FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue, NW, Suite 520N
Washington, DC 20004

June 1, 2015

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

ORDER DELETING FLAGRANT DESIGNATION

Appearances: Stephen D. Turow, Esq., U.S. Department of Labor, Office of the Solicitor, Arlington, Virginia, on behalf of the Petitioner;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, on behalf of the Respondent.

Before: Judge Feldman

This Order addresses the evidentiary criteria that must be demonstrated to support the imposition of enhanced civil penalties provided in the flagrant provisions of section 110(b)(2) of the Federal Mine Safety and Health Act of 1977, as amended by the Mine Improvement and New Emergency Response Act of 2006 ("Mine Act" or "the Act"), 30 U.S.C. § 820(b)(2). Section 110(b)(2) provides:

> Violations under this section that are deemed to be flagrant may be assessed a civil penalty of not more than $220,000 [adjusted for inflation]. For purposes of the preceding sentence, the term "flagrant" with respect to a violation means a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard *that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury.*

30 U.S.C. § 820(b)(2) (emphasis added).

Viewing the facts in a light most favorable to the Secretary, in order to determine whether the cited accumulations in the subject order state a cause of action for a repeated flagrant violation as contemplated by section 110(b)(2) of the Act, an oral argument was held on March 4, 2015, in Washington, DC.[1] The parties filed post-oral argument briefs, which have been considered in this matter.

I. Background and Statutory Scheme

Specifically, this matter concerns a section 104(d) order alleging a repeated flagrant violation of 30 C.F.R. § 75.400 of the Secretary's mandatory safety regulations, attributable to an unwarrantable failure, that prohibits the accumulation of combustible coal materials along and under conveyor belt structures.[2] The cited condition was attributable to a high degree of negligence, rather than to reckless conduct. The subject order, Order No. 8520664 in Docket No. SE 2013-368, was issued on October 3, 2012, and states:

> Combustible material in the form of float coal dust and dry hard packed coal fines were allowed to accumulate on the roof, ribs, footwall, and belt structure of the Main North 3 belt entry. The hard packed coal fines were in contact with moving roller[s] on the belt line in multiple locations along the belt entry. The float coal dust existed on the roof, ribs, footwall, and belt structure from the Main North 3 Tail Piece extending outby to crosscut 27. This is an approximate distance of 2100 feet. Due to the extensive amount of accumulations and that this belt is examined every shift this constitutes more than ordinary negligence and is an unwarrantable failure to comply with a mandatory health and safety standard. Standard 75.400 was cited 92 times in two years at mine 0100851 (91 to the operator, 1 to a contractor). This violation is an unwarrantable failure to comply with a mandatory standard.

Violations of Section 75.400, like that cited in Order No. 8520664, are the most frequently cited violations of mandatory safety standards in underground coal mines.[3] I emphasize—I repeat, I emphasize—that prohibited coal dust accumulations violating section 75.400 pose a significant safety hazard, which must not be trivialized. Such violations can

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[1] "Tr." references refer to the transcript of the oral argument.

[2] 30 C.F.R. § 75.400 provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel- powered and electric equipment therein.

[3] Citations concerning section 75.400 violations constituted approximately 10 percent of all citations issued in 2013 and 11 percent of all citations issued in 2014. MSHA, Most Frequently Cited Standards, www.msha.gov/stats/top20viols/top20viols.asp (accessed January 28, 2015).

proximately cause an explosion through combustion of coal dust accumulations when such accumulations come in contact with an ignition source such as a defective roller. In addition, such accumulations may contribute to the extensiveness of an explosion through propagation. However, the issue is not whether the cited accumulations are potentially hazardous, but rather whether they have been properly designated as flagrant.

Although Order No. 8520664 was designated as a repeated flagrant designation, the Secretary agrees that an operator's past history of violations cannot provide a basis for a flagrant designation if the cited violative condition does not otherwise satisfy the statutory definition in section 110(b)(2). In this regard, the Secretary stated at oral argument:

> COUNSEL: Let me first start by saying that the Secretary agrees unequivocally with what [the Court] just said with respect to history. We absolutely agree that history alone cannot elevate a violation to a flagrant violation. There is no dispute about that from the Secretary's perspective.
>
> And I think as [the Court] read yourself from the Secretary's response to your briefing order, the Secretary has noted that both reckless and repeated flagrant designations require violations that substantially and proximately caused or reasonably could have been expected to cause, death or serious bodily injury.

