distances miners may have to travel to escape the underground mine environment in the event of a fire, their potential exposure to smoke is substantial. Moreover, in this case there were extensive accumulations of coal and coal dust to fuel a fire, so a fire at the location in question would present a severe hazard.

AmCoal nevertheless challenges on substantial evidence grounds the Judge's finding of a reasonable expectation that ten or more miners would have suffered from smoke inhalation while exiting the mine to escape a fire fueled by the belt accumulations. AmCoal contends that there is insufficient evidence of the amount of smoke that would leak into the primary escapeway due to the two damaged stoppings that would have permitted smoke from the belt area to enter that escapeway. AmCoal further contends that the secondary escapeway would not have been contaminated by smoke from a belt-area fire, and thus miners could have used it instead of the primary escapeway.

The Judge found that there was sufficient evidence that some smoke would leak into the primary escapeway due to damaged stoppings between the belt area and the primary escapeway. In making his findings, the Judge expressly credited Inspector Miller's testimony over that of AmCoal mine superintendent Steve Willis. 35 FMSHRC at 2230-31. The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

We see no reason to disturb the Judge's credibility determinations here. The Judge relied upon Miller's 31 years of experience in mining and mine safety. 35 FMSHRC at 2211 n.5, 2230. Miller had described the potential for "contaminat[ion of] the other air courses pretty quickly," because of the damaged stoppings, before miners could get outby the source of the fire. He rejected the idea that the direction of the air flow would mitigate the hazard posed by the smoke. Tr. I 93-94.[17]

In contrast, Superintendent Willis downplayed the likelihood of smoke contaminating the primary escapeway, due to the air flow and air pressure in the primary escapeway being much greater than the air flow and pressure in the belt entry in question. He also described how, if miners were to encounter such smoke, they could use a secondary escapeway and utilize a regulator to divert any smoke in that escapeway. Tr. I 415-19, 421-23, 426; Am. Ex. 5, at 4 (map).

[17] References to "Tr. I" are to the transcript for the first day of the hearing below, held on August 23, 2011, while references to "Tr. II" are to the transcript for the second day of the hearing, held the following day.

We disagree with AmCoal that to satisfy the flagrant provision the Judge was required to be more specific regarding the amount of smoke that would have reached the primary escapeway. The amount of smoke the miners would have been required to travel through in the event of a fire started in the belt accumulations is dependent upon a number of factors. Those factors include not only the intensity of the fire, but also the amount of time miners would have spent traveling through the compromised portion of the escapeway, a variable which itself is dependent upon other variable conditions. *See Buck Creek*, 52 F.3d at 135 (characterizing as "common sense" the "conclusion that a fire burning in an underground coal mine would present a serious risk of smoke and gas inhalation to miners who are present."). In summary, the record evidence supports the Judge's finding that an accumulations fire "reasonably could have been expected to cause . . . serious bodily injury" in the form of smoke inhalation by escaping miners.[18]

C. Repeated Failure to Make Reasonable Efforts to Eliminate the Known Violation

With respect to this violation, the Judge correctly concluded that AmCoal had made no efforts to eliminate the accumulations. The Judge found that the only effort that had been made was to remove some loose coal that had accumulated earlier around the tail roller and stockpile it behind the tail roller guard; this did nothing to eliminate the accumulations violation. He noted that not only were AmCoal's actions contrary to the mine's section 75.400-2 cleanup plan, but also that the stockpile of loose coal simply provided additional fuel in the event of an ignition caused by the tail roller grinding in the accumulations. 35 FMSHRC at 2240, 2264; Am. Ex. 15, at 1 ("[l]oose accumulations of coal along the belt lines will be shoveled onto the belt."). These conclusions by the Judge have essentially gone unchallenged by AmCoal, which is instead challenging whether its failure to address the accumulations can be considered to have been a "repeated" one.

Relying on a number of dictionary definitions, the Judge held that the term "repeated" means "more than one occasion." 35 FMSHRC at 2258. Applying that definition to the facts of the violation, the Judge held that the evidence established that the failure to make reasonable efforts to eliminate the accumulations was repeated in nature. For the first violation, the Judge found that AmCoal failed to take steps to address the violation before and during each of the three shifts the accumulations existed. *Id.* at 2264.

AmCoal challenges the Judge's interpretation and application of the term "repeated." It takes the position that defining "repeated" to simply mean "more than once" is overbroad, is contrary to the term's plain meaning, ignores the context of the flagrant provision and its

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[18] In light of the dangers posed by a potential underground mine fire in this instance, we need not decide whether the slight difference between the pertinent language of the flagrant provision and the fourth element of *Mathies* mandates that flagrant violations cover only "a narrower, more severe subset of hazards" than violations designated S&S. Am. Coal Br. at 35. We need not decide this issue here because even if the standard for flagrant violations is more rigorous, it is met in this case.

legislative history, and is inconsistent with the graduated enforcement scheme of the Mine Act. AmCoal would instead have the Commission hold that the term "repeated" means "several, many, or again and again," and can only be applied after taking the following into account: the extent of the cited conditions, or changes in the extent; the level of the operator's knowledge and any changes to that knowledge between the repeated instances; the level of danger posed by the conditions; and the abatement efforts of the operator.

In considering the meaning of the Mine Act, we must "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). If however, the statute is ambiguous or silent on a point in question, a second inquiry is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. 843-44; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 n.2 (Apr. 1996). 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." *Coal Employment Project v. Dole*, 889 F. 2d 1127, 1131 (D.C. Cir. 1989) (citations omitted).

We find that the term "repeated" as it is used in the flagrant violation provision of the Mine Act does not have a plain meaning with respect to the failure to eliminate a singular, continuing violation. The Judge relied on several dictionary definitions, but they were not consistent. *See* 35 FMSHRC at 2258.[19] "A dictionary definition of a term cannot provide plain meaning when reliance on a different dictionary would provide 'different or uncertain outcomes.'" *Am. Coal Co.*, 35 FMSHRC 380, 383 (Feb. 2013) (finding different dictionaries contain different definitions of "fire") (citing *Alarm Indus. Communication Comm. v. FCC*, 131 F.3d 1066, 1069 (D.C. Cir. 1997)), *aff'd*, 796 F.3d 18 (D.C. Cir. 2015); *see also Sec'y of Labor v. National Cement Co. of Cal.*, 494 F.3d 1066, 1074 (D.C. Cir. 2007) (different dictionary definitions of the term "private" establish that meaning of term was ambiguous as used in Mine Act).

Other traditional tools of statutory interpretation are of little aid in ascertaining a plain meaning of the statute's use of the term "repeated." Unfortunately, there is no legislative history on what Congress meant by any of the terms it employed to define what constitutes a flagrant violation, just the general intent of the flagrant penalty provision. *See Wolf Run*, 35 FMSHRC at 541 n.8. In short, we find the statutory language ambiguous.

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[19] Some of the dictionaries he cited indicate that "repeated" means more than once, so that twice is sufficient to qualify as "repeated," while other dictionary definitions use language that twice is insufficient to qualify as "repeated," such as those that state it means "again and again." Indeed, one dictionary contains both iterations of the term. *See Webster's Third New Int'l Dictionary of the English Language (Unabridged)* 1924 (1993) ("1: renewed or recurring again and again : CONSTANT, FREQUENT (~ absences) (~mistakes) (~changes of plan) 2 : said, done or presented again (an often ~ repeated excuse) (an eloquently ~ repeated speech) (an easily ~ pattern)").

With regard to the second step of *Chevron*, we do not read the Secretary's submissions in this case as having articulated a definite interpretation of "repeated" that he would always apply in the context of cases involving a single, continuing violation. Before the Judge, the Secretary tried the case on a different approach to the flagrant provision, relying on AmCoal's history of accumulations violations, so he likely saw no need to provide such an interpretation.

On appeal, the Secretary still does not provide a concrete interpretation of the "narrow" approach to "repeated" violations applicable in all cases. Instead, he simply states that he "agrees with [AmCoal] that two or three failures might amount to a flagrant violation in certain circumstances but not in others, depending on the particular facts." S. Resp. Br. at 17. We agree with the parties that, as far as it goes, this is a reasonable, albeit very general, interpretation.

Interpreting "repeated" in the context of the circumstances of the "failure" at issue is consistent with the term "flagrant." While Congress provided a definition of the term "flagrant," the word bears an inherent approbation related to intolerable and obvious failure. "Flagrant" means "extremely . . . conspicuous; glaringly evident; notorious." *Websters Third Int'l* at 862-63. Another dictionary definition is "shockingly noticeable or evident; obvious; glaring." *Dictionary.com Unabridged* (Random House, Inc.), http://www.dictionary.com/browse/flagrant (last visited Aug. 29, 2016). We presume that Congress intended this word in its full significance, because it has chosen not to employ "flagrant" in an analogous context involving willful or repeated violations. *See* 29 U.S.C. § 666(a) ("Willful or repeated violation" provision of Occupational Safety and Health Act). Because the terms "flagrant" and "repeated" are used to characterize the operator's "failure to make reasonable efforts to eliminate" a known, serious hazard, our determination centers on the operator's dereliction where immediate remedial action was required.

In this instance, a review of the record with respect to the violation indicates that we need not decide the minimum number of failures to address a violation before those failures can be considered to have been "repeated."[20] The Judge's findings readily establish that, over several

[20] The Secretary focuses on the number of shift examinations of the belt in question that AmCoal conducted that should have alerted it to the accumulations. However, simply counting the number of shift examinations over which a violation existed is not necessarily the most accurate indicator of whether an operator's failure to eliminate it can be characterized as "repeated." Once the existence of an accumulation becomes known to the operator, it has an immediate and continuing obligation to act to correct the condition. *See Peabody Coal Co.*, 14 FMSHRC 1258, 1262-63 (Aug. 1992); *Old Ben Coal Co.*, 1 FMSHRC 1954, 1959 (Dec. 1979). The number of shifts over which accumulations were left unaddressed can provide a useful measurement of the duration of an accumulations violation, and the number of operator reports noting the violative condition may help establish the degree to which the operator was aware of the violation. However, counting each shift or shift examination as a single opportunity for the operator to clean up the accumulations tends to obscure the extent to which the operator failed to act once it became aware of the existence of the condition. Not acting to clean up accumulations over the course of a shift should not necessarily be considered a single "failure."

shifts, AmCoal knew of and had multiple opportunities to eliminate the cited accumulations but did not take corrective action.

The Judge examined in detail the operator's examination records not only for indications of the extent of the accumulations during each of the shifts leading up to Inspector Miller's discovery of the accumulations, but also for what AmCoal's reports documented that the operator did in response to those indications. When the first preshift/onshift report on September 17 indicated accumulations around the Northwest No. 3 belt, the next such report indicated that the area had been cleaned. 35 FMSHRC at 2213; Am. Ex. 22, at 2-3. Thus, AmCoal clearly had the capability to take steps to immediately address an accumulation from the belt in question.

After that, however, AmCoal's reports indicate worsening accumulations, with no corresponding indication of subsequent corrective action by AmCoal. From the examiner's report entered for the shift starting at 8:00 pm on September 17 until Miller issued his order at 5:15 pm on September 18, four successive reports indicated accumulations around the belt. 35 FMSHRC at 2213-14; Am. Ex. 22, at 4& 6; Am. Ex. 23, at 2 & 4. This includes notations that the tail scraper and rollers were "black," which the Judge reasonably interpreted to mean that they were in contact with the accumulations. 35 FMSHRC at 2234-35.

Evidence that AmCoal's failure was a repeated one in this instance was also provided by Miller's testimony, credited by the Judge, that the amount and extent of accumulations indicated that they had begun some time before, that the reddish-brown color of some of the coal dust indicated that it had been in contact with the belt's rollers over a number of shifts, and that the black dust in the area was an indication that it had accumulated since the time the area had last been rock dusted. Miller also viewed the presence of float coal dust in the air to be the result of the turning tail roller suspending it. *Id.* at 2212, 2215; Tr. I 71-72, 63-65, 83-84, 206-07. The coal stockpiled behind the tail also demonstrates that AmCoal was aware of the accumulations, and acted at least at one point to move them away from the rollers (though that did nothing to eliminate them as "accumulations"). 35 FMSHRC at 2214; Tr. I 151.

Lastly, there is no record evidence of anything that was preventing AmCoal from cleaning up the accumulations much sooner. Indeed, in a rather damning concession in its opening brief, AmCoal states that if it had realized the flagrant provision applied to its conduct in this instance, it might have responded differently, such as "dedicat[ing] more personnel to quickly clean-up the accumulations noted in the exam records instead of allowing them to be on the books for three (3) shifts without fully correcting them." Am. Br. at 29-30 & n.11. Such an attitude towards accumulations by the operator clearly runs counter to the duty the Mine Act imposes on it to immediately act to clean up accumulations once their existence becomes known, and may, in part at least, explain why Congress found it necessary to include the flagrant violation provision in the MINER Act.

D. Notice

AmCoal contends that, with regard to the narrow interpretation of the flagrant provision, it did not have adequate notice of the meaning of the term "repeated failure." It maintains "that its management could not and did not 'know what [was] required of them so they [could have] act[ed] accordingly' to avoid" the flagrant orders. Am. Br. at 23 (quoting *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012)). The operator requests that the Commission therefore hold that the flagrant provisions are unconstitutionally vague as applied to AmCoal. According to the Supreme Court in *Fox*, "[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required. . . . It requires the invalidation of laws that are impermissibly vague." 132 S. Ct. at 2317 (citations omitted).

We reject the argument that the term "repeated failure" did not give AmCoal sufficient notice of what the flagrant provision required of it. The operator's notice argument relies on cases involving a defense in which a party claims a lack of notice of prohibited conduct. The conduct at issue here is compliance with the safety standard regarding accumulations. The operator makes no claim that it did not understand how to comply with this provision. Any ambiguity in the statutory language regarding "flagrant violations" affects the amount of penalty assessed. It does not affect the clarity of the standard of conduct to which AmCoal must adhere, as expressed in the underlying safety standard.

The term "repeated" depends on the context in which it is to be applied. In this case, given the above-described facts, all of which are supported by substantial evidence, it is clear that the operator permitted a known, dangerous accumulation to persist over several shifts. Under the facts of this violation, it is also abundantly clear that the operator "repeatedly" failed to address a known violation of a mandatory safety standard.

