FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 17, 2020

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	: : :	
	:	Docket No. LAKE 2018-0188-R
v.	: :	
M-CLASS MINING, LLC	:	

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

DECISION

BY: Rajkovich, Chairman; Young, and Althen, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"). At issue is Order No. 9104295, issued to M-Class Mining, LLC ("M-Class") on February 24, 2018 by the Department of Labor's Mine Safety and Health Administration ("MSHA"). MSHA issued the order under section 103(k) of the Mine Act, 30 U.S.C. § 813(k),[1] after receiving a verbal report from the local police department that a doctor had called reporting that a miner had suffered carbon monoxide poisoning in the mine.

The operator contested the validity of the order after it was terminated, but not vacated, by MSHA. The Secretary argued that the order was valid. The Secretary further argued that because MSHA terminated the order prior to the hearing on the contest, the issue of the validity of the order was moot.

The Judge first determined that the issue was not moot. The Judge then concluded that an "accident" had occurred and affirmed the validity of the section 103(k) order. 41 FMSHRC 1, 11 (Jan. 2019) (ALJ). The operator challenges the Judge's decision that an "accident" had occurred.

[1] 30 U.S.C. § 813(k) states that:

> 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.

Upon review, we affirm the finding that this case is not moot. We further determine that the Judge erred in finding that an accident had occurred, and therefore, we vacate the order.

I.

Background

A. Factual Background

On February 24, 2018, miner Mitchell Mullins began his shift at the M-Class #1 underground coal mine in Macedonia, Illinois. Mullins was part of a crew of 14 miners tasked with closing a gap in the mine roof, the result of a roof fall at the Headgate # 6 section of the MC portal of the mine. The miners erected a steel archway to support the roof before using a diesel air compressor to pump foam into the gap in the roof. Gas detectors were mounted in the area, and eight to ten of the miners, including Mullins, carried hand-held gas "spotters" to track the levels of carbon monoxide in the mine.[2]

Mullins arrived underground at 8:00 a.m. Between 9:00 a.m. and 9:30 a.m., he began to suffer from dizziness and a light headache. Later, between 10:00 a.m. and 11:00 a.m., the operator started using the compressor, which was located in proximity to Mullins. Between 11:15 a.m. and 11:30 a.m., Mullins started experiencing chest pains and difficulty breathing. At approximately 3:00 p.m., Mine Superintendent Demitrios Macropoulos transported Mullins from the section. Macropoulos testified that, on his way out of the mine, Mullins "said something about how the flu had been going around his home, and he had it the previous week, and it's probably not all the way out of his system." Tr. 227-28. Mullins also stated he was feeling better while enroute out of the mine.[3] Nevertheless, Mullins was transported to the emergency room at a nearby hospital.

At approximately 6:50 p.m., Dr. Dean Bosley, a physician at the hospital, called the local police, reported that Mullins had suffered carbon monoxide poisoning while working at the mine, and further recommended that the mine be shut down. The police called an MSHA hot-line to report Dr. Bosley's diagnosis and recommendation. The MSHA hot-line employees used this information to create an escalation report that was then sent to the local MSHA field office.

After receiving the escalation report, the MSHA field office supervisor, Bob Bretzman, called Parker Phipps, a senior management official at the mine. Phipps informed Bretzman that he had worked with Mullins in the same area that day, and had not detected any elevated levels of carbon monoxide with his gas spotter. Bretzman did not issue an order to evacuate the mine,

[2] The handheld gas spotters can record data of carbon monoxide levels throughout a shift or merely the highest ("peak") levels of carbon monoxide detected during a shift. Combined with a tracking system used to locate miners, it is possible to identify where a miner was located during each recording of carbon monoxide levels. Tr. 43, 46-47.

[3] Mullins provided that observation in an interview directly to MSHA field office supervisor Bob Bretzman.

but informed Phipps that he was sending an inspector out to investigate. Phipps then sent a miner to inspect the area at issue. The miner did not detect any elevated carbon monoxide levels.

