FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

FEB 12 2016

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket Nos. WEVA 2014-642-R
ADMINISTRATION (MSHA)	:	WEVA 2014-646-R
	:	WEVA 2014-647-R
v.	:	WEVA 2014-648-R
	:	WEVA 2014-649-R
POCAHONTAS COAL COMPANY, LLC	:	

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

DECISION

BY: Jordan, Chairman; Young, Cohen, and Nakamura, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"). It involves five notices of contest filed by Pocahontas Coal Company, each challenging the validity of a notice of safeguard issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 314(b) of the Act.[1] At issue in this matter of first impression is whether the Mine Act grants the Commission jurisdiction to review a safeguard notice directly, independent of a citation alleging a violation of that safeguard notice. We conclude that it does not.

I.

Statutory Summary and Background

A safeguard notice informs the mine operator about conduct that is mandated or prohibited in a given situation involving transportation of miners and materials in the mine. Although an operator is usually cited for violations of mandatory safety and health standards developed through notice-and-comment rulemaking pursuant to Title I of the Mine Act, 30 U.S.C. § 811(a), Title III of the Mine Act, in section 314(b), also gives the Secretary the authority to issue safeguards in underground coal mines to reduce hazards associated with the transportation of miners and materials. 30 U.S.C. § 874(b). The Secretary implements this provision by authorizing inspectors to issue safeguards on a mine-by-mine basis. The inspector issues the safeguard in writing and indicates a time by which the operator must provide and

[1] Section 314(b) of the Act states that "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." 30 U.S.C. § 874(b).

subsequently maintain that safeguard. 30 C.F.R. § 75.1403-1(b). If the operator does not comply with the safeguard, the inspector issues a citation. *See Wolf Run Mining Co.*, 659 F.3d 1197, 1203-04 (D.C. Cir. 2011), *aff'g*, 32 FMSHRC 1228 (Oct. 2010). When challenging such a citation, an operator may contest the validity of the underlying safeguard notice. *Wolf Run*, 659 F.3d at 1202; *Southern Ohio Coal Co.*, 14 FMSHRC 1, 2-4 (Jan. 1992) (SOCCO II).

MSHA recently adopted a "technical citation" policy for safeguards, akin to the procedure used in resolving disputed roof control and ventilation plans. Program Policy Letter ("PPL") No. P14-V-02 (issued Sept. 24, 2014); *Contest of Mine Approval Actions*, MSHA's Program Policy Manual, V.G-4; *see also, e.g., Mach Mining, LLC*, 34 FMSHRC 1784, 1787 n.8 (Aug. 2012). Under this policy, an operator who wishes to obtain Commission review of a safeguard notice may request a "technical" citation with a nominal penalty, based on momentary non-compliance with the terms of the safeguard notice. Thus, the technical citation provides a basis for Commission review while ensuring miner safety.[2]

II.

Procedural Background

In January and February 2014, MSHA issued five safeguard notices to Pocahontas Coal Company pursuant to section 314(b) of the Mine Act, 30 U.S.C. § 874(b), directing that certain safeguards to ensure the safe transportation of men and materials be put in place at Pocahontas' Affinity Mine. On February 27, 2014, Pocahontas filed five notices of contest under section 105(d) of the Act, challenging the validity of the safeguard notices.[3] 36 FMSHRC 1645, 1645 (June 2014) (ALJ).

Upon a motion by the Secretary, the Judge issued an order dismissing the five notices of contest. Noting that the Mine Act does not grant the Commission unfettered jurisdiction, the Judge found that "[a] review of the Mine Act reveals no statutory authority for the Commission to hear a contest to a notice to provide safeguard in the context of a dedicated proceeding." *Id.* at 1646. She specifically noted that section 105(d), which provides an operator's right to contest the issuance of citations or orders, the associated penalties, and abatement times, does not provide a right to contest safeguard notices, which the Judge considered to be distinct from citations and orders. *Id.* at 1646-47.

Pocahontas filed a petition for discretionary review challenging the Judge's dismissal of the notices of contest, which the Commission granted.

---

[2] After the PPL was issued, the Secretary notified Pocahontas of the availability of a technical citation. On October 16, 2014, counsel for Pocahontas stated that Pocahontas was not interested in receiving technical citations for the safeguard notices at issue.

[3] Section 105(d) states that if an operator contests the issuance or modification of "an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 . . . the Commission shall afford an opportunity for a hearing." 30 U.S.C. § 815(d).

III.

Disposition

Pocahontas contends that the Act provides jurisdiction to directly review safeguard notices in two respects. First, Pocahontas claims that the Act generally grants the Commission broad jurisdictional power to review all enforcement actions by the Secretary, including safeguard notices. Second, Pocahontas claims that safeguard notices are essentially citations, and are therefore reviewable under section 105(d) of the Act. As discussed below, Pocahontas' position conflicts with the language of the Act, its legislative history, basic principles of administrative law, and Commission case law. Accordingly, we conclude that the Commission lacks jurisdiction to directly review a safeguard notice.