An operator's history is probative of the conditions in which the alleged flagrant failure occurred. For example, an operator's history of past similar violations may be used to demonstrate failure to address the root cause on previous occasions; to show the operator had notice of a general problem which included the subject violation; or to establish the operator's general practices and the failure to adopt improved practices, where relevant.

The record in this case refutes the assertion that AmCoal could not have expected the violations here to fall within the scope of the "repeated failure" provision. The Secretary submitted at the hearing 27 citations or orders, issued at the mine within the 12 months preceding the subject orders, for violations of section 75.400 involving accumulations in belt areas of the same materials at issue here — coal, float coal dust, coal fines, and other combustibles. Gov't Exs. 6 to 32. In addition, the Secretary submitted a history of previous violations for the mine showing 361 final and nonfinal orders for accumulations violations at the mine during the two years prior to the issuance of the orders, including five alleging violations attributable to AmCoal's unwarrantable failure issued within the two months prior to the subject violations. Gov't. Ex. 1.

This history places AmCoal's failure to address the subject accumulations in context. The Judge found that MSHA had "warned [AmCoal] repeatedly through meetings, training sessions, and prior citations/orders, about belt accumulation[s]." 35 FMSHRC at 2237; Tr. 86-90. AmCoal thus already knew that MSHA viewed its accumulations to be a serious general problem that the operator was not adequately addressing. With that as background, any reasonably prudent operator would have understood, by reading the "repeated failure" language of the flagrant provision, that its conduct with respect to accumulations — which were allowed to persist over several shifts, despite the agency's specific and escalating admonishments concerning substantially similar violations — was subject to the flagrant penalties.

In summary, we affirm the Judge's determination that the violation in Order No. 7490584 was established to be a flagrant violation of the Mine Act in and of itself. Consequently, in this instance we do not need to address the Secretary's alternative request that we determine whether, contrary to the Judge's decision, the Secretary also established the violation as flagrant based on the evidence of AmCoal's history of accumulations violations.

III.

Order No. 7490599

This order, also referred to herein as "the second violation," states that:

> Float coal dust, a distinct black in color, and loose coal were allowed to accumulate under and around the energized tail roller of the Flannigan Tailgate conveyor belt. The accumulations measured approximately 6 inches to 14 inches in depth. Loose coal and coal float dust also extended outby the tail roller approximately 450 feet as well. The area was black and the turning tail roller was suspending float coal dust into the atmosphere. The bottom belt and bottom rollers were in contact with these accumulations.

Gov't Ex. 3.

A. The Violation of Section 75.400

As with the first violation, there is no dispute in this instance that the cited accumulations constituted a violation of section 75.400. The Judge's finding of a violation is well supported by the record evidence. *See* 35 FMSHRC at 2217-19, 2224 & n.8. He credited Miller's testimony, which was supported by his notes, that there was "a lot" of black float coal dust, such that he immediately noticed it upon entering the area. *Id.* at 2218-19; Tr. I 108-09; Tr. II 143; Gov't Ex. 4.

B. Reasonable Expectation of Death or Serious Bodily Injury

As with the first violation, the Judge relied on his S&S analysis to find that it was reasonable to expect that the second violation, if left unabated, would cause death or serious bodily injury. 35 FMSHRC at 2265. He found the second violation to be even more serious than the earlier accumulations. He found that a fire was reasonably likely to occur as a result of frictional heat generated between the loose coal and the energized tail roller of the belt at issue, and that serious and possibly fatal injuries would result in the event of a fire to the six miners on the working section inby the belt, as a result of smoke inhalation, carbon monoxide poisoning, burns, and entrapment. *Id.* at 2231.

AmCoal's legal challenges to the Judge's reliance on his S&S analysis were addressed, *supra*, with respect to the first violation, and the grounds for rejecting them are even stronger here. With regard to whether the violation was S&S, the Judge credited Inspector Miller's testimony that in this instance there were *two* separate ignition sources in contact with mostly dry accumulations — the bottom belt and bottom rollers, and the energized tail roller that was turning in the accumulations. *Id.* at 2219, 2230-31; Tr. 107, 119. Moreover, the six miners on the section were just six crosscuts away from the accumulations, and thus would have had little time in which to react to the effects of a fire precipitated by the accumulations at the belt. 35 FMSHRC at 2231; Tr. 121.

Lastly, the Judge relied upon Miller's testimony to conclude that, due to the miners' proximity, a mine fire would expose them not only to smoke inhalation, but also to carbon monoxide poisoning, burns, and entrapment. 35 FMSHRC at 2231; Tr. 121. Again, it appears to us that in finding the violation to be S&S, the Judge supported his determination with a quantum of evidence exceeding that necessary to uphold an accumulations violation as S&S under *Mathies*. *See, e.g., Consolidation Coal Co.*, 35 FMSHRC 2326, 2328-29 (Aug. 2013).

While again not contesting the Judge's determination that the second violation was S&S, with respect to whether the violation was also flagrant AmCoal challenges on substantial evidence grounds the Judge's findings of the danger posed by a fire resulting from the cited accumulations. In analyzing the potential effects of a fire at the belt transfer point, the Judge referred to an AmCoal exhibit, a map used to illustrate witness testimony, that he interpreted as showing no stoppings present to isolate escaping miners from the effects of such a fire. *See* 35 FMSHRC at 2231 (citing Am. Ex. 4, at 5). As a result, he considered the smoke hazard to be "unmitigated." *Id.*

AmCoal contends that the exhibit was not prepared to be used as evidence for such matters as the existence and location of stoppings isolating the escapeway, so the Judge should not have used it in the manner he did. Tr. II 38. At the hearing, to the extent he addressed the issue, Inspector Miller testified to there being no evidence of the leakage of air coming off the belt area into the escapeways in this instance, and no evidence of damage to stoppings. Tr. I 347-48.

AmCoal contends that the map was not prepared for the purposes of documenting either the existence or location of stoppings and the Judge erred in interpreting it for that purpose. The Secretary concedes that the Judge misconstrued the evidence and that there were in fact stoppings between the primary and secondary escapeways on the Flannigan Tailgate belt. S. Br. at 21; Tr. II 37-46; Am. Ex. 4, at 5.

However, the evidence demonstrates that the pony belt entry, which ran from its intersection with the Flannigan Tailgate to the set-up area for the long wall panel lacked stoppings. Tr. II 42; Am. Ex. 4 at 5.[21] The Secretary notes that AmCoal's approved ventilation plan only required stoppings separating intake and return air course "up to and including the fourth connecting crosscut outby the working faces." Am. Ex. 18, at 7. Because the miners were inby the area of required stoppings, the area of entry in which they were working was not isolated by stoppings from the pony belt entry. Tr. II 42; Am. Ex. 4, at 5.

Miners evacuating the working face would have to travel outby over 400 feet before there were any stoppings to isolate them from fire and smoke in the pony belt entry, and another 200 or so feet in which the stoppings were not permanent and not designed to withstand fire, but were merely brattice and curtains. Tr. II 42, 101. It was only at that point that the miners would reach the belt intersection where the accumulations had ignited, and upon turning the 90-degree corner where the belts intersected could access any escapeway isolated by stoppings from the Flannigan Tailgate belt.

Accordingly, we conclude that substantial evidence supports the Judge's conclusion that the smoke hazard was serious enough to reasonably be expected to cause death or serious bodily injury.[22] Whether the Judge's misuse of the mine map affected his further finding that, under the circumstances, this violation posed an even greater danger than the earlier violation, is not material to the disposition of the flagrant determination on appeal.[23]

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[21] Foreman Raney's testimony regarding the presence of stoppings isolating the escapeways was specifically limited to the escapeways in the Flannigan Tailgate. Tr. II 101-02.

[22] For the reasons stated in his partial dissent, Commissioner Young would remand this issue to the Judge for him to make the necessary findings of fact in the first instance. Commissioner Althen joins in this view. Slip op. at 32, 41 n.3.

[23] Despite finding a greater degree of gravity for the second violation as compared to the first, the Judge assessed a penalty that was $23,000 less than the penalty he assessed for the first violation, and in so doing reduced the Secretary's proposed penalty for the second violation approximately $9,000 more than he reduced the Secretary's proposed penalty for the first violation. 35 FMSHRC at 2266-67. Consequently, we see no need to include in a remand of the case to the Judge the issue of the gravity of the second violation.

C. Repeated Failure to Make Reasonable Efforts to Eliminate a Known Violation

With regard to whether the violation was "known" by AmCoal, the Judge credited Miller's estimate that the coal and dust had accumulated over more than two shifts, because in only a "train wreck" scenario would such extensive, black accumulations result in less than that amount of time. 35 FMSHRC at 2265 (citing Tr. I 108). The Judge held that while AmCoal did not have actual knowledge of the accumulations, in that they had not been reported in the operator's examination books in this instance, it had constructive knowledge of the accumulations from its Production Delay ("P&D") reports. *Id.* at 2239 (citing Am Ex. 21), 2259, 2265.

The Judge read those reports as having documented problems with the pony belt stopping and starting due to electrical problems over the course of several shifts, and drew upon testimony from AmCoal section foreman Rocky Raney that such stops and starts could cause spillage from the belt and quickly lead to accumulations. *Id.* at 2219, 2239, 2265; Tr. II 66-68. Accordingly, the Judge found that AmCoal had the opportunity during the two shifts preceding the discovery of the accumulations by Inspector Miller to address the accumulations, but did not do so. 35 FMSHRC at 2265.[24]

AmCoal challenges the Judge's findings with regard to its knowledge of the accumulations, and thus his findings that it failed to make reasonable efforts to eliminate the violations. We conclude that the Judge's analysis of the evidence of AmCoal's knowledge of the accumulations was insufficient in this instance.[25]

At the mine, each AmCoal shift foreman would fill out P&D forms by hand each shift, including for the working section in question. Tr. II 31-32; *see* Am. Ex. 20, at 37-42 (three Sept. 23 shifts the Judge focused upon). These reports were then summarized in the daily printout to which the Judge cited, which according to Raney were likely produced by "Mine Control." 35 FMSHRC at 2219, 2239, 2265; Tr. II 30-31, 60-61; Am. Ex. 21, at 10 (Sept. 23). The Judge's reliance on the daily printout of the P&D reports is problematic, however, because the September 23 report was not printed until the morning of September 24, the day after AmCoal was cited for the accumulations. Tr. II 60; *see* Am. Ex. 21, at 10 (notation of date of printing).

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[24] In a related holding, the Judge found that the failure of AmCoal's examiners to report the violations in the two shifts preceding the discovery of the accumulations by Miller mitigated AmCoal's negligence with respect to the second violation. Consequently, the Judge, relying on the Secretary's penalty regulations addressing the negligence factor, reduced the level of AmCoal's negligence from "high" to "moderate." *Id.* at 2241. The Commission granted the Secretary's petition for review on the reduction, and we address his arguments below in Part III.E.

[25] For the reasons set forth in their partial dissent, Chairman Jordan and Commissioner Nakamura would affirm the Judge with regard to these elements of the flagrant provision as to the second violation. *See* slip op. at 33-36.

Rather than exclusively relying on the daily printout of the P&D reports, the Judge should have looked to the handwritten forms prepared by those foremen, as they included contemporaneous information. They also included a greater amount of more specific information, such as the exact times that the pony belt was experiencing the problems summarized on the printed P&D report for that day. For instance, with regard to the first shift on September 23, the shift starting at midnight, the notation that "pony belt would not run for more than [two to three minutes]"(Am. Ex. 20, at 38), was for the 7:00 a.m. to 9:00 a.m. time period at the end of that shift. This is the problem to which Raney, in reviewing the daily summary, linked the potential for spillage at the belt transfer point. Tr. II 65-68.

The pony belt was then not used until the next shift, when there is a notation that it was discovered at the arrival of that next shift, at 9:15 am, that the pony belt's ground monitor card was bad, and it was repaired or replaced between 9:15 and 9:45 a.m., and again between 12:50 and 1:20 p.m. Am. Ex. 20, at 37-38. Raney explained that a bad ground monitor card would shut down the electrical current to the pony belt, resulting in the belt's stopping and starting. Tr. II 66-67.

The time at which the belt was stopping and starting is important, because the Judge inferred from the interruptions in the running of the belt that shift examiners had to have seen the resulting accumulations, and imputed that knowledge to AmCoal. *See* 35 FMSHRC at 2239 ("it seems difficult to believe that reasonably attentive on-shift examiners would not have reported this condition").[26]

However, the evidence is that the belt examinations took place and no reports of accumulations were made. Despite alleging that the violation was flagrant, in this instance MSHA did not issue a citation or order to AmCoal for having failed to conduct a proper examination of the belts during the preceding shifts, unlike what it did with respect to the first violation. While the Secretary now alleges that the AmCoal examiners should have recorded the accumulations, and argues that their negligence in failing to do so is attributable to AmCoal, he provides no explanation why "Inspector Miller did not cite American Coal for it." *See* S. Resp. Br. at 15.

Inferences drawn by a Judge are only permissible to the extent that "they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984). Here, the Judge erred when he gave no consideration to the other conclusions that could have been drawn in this instance.

It may have been that there was the lack of a record of accumulations on a shift report due to the lack of accumulations at the time. Another possibility is that Inspector Miller, exercising his discretion, decided not to cite AmCoal for failure to conduct a proper belt

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[26] The belt area at issue was required to be examined once per shift pursuant to MSHA regulations. *See* 30 C.F.R. § 75.362(b).

examination. Because the Judge did not address these alternative explanations, we cannot find the inference he drew to be a reasonable one.

On remand, the Judge should review all of the record evidence, and determine at what point, prior to Miller's discovery of the accumulations, AmCoal should have become aware of the accumulations.[27] This includes not only the evidence with respect to September 23, but September 22 as well, as there also is record evidence of belt interruptions on that day as well. Am. Ex. 20, 21. In doing so, the Judge should consider what knowledge the foremen on any of the shifts, including Raney's, would have had regarding the accumulations, given the evidence that they and their crews would have had to pass by the location where the accumulations were later discovered by Inspector Miller.[28] Additionally, the Judge could consider that the day shift

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[27] While he agrees that the case should be remanded so that the Judge can consider this evidence, Commissioner Althen states that the question of whether a violation is "known" under the flagrant standard is "not [one of] what AmCoal 'should have known,'" but rather "whether AmCoal knew of the violation, or whether it knew of sufficient facts from which it is reasonable to infer knowledge." Slip op. at 49. While not addressing the need for actual knowledge, Chairman Jordan and Commissioner Nakamura conclude that actual knowledge on the part of AmCoal was established. Slip op. at 35.

