FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

November 20, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : : :	
v.	:	Docket No. KENT 2011-71-R
REVELATION ENERGY, LLC	: :	

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

DECISION

BY THE COMMISSION:

This contest proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). At issue is whether a Commission Administrative Law Judge correctly determined that a two-ton rock leaving a mine after a blast and landing in a residential yard, with no injuries, constitutes an "accident" for purposes of an order issued pursuant to section 103(k) of the Mine Act, 30 U.S.C. § 813(k).[1] For the reasons that follow, we conclude that the definition of "accident" set forth in section 3(k) of the Mine Act, 30 U.S.C.

[1] Section 103(k) of the Mine Act provides:

> In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. § 813(k).

§ 802(k),[2] applies to usage of the term in section 103(k) of the Act, and that the term "accident" in section 3(k) includes events that are similar in nature to, or have a similar potential for injury or death as, the events specifically listed in section 3(k). Finally, we conclude that the subject blasting event constitutes an accident within the meaning of sections 3(k) and 103(k). Accordingly, we affirm in result the Judge's determination.

I.

Factual and Procedural Background

Revelation Energy, LLC, operates the S-1 Hunts BR Mine, a surface coal mine in Pike County, Kentucky. On October 7, 2010, during blasting operations, a two-ton rock, which was about six feet in diameter, was blasted off the mine property. The rock rolled down a hill through a residential yard and came to rest in a creek near a roadway below the owner's home. Nobody was injured.

On October 8, 2010, an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued Order No. 8247763 pursuant to section 103(k) of the Mine Act, requiring Revelation to obtain MSHA's approval before undertaking further activities or engaging in blasting operations.[3] Later that day, the order was modified to permit

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[2] Section 3 of the Mine Act provides in part:

> For the purpose of this chapter, the term –
>
> (k) "accident" includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person.

30 U.S.C. § 802(k).

[3] The order states in part:

> A non injury blasting incident occurred at this surface at approximately 6:30 PM resulting in a rock about 6 feet in diameter and weighing approximately 2 tons leaving mine property. . . .
>
> This 103(k) order is issued to protect the safety of all persons on mine site and off mine site. The mine operator shall obtain prior approval from an authorized representative of the Secretary for all actions to investigate and restore operations to normal. . . .

RE Mot. for Sum. Dec., Ex. 1.

implementation of the operator's plan of action. On October 20, 2010, MSHA terminated the order after Revelation revised its ground control plan to include additional blasting precautions to prevent similar occurrences. S. Br. at 2.

Revelation subsequently contested the order and filed a motion for summary decision before the Administrative Law Judge asserting that the order was invalid because the blasting event was not an "accident" within the meaning of section 103(k) of the Mine Act. The operator contended that the incident did not result in any injuries and was not one of the events listed in the definition of "accident" set forth in either section 3(k) of the Mine Act or in 30 C.F.R. § 50.2(h).[4] The Secretary of Labor opposed the motion, arguing that the incident constituted an accident because it was similar in nature or presented a similar potential for injury as the types of

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[4] 30 C.F.R. § 50.2(h) provides:

> *Accident* means:
>
> (1) A death of an individual at a mine;
> (2) An injury to an individual at a mine which has a reasonable potential to cause death;
> (3) An entrapment of an individual for more than 30 minutes or which has reasonable potential to cause death;
> (4) An unplanned inundation of a mine by a liquid or gas;
> (5) An unplanned ignition or explosion of gas or dust;
> (6) In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery;
> (7) An unplanned ignition or explosion of a blasting agent or an explosive;
> (8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;
> (9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour;
> (10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank;
> (11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes; and
> (12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

events enumerated in section 3(k) of the Mine Act, which, he contends, defines "accident" for purposes of section 103(k).

On June 30, 2011, the Judge issued a decision concluding that the blasting event was an accident.[5] 33 FMSHRC 1555, 1557-60 (June 2011) (ALJ). Relying on the common dictionary definition of "accident," the Judge concluded that an accident is an "unexpected and undesirable" event, and that the blasting event was clearly unexpected and undesirable. *Id.* at 1559. The Judge stated that the Secretary need not prove that the event is similar in nature or has a similar potential to cause death or injury as the enumerated items listed in section 3(k). *Id.* at 1557 n.3, 33 FMSHRC at 1562.

The Commission granted Revelation's petition for discretionary review.

II.

Disposition

On review, Revelation argues that the blasting event did not constitute an accident and that, on the basis of MSHA's Program Policy Manual,[6] the Secretary should be limited by his definition of the term set forth in 30 C.F.R. § 50.2(h). The operator also asserts that the statute is unconstitutionally vague and that the Secretary's interpretation violates its due process rights. We disagree.