A. The Commission may only review enforcement actions over which Congress granted it jurisdiction.

Although it is well settled that the Commission has broad authority to address a wide range of disputes arising under the Mine Act, the exercise of that authority is governed by the language of the Act's jurisdictional provisions. The Commission has long recognized that it is an agency created under the Mine Act with certain defined and limited administrative and adjudicative powers. *See generally, e.g.*, *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169-70 (Sept. 1988); *Old Ben Coal Co.*, 1 FMSHRC 1480, 1484 (Oct. 1979); *Rushton Mining Co.*, 11 FMSHRC 759, 764 (May 1989). As an administrative agency created by statute, the Commission cannot exceed the jurisdictional authority granted to it by Congress. *Kaiser Coal*, 10 FMSHRC at 1169; *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 472-73 (1977); *Civil Aeronautics Board v. Delta Airlines*, 367 U.S. 316, 322 (1961).[4]

Contrary to Pocahontas' argument, the Commission does not possess plenary authority to review all enforcement actions taken under the Act. In *Kaiser Coal*, we explained that several

---

[4] Where the Commission has found broad authority to consider a wide range of issues, it has been in the service of fully resolving a dispute for which jurisdiction otherwise properly exists. Thus our colleague's reliance on *Drummond Coal Co.*, 14 FMSHRC 661 (May 1992), slip op. at 12 n.2, is misplaced. In that civil penalty proceeding, the Commission held that it could review the validity of an MSHA Program Policy Letter where MSHA had relied on the letter to calculate a civil penalty which had been properly contested pursuant to section 105(d). *Id.* at 673-74. The Commission reasoned that several of the Mine Act's provisions confer subject matter jurisdiction by establishing specific enforcement and contest proceedings over which the Commission has jurisdiction. We explained that once that jurisdiction attaches, the Commission has a range of adjudicatory powers to consider issues and to "dispose fully of cases committed to Commission jurisdiction." *Id.* at 674. Consequently, in contest proceedings where there is clearly jurisdiction, the Secretary's less formal regulatory pronouncements fall within the Commission's jurisdictional purview. *See also Kaiser Coal*, 10 FMSHRC at 1170-71 (holding that the Commission lacked jurisdiction over an application for declaratory relief when the related contest proceeding had been withdrawn, and that Mine Act language establishing the Commission "is not an invitation from Congress to legislate for ourselves virtually unlimited jurisdiction over 'any proceeding'").

provisions of the Mine Act, including section 105(d), grant subject matter jurisdiction to the Commission by establishing specific enforcement and contest proceedings and other forms of action over which the Commission presides.[5] 10 FMSHRC at 1169. "Specific provisions, such as these, delineate the scope of the Commission's jurisdiction." *Id.*[6]

B. The Act does not grant the Commission jurisdiction to directly review safeguard notices.

We conclude that no provision of the Act explicitly grants the Commission jurisdiction to review safeguard notices, nor may any part of the Act be read broadly to authorize such review. We focus our analysis on section 105(d), 30 U.S.C. § 815(d), and section 301(a), 30 U.S.C. § 861(a).[7]

1. Section 105(d)

As noted above, section 105(d) states in relevant part that if an operator contests the issuance or modification of "an order issued under section 104, or citation or a notification of proposed assessment of a penalty issued under subsection (a) or (b) of this section, or the reasonableness of the length of abatement time fixed in a citation or modification thereof issued under section 104 . . . the Commission shall afford an opportunity for a hearing." 30 U.S.C. § 815(d). In other words, section 105(d) provides for Commission review of citations or orders issued under section 104,[8] proposed penalty assessments, and the reasonableness of abatement times.

Significantly, section 105(d) does not mention notices or other issuances establishing safeguards. The precise list of jurisdictional triggers in section 105(d) strongly indicates a Congressional intent to exclude other types of actions. *See Saxon v. Georgia Ass'n of Indep. Ins.*

---

[5] Section 105(d), 30 U.S.C. § 815(d), provides for the contest of citations or orders, or the contest of civil penalties proposed for such violations; section 105(b)(2), 30 U.S.C. § 815(b)(2), provides for applications for temporary relief from orders issued pursuant to section 104; section 107(e), 30 U.S.C. § 817(e), provides for contests of imminent danger orders of withdrawal; section 105(c), 30 U.S.C. § 815(c), provides for complaints of discrimination; and section 111, 30 U.S.C. § 821, provides for complaints for compensation.

[6] But see discussion of section 103(k) of the Mine Act, *infra.*

[7] Other provisions of the Act such as section 105(c), 30 U.S.C. § 815(c), and section 107(e), 30 U.S.C. § 817(e), narrowly authorize Commission review of actions taken pursuant to those sections and need not be discussed further.

[8] The statutory language is reflected in Commission Procedural Rule 20(a)(1), which states that an operator may contest: "(i) A citation or an order issued under section 104 of the Act, (ii) A modification of a citation or an order issued under section 104 of the Act; and (iii) The reasonableness of the length of time fixed for abatement in a citation or modification thereof issued under section 104 of the Act." 29 C.F.R. § 2700.20(a)(1). Safeguard notices are not included.

Agents, Inc., 399 F.2d 1010, 1014 (5th Cir. 1968) (holding that "a power which has been withheld or denied by Congress cannot be found to exist as an 'incidental' and 'necessary' power" when Congress has specifically delineated other powers). Indeed, the Mine Act's legislative history provides that "an independent Mine Safety and Health Review Commission is established to review orders, citations and penalties." S. Rep. No. 95-181, at 11 (1977), *reprinted in* Senate Subcomm. On Labor, Comm. On Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 599 (1978) ("*Legis. Hist.*"); *see also Kaiser Coal*, 10 FMSHRC at 1169; *Quinland Coals, Inc.*, 9 FMSHRC 1614, 1620 (Sept. 1987) ("The statutory scheme for review set forth in section 105 provides for an operator's contest of citations, orders, and proposed assessment of civil penalties."). Safeguard notices are not citations or orders issued pursuant to section 104, but rather issuances that establish safeguards pursuant to section 314(b).

Accordingly, we conclude that section 105(d) does not give the Commission authority to review a direct challenge to a safeguard notice.

Pocahontas argues that the terms "citation" and "order" in section 105(d) should be read broadly to encompass all enforcement actions, so as to include safeguard notices. However, safeguard notices are by their nature distinct from citations and orders described in section 104. Section 104(a) provides that a citation shall be issued by the Secretary if an operator has "violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act . . . . Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated . . . [and] fix a reasonable time for [ ] abatement." 30 U.S.C. § 814(a). Thus, according to the statutory language and consistent with MSHA practice, a section 104 citation is a written allegation detailing a specific violation of a specific standard, and containing a specific time by which the violation must be abated.

