FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

August 21, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEVA 2015-0509
v.	:	WEVA 2015-0632
THE MONONGALIA COUNTY COAL COMPANY	:	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"), and involve two orders which the Department of Labor's Mine Safety and Health Administration issued to what is now the Monongalia County Coal Company ("MCCC").[1] We granted the Secretary of Labor's petition for discretionary review challenging a Judge's determinations that (1) belt line accumulations, which violated 30 C.F.R. § 75.400, were not attributable to an "unwarrantable failure" to comply with the standard (Order No. 8059209); [2] (2) those accumulations did not constitute a "flagrant

[1] The orders in dispute identified the operator as Consolidation Coal Company. Prior to the date of the orders, CONSOL Energy, Inc. sold all the issued and outstanding common stock of Consolidation Coal Company to Ohio Valley Resources, Inc. Thereafter, the name of the mine at issue was changed from the "Blacksville No. 2 Mine" to the "Monongalia County Coal Mine;" the Mine ID number, 46-01968, remained the same. After the purchase, the mine operator's name was changed to "The Monongalia County Coal Company."

[2] 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." The unwarrantable failure terminology, taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), 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."

violation" under the Mine Act;[3] and (3) a related violation of the preshift examination standard, 30 C.F.R. § 75.360(a)(1),[4] was not the result of an "unwarrantable failure" (Order No. 8059212). 40 FMSHRC 1234 (July 2018) (ALJ).

On August 11, 2020, the Secretary and MCCC jointly moved the Commission to approve their agreement to settle the case. Pursuant to the agreement, both unwarrantable failure designations would be reinstated, while the Secretary would drop his appeal of the accumulations violation being found to not be "flagrant." The parties also agreed that the penalties assessed by the Judge in his decision, which have already been paid by MCCC, would stand: $60,000 for Order No. 8059209 and $22,200 for Order No. 8059212.

Having considered (1) the terms of the settlement agreement; (2) the substance of the Judge's penalty assessments; and (3) that on October 29, 2019, MCCC entered into bankruptcy proceedings, we conclude that the settlement agreement "is fair, reasonable, appropriate under

[3] Section 8(a) of the Mine Improvement and New Emergency Response ("MINER") Act enacted in 2006 amended section 110(b) of the Act to create a "flagrant" violation designation and to provide for the assessment of an enhanced penalty as follows:

> 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).

[4] Section 75.360(a)(1) provides in pertinent part that "a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground." Belts are required to be examined either once per shift or as part of a preshift exam for, among other things, "accumulations of combustible materials." *See* 30 C.F.R. § 75.362(a)(3)(iii) & (b).

the facts, and protects the public interest." *Am. Coal Co.*, 38 FMSHRC 1972, 1982 (Aug. 2016). Consequently, we grant the settlement motion.[5]

Marco M. Rajkovich, Jr., Chairman

Mary Lu Jordan, Commissioner

Michael G. Young, Commissioner

William I. Althen, Commissioner

Arthur R. Traynor, III, Commissioner

[5] Our grant of the motion renders moot the Secretary's pending motion to strike parts of the response brief MCCC filed with the Commission.

Distribution:

Jason W. Hardin, 215 S. State Street, Suite 1200, Salt Lake City, Utah 84111
jhardin@fabianvancott.com

Artemis D. Vamianakis, 215 S. State Street, Suite 1200, Salt Lake City, Utah 84111
avamianakis@fabianvancott.com

Andrew R. Tardiff, Attorney, U.S. Department of Labor, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, Virginia 22202
tardiff.andrew.r@dol.gov

Chief Administrative Law Judge Glynn F. Voisin, Federal Mine Safety Health Review Commission, 1331 Pennsylvania Avenue, NW Suite 520N, Washington, DC 20004-1710
GVoisin@fmshrc.gov

Melanie Garris, U.S. Department of Labor, MSHA, 201 12th Street South, Suite 401, Arlington, VA 22202-5450
garris.melanie@dol.gov