This case turns on the meaning of the word "accident" as used in section 103(k) of the Mine Act. As discussed below, and applying a "*Chevron*" analysis, we conclude that the plain meaning of "accident" in section 103(k) refers to the definition of "accident" in section 3(k) of the Act, that the plain meaning of "accident" in section 3(k) includes more than the specific events enumerated in section 3(k), and that the scope of section 3(k)'s definition of "accident" is ambiguous. We accord deference to the Secretary's reasonable interpretation of "accident" as including events that are similar in nature to, or have a similar potential for injury or death as, the events specifically listed in section 3(k).

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[5] On January 21, 2011, the Judge had issued an order holding that the blasting event was an "accident" within the meaning of section 103(k) and denying Revelation's motion for summary decision. *See* 33 FMSHRC 1561, 1562 (June 2011) (ALJ). Based on the Judge's determination, the Secretary subsequently filed a motion to dismiss the operator's notice of contest. Revelation opposed the motion and filed a renewed motion for summary decision. The Judge's June 30, 2011, decision granted the Secretary's motion to dismiss and denied Revelation's renewed motion for summary decision.

[6] Under the section regarding "Mine Accident and Rescue, Recovery and Preservation of Evidence," the PPM states that "the term 'accident' is defined in 30 C.F.R. part 50.2(h)." I MSHA, U.S. Dep't of Labor, Program Policy Manual, Sec. 103, at 17 (Jan. 2010).

Section 103(k) of the Mine Act empowers an authorized representative of the Secretary to issue such orders as he deems appropriate to insure the safety of any person in a mine in the event of an "accident" at the mine. 30 U.S.C. § 813(k). Section 3(k) of the Mine Act, which sets forth definitions "[f]or the purpose of this chapter," provides that "accident includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k).

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). Deference is accorded to "an agency's interpretation of the statute [that] 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) (citing *Chevron*, 467 U.S. at 844). The agency's interpretation of the statute is entitled to affirmance, as long as that interpretation is one of the permissible interpretations that the agency could have selected. *Joy Technologies, Inc. v. Sec'y of Labor*, 99 F.3d 991, 995 (10th Cir. 1996), *cert. denied*, 520 U.S. 1209 (1997) (citing *Chevron*, 467 U.S. at 843); *Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1277 (10th Cir. 1995).

As the Eighth Circuit recently held in a similar case, the "plain text of section 3(k) suggests that the term 'accident' is not limited to the enumerated items contained in the definition." *Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012). The court reasoned that the definition uses the word "includes," which is usually a term of enlargement, and not of limitation. *Id*. (citing *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) (citation omitted)). "When a statute uses the word 'includes' rather than 'means' in defining a term, it does not imply that items not listed fall outside the definition." *Id.* (quoting *United States v. Whiting*, 165 F.3d 631, 633 (8th Cir. 1999)); *see Burgess*, 553 U.S. at 130; *see also American Coal Co.*, 35 FMSHRC 380, 386 (Feb. 2013) (quoting *Pattison*, 688 F.3d at 513). The court noted that all other definitions in the Act, with one exception, use "means" rather than "includes," and that the differentiated use of "means" and "includes" by Congress implied that it was mindful of the distinct connotations of the two words when it drafted the definition section. *Id.* (citing *Sosa v. Alvarez–Machain*, 542 U.S. 692, 711 n.9 (2004)).

Nonetheless, "[w]hile the text indicates that the term 'accident' extends beyond the definition's enumerated items, ambiguity remains regarding just how far the definition sweeps." *Pattison*, 688 F.3d at 513. In *Pattison*, as in this case, the Secretary argued that "accident" includes events that are similar in nature or have a similar potential to cause death or injury as the listed items. *Id*. The court held that under *Chevron*, the Secretary's interpretation was reasonable. *Id*. The court reasoned that because the Act is remedial in nature, its terms should be construed broadly. *Id.* (citing *Sec'y of Labor*, *o/b/o Bushnell v. Cannelton Indus*. *Inc*., 867 F.2d 1432, 1437 (D.C. Cir. 1989)). It explained that the Act's purpose in protecting miners

would be undermined if the Secretary lacked the power to take remedial measures simply because all miners fortuitously escaped injury or death in a dangerous mine incident. *Id.*

Consistent with the court's reasoning in *Pattison*, we conclude that the scope of the term "accident" is ambiguous, and that the Secretary's interpretation is permissible and entitled to deference under *Chevron*.

First, the Secretary's interpretation is consistent with the language of the Act. The use of the term "includes" in section 3(k) is a term of enlargement that reasonably includes events that, while not listed, are similar in nature to, or have a similar potential to cause death or injury as, the listed items.

Second, the Secretary's interpretation is consistent with the legislative purpose of the Act. Section 103(k) constitutes a broad grant of discretionary authority to the Secretary to protect miners in the event of a mine accident. *See Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983) ("Section 103(k) gives MSHA plenary power to make *post-accident* orders for the protection and safety of all persons.") (emphasis in original). The Senate Report states:

> The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure [sic] the safety of any person. The grant of authority . . . in Section [103(k)] to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders. . . .