Tr. 29-30.[4]

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[4] The Commission has not concluded that a history of violations can elevate a violation, not otherwise meeting the statutory criteria for a flagrant designation, to a repeated flagrant violation. Rather, the Commission has held that past violative conduct may be considered in determining whether to cite a condition as a repeated flagrant violation. *Wolf Run Mining Co.*, 35 FMSHRC 536, 541 (Mar. 2013). Of course, a history of violations is *always* relevant in the unwarrantable failure analysis and in the penalty assessment process. *See* 30 U.S.C. § 820(i). The maximum enhanced statutory penalty for a flagrant violation is $220,000.00 (adjusted for inflation). 30 U.S.C. § 820(b)(2). An aggravated history of violations may warrant the imposition of this maximum penalty, rather than a lower penalty in the enhanced penalty range. With regard to notice based on an aggravated violation history, I note that inexcusable (unwarrantable) conduct and the degree of gravity of a violation are mutually exclusive concepts. In other words, a violation can be attributable to unwarrantable conduct even though it is determined to be non-significant and substantial ("S&S") in nature. *See, e.g.*, *Manalapan Mining Co., Inc.*, 36 FMSHRC 849 (Apr. 2014) (remanding Order No. 7511478 (Belt No. 2) for re-analysis of the unwarrantable issue with respect to a violation that was deemed to be non-S&S in nature). In the final analysis, it is the facts surrounding the violation that determines the degree of gravity irrespective of the degree of negligence. Predicate violations *arbitrarily selected* by the Secretary during an *arbitrarily designated* time period preceding the subject alleged flagrant violation are irrelevant to the issue of whether the cited condition satisfies the statutory criteria for a flagrant violation.

Rather, relying on the language of the statue, which he must, **the Secretary poses the issue as whether the cited accumulations "reasonably could have been expected to cause death[,] or serious [bodily] injury."** *Sec'y of Labor's Response to Briefing Order*, at 1 (May 4, 2015) ("Sec'y Resp.") (emphasis added). However, the Secretary begs the question by oversimplifying the issue. At the risk of stating the obvious, the vast majority of all violations of the Secretary's mandatory safety standards can be reasonably expected to cause serious injury, given continuing mining operations. Rather, resolution of whether there is a sufficient causal relationship to justify a flagrant designation requires distinguishing between whether the violation alleged to be flagrant can be reasonably expected to be the *proximate* cause of death or serious bodily injury, and, whether the violation can be the *contributing* cause of death or serious bodily injury. By oversimplifying this issue, the Secretary conflates the requirements for an S&S designation with the requirements for enhanced penalties under the flagrant provisions of section 110(b)(2).

Consistent with the Mine Act's statutory scheme, the enhanced civil penalty provisions of section 110(b)(2) were promulgated to "provide[] for the use of increasingly severe sanctions for increasingly serious violations or [increasingly serious] operator behavior." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 828 (Apr. 1981). Thus, the Mine Act provides a scheme of increasingly severe sanctions: for S&S violations cited under 104(a); for violations attributable to unwarrantable failures cited under section 104(d), which subject operators to a maximum penalty of $70,000.00; and for flagrant violations under section 110(b)(2), which subject operators to a maximum penalty of $220,000.00 (adjusted for inflation). Obviously, all flagrant violations are S&S in nature. However, it is only the most egregious S&S violations—because of their direct causal relationship to death or serious bodily injury, or the threat thereof—that can be properly designated as flagrant.