Commissioners Cohen and Young conclude that, in the context of this case, they do not need to reach the issue of whether there is a difference between implied actual knowledge and constructive knowledge. However, they note that supervisors cannot "'close their eyes to violations and then assert a lack of responsibility for those violations because of self-induced ignorance.'" *Matney, emp. by Knox Creek Coal Corp.*, 34 FMSHRC 777, 786 (Apr. 2012) (quoting *Glenn, emp. by Climax Molybdenum Co.*, 6 FMSHRC 1583, 1587 (July 1984)). The question of the operator's knowledge and whether it meets the standard required to show a flagrant violation is one for the judge to resolve in the first instance.

Commissioners Cohen and Young further note that Commissioner Althen claims that the Commission has repeatedly held that constructive knowledge, i.e., a "should have known" standard, is indicative of only ordinary negligence. Slip op. at 43-44 n.5 (citing *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987)). That is a misreading of Commission case law. In *Emery*, the Commission cited the Act's legislative history and explicitly stated that aggravated conduct more than ordinary negligence can be demonstrated through a "knew or should have known standard." *See* 9 FMSHRC at 2002-04. In *Eastern Associated Coal Corp.*, 13 FMSHRC 178, 187 (Feb. 1991), the Commission again held that "[a] lack of actual knowledge by [] management . . . does not necessarily bar an unwarrantable failure finding." This principle has been recently reaffirmed by the Commission in our decision in *Brody Mining*, 37 FMSHRC at 1699.

[28] Below, the Secretary argued that Raney must have seen the accumulations at the start of the shift immediately prior to their being cited by Miller, but otherwise made no attempt to establish that AmCoal knew of the violations earlier. *See* S. Post-Hr'g Br. at 39-41 (citing Tr. I 114-15). Indeed, the Secretary never explored with Raney during his testimony whether he

crew on September 23 made repairs to the pony belt so that it would run without interruption, and so, presumably, the crew was working near the accumulations. The Judge should also reexamine the evidence supporting his inference that multiple shift examiners had to have noticed the accumulations.

Only after having considered all of the evidence, and found the time at which AmCoal should have become aware of the violation, can the Judge determine whether AmCoal then "repeatedly" failed to make reasonable efforts to address the accumulations.

D. The Alternative of Establishing a Flagrant Violation Under the Broad Interpretation of "Repeated"

In the event on remand that the Judge does not find that Order No. 7490599 was a flagrant violation under the narrow approach, he will need to address whether a flagrant violation was nevertheless established by the Secretary under the broad approach, as mandated by the terms of the flagrant provision. Should he reach the issue of the broad interpretation, having previously rejected the Secretary's proffered interpretation, the Judge will have to fashion an interpretation of the flagrant violation provision which permits the Secretary to establish a violation as flagrant by taking the operator's history of previous accumulations violations into account. *See Wolf Run*, 35 FMSHRC at 541.[29]

Commissioners in their individually-signed opinions set forth below further address this issue.

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had noticed the accumulations. The Judge did not make a finding from other evidence that Raney must have observed the accumulations. The intersection between the Flannigan Tailgate and pony belts where the accumulations were discovered was in an area only six crosscuts (and thus a little more than 600 feet) outby the working section. Tr. I 365; Tr. II 42. Inspector Miller testified that Joe Myers, the AmCoal safety escort accompanying him on his inspection at that time, reacted to the accumulations by getting upset with foreman Raney and his crew, because they, upon arriving for their shift at the section, had to have passed through the area to get to the working section, and thus should have noticed the accumulations. Tr. I 114-15.

[29] All Commissioners agree, except for Commissioner Althen who dissents on the ground that the flagrant provision does not permit consideration of the operator's history of previous violations.

E. The Judge's Reduction in the Level of AmCoal's Negligence

The Judge modified the order as to the second violation to find it was the result of only moderate negligence on the part of AmCoal. He did so because he found that the failure of AmCoal's shift examiners to report the accumulations to mine management was a mitigating factor with respect to AmCoal's negligence, and that under MSHA's regulations, if there is even a single mitigating factor, a violation will not be alleged to be due to high negligence. 35 FMSHRC at 2241 (citing 30 C.F.R. § 100.3(d)).

In his cross-appeal, the Secretary contends that the negligence of AmCoal's mine examiners in not reporting the accumulations to management is attributable to the operator for negligence purposes under Commission case law. According to the Secretary, the Judge's erroneous discounting of the level of AmCoal's negligence led him to reduce the Secretary's proposed penalty by 53 percent, which was an abuse of discretion on the Judge's part. He requests that the case be remanded for a reassessment of the penalty. AmCoal counters that the Judge's lowering of the negligence found means that his finding of unwarrantable failure with respect to the violation must be reversed as a matter of law.

While the Secretary is correct that the Judge should have imputed the actions of the shift examiners to AmCoal for negligence determination purposes, as discussed previously, our remand requires that he reconsider his findings on the culpability of AmCoal's shift examiners with regard to the cited accumulations. Thus, we remand the Judge's negligence determination and penalty assessment as well.[30]

As we discussed earlier with respect to the gravity of the first violation, the Commission and its Judges are not in any way bound by the Secretary's penalty regulations in analyzing negligence issues, such as the existence and importance of any mitigating factors. *Mach Mining*, 809 F.3d at 1263-64. Thus, on remand, the Judge should conduct an independent analysis of AmCoal's negligence with respect to this violation, evaluating negligence from the starting point of a traditional negligence analysis rather than based upon the 30 C.F.R. Part 100 definitions, "consider[ing] the totality of the circumstances holistically." *Brody Mining*, 37 FMSHRC at 1702.

Under such a traditional analysis, an operator is negligent if it fails to meet the requisite standard of care – a standard of care that is high under the Mine Act. "Negligence" is not defined in the Mine Act. The Commission, has, however,

> recognized that "[e]ach mandatory standard . . . carries with it an accompanying duty of care to avoid violations of the standard, and an operator's failure to meet the appropriate duty can lead to a

[30] As they explain in their separate opinion, Chairman Jordan and Commissioner Nakamura would reverse the Judge and reinstate a finding of high negligence with respect to the second violation. *See* slip op. at 36-38.

> finding of negligence if a violation of the standard occurs." *A.H. Smith Stone Co.*, 5 FMSHRC 13, 15 (Jan. 1983). In determining whether an operator met its duty of care, we consider what actions would have been taken under the same circumstances by a reasonably prudent person familiar with the mining industry, the relevant facts, and the protective purpose of the regulation. *See generally U.S. Steel Corp.*, 6 FMSHRC 1908, 1910 (Aug. 1984).

JWR, 36 FMSHRC at 1975(citation and footnote omitted); *see, e.g., id.* at 1976-77 (requiring Secretary to show that operator failed to take specific action required by standard violated); *Spartan Mining Co.*, 30 FMSHRC 699, 708 (Aug. 2008) (considering negligence inquiry to be circumscribed by scope of duties imposed by regulation violated). Thus, in making a negligence determination, the Judge is not limited to an evaluation of allegedly "mitigating" circumstances. Instead, the Judge may consider the totality of the circumstances.

Because Commission Judges are not bound by the definitions in Part 100 when considering an operator's negligence, they are not limited to an evaluation of potential mitigating circumstances.[31] Therefore, a Commission Judge may find "high negligence" in spite of mitigating circumstances or may find "moderate" negligence without identifying mitigating circumstances. In this respect, the Commission has recognized that the gravamen of high negligence is that it "suggests an aggravated lack of care that is more than ordinary negligence." *Topper Coal Co.*, 20 FMSHRC 344, 350 (Apr. 1998) (citation omitted).[32]

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[31] As stated in his concurring opinion in *Hidden Splendor Resources, Inc.*, 36 FMSHRC 3099, 3105-08 (Dec. 2014), Commissioner Cohen urges the Commission to hold not merely that the definitions of the degrees of negligence contained in 30 C.F.R. § 100.3(d) and Table X contained therein are not binding on the Commission, but that these definitions are too restrictive, and should not be used by Commission Judges. In these definitions, the distinctions between "low" negligence, "moderate" negligence and "high" negligence are made by counting the number of mitigating circumstances. Thus, in this case the Judge ruled out the possibility of high negligence in Order No. 7490599 because Table X provides that a finding of high negligence can be made only if there are no mitigating circumstances. 35 FMSHRC at 2241. Counting the number of mitigating circumstances is an appropriate approach for MSHA inspectors at mine sites who must make determinations regarding negligence efficiently and quickly. However, it is too mechanical and restrictive an approach for Commission Judges who have the opportunity to "evaluate all of the evidence presented to them after a full hearing and take a more nuanced approach to the degree of negligence." *Hidden Splendor*, 36 FMSHRC at 3108 (Cohen, Comm'r, concurring).

[32] When a Judge finds an operator to be negligent, the Judge should take into account the degree of operator negligence, which would be on a scale between low negligence and reckless disregard, in assessing an appropriate penalty. Of course, because Judges are required to explain substantial divergences from the penalty proposed by the Secretary, if the Judge makes a substantial penalty adjustment based upon a negligence finding, the Judge must explain his/her determination. *Brody*, 37 FMSHRC at 1703 n.17.

On remand, the Judge will need to examine the violation and determine the degree of negligence on the part of the operator that led to it. The Judge must consider the actions that a reasonably prudent operator would or would not have taken, under the circumstances presented that are relevant to an operator's obligation to comply with section 75.400. *See, e.g., DQ Fire & Explosion Consultants, Inc.*, 36 FMSHRC 3090, 3095-96(Dec. 2014) (examining operator's claim of mitigating circumstances in reviewing Judge's high negligence finding), *aff'd*, 632 F.App'x 622 (D.C. Cir. 2015); *Wolf Run Mining Co.*, 35 FMSHRC 3512, 3519-20 (Dec. 2013) (examining operator's conduct as a whole in attempting to comply with regulation); *Consol*, 35 FMSHRC at 2345-46 (concluding that repeated violations of regulation merited increase in level of negligence ascribed to operator). It is within this context that the Judge can consider the Secretary's arguments regarding the extent of AmCoal's knowledge and how that impacts the operator's level of negligence and the penalty that it should be assessed for the violation.

Remand of the negligence issue nullifies AmCoal's argument that the Judge's unwarrantable failure determination must be reversed because it contradicts his finding of moderate negligence. In any event, that determination was arrived at after taking into account all of the unwarrantable failure factors. *See* 35 FMSHRC at 2233-41.

AmCoal did not challenge the Judge's findings on such factors as the extent of the accumulations (*id.* at 2233); that, as detailed with respect to the first violation, the operator had been placed on notice that greater efforts to comply with section 75.400 were necessary on its part (*id.* at 2237); and that the violative conditions were obvious when discovered by the inspector. *Id.* at 2239. In addition, we have already affirmed the Judge in large part as to the danger of the violation, another factor the Judge took into account in determining that the violation was attributable to AmCoal's unwarrantable failure. *See id.* at 2238. Given the limited remand in this instance, we do not foresee the Judge's findings on the scope of the operator's knowledge of the violation undercutting our conclusion that substantial evidence otherwise supports the Judge's unwarrantable failure determination. Consequently, we affirm that determination.

V.

Conclusion

For the foregoing reasons, we (1) affirm the violation in Order No. 7490584 as properly assessed as a flagrant violation; and (2) vacate in part the Judge's determinations with respect to the violation in Order No. 7490599 and remand to him the questions of whether the Secretary established it as flagrant violation, the level of the operator's negligence in connection with the violation, and, if necessary, a reassessment of the penalty in accord with his findings on remand.

Commissioner Cohen, concurring:

I agree with all parts of the foregoing majority opinion in this case. I write separately, together with Commissioner Young, to state our views on the issue of the broad interpretation of the flagrant provision as it has been advanced by the Secretary of Labor in this case, and, should he reach the issue on remand, how the Judge should consider the interpretation with respect to Order No. 7490599. There is no question that the Secretary has the right to argue this issue before the Commission in response to the appeal by American Coal Company ("AmCoal") of the Judge's decision.[1]

At the hearing, the Secretary submitted a history of 359 citations and orders for accumulations violations at the mine from October 1, 2005 to October 1, 2007, the two years roughly prior to the two orders being tried below. Gov't Ex. 1. As of August 4, 2011, aside from the two violations being tried, all but 11 had been paid and become final. *Id.* at 9.[2]

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[1] As the prevailing party below, the Secretary may urge in support of the decision under review even those arguments that the Judge considered and rejected, so long as the position which the Secretary seeks the Commission to adopt would not attack the judgment below or enlarge the Secretary's rights thereunder. *See, e.g., Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1529 (Aug. 1990). Amcoal argues that taking into account the operator's history of previous violations, or permitting remand for the Judge to further consider the issue with respect to either violation would enlarge the Secretary's rights. The Secretary, however, is merely arguing alternative grounds for finding one or both of the violations to be flagrant. This is an argument we have at least acknowledged. *See Wolf Run Mining Co.*, 35 FMSHRC 536, 541 (Mar. 2013) (concluding that plain meaning of the flagrant provision permits proof of flagrant violation by use of prior violations, although "[o]ne might reasonably argue about the number of prior violations that should be necessary, or how similar those prior violations should be before conduct is appropriately considered a 'repeated failure' under 110(b)(2)").

This case is merely one in which those arguments are being addressed, the Secretary having tried the case under that approach. That the case may provide a more important precedent if decided by taking into account AmCoal's history of previous history of violations was thus evident from the case's outset. The Judge's rejection of the Secretary's broader approach and adoption of a narrower approach to the case, also contemplated by *Wolf Run*, does not limit the Secretary's right to vindicate his approach now, while AmCoal is challenging the Judge's decision.