In contrast, safeguard notices function as mandatory standards. Section 314(b), which grants the Secretary authority to require additional safeguards, is an interim mandatory standard enforceable "in the same manner and to the same extent" as any Title I mandatory standard, i.e., through the issuance of a section 104 citation or order. 30 U.S.C. §§ 861(a), 814(a). Because notices of safeguard implement that authority, they are also, in effect, mandatory standards. *Wolf Run*, 32 FMSHRC at 1233. The result is a two-step process for enforcing violations of section 314(b). An operator first receives a notice establishing the safeguard to be provided. Then, in the event of a failure to provide that safeguard, the operator may be issued a citation or order alleging a violation of the relevant mandatory standard, i.e., the safeguard notice under section 314(b). *Id.* An issuance cannot simultaneously provide a standard and allege a violation of it; thus, a safeguard notice cannot be both a mandatory standard and a reviewable citation or order. Accordingly, we reject Pocahontas' claim that notices of safeguard fall within the definition of a citation.

For similar reasons, a safeguard notice differs from an order reviewable under section 105(d) of the Act. Such orders generally require both the existence of violative conduct and the withdrawal of miners from an affected area of the mine. *See* 30 U.S.C. § 814(b), (d), (e), (f), (g). As discussed above, safeguard notices are mandatory standards which require an operator to

implement protective measures; they do not allege violative conduct or require withdrawal. Finding that safeguard notices are reviewable citations or orders under section 105(d) would contravene both the plain language of section 105(d), and the nature of safeguard notices as mine-specific mandatory standards.[9]

In its reply brief, Pocahontas points to judicial precedent indicating that the Commission has authority to review orders issued under section 103(k), 30 U.S.C. § 813(k), even though the statutory language is silent on the matter.[10] However, unlike a safeguard notice, authority for Commission review of section 103(k) orders can be found in the Act's legislative history. *See Am. Coal Co. v. Dept. of Labor*, 639 F.2d 659, 660-62 (10th Cir. 1981); *Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 515-16 (8th Cir. 2012). In determining that the Commission possessed the requisite jurisdiction to review section 103(k) orders, the Tenth Circuit found support in its reading of the entire Mine Act, as well as the legislative history, which states that "an operator . . . *may appeal to the Commission the issuance of a closure order*." *Am. Coal. Co.*, 639 F.2d at 660, *quoting* S. Rep. No. 95-181, at 13 (1977), *Legis. Hist.* at 601 (emphasis added). This language is particularly important, because a section 103(k) order, like other MSHA enforcement orders, frequently does result in the withdrawal of miners, i.e., it involves closure of an affected area. As stated in the Senate Report on the Mine Act, the grant of authority in section 103(k) "is intended to provide the Secretary with flexibility in responding to accident situations, *including the issuance of withdrawal orders.*" S. Rep. No. 95-181 at 29, *Legis. Hist.* at 617 (emphasis added). In contrast, as discussed above, a safeguard notice requires the implementation of safety measures rather than the withdrawal of miners. That section 103(k) orders are reviewable despite the lack of an explicit grant of authority reflects their similarity to withdrawal orders reviewable under section 105(d), a similarity which safeguard notices do not share.

2. Section 301(a)

Section 301(a) of the Act provides:

> The provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act, and

---

[9] Although our colleague argues that safeguard notices fall within the general dictionary definition of an "order," the relevant question here is whether safeguard notices are orders *of the specific type that are reviewable under section 105(d) of the Mine Act*, i.e., orders that allege violative conduct and generally require withdrawal of miners. As discussed above, we find that they are not.

[10] Although the Secretary correctly asserts that Pocahontas did not raise the section 103(k) argument prior to its reply brief, we believe that this example of the Commission's jurisdictional authority is sufficiently related as part of the larger reading of the Act's structure and language, and therefore should be considered. *See Oak Grove Res., LLC*, 33 FMSHRC 2657, 2664 (Nov. 2011). Moreover, the argument is too important not to be considered.

> *shall be enforced* in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of this Act. Any *orders issued in the enforcement* of the interim standards set forth in this title shall be subject to review as provided in Title I of this Act.

30 U.S.C. § 861(a) (emphasis added). As its text indicates, the purpose of section 301(a) is to ensure that Title III interim standards are enforced, and that such enforcement is reviewed, to the same extent as any Title I mandatory standard.[11] In practical terms, it provides that citations or orders may be issued for violations of Title III interim mandatory standards, including, of course, for violations of safeguard notices issued pursuant to Title III, and that such citations and orders are reviewable by the Commission.[12]

Significantly, section 301(a) states that the interim mandatory safety standards created by Title III shall be "enforced" like the mandatory safety standards to be promulgated under section 101 of the Act, and then says that orders issued in the "enforcement" of the Title III interim standards shall be reviewable by the Commission as provided in Title I of the Act (i.e., in accordance with section 105(d)). As noted above, a safeguard functions as a mine-specific mandatory standard. It does not allege violative conduct. The creation of such a standard – i.e., the issuance of the safeguard by an inspector – is not, by itself, the "enforcement" of a standard which would be reviewable by the Commission pursuant to section 301(a). Rather, the "enforcement" – and hence the reviewable event – occurs at a later time when a citation or order is issued because of a violation of the safeguard. As with citations and orders contested pursuant to section 105(d), the safeguard does not function as both a standard and a notice of violation of the standard. Put another way, the second sentence of section 301(a) provides for Commission review of an order "issued in the enforcement of the interim standards set forth" in Title III. Since the issuance of a safeguard is the creation rather than the enforcement of a standard, such issuance, by itself, is not reviewable by the Commission under section 301(a).