It is well-settled that a violation is S&S when there is a "reasonable likelihood that the hazard *contributed to* by the violation will result in an event in which there is an injury [of a reasonably serious nature]." *U.S. Steele Mining*, 6 FMSHRC 1834, 1836 (Aug. 1984); *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). In clarifying the contributing nature of a hazard created by an S&S violation, the Commission held in *Musser Eng'g, Inc.*:

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

32 FMSHRC 1257, 1280-81 (Oct. 2010) (emphasis added). Thus, *Musser* stands for the proposition that the hallmark of the most serious S&S violations is that the hazards created by the violations, in and of themselves, will *directly* cause injury. It follows, consistent with the

Mine Act's statutory scheme, that it is only these most serious S&S violations that can properly be designated as flagrant.[5]

II. Elements of Section 110(b)(2)

a. *Causation*

We start, as we must, with the statutory definition for a flagrant violation provided by Congress in section 110(b)(2). Congress defined a flagrant violation as one "that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2)

As a threshold matter, it is necessary to distinguish the terms proximate cause, as used in section 110(b)(2), from contributory cause. A proximate cause is "a cause that directly produces an event and without which the event would not have occurred." *Black's Law Dictionary* 213 (7th ed. 1999). Synonyms for proximate cause include "direct cause," "primary cause," and "legal cause." *Id.* On the other hand, a contributing cause is "a factor that—though not the primary cause—plays a part in producing a result." *Id.* at 212.

The Secretary, in essence, argues that the definition of a flagrant violation provided by Congress is ambiguous. As his proffered interpretation, the Secretary asserts that a violation is flagrant if it was the *proximate cause* of death or serious bodily injury that has already occurred. With regard to accidents that have not yet occurred, the Secretary argues, in essence, that violations can be properly designated as flagrant if the violation can be reasonably expected to be the *contributing cause* of death or serious bodily injury. Assuming for the sake of argument that section 110(b)(2) is ambiguous, the Secretary's two-tiered approach with regard to levels of causation under section 110(b)(2) is not entitled to *Chevron* deference[6] in that it is unreasonable because it cannot be reconciled with long-standing and generally-accepted principles of statutory interpretation.

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

[6] The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron USA, Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984). If a statute is clear and unambiguous, effect must be given to its language. *Id.* at 842-43. However, if 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 Id.* at 843-44; *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 n.2 (Apr. 1996); *Keystone Coal Mining Co.*, 16 FMSHRC 13 (Jan. 1994). Deference is accorded to "an agency's interpretation of the statute it is charged with administering when that interpretation is reasonable." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 460 (D.C. Cir. 1994).

In this regard, as discussed below, the principles of statutory interpretation dictate that the operative phrase in section 110(b)(2) should be read as: A violation can be properly designated as flagrant if it "substantially and proximately caused, or reasonably could have been expected to [substantially and proximately] cause, death or serious bodily injury." In short, to properly designate a violation as flagrant, the Secretary must always demonstrate that the cited condition could *proximately cause* death or serious bodily injury.

I reach this inescapable conclusion based on several tenets of statutory construction. Namely, when a general clause follows a specific clause, the words in the general clause must be construed to embrace the specific words in the preceding clause. 2A *Sutherland Statutory Construction* § 47:17 (7th ed.). Moreover, each part or section of a statute should be construed relative to every other part of a statute to produce a harmonious whole. *Id.* at § 46.5. Thus, general words may not be given an abstract meaning that is inconsistent with preceding specific words, such that the general words would render the specific words superfluous. *Id.* at § 47.17.

In applying the aforementioned principles it is helpful to enumerate the three relevant clauses in section 110(b)(2). The relevant clauses are:

(1) "that substantially and proximately caused";

(2) "or reasonably could have been expected to cause"; and

(3) "death or serious bodily injury".

It is clear that the term proximate cause in the first clause defines the level of causation in the second clause. For to hold that violations that only *contribute* to death or serious bodily injury, rather than those that *proximately (directly) cause* death or serious bodily injury, can be properly designated as flagrant would render the term "proximate cause" in the first clause superfluous. Furthermore, limiting enhanced civil penalties only to flagrant violations that can proximately (directly) cause death or serious bodily injury is harmonious with the statutory scheme of the Mine Act that imposes higher penalties for more serious violations.

b. *Analogy to Imminent Danger*

Well-settled "principles of statutory construction require us to construe identical words used in different parts of the same statute . . . to have the same meaning." *IBP Inc. v. Alvarez*, 546 U.S. 21, 34 (2005) (citations omitted). To further support the proposition that it is only the most serious violations that can be reasonably expected to proximately (directly) cause death or serious injury that can be designated as flagrant, one need only look to the statutory definition of

imminent danger in section 3(j) of the Mine Act, which contains, essentially verbatim, the language of the second and third clauses in section 110(b)(2) discussed above.[7] Section 3(j) of the Mine Act defines "imminent danger" as "the existence of any condition or practice in a coal or other mine which could *reasonably be expected to cause death or serious physical harm* before such condition or practice can be abated." 30 U.S.C. § 802(j) (emphasis added).