[2] Seventy-five of those 359 citation or orders were alleged or found to be significant and substantial ("S&S"). Tr. I 125-26; Gov't Ex. 1, at 9. According to Miller, the issuing inspectors had also designated 11 of those as attributable to the operator's unwarrantable failure, including three issued within the two months prior to the violations here. Tr. I 126; Gov't Ex. 1, at 8-9.

The Secretary also submitted copies of 27 citations or orders, issued to AmCoal within the 12 months preceding the issuance of the subject order for violations of 30 C.F.R.§ 75.400.[3] These involved accumulations in belt areas of the same materials at issue here – coal, float coal dust, coal fines, and other combustibles. Nineteen of the orders had been issued alleging that the violations were S&S, and five of them resulted from AmCoal's high negligence. Gov't Exs. 6 to 32.

The Secretary also presented evidence that the Department of Labor's Mine Safety and Health Administration ("MSHA") had worked with AmCoal on training and mine examinations that would focus the operator's attention on its accumulations problems. Tr. I 86-90, 143-45.

In his post-hearing brief, the Secretary drew upon court and Occupational Safety and Health Review Commission precedent that he argued was decided under an analogous provision, section 17(a) of the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. § 666(a). He maintained that the foregoing evidence established that both orders at issue were flagrant violations and that AmCoal had not acted reasonably to address the two violations of section 75.400 after an extensive history of substantially similar violations.

In the hearing below, the Secretary argued that his interpretation of "repeated failure" was entitled to deference. The Judge declined to give the Secretary's interpretation full deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). 35 FMSHRC at 2253-58. On appeal before the Commission, the Secretary has again asserted an entitlement to *Chevron* deference, a position AmCoal has countered. S. Resp. Br. at 25-26; Am. Reply Br. at 12-14.

We do not perceive any coherent interpretation of the "repeated failure" language by the Secretary to consider in terms of granting deference. As AmCoal pointed out, the Secretary did not state an interpretation of the language in his brief to the Commission but merely referred to his "position taken in the Secretary's post-hearing brief." S. Resp. Br. at 25; Am. Reply Br. at 13 n.7. In his post-hearing brief to the Judge, the Secretary did nothing more than (1) analogize to section 17(a) of the OSH Act, which provides for enhanced penalties against employers who "repeatedly" violate Occupational Safety and Health Administration standards, and (2) cite to several cases under the OSH Act which, according to the Secretary, indicate that a violation following one prior violation of the same standard, or of a different standard involving similar hazards, establishes a "repeated" violation for OSH Act purposes. S. Post-Hr'g Br. at 36-37.

We would decline to afford deference to the Secretary's formulation, which lacks practical utility for Commission judges in that it does not provide a manageable standard or

[3] The Judge found that the 27 citations and orders for belt area accumulations entered into evidence were not proven to be final orders of the Commission. 35 FMSHRC at 2247-48 & n.19. However, the Secretary points out that the finality of all 27 of those citations and orders was established by the printout he submitted detailing the broader array of accumulations violations over a greater length of time. *See* S. Resp. Br. at 29; Gov't. Ex. 1.

limits. Under the Secretary's suggested approach, a single prior accumulations violation in an underground coal mine might be a sufficient basis for finding a subsequent violation to be flagrant — or not. There is no principled basis for making the determination.[4]

The Secretary's analogy to section 17(a) of the OSH Act as a purported "interpretation" is thus not an application of reasoned judgment or expertise to which we must, or even logically could, defer. The Secretary has simply plucked the word "repeated" out of another statute which protects occupational safety and health, and made a specious argument that there's a parallel in the statutory language or Congressional intent. Adopting the Secretary's methodology would ignore the specific provisions Congress created for section 110(b)(2). Unlike section 17(a) of the OSH Act, the Mine Act's flagrant provision (1) requires "reasonable efforts to eliminate a *known* violation," and (2) requires that the violation "proximately caused, or reasonably could have been expected to cause, *death or serious bodily injury*." 30 U.S.C. § 820(b)(2) (emphases added). Most fundamentally, as we noted *supra*, slip op. at 13, section 17(a) of the OSH Act, does not contain the word "flagrant," a word of approbation related to intolerable failure.

We therefore would hold that the Judge did not err in declining to afford *Chevron* deference to the Secretary's interpretation. However, we do believe that the Judge should have nonetheless considered, and made an independent determination on, the question of the broader interpretation of "repeated failure," and the evidence of the operator's history of violations which the Secretary proffered in support of a more expansive view.

The Judge's determinations regarding the relevance, use, and weight of the operator's history of violations in this context were complicated by a number of factors. The only Commission precedent did not resolve the issue, and only alluded to it in passing. The Secretary has not promulgated regulations delineating his interpretation of a "repeated failure," nor did he provide a coherent interpretation in the context of this litigation. And the guidance materials the Secretary has provided to his inspectors reflect the agency's grappling with the application of the statute.

In considering this matter, we would conclude that the operator's history may be more generally relevant to the determination of flagrancy than the Judge decided. The Judge rejected the Secretary's attempt to use AmCoal's history of violations to establish either violation as flagrant largely without examining the evidence submitted on the previous violations. The Judge said, "in the absence of further guidance from the Commission, long overdue rulemaking from

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[4] Earlier in this decision, the Commission considered the formulation by the parties that "two or three failures might amount to a flagrant violation in certain circumstances but not in others, depending on the particular facts." Slip op. at 13 (quoting S. Resp. Br. at 17). We stated that this formulation "as far as it goes . . . is a reasonable, albeit very general, interpretation." *Id.* The Commission's earlier statement was solely in the context of the narrow approach to "repeated failure," where there is a single, continuing violation rather than a history of past violations. It did not apply to consideration of allegedly flagrant violations under the broad approach to "repeated failure."

MSHA, or a consistent interpretation or litigating position by the Secretary that has not been advanced by appellate counsel in another case, I decline to address a broader interpretation here or the significance of past violation history." 35 FMSHRC at 2263. While the Judge's frustration with the absence of clear principles governing the use of violation history is understandable, the language of the statute and our decision in *Wolf Run* nevertheless support the reasoned consideration of an operator's history of substantially similar violations, where they may be shown to be relevant to the issues arising in the repeated failure context.[5]

The Secretary introduced the aforementioned evidence on AmCoal's recent history of accumulations violations at the hearing. Inspector Miller, the Secretary's only witness in the case, testified extensively regarding that evidence. Tr. I 124-34, 142-46, 162-71. This evidence could be probative of a finding of a flagrant violation under the broad approach to "repeated failure" flagrant violations.[6]

We disagree with the Judge's conclusion that "the Secretary must establish *all* the statutory elements for *each* 'repeated failure' relied upon to establish a flagrant violation." 35 FMSHRC at 2255 (emphases added). The Judge would have thus required the Secretary's evidence to establish that each prior violation in the operator's history was both a "known" violation and involved a reasonable expectation of death or serious bodily injury to one or more miners. *Id.*[7]

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[5] Contrary to Commissioner Althen's characterization of the liberal construction we and the courts of appeals afford the Act (*see s*lip op. at 51 (the "last redoubt of losing causes")), our reading in favor of the safety purposes of the statute is an entrenched canon of mine safety jurisprudence. *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 823 F.2d 608, 617 (D.C. Cir.1987) ("In reviewing the Mine Act to determine congressional intent, we begin with the recognition that '[t]he primary purpose of the . . . Act was to protect mining's most valuable resource — the miner,'" and in order to meet the "'urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal mines in order to prevent death and serious physical harm . . . Congress intended the Act to be liberally construed.'") (quoting *Int'l Union, United Mine Workers of Am. v. Kleppe*, 532 F.2d 1403, 1405–06 (D.C. Cir.), *cert. denied*, 429 U.S. 858 (1976)); *accord Freeman Coal Min. Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974).

[6] While Commissioner Althen argues that a repeated violation would require a prior occurrence of the same violation, that is not what the statute says. As we have said, "repeated failure" modifies "to make reasonable efforts to eliminate." If the subsequent violations have a common cause or origin known to the operator — including bad management, where better practices would have eliminated recurrent violative conditions — a Judge may find a repeated failure to take reasonable steps to eliminate those conditions.

[7] It appears that the Judge's analysis of the statutory language may have relied upon our decision in *Wolf Run*. 35 FMSHRC at 2247-49. In *Wolf Run*, however, an operator's prior history of violations was considered only with respect to the "repeated" clause of the flagrant

Reading "repeated" as narrowly as the Judge did in this case is contrary to the intent and language of the statute. The essence of a repeated flagrant violation is a condition which threatens miners with serious bodily injury or death and which has been ignored or disregarded often enough to demonstrate intolerable irresponsibility. Because repetition requires a demonstration of prior occasions, the operator's history of substantially similar violations is patently relevant.

As noted previously, *supra* slip op. at 15-16, the operator's history may reveal a common cause or origin known to the operator, which was not addressed on previous occasions. Similarly, the operator's violation history may be used to show a known pattern of neglect which included the subject violation. *Id.* Finally, while a mere listing of violations of the same standard may be insufficient to establish repetition, evidence of a large number of substantially similar violations arising from general practices or neglect, or a smaller number of violations that may be shown to share a common cause that was known and disregarded, may meet the statutory criteria. Thus, in our opinion, it is unnecessary on remand for evidence adduced by the Secretary to conclusively establish that the previously-established violations of section 75.400 each met the statutory definition of a "repeated or reckless failure," as the Judge suggested.[8] Rather, Judges should consider allegations of repeated failure case-by-case, and should consider the operator's history of violations where it may be probative of the issue.[9]

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provision. *See* 35 FMSHRC at 541 ("it is difficult to conceive how one determines whether certain conduct represents 'repeated' behavior of any sort without considering whether there have been prior instances of similar behavior. One might reasonably argue about the number of prior violations that should be necessary before conduct is appropriately considered a 'repeated failure' under section 110(b)(2) . . ."). Our decision in that case did not address whether the violations in the operator's prior history also need to satisfy the other elements of the flagrant provision.

[8] The Judge's conclusion on this point appears to flow from his opinion that final determinations on S&S and unwarrantable failure findings may be sufficient to establish the requisite findings of "known violation" and risk of serious bodily injury to miners in the earlier violations. It does not necessarily follow, however, that evidence on the two special findings is a necessary condition precedent before such violations can serve as predicate violations for a "flagrant" violation. There is nothing definitive in the language of the flagrant provision on that point, and the Judge may be imbuing S&S and unwarrantable failure findings with more significance than the record in those previous cases actually permits, particularly with respect to cases that are settled short of a Commission decision on the issues. In essence, the Judge's approach would require the Secretary to establish through litigation the requisite findings in those previous cases before he could even later bring a flagrant case. We cannot discern in the flagrant provision any congressional intent to place such a burden on the Secretary or to increase litigation before the Commission under the Mine Act.

[9] On remand, the Secretary of course bears the burden of demonstrating a link between the violation in Order No. 7490599 and previously-cited dangerous conditions that are

In this context, we would have the Judge especially consider the evidence of the Secretary's efforts prior to the violations at issue in this case to get AmCoal to improve training and examinations related to accumulations violations. The alleged failure of AmCoal to take meaningful action toward that end would be reviewed to determine whether it supports a showing of a repeated failure to make reasonable efforts to eliminate the problem, as the Act requires.

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substantially similar. *See Wolf Run*, 35 FMSHRC at 541. Such a demonstration should include an explanation of how the failure here was a repeated failure to make reasonable efforts to eliminate a known and serious violation.

Commissioner Young, concurring in part and dissenting in part:

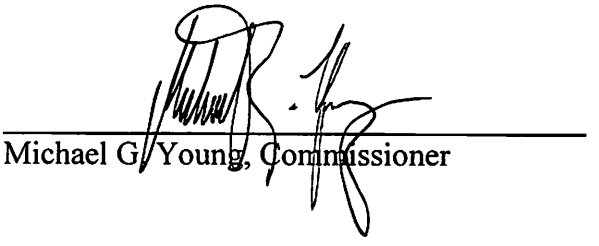
I join in my colleague Commissioner Cohen's opinion in all parts except Part III.B, the issue of whether the accumulations cited in the second violation could be reasonably expected to lead to serious bodily injury to miners. I would vacate the Judge's findings on this issue and include the issue in the remand.

The Judge found that the accumulations cited in the second violation could be reasonably expected to lead to serious bodily injury to miners, but only reached that conclusion after relying on a map which he read to demonstrate a lack of stoppings that would protect escaping miners from the effects of a fire resulting from the accumulations. 35 FMSHRC 2208, 2231 (citing Am. Ex. 4, at 5), 2265 (July 2013) (ALJ).

The Secretary of Labor concedes the argument of the American Coal Company that it was error for the Judge to do so. S. Resp. Br. at 21. Rather than remand to the Judge, however, the Secretary would have the Commission examine the evidence regarding the actual location at issue in the mine and find here that escaping miners would be exposed to smoke from a fire resulting from the cited accumulations. *Id.* at 21-23.

While Commissioner Cohen, joined by Chairman Jordan and Commissioner Nakamura in their separate opinion, make such a finding in support of their conclusion that death or serious injury to miners could be reasonably expected to result from the accumulations here, I cannot agree with this procedure. Where a Judge errs in failing to understand the evidence presented, as the Judge did here, our standard practice is to remand the case to him for him to make the necessary findings of fact in the first instance, using a correct understanding of the evidence. *See, e.g., Wolf Run Mining Co.*, 32 FMSHRC 1669, 1676–77 (Dec. 2010) (vacating Judge's affirmance of citation and remanding for factual determination and to address operator's arguments erroneously unaddressed).

Remand is especially appropriate in this instance, because the Judge's misunderstanding of the evidence led him to conclude that the degree of gravity of the second violation was even greater than the first violation. The Judge found that the lack of stoppings was reasonably likely to lead not only to smoke inhalation but to carbon monoxide poisoning, burns, and entrapment of the six miners on the working section. *See* 35 FMSHRC at 2231. As this finding rests on clear error, remand on the issue of the gravity of the second violation is clearly necessary.



Michael G. Young, Commissioner

Chairman Jordan and Commissioner Nakamura, concurring and dissenting:

We join the opinion of our colleagues affirming the Judge's flagrant determination with respect to the first violation at issue in this case. However, we write separately because we would also affirm the Judge's flagrant determination regarding the second violation (Order No. 7490599).