---

[11] Section 301(a) appeared in the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"). The legislative history of the Coal Act confirms that "such implementation actions, conditions, or requirements, as well as any actions taken or instructions issued by an inspector, will be enforced in the same manner as the standards themselves." Senate Conference Report (Dec. 18, 1969), *reprinted in* Senate Subcomm. On Labor, Comm. On Labor and Pub. Welfare, 94th Cong., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1609 (1975).

[12] The language of section 301(a) was carried over without modification from the 1969 Coal Act, and the Coal Act did not provide for review of "citations." Pub. L. 91-173, 83 Stat. 753-55, 765 (§§ 105, 301(a)). Accordingly, despite the omission of the word "citation," we read section 301(a) to provide for the review of the types of enforcement actions available for violations of Title I mandatory standards, which under the 1977 Mine Act includes section 104 citations. 30 U.S.C. § 104(a).

This conclusion is consistent with the Commission's treatment of roof control plans and ventilation plans, which are addressed in sections 302 and 303 of the Act. 30 U.S.C. §§ 862, 863. Like safeguard notices, roof control and ventilation plans are mine-specific mandatory standards authorized by a provision of Title III. *See Wolf Run*, 659 F.3d at 1201-02; *Wolf Run*, 32 FMSHRC at 1233; *Martin County Coal Corp.*, 28 FMSHRC 247, 254–55 (May 2006). The Commission has held that review of a disputed plan provision is not available until a citation or order alleging a failure to comply with the provision – i.e., an enforcement action of the type normally reviewable under Title I – has been issued. *See, e.g., Target Industries Inc.*, 23 FMSHRC 945, 973 n.2 (Sept. 2001) (citing *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2773 n.8 (Dec. 1981)). We conclude that the same holds true for safeguard notices.

As an administrative agency created by statute, our jurisdiction is delineated by specific provisions of the Act. No provision of the Act explicitly grants jurisdiction to review safeguard notices. Given the nature of safeguard notices as mine-specific mandatory standards, such jurisdiction cannot be read into sections 105(d) or 301(a) of the Act, and jurisdiction of contests of section 103(k) orders is not analogous. Accordingly, we hold that the Act does not grant jurisdiction to directly review safeguard notices.

C. Although the Commission has no jurisdiction to review a safeguard notice by itself, jurisdiction attaches once a citation, including a technical citation, is issued pursuant to such notice.

Although an operator may not obtain direct review of a safeguard notice, it is not precluded from challenging such a notice. Review is available through a challenge to a subsequent citation alleging a violation of the safeguard notice at issue. *See SOCCO II*, 14 FMSHRC at 14 (Jan. 1992); *Wolf Run*, 659 F.3d at 1202-03.

Pocahontas challenges the adequacy of the existing procedure. Pocahontas argues that without the ability to obtain direct review of a safeguard notice, operators may have to expend significant time and resources complying with a potentially invalid notice while awaiting an opportunity to challenge it through a related citation. While we recognize that safeguard notices may remain in effect for some time before a citation is issued, we find that the availability of technical citations resolves this concern. Technical citations have long been the accepted method for challenging mine-specific mandatory standards issued pursuant to Title III. *See, e.g., Wolf Run*, 32 FMSHRC at 1240; *C.W. Mining Co.*, 15 FMSHRC 1559, 1564 (June 1993) (ALJ); *Jim Walter Res.*, 12 FMSHRC 1384, 1388 (July 1990) (ALJ); *see also Contest of Mine Approval Actions*, PPM V.G-4. In 2014, MSHA announced that "technical citation procedures similar to those used in the context of roof control, ventilation, and emergency response plans"[13] are available for safeguard notices as well. PPL No. 14-V-02. The technical citation process gives

[13] *See, e.g., Prairie State Generating Co. LLC v. Sec'y of* Labor, 792 F.3d 82 (D.C. Cir. 2015) (discussing the technical citation process for roof and ventilation plans); *Mach Mining, LLC v. Sec'y of Labor*, 728 F.3d 643, 655-56 (7th Cir. 2013) (discussing the use of technical violations when an operator seeks review of an impasse in the development of a ventilation plan).

operators the opportunity to request the issuance of a nominal citation based on momentary noncompliance. This process allows operators to timely obtain review of a safeguard notice without endangering miner safety or risking significant economic harm.[14]

Pocahontas also argues that the existing review procedure does not provide a sufficient "check and balance" against the lack of notice-and-comment rulemaking for safeguard notices. It claims that direct post-issuance review is necessary to counterbalance operators' lack of pre-issuance involvement in the creation of these mine-specific mandatory standards.

We disagree. Congress chose not to subject safeguard notices to the notice-and-comment rulemaking required for mandatory standards issued pursuant to Title I. *See Wolf Run*, 659 F.3d at 1202-03. The D.C. Circuit in *Wolf Run* found concerns regarding lack of pre-enforcement review to be "overstated," noting that the Commission has "interpreted the criteria [for a valid safeguard notice] so as to ensure that an operator has adequate notice of what safeguard is required." *Id.* (citations omitted). As the D.C. Circuit affirmed in *Wolf Run*, an operator can "seek meaningful review" of a safeguard notice in a subsequent citation proceeding. *Id.*

We conclude that the Mine Act does not grant the Commission the authority to directly review the validity of safeguard notices, and that the existing method of indirect review through subsequent related citations, including technical citations, is adequate.

---

[14] Pocahontas claims that technical citations are insufficient because they are granted at MSHA's discretion. We agree that, in order for technical citations to resolve the concerns raised by the potential for delay, an operator must be able to rely on their availability. Indeed, if a procedure for technical violations did not exist, there could be a significant due process issue. However, we are reassured by the long accepted use of technical citations in other Title III contexts, as well as the use of "should" (rather than "may") in MSHA's policy statement. PPL No. 14-V-02. We are also unpersuaded by Pocahontas' stated concern that an operator who requests a technical citation may instead be issued a serious non-technical citation.

IV.