The Commission addressed the definition of the term "imminent" in adjudicating an imminent danger order issued pursuant to section 107(a) of the Mine Act in *Utah Power & Light Co.*, 13 FMSHRC 1617 (Oct. 1991). The Commission defined "imminent" as "ready to take place: near at hand: impending. . . : hanging threateningly over one's head: menacingly near. *Id.* at 1621 (citing *Webster's Third New Int'l Dictionary* at 1130 (1986)). The Commission opined that "[t]he language of the Act and its legislative history make clear that Congress intended that there must be some degree of imminence to support a section 107(a) order." *Id.*

It is particularly noteworthy that the Commission has articulated the importance of distinguishing serious violations that pose an extremely high degree of danger, such as imminent danger conditions, from routine S&S violations that could contribute to an injury based on future continued mining operations. In this regard, the Commission has stated:

> If the imminent danger provisions of the Act are interpreted to include any hazard that has the potential to cause a serious accident at some future time, the distinction is lost between a hazard that creates an imminent danger and a violative condition that "is of such nature as could significantly and substantially contribute to the cause and effect" of a mine safety hazard. Section 104(d)(1); 30 U.S.C. § 814(d)(1). . . . [T]he Commission held that to be of an S&S nature, a cited condition "need not be so grave as to constitute an imminent danger." [*Cement Division, National Gypsum Company*, 3 FMSHRC 822] at 828 [Apr. 1981.]

Utah Power & Light, 13 FMSHRC at 1622.

Thus, it is significant that Congress, in its recent promulgation of the flagrant provisions of section 110(b)(2), chose to use the identical language that it used in section 3(j) to define an imminent danger—that is, a condition that "could reasonably be expected to cause death or serious [injury]." It is eminently clear that Congress used the "reasonably expected to cause death or serious injury" language in both sections 3(j) and 110(b)(2) to apply only to conditions that are extremely dangerous because they can directly (proximately) cause death or serious bodily injury without any intervening events that depend on continuing mining operations.

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[7] Imminent danger orders and flagrant violations do not conflict with, nor are they substitutes for, each other. While both require remedial urgency, an imminent danger requires a miner's actual exposure to the danger posed by the hazardous condition. Moreover, unlike a flagrant violation, an imminent danger order may be issued regardless of the obviousness of the hazard, and without regard to whether the hazard is attributable to the negligence of the mine operator. In addition, an imminent danger order may be issued even if the hazardous condition does not constitute a violation of a safety standard.

As such, the Secretary's assertion that violations that can only contribute to death or serious bodily injury can provide a basis for a flagrant designation, must be rejected as unreasonable.

III. Flagrant Designation in Order No. 8520664

Having concluded that a violation must be capable of proximately (directly) causing death or serious bodily injury to justify a flagrant designation, we turn to whether the undisputed material facts, as construed in a light most favorable to the Secretary, support the Secretary's flagrant designation in Order No. 8520664. Coal dust accumulations in the presence of an actual (present) ignition source, not present in the current case, can be the proximate cause of death or serious bodily injury. However, characterizing an accumulations violation as "flagrant," i.e., a condition that is extremely dangerous and cannot escape notice, is descriptive of present circumstances without regard to past history or continued mining operations.

While the cited accumulations may have been exposed to future ignition sources based on conveyor belt defects that may occur during the course of continued mining operations, the undisputed material facts demonstrate that the cited accumulations were *not* in proximity to any identifiable ignition source, such as a misaligned belt or defective roller on October 3, 2012, the date Order No. 8520664 was issued. In this regard, the Secretary forthrightly conceded during oral argument:

> COURT: Was there any evidence of any heat? . . .
>
> COUNSEL: And the simple answer I'd like to give you . . . is at the time the violation was issued, *there is no evidence of heat sufficient to ignite coal at the time the violation was issued.*

Tr. 129-130 (emphasis added).