The statutory criteria for a flagrant violation require "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). For the reasons stated below, we find that all of these factors have been satisfied.

The salient facts regarding this violation are:

- Float coal dust and loose coal accumulated under and around the energized tail roller of the belt.
- The accumulations measured approximately 6 inches to 14 inches in depth.
- Loose coal and coal float dust also extended outby the tail roller approximately 450 feet
- The area was black.
- The turning tail roller was suspending float coal dust into the atmosphere.
- The bottom belt and bottom rollers were in contact with these accumulations.
- The inspector testified that absent a "train wreck," it would take more than two shifts for accumulations of this type and color to develop.
- There was no reference to these conditions in the examination books.
- Based on the red-brown color of the float dust, the inspector concluded that the roller and belt had been grinding in coal for a significant period of time.
- The Judge credited the inspector's testimony that the float coal dust and loose coal that was accumulating under and around the tail roller was not wet.
- The inspector designated the violation S&S based on the fact that the bottom belt and bottom rollers were in contact with the accumulations and the energized tail roller was turning in the accumulations, thus providing two separate potential ignition sources.

35 FMSHRC 2208, 2218-19 (July 2013) (ALJ); Gov't Ex. 3.

A. Repeated Failure to Make Reasonable Efforts to Eliminate a Known Violation

Regarding AmCoal's knowledge, substantial evidence supports the Judge's decision regarding the extent to which AmCoal was or should have been aware of the accumulations. Indeed, the evidence is such that it establishes actual knowledge of the accumulations on the part of AmCoal, and not just constructive knowledge.

Raney testified that that the starting and stopping of a belt can lead to spillage of coal from the belt. Tr. II 66-68. In this instance there were electrical problems with the pony belt

during the shifts preceding the discovery of the accumulations by Inspector Miller, which resulted in the belt's shutdown a number of times during those shifts.

The September 23 handwritten reports of the foremen (the production and delay, or "P&D" reports) on the previous two shifts amply demonstrate that the foremen were aware of the problems with the pony belt.[1] They clearly noted that during the first shift the pony belt was down four different times and, during the last time, interrupted production for 120 minutes (until the end of the shift). 35 FMSHRC at 2219. The handwritten reports reflect that the first shift crew waited to leave the section until the second shift crew had arrived. The report from the second shift on September 23 shows that that crew was making repairs to the belt from the very beginning of the shift, and they therefore were aware that the first shift had been having problems with the pony belt. Later in that shift, there was another delay of 30 minutes while maintenance was performed on the pony belt. Hence, they knew that there could have been violative accumulations. Am Ex. 20.[2]

Evidence of those shutdowns is also supplied by the daily printed production delay report. 35 FMSHRC at 2239, 2265. Raney explained that the daily report was likely produced by "Mine Control" from the handwritten shift P&D reports that foremen supplied. Tr. II 30-31, 60-61; Am. Ex. 20 (shift P&D reports). The daily reports indicate electrical and breaker problems with the belt during all three shifts on September 22, which grew worse during the first two shifts on September 23 before repairs were made on the second shift. Tr. II 61-66; Am. Ex. 21, at 8-10.

Further evidence that the accumulations occurred over several shifts was supplied by Inspector Miller, whose testimony on the nature of the accumulations the Judge credited. 35 FMSHRC at 2265. Consistent with his contemporaneous notes, Miller attributed the presence of float coal dust that was red-brown in color to the grinding of coal dust by the tail roller of the belt over an extended period of time. Tr. I 116, 203, 206-08; Gov't. Ex. 4, at 6.

The Judge inferred from the foregoing that the accumulations had resulted from the stopping and starting of the pony belt, and that AmCoal had constructive knowledge of the accumulations over the course of the preceding shifts. Inferences drawn by a Judge are permissible to the extent that "they are inherently reasonable and there is a logical and rational connection between the evidentiary facts and the ultimate fact inferred." *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1138 (May 1984).

Here the record establishes that the inferences the Judge drew were reasonable. Not only was there evidence of the belt stopping and starting multiple times and that coal spillage can result from each stop and start of the belt, but there was also evidence that the stopping and starting had been reported during each shift and a daily report produced for AmCoal

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[1] These handwritten reports are prepared contemporaneously on or immediately after the shift. Tr. II 91.

[2] The handwritten P&D reports also reflect that the section crew on the second September 23 shift did not leave until the third shift crew arrived on the section (5:15 pm). Am. Ex. 20.

management documenting the stops and starts during the three shifts the day prior to the discovery of the accumulations. Moreover, it was the working section foremen for the shifts who were reporting the stops and starts of the belt. Am. Ex. 20, 21.

We conclude that AmCoal had actual knowledge of the resulting accumulations. Five total shift P&D reports were submitted regarding the electrical problems, a daily P&D report was produced documenting the problems the previous day, and the inspector's credited description of the accumulations was consistent with the accumulations occurring over the course of several shifts. 35 FMSHRC at 2265.

This is entirely consistent with the Commission's interpretation of the term "knowingly" under section 110(c) of the Mine Act, 30 U.S.C. § 820(c). We have held that "[a] knowing violation occurs when an individual 'in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." *Cougar Coal Co.*, 25 FMSHRC 513, 517 (Sept. 2003) (quoting *Richardson*, 3 FMSHRC 8, 16 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983)).

Here, where the belt was continually stopping and starting over the course of not only multiple shifts but also multiple days, a reasonable operator would have investigated whether accumulations were resulting. Yet there is nothing in the record indicating that AmCoal did so.

Furthermore, given the length of time during which the problems were occurring, it was reasonable for the Judge to infer that AmCoal had multiple opportunities to address the accumulations, and thus its failure to do so constitutes a "repeated" one. As with the first violation, the evidence that the accumulations may have existed over the course of several shifts means that it is not necessary to decide in this instance what minimum number constitutes a "repeated failure."

It is even less essential to our decision to provide, as our colleagues Commissioners Cohen and Young attempt to do, a definitive interpretation of the "broad" meaning of "repeated," in the context of an operator's history of violations. Slip op. at 26-31. The majority in this case have vacated the Judge's decision applying the "narrow" approach to repeated, and remanded the case to him. If he finds no liability under the narrow analysis, then the Judge should proceed to consider the Secretary's alternate theory.

Our colleagues' instructions to the Judge on how the case should be litigated under the broader theory (if that becomes necessary), are, however, premature. The Judge, in the first instance, can interpret the statutory provision "repeated" under the historical approach, applying his legal definition to the facts in the record before him. If the case is appealed, we will then have ample opportunity to review the matter. The case would then be in a posture where our view on the correct interpretation of the broad application of "repeated" is squarely and properly before us, and we would also have the benefit of the parties' views on the issue.

Having argued that our colleagues' determination to weigh in on this issue now is precipitous, we are nonetheless constrained to comment on the substance of their suggested approach.

Commenting in the abstract, as they must, their opinion serves to illustrate why adjudicatory bodies generally refrain from issuing advisory opinions, preferring instead to rule within the context of the facts of a specific case. Our colleagues state that "while a mere listing of violations of the same standard may be insufficient to establish repetition, evidence of a large number of substantially similar violations arising from general practices or neglect, or a smaller number of violations that may be shown to share a common cause that was known and disregarded, may meet the statutory criteria."[3] Slip op. at 30. They also indicate that an operator's history of violations may be used to show "a known pattern of neglect" which includes the violation at issue. *Id.*

Our colleagues' opinion raises as many questions as it strives to answer. For instance, must the Secretary, to prove his case, put on evidence regarding each of the prior violations he posits as supporting a "repeated" violation? How must the Secretary prove the existence of "a known pattern of neglect?" How feasible would such a requirement be if the violations occurred many months or even years prior to the violations deemed flagrant? What does "substantially similar" mean and if violations of the same standard are not "substantially similar" enough, what more is required? What constitutes a "link" between the prior violations and the current ones, slip op. at 30, and how would that be demonstrated?

In short, in their desire to provide guidance on a statutory interpretation question that is neither currently before them nor necessarily headed to the Judge on remand, our colleagues, without benefit of briefing by the parties, announce a test that may confuse rather than clarify. We believe the more prudent approach is to wait until this issue is properly before us before weighing in on such an important matter.

B. Reasonable Expectation of Death or Serious Bodily Injury

The majority has adroitly summarized the evidence supporting the Secretary's claim that it was reasonable to expect that this violation would cause death or serious bodily injury. Slip op. at 17-18. We agree with its conclusion that substantial evidence supports the Judge's determination that the smoke hazard was serious enough to meet this test. We also agree that the Judge's possible misuse of the mine map is not material to the disposition of this issue (and believe that it constituted harmless error).

C. The Judge's Reduction of the Level of AmCoal's Negligence

We would reverse the Judge's determination that the second violation was the result of only moderate negligence on the part of AmCoal. The Judge found that the failure of AmCoal's shift examiners to report the accumulations to mine management was a mitigating factor with

[3] We note that the operator's history in this case includes 359 violations of section 75.400's prohibition against accumulations in the 24 months preceding the issuance of the flagrant violations at issue here. Slip op. at 26.

respect to AmCoal's negligence. 35 FMSHRC at 2241 (citing 30 C.F.R. § 100.3(d)). We disagree.

As a threshold matter, it is important to place this negligence determination in the proper perspective. The Judge held that the violation was flagrant (a holding we would affirm), finding that AmCoal repeatedly failed to make reasonable efforts to eliminate the violation for two shifts even though the operator was alerted to the fact that potential accumulations would need additional attention. 35 FMSHRC at 2265. In addition, the Judge found the violation to be the result of AmCoal's unwarrantable failure to comply with the safety standard, 35 FMSHRC at 2240, thus concluding that the operator's conduct was aggravated. He noted that unwarrantable failure is characterized by conduct such as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2231 (citing *Emery Mining Corp.*, 9 FMSHRC 1907, 2003-04 (Dec. 1987)).[4] Given these findings, we require no great analytical leap to reinstate MSHA's high negligence determination.

Turning now to the Judge's analysis of the negligence level, we start with the view — shared by our colleagues in the majority — that an operator is negligent if it fails to meet the requisite standard of care — a standard of care that is high under the Mine Act. We must consider the actions that a reasonably prudent operator would or would not have taken, under the circumstances presented that are relevant to an operator's obligation to comply with section 75.400. *See, e.g., Wolf Run Mining Co.*, 35 FMSHRC 3512, 3519-20 (Dec. 2013) (examining operator's conduct as a whole in attempting to comply with regulation); *Consol*, 35 FMSHRC at 2345-46 (repeated violations of regulation merited increase in level of negligence ascribed to operator).[5] Thus we must examine whether the operator met the standard of care that a reasonably prudent mine operator would have applied.

As we stated during our discussion affirming the Judge's flagrant determination for this violation, AmCoal had actual knowledge of the violation via its own P&D reports. Slip op. at 34-35. Management created these reports and in fact a section foreman writes such a report for each production shift on each section. Tr. I at 461-62. Supervisors at the mine were thus aware that there were electrical problems with the belts, and were aware that the stopping and starting of the belts was a known cause of spillage. Hence a reasonably prudent foreman at a mine with an extensive history of coal accumulations (such as AmCoal's) should have investigated this problem. The failure to do so indicates a lack of reasonable care.

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[4] The operator argued to the Commission that, given the Judge's finding of only moderate negligence, the violation could not be unwarrantable because unwarrantable failure requires a higher level of negligence. Given our determination that the negligence level should be reinstated as high, we need not address this assertion.

[5] Although the Judge recognized that negligence is conduct that falls below the requisite standard of care, 35 FMSHRC at 2241, he also utilized the Secretary's Part 100 penalty regulations, which state that MSHA may allege a moderate level of negligence if there are "mitigating circumstances." *Id.* (citing 30 C.F.R. § 100.3(d)).

The absence of information about the belt problems in the MSHA-mandated examination reports in no way reduces the level of negligence here. An operator cannot rely on a negligent examination[6] (which could have conceivably been a violation of the MSHA examination standards) to mitigate the negligence for the violation of another standard. We agree with the Secretary that an operator may not put blinders on regarding information about a potential hazard simply because that information is not contained in an MSHA-mandated examination report. S. Reply Br. at 3 n.3 (citing *Ernest Matney, emp. by Knox Creek Coal Corp.*, 34 FMSHRC 777, 786 (Apr. 2012) (on-site supervisors may not close their eyes to violations and then assert lack of responsibility based on self-induced ignorance)). As the Secretary persuasively argues, permitting a defective mine examination to shield an operator from a negligence charge would reduce incentives for operators to ensure the effectiveness of their examination procedures.[7]

The Secretary proposed a penalty of $164,700, but the Judge reduced it to $77,737, based, we believe, on his reduction of the negligence level. Because we would reinstate the finding of high negligence, we would vacate and remand the penalty for reassessment in light of this determination.[8]

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[6] The Judge found it "difficult to believe that reasonably attentive on-shift examiners would not have reported th[e] condition," 35 FMSHRC at 2239, and that if [AmCoal] had conducted thorough examinations, the conditions should have been documented." *Id.* He emphasized that "even a casual observation would have revealed that there was an energized tail roller grinding through coal at the Flannigan Tailgate." *Id.*

[7] Our reinstatement of the inspector's high negligence finding nullifies AmCoal's argument that the Judge's unwarrantable failure determination must be reversed because it contradicts his finding of moderate negligence.

[8] Regarding the unwarrantable failure determination, we join our colleagues in affirming that determination.

In conclusion, we would affirm the Judge's finding that this violation was flagrant and unwarrantable, reinstate the inspector's negligence level to "high," and vacate and remand the civil penalty.

Mary Lu Jordan, Chairman

Patrick K. Nakamura, Commission

Commissioner Althen, concurring in part and dissenting in part:[1]

A. Order No. 7490854

I join in the sustaining Order No. 7490854 as a flagrant violation. I do not join with certain opinions expressed in the majority decision and, therefore, do not join in the decision. Although the issue of whether the violation created a "reasonable expectation" of death or serious injury is not free from doubt, I find the Judge's decision meets the substantial evidence test, thereby requiring affirmance. The number of shifts the violation existed and its obviousness and extensiveness support the conclusion that management repeatedly ignored a known, extensive, and sufficiently dangerous accumulation to meet the definition of a flagrant violation. However, as explained in more detail below, I disagree that the Secretary may use a history of non-flagrant violations to support a finding that a later violation is flagrant. Therefore, I would disagree with any use of AmCoal's history of violations to support upholding a flagrant designation for Order No. 7490854. *See infra* slip op. at 53-55.