Conclusion

For the reasons set forth herein, we conclude that the Commission lacks jurisdiction to review a direct challenge to a safeguard notice independent of a related citation alleging a violation of that safeguard notice. Accordingly, we affirm the Judge's Order dismissing the five notices of contest at issue for lack of jurisdiction.[15]

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

[15] Dismissal of these notices of contest does not preclude Pocahontas from disputing the validity of the safeguard notices in the course of litigating any subsequent related citation properly challenged and brought before the Commission.

Commissioner Althen, dissenting:

A safeguard is a self-executing command issued by an individual inspector. It requires the operator to institute specific mining practices. The Department of Labor's Mine Safety and Health Administration ("MSHA") enforces compliance with the command through issuance of citations and imposition of civil penalties. I disagree with the majority's abdication of the Commission's jurisdiction to review safeguards until and unless the operator disobeys the inspector's order. Therefore, I respectfully dissent.

DISCUSSION

A. Jurisdiction under Title I of the Mine Act

Title I of the Mine Act provides MSHA with a variety of tools to achieve miner safety and for enforcement of the Mine Act and the regulations issued under it. These processes include section 103(k) (control orders after accidents), section 104 (citations and orders), and section 107 (imminent danger orders). *See* 30 U.S.C. §§ 813(k), 814, 817. In turn, Title I provides the Federal Mine Safety and Health Commission ("Commission") jurisdiction to review these enforcement actions.[1]

For some enforcement actions, the Mine Act expressly provides Commission jurisdiction. For example, section 105(d) explicitly grants the Commission jurisdiction, *inter alia*, to hear contests by operators or miners of citations and orders issued under section 104. Separately, section 107 expressly gives the Commission jurisdiction to review imminent danger orders. Section 111 gives the Commission jurisdiction to require compensation for miners. *See* 30 U.S.C. §§ 815(d), 817, 821.

Other commands (orders) reviewable by the Commission are not expressly included within these specific jurisdictional grants. The Commission and courts have read the legislative history of the Act, the limited jurisdiction granted to federal courts in mine safety matters, and the broad review authority of the Commission and have found Commission jurisdiction for review.

For example, as noted above, section 103(k) permits MSHA to issue control orders. The Mine Act, including section 105(d), does not expressly grant the Commission jurisdiction to

---

[1] The Mine Act provides specific procedures for notice and public comment for the promulgation of mandatory health and safety standards. 30 U.S.C. § 811. Any person adversely affected by a mandatory safety standard may seek judicial review of the standard within sixty days of promulgation. Such review may occur only in the United States Court of Appeals for the District of Columbia Circuit or the circuit where the petitioning person resides or has his principal place of business. *Id.* Thus, the Mine Act expressly restricts review of mandatory safety standards to federal circuit courts of appeal. *See Nat'l Mining Ass'n v. Sec'y of Labor*, 763 F.3d 627, 631 (6th Cir. 2014). Federal district courts have limited jurisdiction under sections 108 and 110 of the Mine Act. Section 108 identifies specific circumstances not relevant here in which MSHA may institute a civil action in district courts, and section 110(j) authorizes actions in district courts to collect penalties imposed under the Act. 30 U.S.C. §§ 818, 820(j).

review such orders. However, citing the legislative history of the Act, the legislative scheme, and the specialized authority of the Commission, circuit courts of appeal have affirmed the Commission's jurisdiction over such orders. *Am. Coal Co. v. U.S. Dep't of Labor*, 639 F.2d 659, 660-62 (10th Cir. 1981); *see also Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 516 (8th Cir. 2012).

Within the last six months, in *Jim Walter Resources, Inc.*, the Commission reviewed a section 103(j) order, invalidating it because the order exceeded MSHA's statutory authority. 37 FMSHRC 1868, 1870 (Sept. 2015). We then upheld a section 103(k) order that imposed affirmative duties upon the operator including mandatory training of all miners on ignition issues. *Id.* at 1870-73.[2]

Consequently, it is plain that Title I broadly grants the Commission jurisdiction to review orders both through explicit provisions and through reliance upon the specialized knowledge and authority of the Commission to review orders issued by MSHA. The majority's decision does not provide but rather denies the important right to immediate judicial review of binding agency orders having immediate impact upon the citizen's actions.[3]

B. Jurisdiction under Title III of the Mine Act

Title I provides for the development, promulgation, revision, and judicial review of mandatory safety and health standards. Titles II and III retained certain existing mandatory health (Title II) and safety (Title III) standards. These interim standards initially were included in the Coal Mine Health and Safety Act of 1969. The sections of Title III relevant to this case – sections 301(a) and 314(b) – remain unchanged from 1969 until today.

---

[2] Further demonstrating Congress' grant of broad powers to the Commission, the Commission has found that it has the authority to review an MSHA Program Policy Letter. *Drummond Co.*, 14 FMSHRC 661, 673-78 (May 1992). Relying on an expansive reading of the Mine Act, a court has held that the Commission can also entertain requests for declaratory relief. *Climax Molybdenum Co. v. Sec'y of Labor*, 703 F.2d 447, 452 (10th Cir. 1983). As the Commission stated in *Drummond*:

> The reason the Commission was created by Congress and equipped with broad remedial powers and policy jurisdiction was to assure due process protection under the statute and, hence, to enhance public confidence in the mine safety and health program. Addressing claims of arbitrary enforcement by the Secretary is at the heart of that adjudicative role.

14 FMSHRC at 675 (citation omitted).

[3] The procedure adopted by MSHA for issuance of "technical" citations is sufficient to alleviate constitutional concerns. However, those procedures do not address the jurisdiction of the Commission as an agency independent from MSHA to review orders issued by MSHA – a matter of overarching importance in the scheme of federal agency jurisprudence.