Moreover, the cited accumulations were remotely located where they could not be exposed to ignition sources at the mine face. In this regard, at oral argument, the parties stipulated that the location of the cited accumulations was approximately .58 miles from the zero-gate continuous mining development area, .96 miles from an active working face, and 2.3 miles from an active long wall mining face. Tr. 139-40; Oral Arg. Jt. Ex. 1. Rather, the Secretary repeatedly relies on speculation that there will be future sources of heat that will arise during the course continued mining operations, as a basis for asserting that the cited accumulations could reasonably be expected to cause death or serious bodily injury. *Sec'y Resp.*, at 6-10. In his brief, the Secretary also repeatedly proposes that the "the rationale for presuming 'continued mining operations' applies equally to 'flagrant' and [S&S] determinations." *Id.* at 18-22. Consistent with this proposition, at oral argument the Secretary stated:

> COUNSEL: If the Court doesn't agree that the concept of continued normal mining operations applies in a flagrant violation, then the Court should rule that way, we would lose this case.

Tr. 151-52. Precisely.

Fundamentally, the Secretary must not be permitted to use interchangeably the term "actual (present) ignition source" with the term "potential ignition source" that may occur as a consequence of a future defect in the conveyor belt system during continued mining operations. In the present case, in the absence of ignition sources, the cited accumulations themselves are not capable of combustion and, as such, cannot be the proximate cause of serious bodily injury or death, as contemplated by section 75.400. Consideration of potential exposure to a future ignition source based on continued mining operations in the context of a traditional S&S analysis goes beyond scope a flagrant analysis.

Rather, whether the facts surrounding a violation support a flagrant designation is determined by the facts as they existed at the time the citation was issued. Coal dust accumulations *not in the presence of ignition sources* can be a *contributing cause* of injury if they propagate an explosion. However, such accumulations cannot be the *proximate cause* of injury. To conclude otherwise, would be to render the vast majority of prohibited accumulations under section 75.400 flagrant violations. This is consistent with the Commission's admonition that the distinction between imminent danger hazards and hazards created by the vast majority of S&S violations should be preserved. *See Utah Power & Light*, 13 FMSHRC at 1622. Simply put—if everything is flagrant, nothing is flagrant. Nor does the Secretary have the prosecutorial discretion to arbitrarily and capriciously label violations as flagrant.[8]

IV. Constraints on Prosecutorial Discretion

I am cognizant of the broad prosecutorial discretion that should be accorded to the Secretary. In this regard, I routinely approve reasonable settlement terms proffered by the Secretary that delete S&S and unwarrantable designations based on prosecutorial discretion. Yet, however well-intentioned, the Secretary's enforcement discretion is not unfettered and may not be arbitrarily and capriciously exercised. In this regard, the Secretary's assertion that the cited condition is extraordinary and warrants a flagrant designation is belied by his own prosecutorial history.

Order No. 8520664 specifies that citations for violations of section 75.400 were issued 92 times in the previous two years at the Oak Grove Mine. At oral argument, the parties were requested to submit copies of all of these citations or orders that were designated as S&S. Consistent with this request, the parties provided copies of 30 citations and orders. Of these 30 citations and orders, approximately ten involved extensive accumulations, some of which were in contact with moving rollers. It is significant that the Secretary did not designate any of these 30

[8] Presently before the Commission is Judge McCarthy's decision in *American Coal Co.*, 35 FMSHRC 2208 (July 2013) (ALJ), which affirmed flagrant designations for routine coal dust accumulations in violation of section 75.400 that were not in proximity to any ignition sources. The flagrant designations were affirmed primarily because the violative accumulations were ignored in that they were noted in the pre-shift examination book but went unabated. *Id.* at 2236. However, the specific issue of the requisite degree of causation for a flagrant finding, in the context of the propriety of considering continued mining operations, is not currently before the Commission.

citations and orders as flagrant violations. While the Secretary may lack the necessary information to compare the gravity of the 30 previously-issued S&S accumulation violations with the gravity of the accumulation violation in Order No. 8520664, the Secretary's attempt to explain his history of arbitrary enforcement is regrettable. The Secretary stated:

> It is conceivable, but highly unlikely, that one of the previous violations was the result of the exact same levels of gravity and negligence, and had the same history of violations as Order No. 8520664, yet MSHA determined that it was not 'flagrant.'