B. Order No. 7490599

I agree to a remand of Order No. 7490599 for a reconsideration of what the operator "actually knew" with respect to the underlying violation and the level of the operator's negligence. *See infra* slip op. at 56. However, I respectfully disagree with my colleagues with respect to several aspects of their various opinions.

An essential element of a flagrant violation is that the violation must be "known" by the operator. In the context of a flagrant violation, a violation is "known" only if the operator has actual knowledge, express or implied, of the violation. Constructive knowledge, as used by the Judge below, does not comport with the wording of section 110(b)(2), the purposes of the statutory provision, or integration of the section with other sections of the Mine Act. Therefore, as explained below, I would find that the Secretary must prove actual knowledge of the violation under the Commission's so-called "narrow" standard of review.

Chairman Jordan and Commissioner Nakamura conclude that the facts demonstrate actual knowledge. Slip op. at 34-35. However, I take no position on whether the facts demonstrate sufficient knowledge to sustain a flagrant finding under an actual knowledge standard.[2]

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[1] I appreciate the footnotes added to the majority decision indicating areas in which individual Commissioners disagree. However, given the number of issues involved, their complexity, and the number of different opinions, I prefer to limit my agreement to areas in which I expressly state agreement in this opinion.

[2] I think the Judge must make the determination of knowledge in the first instance. In my opinion, the necessary determination is whether the operator had actual knowledge of the violation within a time frame that a failure to eliminate the violation justly may be found to be "repeated."

I do opine that Congress meant section 110(b)(2) to apply only where an operator has actual knowledge of the violation. Because the Judge used a constructive knowledge construct that I find inappropriate, I would remand for a finding with respect to actual knowledge.[3]

Separately, I disagree with my colleagues' decision in *Wolf Run Mining Co.*, 35 FMSHRC 536 (Mar. 2013), that a history of non-flagrant violations not shown to have created a reasonable expectation of death or serious bodily injury may demonstrate the "repeated" element of a flagrant violation. I, therefore, disagree with use of previous violations to demonstrate a failure by an operator to eliminate a violation that is "known" to it. The flagrant violation section responds to pre-MINER Act circumstances in which an operator could know of an extremely dangerous violation, bordering upon if not constituting an imminent danger, but not face any repercussions beyond the normal penalty amounts by allowing the danger to continue unless and until an inspector noticed the condition. In my opinion, the plain language of section 110(b)(2) demonstrates it applies only to repeated failures to remedy "a known violation," that is, the violation that is the subject of the flagrant designation.[4]

DISCUSSION

I. Background

Section 110(b)(2) of the Mine Act, 30 U.S.C. § 820(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.

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[3] I also would remand the Judge's finding of moderate negligence. *See* slip op. at 23-25. I am not certain the Judge felt bound by the Part 100 regulations in a manner that he had no choice other than to reduce negligence or he found the mitigating circumstance a sufficient reason. I would accept a finding by the Judge that the failure of the pre-shift examiner to note any accumulation coupled with the inspector's failure to cite a pre-shift violation is sufficient to reduce negligence to a moderate level. Separately, I agree with Commissioner Young's opinion that we should remand the case for a redetermination of whether the violation was "reasonably expected" to cause death or serious bodily injury. *Id.* at 32. The seriousness of an injury if it should occur does not deal with the "expectation" of the occurrence.

[4] I am bound to respect the settled law of the Commission. However, as the Commission decision demonstrates, the contours of the so-called broad interpretation do not appear settled. Therefore, I find it remains appropriate to express the view that the broad interpretation, standing alone and certainly without any definition or context, does not comport with the purpose and effect of section 110(b)(2).

Congress has established a scheme of "increasingly severe sanctions for increasingly serious violations or operator behavior." *Emery Mining Corp.*, 9 FMSHRC 1997, 2000 (Dec. 1987) (quoting *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 828 (April 1981)). At the far end, those progressive sanctions apply to violations resulting from highest levels of negligence — that is, gross negligence or reckless disregard (unwarrantable failures) and violations that could contribute significantly and substantially to the likelihood of serious injuries (S&S violations). For unwarrantable failure violations, the progressive discipline culminates in a difficult to break chain of withdrawal orders under section 104(d), 30 U.S.C. § 814(d). For S&S violations, the progressive discipline culminates in a perhaps more difficult to break chain of withdrawal orders under section 104(e). Such violations carry a maximum civil penalty of slightly less than $70,000. *See supra*, slip op. at 9 n.16. Certainly, Congress was aware of the existing sanctions under the Mine Act in passing the MINER Act.

Congress enacted the MINER Act in response to three tragic and highly publicized mine disasters at the Sago, Aracoma Alma, and Darby mines, respectively. S. Rep. No. 109-365, at 2 (Dec. 6, 2006). Each of those events spotlighted the occurrence of particularly serious dangers and the inability of the miners to escape those dangers.

After the Alma mine disaster, for example, four foremen pled guilty to criminal charges of not conducting escapeway drills. *Massey bosses get probation on Aracoma charges*, Charleston Gazette-Mail (Dec. 9, 2010), http://www.wvgazettemail.com/News/201012091056. The foremen knew that mandatory safety standards required the drills and knew that awareness of how to react to an emergency could spell the difference between life and death. Yet, they repeatedly did not conduct the drills. In enacting section 110(b)(2), Congress demonstrated that it would not tolerate an operator that knows of a violation reasonably expected to cause death or serious injury to repeatedly or recklessly ignore rather than eliminate the violation.

The majority decision notes the lack of legislative history of the flagrant provision but suggests that Congress may have been looking at the fourth step of the *Mathies* test for S&S violations in defining flagrant violations. Slip op. at 7. Perhaps Congress is intimately familiar with Commission case law. However, given that the gravity standard in the definition of a flagrant violation is virtually identical to the definition of an imminent danger in the Mine Act itself, it seems strange to stretch for a comparison to Commission case law when a statutory provision is far closer in wording. The gravity portion of the definition of an imminent danger is "reasonably could be expected to cause death or serious physical harm." 30 U.S.C. § 802(j). Section 110(b)(2) covers known violations that "reasonably could have been expected to cause, death or serious bodily injury."

The gravity aspect of an S&S violation does not meet the definition of a flagrant violation unless the gravity goes beyond the Mathies standard of ***reasonably likely*** to result ***in a reasonably serious injury*** and reaches the level of "***reasonably expected*** to result in death or ***serious bodily injury***." In other words, every flagrant violation meets the gravity requirement for an S&S violation but not every S&S violation meets the gravity requirement for a flagrant violation. To intimate otherwise is error. There is a clear and distinct difference between S&S violations and flagrant violations regarding the necessary level of gravity.

Further, ironically, if the supposition that Congress used the fourth step of the *Mathies* test were correct, the dropping of the word "reasonably" from the definition of a flagrant violation before "serious bodily injury" could well be taken as demonstrating that the injury itself must be more severe than those qualifying for S&S. If one supposes use of a model, then deletion of a substantive word from the model would seem to be meaningful. In sum, I do not think it useful to misconceive the fourth step of *Mathies* as a model for the gravity element of a flagrant violation.

In establishing a nearly four-fold higher maximum penalty, Congress dealt with two essential elements to the violation: gravity and culpability. As seen, with respect to gravity, the violation must be one that "substantially and proximately caused, or that could reasonably be expected to cause, death or serious bodily injury."

The section is more complex regarding culpability. The circumstances must violate "a mandatory safety standard." The violation must be "known" to the operator. Finally, the operator must fail recklessly or repeatedly to make reasonable efforts to eliminate the known violation. I deal first with the requirement that the violation is "known" and then with circumstances constituting a "repeated" failure to eliminate a known violation.

II. For Purposes of Section 110(b)(2), a Violation Is "Known" Only if the Operator Has Actual Knowledge of the Violation.

To be flagrant, a violation must be "known" by the operator. The law recognizes actual knowledge and constructive knowledge. In reaching his decision below, the Judge found the term "known" embraced both actual and constructive knowledge. *American Coal Co.*, 35 FMSHRC 2208, 2259-60 (July 2013) (ALJ). There are, of course, distinct differences between actual knowledge and constructive knowledge. Black's Law Dictionary notes the distinction in defining actual knowledge as "direct and clear knowledge as distinguished from constructive knowledge." *Knowledge*, *Black's Law Dictionary* 1004 (10th ed. 2014)

Constructive knowledge or notice is a principle applied in negligence cases[5] to permit a

[5] The Commission has repeatedly held that constructive knowledge, or a "knew or should have known" standard, is equal to a negligence standard. In *Emery Mining*, 9 FMSHRC at 1999, 2005, for example, the Commission reversed a Judge's finding of unwarrantable failure based on the Judge's conclusion only that the operator's safety personnel "should have known of the condition." Similarly, Chairman Backley, writing for the Commission in *Wyoming Fuel Co.*, 16 FMSHRC 1618 (Aug. 1994), stated that "[u]se of a 'knew or should have known' test by itself would make unwarrantable failure indistinguishable from ordinary negligence." *Id.* at 1628 (quoting *Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (Oct. 1993)). Consequently, while the Commission properly applies constructive knowledge in unwarrantable failure cases, the Commission has stated clearly that because constructive knowledge is indicative of only ordinary negligence, constructive knowledge, standing alone, is insufficient to meet unwarrantable failure's extreme negligence standard. Commissioners Young and Cohen misapprehend the point of the preceding sentences. *See* slip op. at 21 n.27. The sentence immediately preceding the former sentence, for example, merely states the obviously correct proposition that the factor of constructive negligence by itself — that is, "standing alone" — is insufficient to meet the

court to make a legal inference that an actor did not meet a legal standard of care.[6] Actual knowledge, on the other hand, is a factual inquiry to determine whether an actor knew of the required fact or knew of facts making it reasonable to infer knowledge of the facts. Thus, actual knowledge may be "express" in which the evidence definitively shows the actor knew the facts in issue or "implied" in which an adjudicator may draw an inference the actor knew of the disputed facts from facts of which the actor had express knowledge. Simply stated, one cannot

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standards for an unwarrantable failure because the Commission has repeatedly required Judges to explicitly consider seven separate factors in determining the existence of an unwarrantable failure. Indeed, as stated earlier in this footnote, in the *Emery* case, the operator clearly was constructively negligent but the Commission reversed the Judge's finding of an unwarrantable failure because the totality of conduct did not constitute an unwarrantable failure.

The source of Commissioners Young and Cohen's disagreement is further unclear given that the Secretary has *twice* argued that by showing only that an operator "knew or should have known" of a violation, based on *Emery*, a violation can constitute an unwarrantable failure, and the Commission has *twice*, clearly and forcefully, rejected that interpretation of *Emery*. Thus, when confronted in *Virginia Crews* and *Wyoming Fuel* with the argument that a violation was unwarrantable solely because the operator knew or should have known of the violation, "we reject[ed] such an interpretation of *Emery*" because that would "make unwarrantable failure indistinguishable from ordinary negligence." *Wyoming Fuel*, 16 FMSHRC at 1628 (quoting and citing *Virginia. Crews*, 15 FMSHRC at 2107)).

Of course, the important point — a point with respect to which Commissioners Cohen and Young do not express any disagreement — is that constructive knowledge is directed toward negligence. It is not directed to the "known" violation requirement focused upon by section 110(b)(2).

[6] For example, in the context of negligence actions against possessors of land, "[p]ossessors of land owe a duty to protect invitees from foreseeable harm." *Carrender v. Fitterer*, 503 Pa. 178, 185, 469 A.2d 120, 123 (1983). A duty is only owed, however, when the possessor "knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitee." Restatement (Second) of Torts § 343(a). Where a possessor should discover a condition through the exercise of reasonable care, it has constructive notice of the condition and breached its standard of care. *See Rojas v. Wal-Mart Stores, Inc.*, 857 F. Supp. 533, 538 (N.D. Tex. 1994) ("[E]ven without actual knowledge, Defendant Wal-Mart would be considered to have constructive knowledge of any premises defects or other dangerous conditions that a reasonably careful inspection would reveal."); *Reid v. Kohl's Dep't Stores, Inc.*, 545 F.3d 479, 481-82 (7th Cir. 2008) ("Where constructive knowledge is alleged, '[o]f critical importance is whether the substance that caused the accident was there a length of time so that in the exercise of ordinary care its presence should have been discovered.'") (quoting *Torrez v. TGI Friday's, Inc.*, 509 F.3d 808, 811 (7th Cir. 2007).

avoid an obligation by closing his eyes to facts he sees.[7] *Sapp v. Warner*, 105 Fla. 245, 255, 141 So. 124, 127 (1932).

I conclude that the knowledge requirement for a flagrant violation is actual knowledge. This conclusion necessarily follows from the background of the enactment of the provision, the ordinary meaning of the terms "flagrant" and "known," and the section's relationship to other sanctions in the Mine Act's scheme of progressively severe sanctions.

Congress passed the Act in direct response to Sago, Aracoma, and Darby. We also know that those disasters involved circumstances in which operators had actual knowledge of very dangerous circumstances arising from violations but, despite that knowledge, the operators took no timely action to eliminate the violations. To qualify for the extraordinary penalty, the violation must be "flagrant."

Webster's Third New International Dictionary defines flagrant as "extremely, flauntingly, or purposefully conspicuous usu[ally] because of uncommon evil, unworthiness, unpleasantness, or truculence: glaringly evident." *Webster's Third New Int'l Dictionary* (Unabridged) 862-63 (1993 ed.). The American Heritage Dictionary of the English Language defines flagrant as "conspicuously bad, offensive, or reprehensible: *a flagrant miscarriage of justice*." *American Heritage Dictionary of the English Language* 667 (4th ed. 2009). Webster's Collegiate Dictionary defines flagrant as "conspicuously offensive esp[ecially] so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality." *Webster's Collegiate Dictionary* 441 (10th ed. 1999). Black's Law Dictionary uses the term "flagrant" to define "egregious"—that is, "egregious" means "extremely or remarkably bad; flagrant." *Egregious, Black's Law Dictionary* at 629. Indeed, in Black's, "flagrant" is a sixth meaning of "gross"—that is, "gross" means "[b]eyond all reasonable measure; flagrant." *Gross, Black's Law Dictionary* at 818. Administrative Law Judge Paez correctly noted the importance of Congress' use of the term "flagrant" in *Stillhouse Mining, LLC*, 33 FMSHRC 778 (Mar. 2011) (ALJ), finding "[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." *Id.* at 801.