Section 301(a) provides:

> The provisions of sections 302 through 318 of this title shall be interim mandatory safety standards applicable to all underground coal mines until superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act, and shall be enforced in the same manner and to the same extent as any mandatory safety standard promulgated under section 101 of this Act. *Any orders issued in the enforcement of the interim standards set forth in this title shall be subject to review as provided in Title I of this Act.*

30 U.S.C. § 861(a) (emphasis added).

By its plain terms, section 301(a) allows operators affected by any order issued in implementing the standards of Title III to challenge such order just as they may challenge orders implementing the provisions of Title I. Title III does not permit challenges to the validity of the interim mandatory standards themselves. The purpose of section 301(a), therefore, is to establish a review mechanism for later agency actions enforcing the interim standards. Congress ensured that actions of inspectors enforcing the interim standards of Title III would be subject to the same type of review as actions by inspectors enforcing mandatory standards promulgated under Title I.

Section 314(b) grants inspectors the authority to enforce the mandatory hoisting and mantrip standards of section 314 through issuance of safeguards to minimize transportation hazards. It states that "[o]ther safeguards adequate, in the judgement of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided." 30 U.S.C. § 874(b).

Section 301(a) could not be more plain and direct. Orders issued in enforcement of the Title III interim mandatory standards are subject to review just as enforcement actions under Title I of the Mine Act are subject to review. Safeguards are orders enforcing section 314(b), and are thus subject to challenge before the Commission.

C. Application of the Commission's Jurisdiction

This case involves five safeguards. All of the challenged safeguards are commands unilaterally issued by inspectors requiring specific actions by the operator. For example, one of the safeguards at issue in this case, No. 9002751, provides:

> This is [a] notice to provide safeguard requiring [the] operator to ensure that all track D-rails are placed on track rails when track equipment is parked in an inclined area to prevent a possible run away from track equipment. The track D-rail was not placed on the track rail on the #2 inclined track spur while a loaded track rail

> car was parked in spur and not adequately secured to prevent a run away.

Docket No. WEVA 2014-647-R, Notice of Contest, Ex. A. Clearly, this is a unilaterally issued order enforcing the interim mandatory safety standard of section 314 of the Mine Act.

As defined in the Administrative Procedure Act ("APA"), an agency "order" is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6).[4] Separately, in the absence of a statutory or regulatory definition or technical usage, the Commission turns to dictionaries for a term's ordinary meaning. *See Newmont USA Ltd.*, 37 FMSHRC 499, 503 (March 2015).

Black's Law Dictionary (10th ed. 2014) defines an "order" as: "1. A command, direction, or instruction. See MANDATE (1). 2. A written direction or command delivered by a government official, esp[ecially] a court or judge. The word generally embraces final decrees as well as interlocutory directions or commands." Lay dictionaries define an "order" as "an authoritative direction, or instruction; command; mandate" (*Random House Webster's Unabridged Dictionary* 1362 (2d ed. 1998)), or "an authoritative mandate, usu[ually] from a superior to a subordinate." *Webster's Third New Int'l Dictionary Unabridged* 1588 (1993). Each of the Mine Act safeguards at issue here bears all the hallmarks of an "order."

First, Safeguard No. 9002751 reads like an order. It sets forth a concise and direct command. The operator must follow the command "requiring [the] operator to ensure that all track D-rails are placed on track rails when track equipment is parked in an inclined area." Further, it is final and non-appealable within MSHA.

Second, MSHA issued Safeguard No. 9002751 like an order. An MSHA inspector issued it after having viewed conditions at the mine and found a condition he believed created a hazard. He then unilaterally demanded specified action by the operator. There was no requirement that the inspector engage in any discussion whatsoever with the operator's representative before doing so. Certainly, there were no "negotiations" over issuance of the safeguard.

Third, Safeguard No. 9002751 operates like an order. Failure to comply with it results in issuance of a citation and assessment of a civil penalty. The safeguard, itself, does not cite violative practices or conditions. Instead, it asserts MSHA authority to order specific actions by the operator to comply with section 314 of the Mine Act. A safeguard represents MSHA taking control of specific conditions or practices at a mine and enforcing the interim mandatory standard by imposing operational constraints and/or obligations upon the operator regarding such conditions or practices. Such constraints may well be exercises of an inspector's authority under

[4] The provisions of the APA do not apply generally to Commission proceedings. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 159 (D.C. Cir. 2006). However, that does not mean that the principles underlying the APA are inapplicable. *Id.* The Commission has referenced the definitions in the APA in defining matters under the Mine Act. *See Tarmann v. Int'l Salt Co.*, 12 FMSHC 1, 2 n.1 (Jan. 1990).

section 314(b). However, that does not place such orders beyond immediate review by the Commission.

A safeguard reads like an order, issues like an order, and acts like an order – it is an order. That being the case, section 301(a) and Title I confer jurisdiction upon the Commission to review safeguards.

A safeguard is so clearly an order that the majority struggles in attempting to define what form of legal instrument it is, other than an order. At first, they pass safeguards off as a form of "notice" that simply "informs the mine operator about conduct that is mandated or prohibited." Slip op. at 1. This is the majority's first tacit recognition that a safeguard has the characteristics of an order. The "information" is a unilateral command by an inspector that "mandates" or "prohibits" conduct. It "notifies" the operator that it must do as the inspector commands or pay a civil penalty – that is, an order.