S. Rep. No. 181, at 29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978).

Reading section 103(k) to give the Secretary authority to protect miners and other persons in the event of an incident that is similar in nature to, or presents a similar potential for injury or death as, the events specifically listed in section 3(k) is consistent with Congress' intent to give the Secretary broad authority to protect persons in the event of an accident. *See also American Coal Co.*, 35 FMSHRC at 386 (stating that the determination of "accident" should be read broadly to carry out Congress' objective).

We do not accept the operator's argument that the Secretary, in issuing section 103(k) orders, should be limited by his definition of "accident" set forth in section 50.2(h). The definition of "accident" in section 50.2(h) is narrower in scope than the definition of "accident" in section 3(k) of the Act and defines what constitutes an accident for reporting purposes. *Aluminum Co. of Am.*, 15 FMSHRC 1821, 1826 (Sept. 1993) (stating that section 50.2(h)'s definition of "accident" applies for "reporting purposes"); *Energy West Mining Co. v. FMSHRC*,

40 F.3d 457, 459 (D.C. Cir. 1994) (providing that Part 50 "govern[s] a mine operator's duty to report accidents, occupational injuries and occupational illnesses."). Section 50.2 plainly limits its application to terms "used in this part," that is, Part 50 of MSHA's regulations (the reporting regulations). 30 C.F.R. § 50.2. In contrast, the definition of "accident" in section 3(k) applies to the entire Mine Act, as section 3 of the Mine Act specifically states that the definition of the term "accident" set forth in paragraph (k) applies "[f]or the purpose of this Chapter . . . ." 30 U.S.C. § 802. Thus, section 3(k) is the applicable provision for purposes of determining what constitutes an "accident" under section 103(k).[7]

We note further that the Secretary's position has been consistent over time. The Secretary advanced the same position before the Judge as he did before the Commission, as well as in *Pattison*. As the court noted in *Pattison*, the Commission has expressed agreement with the Secretary's longstanding position. 688 F.3d at 513 (citing *Aluminum Co.*, 15 FMSHRC at 1825–26).

We also find unavailing the operator's remaining argument that the Secretary's interpretation of section 3(k) violates its due process rights. Courts have found statutes to satisfy due process as long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the standards are meant to address and the objectives the standards are meant to achieve, would have fair warning of what the standards require. *See Grayned v. City of Rockford*, 408 U.S. 104, 108-10 (1972); *Freeman United Coal Mining Co. v. FMSHRC*, 108 F.3d 358, 362 (D.C. Cir. 1997). Section 3(k) provides illustrative examples of what constitutes an "accident," and, as the Eighth Circuit stated in *Pattison*, the plain language of the Act, utilizing the term "includes," indicates that these examples are non-exhaustive. Thus, a reasonable person familiar with the language and objectives of section 3(k) would have fair warning that any event that is similar to what is listed in the statute, or which has the potential to cause injury or death, may constitute a basis for a section 103(k) order.

Applying the Secretary's interpretation of section 3(k) to the instant case, we easily conclude that the blasting event constitutes an "accident." A blast that unexpectedly causes a two-ton rock that is six feet in diameter to enter a nearby residential yard outside of the mine site clearly has a similar potential to cause injury or death as the events listed in section 3(k). Furthermore, the fact that section 103(k) requires an accident to occur "in a coal or other mine" does not preclude the Secretary's application of section 103(k) to the subject blasting event. Although a separate portion of the accident, i.e., the rock entering the yard, occurred outside of

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[7] Nor do we find compelling the operator's argument that the PPM cites Part 50 for the definition of "accident" and that the Secretary's interpretation is inconsistent with the PPM. As the Commission has long recognized, the PPM does not prescribe rules of law and is not binding on the Secretary or the Commission. *D.H. Blattner & Sons Inc.*, 18 FMSHRC 1580, 1586 (Sept. 1996) (citing *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538-39 (D.C. Cir. 1986)), *aff'd*, 152 F.3d 1102 (9th Cir. 1998).

the mine, the launching of the rock took place inside of the mine, which amounts to an "accident" occurring "in a . . . mine."

III.

Conclusion

For the reasons set forth above, we affirm in result the Judge's denial of Revelation's renewed motion for summary decision and his granting of the Secretary's motion to dismiss the notice of contest.

/s/ Mary Lu Jordan
Mary Lu Jordan, Chairman

/s/Michael G. Young
Michael G. Young, Commissioner

/s/ Robert F. Cohen, Jr.
Robert F. Cohen, Jr., Commissioner

/s/ Patrick K. Nakamura
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/s/ William I. Althen
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