Sec'y Resp., at 27. As previously noted, the subject accumulations in Order No. 8520664 were located between .56 and 2.3 miles from the working faces. It is probable that a significant number of these 30 accumulation violations were located in closer proximity to working faces, thus reflecting a higher degree of gravity.

I share the Secretary's apparent frustration over Oak Grove's repeated history of section 75.400 accumulation violations. However, as previously discussed, the Secretary has conceded that a previous history of violations does not provide an adequate basis for designating a violation as flagrant that does not otherwise satisfy the statutory criteria.

It is worth noting that I am constrained to apply the applicable statutory provisions that I have, not the provisions that I wish I had. Congress defined a flagrant violation as one "that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." I would have preferred Congress to have articulated a timeline for the imposition of enhanced civil penalties for flagrant violations, as they did for withdrawal orders under section 104(d)(1) of the Mine Act. For example, Congress could have articulated that the fourth unwarrantable failure violation of the same mandatory safety standard within a two year period constitutes a flagrant violation. However, Congress declined to do so. It is inappropriate for me, or for the Secretary, to utilize our adjudicative or enforcement functions as a substitute for the legislative will of Congress.

As a final note, narrowly construing section 110(b)(2) to only apply to the most dangerous violations that can proximately cause serious bodily injury or death will not adversely affect deterrence. The most effective means of achieving compliance is the deterrent effect of 104(d)(1) withdrawal orders issued under the Mine Act that explicitly require stoppages of production until abatement is achieved. *See Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 36 FMSHRC _, slip op. at 13 (May 2014) (dissenting), citing *Amax Lead Co.*, 4 FMSHRC 975, 978-79 (June 1982) (holding that unwarrantable failure withdrawal sanctions are among the strongest compliance incentives provided by the Act's enforcement scheme); *see also Brody Mining, LLC*, 36 FMSHRC 2027, 2042 (Aug. 2014). A significant loss of production is a far greater economic loss, particularly for moderate and large operators, than civil penalties proposed under the Act.

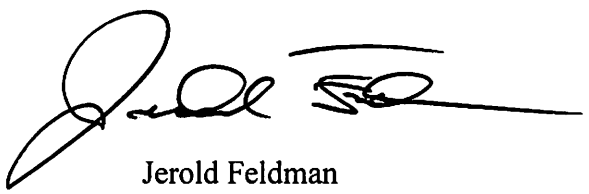
Although the deterrent effect of civil penalties must not be trivialized, the more important role of a flagrant violation charge is that it hopefully will shock the conscience of, if not disgrace, a recalcitrant mine operator. Such designations may also expose operators to greater civil liabilities for the death or serious injuries that such violations may cause.

ORDER

The Commission and its judges are guided, as far as practicable, by the Federal Rules of Civil Procedure, with respect to any procedural matter not addressed by the Mine Act or the Commission's procedural rules. 29 C.F.R. § 2700.1(b). Federal Rule of Civil Procedure 56(f) provides that a judge may, on his own, dispose of a matter by summary decision in favor of a nonmovant, in this case, Oak Grove, after providing the parties a reasonable time to respond and determining that there are no outstanding material facts that are genuinely in dispute. Fed. R. of Civ. P. 56(f). The parties have had an opportunity to participate in oral argument and submit briefs in this matter.

Viewing the evidence in a light most favorable to the Secretary, **IT IS ORDERED THAT** the flagrant designation in Order No. 8520664 **IS DELETED** as the undisputed evidence fails to demonstrate that the cited violative coal dust accumulations reasonably could have been expected to proximately cause death or serious bodily injury.

IT IS FURTHER ORDERED that the Secretary file, within 45 days of the date of this Order, a relevant amended petition for assessment of civil penalty for Order No. 8520664 consistent with this Order.



Jerold Feldman
Administrative Law Judge

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