A few pages later, however, the majority implicitly reduces safeguards to the ambiguous status of "issuances," theorizing that "[s]afeguard notices are not citations or orders issued pursuant to section 104, but rather issuances that establish safeguards pursuant to section 314(b)." *Id.* at 5. So, safeguards are deemed simple "issuances."[5]

Later in the opinion, however, the majority dances to the other end of the legal spectrum to declare that safeguards actually "are mandatory standards which require an operator to implement protective measures" (slip op. at 6), and states "[g]iven the nature of safeguard notices as mine-specific mandatory standards . . . ." *Id.* at 8.[6] Here, the majority would find

---

[5] This case illustrates the outsized importance MSHA may seek to attach to the name given to issuances and decrees. Had MSHA properly entitled safeguards as "Safeguard Orders," I am confident the majority would agree that we have jurisdiction to review such orders. By choosing to instead call them "Safeguard Notices," the Secretary seeks to have safeguard orders treated as mere "notices" or, according to the majority, even more ambiguously, "issuances." An enforceable demand, however, is not a mere notice or issuance; if a safeguard is a notice, it is one mandating specific conduct backed by a penalty for failure to comply. The operator for the first time is commanded to take or refrain from taking specified actions. In substance, a safeguard is an order, not a notice. "Beware lest you lose the substance by grasping at the shadow." Aesop, *The Dog and the Shadow*, *in The Harvard Classics Vol. 17 Part 1* (Charles W. Eliot, ed., P.F. Collier & Son 1909-14, Bartleby.com online ed. 2001) (c. 6th Century BCE).

[6] This characterization of safeguards is a departure from the Commission's prior care in characterizing safeguards. The Commission had previously referred to safeguards as "in effect" mandatory safety standards. *Southern Ohio Coal Co.*, 14 FMSHRC 1,8 (Jan. 1992) ("section 314(b) extends authority to the Secretary to create on a mine-by-mine basis what are, in effect, mandatory standards, without the formalities of rulemaking"); *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). Such wording avoids an obvious problem: the Mine Act does not permit inspectors to establish mandatory safety standards. Congress expressly stated in Title III of the Mine Act that the Interim III standards as written would exist until "superseded in whole or in part by improved mandatory safety standards promulgated by the Secretary under the provisions of section 101 of this Act." 30 U.S.C. § 861(a).

safeguards are mandatory safety standards issued by individual inspectors, but obviously without notice and comment and without any opportunity for judicial review before their enforcement – a notion wholly contrary to the right to immediate judicial review of mandatory standards.[7]

The majority recognizes that safeguards implement the authority granted to the Secretary to enforce the interim mandatory standards. Slip op. at 5. A safeguard implements a mandatory safety standard by an inspector commanding an operator to take specified actions in order to comply with the mandatory safety standard. It is a final agency action and has an immediate and concrete impact upon the operator. The result of a failure to obey the command is a citation and penalty. So, by recognizing that a safeguard implements a mandatory safety standard with a civil penalty for noncompliance, the majority recognizes that a safeguard is the quintessential type of command that constitutes an order that is subject to review by the Commission.

Having recognized that a safeguard has the attributes of an order, the majority implicitly further recognizes that a safeguard is an order by attempting to distinguish safeguard orders from 103(k) orders. Slip op. at 6. Stating that a safeguard is a different kind of "order" does not make it not an "order." It attempts to make it a kind of order over which the Commission has no jurisdiction. However, for purposes of jurisdiction, section 103(k) orders and safeguard orders are indistinguishable.

Obviously, my difference with my colleagues is more than legal terminology. Our difference involves the right of citizens to pre-enforcement review of government commands issued by individual federal agents. I would find a safeguard is the type of action that may be reviewed immediately. It commands specific and immediate action by a private citizen enforced by penalties. My colleagues think that, in Title III, Congress gave individual inspectors the right to go beyond enforcement and actually issue mandatory standards. Under that rubric, a safeguard does not enforce Title III, but rather creates a uniquely unreviewable mandatory safety standard – a safety standard that is unreviewable unless and until a citizen violates the inspector's command. Slip op. at 6-7. I do not know of any provisions in Title I that allow individual inspectors to unilaterally issue unreviewable mandatory safety standards to operators, and I do not think we should interpret Title III to allow such action. My colleagues recognize all the underpinnings for Commission review but do not take the logical final step and accept our jurisdiction.

The Mine Act does not expressly grant the Commission jurisdiction to review section 103(k) orders. However, as explained above, the Commission and circuit courts of appeal have

---

[7] The Supreme Court has repeatedly stressed the fundamental importance of the right to review of government mandates that have a direct and immediate impact upon a private person's rights. As the Supreme Court has emphasized, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Here, as in section 103(k), not only is there no evidence to support that Congress wished to deny review of safeguard orders but instead section 301(a), legislative history, and court cases demonstrate that Congress created the Commission to address MSHA commands compelling an operator to take specific actions or to incur civil penalties.

recognized that Congress created the Commission as a specialized agency with broad powers to review MSHA enforcement actions. In other words, the Commission is the agency designated by Congress to review MSHA enforcement actions, and we have jurisdiction to review section 103(k) orders (*American Coal Co.*, *supra*; *Pattison Sand*, *supra*). Therefore, Commission jurisdiction is not strictly limited by the wording of section 105(d).

The majority argues that safeguards are not "analogous" to a section 103(k) order, saying that section 103(k) orders have a "similarity" to withdrawal orders. Slip op. at 6. The indisputable fact, however, is that section 103(k) orders are not always withdrawal orders and may be mandatory in nature. In *Jim Walter*, the Commission adjudicated a section 103(k) order requiring all miners to take an hour-long training course on ignition safety and prevention before they could enter the mine. 37 FMSHRC at 1871. Clearly, this was a mandatory command (an order) to take a set of prescribed actions. From a legal standpoint, that order is identical in nature to a safeguard. An inspector issues both section 103(k) and safeguard orders unilaterally, and both dictate actions that the operator must take. Indeed, a safeguard is more obviously an "order," as it commands the operator to take specific actions to comply with the interim standard of section 314(b) of the Mine Act. Despite its protestations, the majority cannot consistently maintain that the Commission has jurisdiction to review mandatory directives issued under section 103(k) but cannot review safeguard orders issued by individual inspectors. We may review section 103(k) orders, and we may review safeguard orders.[8]

Finally, the majority asserts that the issuance of a safeguard resembles MSHA's role in roof control and ventilation plan disputes. Slip op. at 8. Because section 301(a) of the Mine Act expressly provides for enforcement of safeguard orders in accordance with Title I, this argument is irrelevant.