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[7] The difference between implied actual knowledge and constructive knowledge may be subtle. The notion of constructive knowledge comprehends the notion of a "legal" duty to make an inquiry. If an actor has a duty to undertake an inspection, for example, but fails to do so, the actor may have constructive knowledge of an event that he should have discovered by performing his duty. In such instance, the actor "should have known" certain facts but did not know those facts because of his failure to meet a legal duty of care. He was negligent, perhaps grossly or unwarrantably so. The notion of implied actual knowledge, on the other hand, is a factual construct based upon information of which the actor actually was aware. Thus, if an actor performing an inspection actually detects facts (former facts) that would have led a reasonable actor to learn of a specific problem (latter facts), a court may infer actual knowledge of the latter facts due to the actor's express knowledge of the former facts. Constructive knowledge springs from a legal duty to discover certain information whereas implied (or inferred) actual knowledge is a factual inference drawn from facts of which a person actually was aware.

Congress' institution of a new "flagrant" violation to identify especially egregious conduct and its nearly quadrupling the maximum penalty for flagrant violations connotes an intention by Congress to penalize severely any violations where operator conduct goes substantially beyond violations previously established in the Mine Act. A "flagrant" violation, therefore, goes beyond the level of extreme negligence or reckless disregard already dealt with as unwarrantable failures and the requirement for a reasonable expectation of death or serious bodily injury essentially reaches the gravity level necessary for an imminent danger. For example, in upholding an administrative decision finding a "flagrant' violation of another federal statute, the Ninth Circuit emphasized, "the ruling was based on the [Judicial Officer]'s finding that Potato Sales's conduct was intentional, knowing, and deliberate." *Potato Sales Co. v. Dep't of Agric.*, 92 F.3d 800, 805 (9th Cir. 1996).

Recognizing Congress' targeted aim at especially egregious conduct, we turn to the requirement that the violation must be "known." The dictionary definitions of "know" is "1. to apprehend immediately with the mind or with the senses: perceive directly: have direct unambiguous cognition of . . . (2) to have perception, cognition, or understanding of esp[ecially] to an extensive or complete extent." *Webster's Third Int'l* at 1252. In turn, "known" is the past participle of the word "know." Something is known when it is "familiar or recognized." *Id.* at 1253.

Mindful of the meaning of flagrant and known, it is then necessary to consider the terms in the context of their function within the structure of the Mine Act. Prior to the MINER Act, the Mine Act recognized and penalized the most serious forms of violations or negligence (excepting criminal acts) as an S&S and/or "unwarrantable failure" violation. Under Commission cases, unwarrantable failures are characterized by "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Emery Mining Corp.*, 9 FMSHRC at 2003–04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991). In *Buck Creek Coal, Inc.*, 52 F.3d 133 (7th Cir. 1995), the Seventh Circuit endorsed the standard established in *Emery Mining*:

> An unwarrantable failure may be established "by showing that a violative condition or practice was not corrected prior to the issuance of a citation or order because of 'indifference, willful intent or serious lack of reasonable care.'" [*Emery Mining*, 9 FMSHRC] at 2003. It has also been defined as an "intentional or knowing failure to comply or reckless disregard for the health and safety of miners." *Secretary of Labor v. Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (1991). *See also Secretary of Labor v. Virginia Crews Coal Co.*, 15 FMSHRC 2103, 2107 (1993).

52 F.3d at 136.

Thus, the Commission emphasizes that an unwarrantable failure exists when a violative condition results from a reckless disregard for safety. Because the basis of an unwarrantable

violation is gross neglect or reckless disregard, MSHA issues unwarrantable failure citations on the legal ground of extreme negligence.

Had Congress wished, therefore, to base a flagrant violation upon reckless disregard or gross neglect — that is, a negligence standard to which constructive knowledge is applicable, the Mine Act provided ready terminology. Congress could have defined a flagrant violation as a reckless or repeated failure to make reasonable efforts to eliminate an unwarrantable failure that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury. It did not do so. Instead, by using a "known" violation, Congress focused upon fact-based knowledge rather than upon negligence-based imputed knowledge.

I am unaware of any case in which the Commission has addressed expressly the distinction between actual knowledge and constructive knowledge. Of course, the Commission has reached decisions in which a section of the Mine Act deals with actions taken "knowingly." Those cases sometimes use the terminology "knew or should have known." However, I do not find those cases controlling as they apply to a different subsection using different terminology, enacted at a different time for a different purpose. The term "knowingly" in section 110 applies to violations of orders issued under the Mine Act, a false statement made in documents required under the Mine Act, or sales of non-compliant equipment as if it were compliant. 30 U.S.C. § 820(c), (f), (h). Obviously, these are all very different circumstances from violating a mandatory safety standard during the course of mining operations.

Even *identical* words within the same statute may have different meanings when they serve different purposes. *Verizon California, Inc. v. FCC*, 555 F.3d 270 (D.C. Cir. 2009).

In *Verizon California*, the District of Columbia Circuit stated:

> [b]ecause of that possibility — different contexts dictating different interpretations — courts addressing the meaning of a term in one context commonly refrain from any declaration as to its meaning elsewhere in the same statute.

Id. at 276; *see also Weaver v. USIA*, 87 F.3d 1429, 1437 (D.C. Cir. 1996) ("Identical words may have different meanings where 'the subject-matter to which the words refer is not the same in the several places where they are used, or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another'") (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)); *Dewsnup v. Timm*, 502 U.S. 410, 416 (1992).

Here, as noted above, different Congresses enacted different provisions thirty years apart using different words in different contexts to address different problems. Therefore, the word "knowingly" used in different contexts does not guide interpretation of "known" in section 110(b)(2).

Moreover, even were we to look at "knowingly" cases, many of those cases apply an actual knowledge standard. The Commission, in fact, has written of the "knowingly" standard as

requiring that the operator "had reason to know" of the violation. Whether an actor "has reason to know" is a factual and legally distinct (if easily misunderstood) concept from whether an actor "should have known." "Had reason to know" involves knowledge of facts not a negligence duty to take specific actions. Instead, it asks whether the actor knew of sufficient facts from which a reasonable actor would then determine the actual facts, not whether an actor would take action in the first instance without knowing facts leading to a possible inference that other facts existed.

In *Richardson*, 3 FMSHRC 8 (Jan. 1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), *cert. denied*, 461 U.S. 928 (1983)), the Commission defined the term "knowingly" as follows:

> "[k]nowingly," as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

3 FMSHRC at 16 (quoting *United States v. Sweet Briar, Inc.*, 92 F. Supp. 777, 780 (D.S.C. 1950)).

The Commission, therefore, stated that the meaning of "knowingly" is "that used in contract law." *Id.* Contract law recognizes that "reason to know" and "should know" are distinct legal concepts. The Second Restatement of Contracts states: "Reason to know is to be distinguished from knowledge and from 'should know.'" Restatement (Second) of Contracts § 19 cmt. b (Am. Law Inst. 1981). The Second Restatement of Contracts cites favorably to the Second Restatements of Torts and Agency, which also recognize the distinction between "should know" and "reason to know." *Id.* The Second Restatement of Torts makes clear that the two concepts should not be conflated:

> "reason to know" implies no duty of knowledge on the part of the actor whereas "should know" implies that the actor owes another the duty of ascertaining the fact in question. "Reason to know" means that the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist. "Should know" indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty.

Restatement (Second) of Torts § 12, cmt. a (Am. Law Inst. 1965).

Thus, the question in this case is not what AmCoal "should have known." The question is whether AmCoal knew of the violation, or whether it knew of sufficient facts from which it is reasonable to infer knowledge to AmCoal.

In this case, the Judge found the violation was known on the basis that AmCoal "should have known about" the accumulations. 35 FMSHRC 2265; Am. Ex. 21, at 10. This is a lesser negligence standard. *See, e.g.*, *United States v. Kalu*, 791 F.3d 1194, 1208 (10th Cir. 2015) (stating that "should have known" is "equivalent to a negligence standard" rather than knowledge or reckless disregard); *United States v. Ladish Malting Co.*, 135 F.3d 484, 488 (7th Cir. 1998) ("No case of which we are aware treats what a person 'should have known' as knowledge or wilfulness. Unless knowledge, recklessness, criminal negligence, and civil negligence are to merge into a single mental state, it is essential to preserve the difference."); 30 C.F.R. § 100.3, tbl.X (using "should have known" standard in defining low, moderate, and high negligence). When a statute requires actual knowledge, a finding based on constructive knowledge must be set aside. *Radiology Center, S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d. 1216, 1222-23 (7th Cir. 1990).

III. A Flagrant Designation Requires Proof of the Reckless or Repeated Failure to Eliminate the Specific Violation Charged — Prior Violations Are Not Relevant.

A. Section 110(b)(2) Has a Plain and Unique Meaning.

Section 110(b)(2) plainly refers to a single, specific violation—"***a*** known violation." This is a reference is to the discrete violation that is allegedly flagrant rather than a group of violations leading up to making a discrete violation being denominated as flagrant due to prior non-flagrant violations. To commit a "flagrant" violation, the operator, recklessly or repeatedly, must fail make reasonable efforts to eliminate that cited and known violation. Moreover, the definition of "flagrant" and the uniqueness of a flagrant violation support its application based only on a repeated failure to eliminate a reasonable expectation of death or serious injury resulting from the specifically charged violation.

As described above, prior to the MINER Act, the Mine Act provided a remedy and severe sanction for repeated significant and substantial ("S&S") violations. Congress enacted section 104(e) to "provide an effective enforcement tool" against repeat violators who are undeterred by MSHA's standard enforcement scheme, which consists of citations and orders. S. Conf. Rep. No. 95-181, at 32 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 620 (1978). There is no mention in the legislative history of the MINER Act of supplementing the pattern of violations section 104(e) or dissatisfaction with its usage or non-usage. There is no basis to believe Congress was enacting a severe penalty aimed at the very same purpose as section 104(e).

Under the Commission's reasoning in *Wolf Run*, a violator not only would face withdrawal orders for unwarrantable failures or a pattern of S&S violations but also could face a future of quadruple-fold maximum penalty for every subsequent violation reaching the requisite level of gravity. It is simply impossible to reconcile such a result with the absence of any

mention of sections 104(d) and 104(e) from the legislative history of the flagrant penalty provisions, any mention of such an ongoing sanction, and, in fact, Congress' statement elsewhere that safety penalties should not put operators and miners out of work.

Clearly, a uniquely violative circumstance is at the heart of a "flagrant" violation and an unprecedented civil penalty. That circumstance is failing repeatedly to correct a specific violation of which the operator has knowledge and is so serious that it creates a reasonable expectation of death or serious injury.

Administrative Law Judge Feldman persuasively explained in *Conshor Mining, LLC*, 33 FMSHRC 2917, 2927-28 (Nov. 2011) (ALJ), that "the plain statutory language in section 110(b)(2) with respect to 'repeated conduct' refers to a single known violation, rather than a series of recurring violations." Administrative Law Judge Barbour agreed with Judge Feldman's interpretation stating "the Secretary must show that Wolf Run repeatedly failed to make reasonable efforts to eliminate the violation of section 75.400 charged in the order." *Wolf Run Mining Co.*, 34 FMSHRC 337, 346 (Jan. 2012) (ALJ), *rev'd*, 35 FMSHRC 536 (Mar. 2013).

I would accept and apply their well-reasoned decisions.

B. The Commission's *Wolf Run* Decision Misinterprets Section 110(b)(2).

In *Wolf Run*, the Commission found it would allow use of prior non-flagrant violations to prove a flagrant violation even though knowledge of the violation and reasonable expectation of death were not necessary to prove such prior non-flagrant violations. Such an interpretation does comport with the words or purpose of section 110(b)(2) and is not reasonable.

1. The Commission's Reasons for Its Reading Are Insubstantial.

The arguments offered by the Commission in support of its interpretation in *Wolf Run* accentuate its erroneousness. The Commission first asserted in *Wolf Run* that unless prior non-flagrant violations may prove a repeated failure to remedy a known violation, section 110(b)(2) "would be effectively indistinguishable from the failure to abate provisions of section 104(b) of the Mine Act." 35 FMSHRC at 542. That is obviously incorrect. Section 104(b) deals exclusively with the failure to abate a condition identified in a citation. Section 110(b)(2) is not aimed at enforcing abatement orders. Instead, section 110(b)(2) authorizes imposition of a severe penalty upon an operator that fails to remedy a known violation that is reasonably expected to cause death or serious injury notwithstanding the absence of a citation. The sections apply to completely different situations.

The clear purpose of section 110(b)(2) is to incentivize operators strongly to eliminate known violations reasonably expected to cause serious injury without waiting for an inspector to discover the violative condition. Far from being duplicative of section 104(b), section 110(b)(2) plugs a perceived hole in mine safety by imposing a very stiff penalty upon an operator that repeatedly fails to remedy a known and very seriously dangerous violation despite the absence of

a citation setting an abatement period.[8] Operators now run a very significant financial risk if they wait for an inspector to catch a very dangerous known violation before eliminating it.