In any event, approval of roof control and ventilation plans is markedly and substantively different from the immediate issuance of a final binding order by a lone inspector on his personal initiative. There are substantive differences between obtaining the statutorily prerequisite approval of a plan and the unilateral issuance of a binding command through a safeguard.

The Mine Act expressly places a duty upon the operator to devise a plan that is acceptable to MSHA. The operator has the obligation to develop a plan acceptable to MSHA and MSHA has discretion in approving or rejecting the proffered plan. Further, the plan approval process involves negotiations, proposals, and counter-proposals between MSHA and the operator. In a legal sense, MSHA rejects insufficient plans proposed by the operator and

---

[8] The majority seeks to minimize and deflect the importance of the Commission's jurisdiction to review section 103(k) orders by inferring that such orders are "withdrawal orders." *See* slip op. at 6 ("That section 103(k) orders are reviewable despite the lack of an explicit grant of authority reflects their similarity to withdrawal orders reviewable under section 105(d), a similarity which safeguard notices do not share."). Certainly, a command to provide mandatory training as issued in *Jim Walters*, *supra*, has nothing in common with a withdrawal order. In any event, section 301(a) of the Mine Act is a positive grant of jurisdiction to review safeguard orders that enforce (i.e., implement) mandatory safeguards in the same manner as orders issued under Title I.

informs the operator of changes that would satisfy MSHA. That does not foreclose the operator from submitting further variations of the plan in an attempt to win MSHA's approval.

If the operator refuses to satisfy MSHA's right to approve plans, it may challenge MSHA's disapproval as an abuse of discretion. The Mine Act places the burden upon the operator to satisfy MSHA or show an abuse of discretion. If the operator fails to obtain plan approval, it is not violating an order issued by MSHA. It is disobeying a requirement of the Mine Act to obtain pre-approval from MSHA.

Indeed, the United States Court of Appeals for the District of Columbia Circuit recently emphasized the "notice and comment" aspect of the plan approval process in sustaining the Commission's standard of review for plan approval disputes. In *Prairie State Generating Co. LLC v. Sec'y of Labor*, the court stated:

> The statutory requirements of negotiation between the Secretary and an operator in the development of suitable, mine-specific plans, and the Mine Act's provision for miners' input during the plan-approval process, can be thought to play a role in the development of mine-specific plans akin to that of notice and comment in formal administrative rulemaking. Mine operators receive written notice of the reasoning and bases for the Secretary's initial plan-suitability determinations and have multiple opportunities to respond with arguments and supplemental data. *Carbon County*, 7 FMSHRC at 1370-71; 30 C.F.R. §§ 75.220, 75.370. Plan negotiations thus may reasonably be characterized as serving the same interests as notice and comment, albeit less formally: notice to affected parties, opportunities for such parties to develop the record by submitting factual and legal support, and improvement of the agency's decisionmaking. *See, e.g., Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 547 (D.C. Cir. 1983).

792 F.3d 82, 90-91 (D.C. Cir. 2015). None of this occurs before issuance of a safeguard. With a safeguard, MSHA does not define a safety hazard and ask for a plan from the operator to deal with the issue. There is no advance written notice of the bases for the inspector's intention to issue a safeguard; there is no, let alone multiple, opportunities to convince any MSHA official that the safeguard is unnecessary, too broad, ambiguous, etc. In sum, the operator does not fail to provide a suitable plan to MSHA; an MSHA inspector unilaterally imposes an immediate obligation upon the operator.[9]

---

[9] In *Elk Run Coal Co. v. U.S. Dep't of Labor*, 804 F. Supp. 2d 8 (D.D.C. 2011), the district court upheld the plan review process against a claim of facial unconstitutionality. In so doing, the court found that the plan approval process is a cooperative process and that, rather than MSHA compelling action, the operator must obtain approval of a plan submitted by it. The Secretary argued and the court accepted that MSHA's refusal to adopt a plan submitted by an operator does not constitute "final agency action." In response to operator complaints that it needed to commit a violation to obtain review, the district court accepted the Secretary's

It is not tenable to contend that an inspector imposing mandatory obligations upon an operator is not taking a discrete final agency action or to assert that such action has any attribute of rulemaking. A safeguard has only the legal attributes of an order. The inspector comes; the inspector sees; the inspector commands. In short, the plan approval process most certainly is not a template for safeguard orders.

Conclusion

Our system of justice does not favor issuance of binding governmental commands without a right to pre-enforcement challenge. The right to challenge government mandates is fundamental. Here, immediate jurisdiction is consistent with Title I's provision of review of government-mandated actions and with section 301(a)'s provision of jurisdiction over orders enforcing Title III standards. Such jurisdiction also is consistent with the broad authority of the Commission recognized by the Commission and circuit courts of appeal. I respectfully dissent.

William I. Althen, Commissioner

argument, finding that "[w]hile these complaints may describe what Plaintiffs believe to be 'programmatic' deficiencies with MSHA's ventilation-plan review-and-approval process, they do not identify any discrete, final agency actions that this Court can review." *Id.* at 31.

Distribution:

Robert H. Beatty, Jr., Esq.
Dinsmore & Shohl, LLP
215 Don Knotts Blvd., Suite 310
Morgantown, WV 26501

Jason M. Nutzman, Esq.
Dinsmore & Shohl, LLP
P. O. Box 11887
900 Lee Street, Suite 600
Charleston, WV 25339
jason.nutzman@dinsmore.com

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
1100 Wilson Blvd., 25th Floor
Arlington, VA 22209-3939

Benjamin D. Chaykin, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor West
Arlington, VA 22209-2247

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., Room 2220
Arlington, VA 22209-2296

Administrative Law Judge Margaret A. Miller
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-5268