The Commission also erroneously asserted that section 110(b)(2) would be duplicative of section 110(b)(1). *Id.* at 542. The Commission again failed to recognize that section 110(b)(1) deals with failures to correct violations for which citations have been issued. Thus, the Commission missed a central point of section 110(b)(2) — requiring operators to correct known very serious violations without the prior presence of an inspector. It is not acceptable for operators to allow known violations that are reasonably expected to cause death or serious injury to persist. Section 110(b)(2) addresses that problem — a problem not addressed by section 104(b) or section 110(b)(1).[9]

The Commission's last argument in *Wolf Run* is that the term "repeated" must extend to a history of prior violations because, if the term "repeated" does not include a history of prior violations then, "this might result in the elimination of any meaningful distinction between a 'reckless' and a 'repeated' flagrant violation." 35 FMSHRC at 543. Surely, the Commission does not mean that it cannot see a distinction between repeated failures to remedy and reckless failures to remedy. Once it does so, the makeweight argument collapses. Instead, "reckless" and "repeated" have distinctly different meanings and create different bases upon which the Secretary can establish a flagrant violation. Thus, the repeated failure is not rendered "mere surplusage," as the Commission states, simply because it is restricted to the cited violation. *Id.*

Finally, the *Wolf Run* Commission stated that Judges Barbour and Feldman's reading of the statute ran "counter to the rest of the Act's graduated enforcement scheme." *Id.* at 541. In doing so, the Commission "retreat[ed] to that last redoubt of losing causes, the proposition that the statute at hand should be liberally construed to achieve its purposes." *Director, Office of Workers' Comp. Progs., Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-36 (1995) (citation omitted).[10] The Commission reasoned that, because the

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[8] Additionally, section 104(b) provides for withdrawal orders whereas section 110(b)(2) provides for monetary penalties.

[9] In the preamble to the final flagrant violation rule, MSHA distinguished subsection 110(b)(1) from subsection 110(b)(2) stating, "[S]ection 110(b)(1) specifically applies to failure to correct a 'violation for which a citation has been issued.' In contrast, section 110(b)(2) applies to failure to eliminate a 'known violation,' and does not specify that a 'known violation' must be a violation which has been cited." 72 Fed. Reg. 13,592, 13,623 (Mar. 22, 2007).

[10] Commissioner Cohen responds with vigor to this expression by the United States Supreme Court. *See* slip op. at 29 n.5 (Cohen, Comm'r, concurring). It is, of course, simply a colorful way of saying that Judges and Commissioners must apply the law as written rather than indulge their own predilections toward the law. Of course, we interpret the Mine Act mindful of its fundamental purpose. However, our duty is a judicial one to apply the law as written. We are not empowered to make policy that we might desire under the guise of interpretation. My colleague casts the Mine Act so liberally as to make meetings with MSHA a factor in determining whether an operator has failed repeatedly to eliminate "a known violation." *See* slip op. at 16. Indeed, he concludes his concurrence by asserting that the issue is whether the

Secretary could consider past violations with respect to unwarrantable failure violations, he must be able to do so under the flagrant provision. 35 FMSHRC at 542. Invocation of an Act's purpose "may be invoked, in case of ambiguity, to find present elements that are *essential* to the operation of a legislative scheme; but it does not add features that will achieve the statutory 'purposes' more effectively." 514 U.S. at 135-36 (emphasis added). This is because "[e]very statute purposes, not only to achieve certain ends, but also to achieve them by particular means." *Id.* at 136.

Imposition of an especially severe flagrant violation penalty for a repeated or reckless failure to correct a known violation reasonably expected to cause death or serious bodily injury is the essence of the Mine Act's scheme of increasingly enhanced enforcement. A Commission desire to provide the Secretary another avenue to impose flagrant penalties is not a reason to find two meanings where there is only one. The plain wording of section 110(b)(2), its purpose, its essential elements, and the failings in the Commission's analysis wholly undercut the Commission's interpretation in *Wolf Run*.

2. *Wolf Run* Presents Due Process Concerns.

Apart from the Commission's misconstruction of section 110(b)(2), there is another perplexing problem with the *Wolf Run* decision and with the decision in this case. The Commission acknowledged that, under its interpretation, operators could not know the number, type, or similarity of prior violations that would be necessary for prior violations to sustain a flagrant penalty. The Commission made this acknowledgement, saying,

> One might reasonably argue about the number of prior violations that should be necessary, or how similar those prior violations should be before conduct is appropriately considered a "repeated failure" under 110(b)(2), but an interpretation that precludes consideration of *any* prior violations runs counter to the natural meaning of the language.

35 FMSHRC at 541.

Having acknowledged the patent ambiguity in its construction of statutory language providing for hundreds of thousands of dollars of penalties, the Commission wholly ignores the obvious issue of whether such an incomprehensible reading of the Mine Act meets basic principles of fair notice and due process. It is elementary that due process requires that a party must receive fair notice before being deprived of property. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Civil penalties are "quasi-criminal" in nature. Consequently, parties subject to administrative penalties and especially penalties running into the hundreds of thousands of dollars are entitled to clear notice of the conduct for which such penalties may be assessed. *United States v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4th Cir.

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evidence "supports a showing of a repeated failure to make reasonable efforts to eliminate the ***problem***." Slip op. at 31 (emphasis added). At the end, therefore, he seems to think section 110(b)(2) is aimed at curing a repeated "problem" rather than at very severely penalizing the repetition of "***a*** known violation."

1997); *First Am. Bank of Virginia v. Dole*, 763 F.2d 644, 651 n.6 (4th Cir. 1985). As the Fifth Circuit stated in its oft-quoted decision in *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976),

> [S]tatutes and regulations which allow monetary penalties against those who violate them . . . must give . . . fair warning of the conduct [they] prohibit[] or require[], and [they] must provide a reasonably clear standard of culpability to circumscribe the discretion of the enforcing authority and its agents.

The Fifth Circuit's reference to a "reasonably clear standard' is often encapsulated in another phrase used by the courts — namely, that the regulation must provide notice of the basis for liability with "ascertainable certainty." *Id.*; *see also, e.g.*, *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000); *Geo. Pac. Corp. v. OSHRC*, 25 F.3d 999, 1005 (11th Cir. 1994); *Dravo Corp. v. OSHRC*, 613 F.2d 1227, 1232-33 (3rd Cir. 1980).

3. The Current Decisions

Having read the separate Chairman Jordan/Commissioner Nakamura and Commissioners Cohen/Young opinions, I have no idea how previous violations can or should be used to determine that a current known violation reasonably expected to cause death or serious bodily injury "repeats" a prior violation. This ambiguity is troubling in light of the obvious errors in *Wolf Run*.

Chairman Jordan and Commissioner Nakamura do not address the problem because they find that the violation is flagrant under the narrow interpretation of the statute.[11] If the Judge disagrees, he is on his own with respect to application of the broad standard, even though he already provided his opinion of how to apply the misguided *Wolf Run* decision.

Commissioners Cohen and Young deal with the issue of use of previous violations. However, I cannot find any meaningful suggested guidance for Administrative Law Judges in their minority opinion.

Commissioners Cohen and Young say "the language of the statute and our decision in *Wolf Run* support the reasoned consideration of an operator's history of substantially similar violations, where they may be shown to be relevant to the issues arising in the repeated failure context." Slip op. at 29. Of course, as we have seen, the *Wolf Run* decision was based upon a number of remarkable misinterpretations of the Mine Act. For present purposes, however, the important point is that the foregoing phrases are clichés typically used by lawyers when they have nothing concrete to offer such as "substantially similar" violations, and "where they may be

[11] Because we are all human, such uncertainty unintentionally creates an insidious danger that I hesitate to identify but, in this real world, must acknowledge. A Judge faced with a difficult decision on knowledge of the charged violation under the "narrow" interpretation but complete uncertainty how to deal with the nonexistent or impossible to fathom standard for the "broad" interpretation might be pushed imperceptibly and even unknowingly toward a flagrant finding under the narrow interpretation thereby avoiding grappling with the broad interpretation.

shown to be relevant," and "to the issues arising in the repeated failure context." I do not see how that sentence offers any meaningful guidance to Administrative Law Judges.

Moreover, I do not see how such suggestions comply with fundamental due process standards of notice to operators of the standard for a flagrant violation. Section 110(b)(2) establishes a standard for civil penalties into the hundreds of thousands of dollars. We have the same duty as any federal agency to provide fair notice of scope of the violation that may result in such penalties.

Even were we to allow previous violations to be used as my colleagues wish, I simply do not see how the Commission could find that a violation "***repeats***" a failure to eliminate "a known violation that . . . could have been expected to cause, death or serious bodily injury" unless that prior violation was "a known violation . . . that could have been expected to cause, death or serious bodily injury."[12] A new violation could only "repeat" a prior violation if such prior violation and the new violation share the same fundamental elements. Here, that means that in the prior violation the operator (1) failed to eliminate a known violation that (2) could be reasonably expected to cause death or serious injury.[13] The difficulty for my colleagues seems to be that they strongly desire to allow use of prior violations, but they realize the vast majority of

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[12] Commissioner Cohen, joined by Commissioner Young, claims that "repeated failure" modifies "to make reasonable efforts to eliminate." *See* slip op. at 29 n.6. This limited parsing of the statutory definition of "flagrant" ignores the critical terminology of the statute by disregarding that the entirety of the key phrasing is "repeated failure to make reasonable efforts to eliminate ***a*** known violation of ***a*** mandatory health or safety standard." (emphases added). A key issue of section 110(b)(2) is this: What must the operator fail to make reasonable efforts to eliminate? There is one, and only one, answer to that question. The statute demands the failure to make reasonable efforts to eliminate "a known violation." "A known violation" is the direct object of the infinitive phrase "to eliminate," which itself modifies "efforts." The Act does not require efforts to eliminate bad management or to encourage "better practices" (whatever that means). Identifying actions such as "bad management" and an absence of "better practices" as demonstrating a preceding and repeated failure to make reasonable efforts to eliminate a known violation demonstrates compellingly the absence of any knowable or reasonable standard, let alone a standard for imposing hundreds of thousands of dollars in civil penalties, under the Commission's *Wolf Run* decision or Commissioner Cohen's opinion. Indeed, it appears use of the actual statutory language is so foreign that even in the last sentence of the footnote, they use the term "violative conditions" instead of "a known violation."

[13] The term "a known violation" must mean that the operator had knowledge of the specific cited condition, not that it generally knows various kinds of activities constitute violations. For example, operators "know" an accumulation of loose coal and coal dust constitutes a violation. It would be foolish to assert that an operator who commits a number of violations of 30 C.F.R. § 75.400 could then be on the hook for every subsequent violation as a "flagrant" violation because it "knows" accumulations of coal dust violate a mandatory safety standard.

prior violations do not demonstrate either that the operator had knowledge of the violation or that the prior violation created a reasonable expectation of death or serious bodily injury.[14]

Inspectors may be, and often are, the first persons to find a violation. The occurrence of a prior violation, standing alone, does not demonstrate that the prior violation was "known" by the operator. Indeed, even with respect to unwarrantable failures, Judges must evaluate and weigh seven distinct attributes, only one of which is knowledge. Therefore, although knowledge of the violation is a necessary element of proof of a flagrant violation, knowledge is rarely, if ever, an essential element of non-flagrant citations.[15]

Further, without rules for, or any understanding of, the kinds of prior violations that may be considered or what number are necessary, the Commission's decisions create an unknowable, unworkable, abusive, and purely subjective standard for the issuance of penalties in the hundreds of thousands of dollars. We see that problem at work in this case.

It seems to me the inability to explain how an interpretation should be applied should be a hint that the interpretation is incorrect. In any event, I conclude that *Wolf Run* was decided incorrectly and that the repeated element of a flagrant violation means situations in which an operator repeatedly allows a known violation to sit unabated despite "repeated" awareness of the violation.

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[14] My colleagues correctly point out that the operator had a very high number of violations of section 75.400 during the two years preceding the flagrant citations. No one can defend or excuse such violations, especially in a high methane mine. At the same time, it is notable that, according to MSHA's website, in the calendar years 2006 and 2007 MSHA issued 15,301 citations to underground coal mines for violations of section 75.400. MSHA, Most Frequently Cited Standards by Mine Type, http://arlweb.msha.gov/stats/top20viols/top20home.asp (last visited Aug. 30, 2016). Further, the operator's mine is on a frequent inspection schedule with inspectors present virtually every day. Finally, my colleagues state that the mine has "a complex system of conveyor belts transports coal for many miles from mine face to portal." Slip op. at 2. Of course, miles of belt lines with multiple exchange points create a particular danger of coal accumulations. None of this excuses any one violation, a large number of violations, or any inattention to safety, and I do not draw any such conclusion. The point is that the recitation of one raw number does not constitute a judicious review of performance. Such review would require a detailed analysis of all factors bearing upon the number of violations in a particular setting.

[15] Similarly, as noted, the culpability language of section 110(b)(2) does not track the language of the Commission's S&S decisions but instead tracks the definition of an imminent danger — that is, a violation that is "reasonably expected" to cause death or serious physical harm. An S&S violation may exist without a finding of a "reasonable expectation" of death or serious physical harm. Therefore, standing alone, a prior S&S violation does not prove any element of a flagrant violation.

Conclusion

The Commission has stated that "a judge's factual findings are often colored by the legal standard applied," and in such a case, remand for reconsideration of factual findings under the correct standard is appropriate. *Dolan v. F & E Erection Co.*, 22 FMSHRC 171, 180 (Feb. 2000). I agree. Accordingly, I would vacate the Judge's decision and remand the case for a determination of whether AmCoal knew or had a fact-based reason to know of the violation, not whether it should have known.

In remanding, I find that the Judge failed to address much of the record evidence that would detract from his erroneous finding of knowledge and that the Judge misunderstood the record evidence regarding the stoppings. The Judge should consider all of the evidence, even that which conflicts with his original conclusion. *Cf. Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951) ("The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."); *American Wrecking Corp. v. Sec'y of Labor,* 351 F.3d 1254, 1261 (D.C. Cir. 2003) ("The substantial evidence rule requires that the [Occupational Safety and Health Review] Commission reasonably consider material evidence on both sides, as evidence that is substantial when viewed in isolation may become insubstantial when contradictory evidence is taken into account.").

Although I disagree with the Commission's decision in *Wolf Run*, I concur with the majority that the judge properly found that Order No. 7490584 was flagrant. Regarding Order No. 7490599, I would vacate and remand the flagrant and gravity determinations for the Judge to reconsider (1) whether the violation was "known" under the correct legal standard, (2) whether the accumulations could be reasonably expected to result in serious bodily injury, and (3) the operator's level of negligence in consideration of all of the facts. I would not permit the Judge to take a history of prior violations into account.

William I. Althen, Commissioner

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