Inspector Brandon Naas was dispatched to the mine. He reviewed the escalation report at the MSHA field office before leaving for the mine. Naas arrived at the mine at 10:43 p.m. Upon his arrival, relying upon the escalation report generated by the doctor's call, Naas immediately issued Order No. 9104295 under section 103(k) of the Mine Act at 10:55 p.m. to suspend operations in the area at issue. While Naas was still on the surface, he reviewed a report from the mounted gas detectors (the monitors) and checked the data from a hand-held gas spotter. In neither case was there any indication of elevated carbon monoxide levels in any area where Mullins had been working. At about midnight, Naas went underground to Headgate # 6 to investigate the area at issue. While he was underground, he used a gas spotter and did not detect any elevated levels of carbon monoxide. He was unable to locate, and therefore check, Mullins' own hand-held gas spotter.

By 1:25 a.m. Naas had completed his investigation. Having not found any high levels of carbon monoxide, he modified his order to release the area for resumption of normal mining operations. Naas then started the air compressor to determine if he could detect an exhaust of carbon monoxide. He did not detect any elevated levels of carbon monoxide from the compressor. Sec'y Ex. 2 at 6-7.[4]

The next day, at 8:15 a.m., Naas again modified the order. The second modification removed the compressor from service pending further investigation. MSHA stated that this modification was made because of a need for further investigation into whether the compressor was a source of elevated carbon monoxide. Sec'y Ex. 1 at 1-3.

Between February 26 and February 28, Naas interviewed Mullins and other miners who had worked with Mullins on February 24. Again, he did not find any evidence that any miners had detected elevated levels of carbon monoxide on the day in question. Naas also did not find any evidence that any other miner who had worked in the area that day had suffered chest pains or breathing difficulties.

Despite the lack of findings, MSHA subsequently required the operator to submit an action plan to prevent exposure to elevated levels of carbon monoxide. On March 1, 2018, the operator submitted its proposed action plan. MSHA rejected this plan on March 7, 2018. The operator responded by proposing another action plan on March 8, 2018. However, the parties were again unable to reach agreement.

Thereafter, on March 15, 2018 the operator filed this action. Over one month later, on April 4, 2018, although the parties had not reached an agreement on a proposed action plan, MSHA terminated the order and returned the compressor to the operator. MSHA never identified elevated levels of carbon monoxide in the area nor any source that would cause

[4] State inspectors took bottle samples of the air to check for carbon monoxide. The results of those bottle samples were negative, showing 5 ppm, an amount significantly below the regulatory threshold. Tr. 66.

elevated levels of carbon monoxide. MSHA never issued a citation related to the order. 41 FMSHRC at 5.

B. Procedural Background

M-Class not only contested the order on March 15, it also filed a motion for an expedited hearing on the order. On March 30, the presiding Judge denied M-Class's motion for an expedited hearing. The operator continued to challenge this order, contending that no accident had occurred.

On July 18, the Judge concluded that the case was not moot. 40 FMSHRC 1288 (July 2018) (ALJ). On September 20, the Secretary filed a petition for interlocutory review of the Judge's order asking the Commissioners to find that the matter was moot. Due to the absence of a quorum, the Commission was unable to consider this petition.[5]

On October 3-4, the Judge held a hearing in this matter. Neither Mullins, the allegedly affected miner, nor Dr. Bosley, the physician who initially phoned the local police recommending that the mine be shut down, testified during the hearing. On January 14, 2019, the Judge determined that an "accident" had occurred on February 24, 2018 and affirmed the order. 41 FMSHRC at 10-11. Subsequently, the operator filed a timely petition for review, which the Commission granted on February 25, 2019.

II.

Judge's Decision

The Judge's order of July 18, 2018, held that the section 103(k) order was not moot, despite having been terminated, because the order posed continuing consequences for the operator. Specifically, the Judge found that the order could impact the operator's reputation. Alternatively, the Judge found that the order fell within the capable-of-repetition-yet-evading-review exception to mootness. 40 FMSHRC at 1291-92.

The Judge went on to decide the case on the merits. In the decision, the Judge held an "accident" had occurred and affirmed the section 103(k) order. 41 FMSHRC at 11.

The Judge reasoned that the event involving Mullins was an "accident" because it was a sudden event which required quick action to ensure safe mining conditions, making it similar in nature to a mine inundation – an event which constitutes an "accident" under section 3(k) of the Mine Act. *Aluminum Co. of America ("Alcoa"),* 15 FMSHRC 1821, 1824 (Sept. 1993). In relevant part, the Judge determined that "Mullins' diagnosis and the rapid response of all involved parties demonstrate that his injury was a sudden event . . . [The] evacuation and

[5] The Commission may grant interlocutory review only by "a majority vote of the full Commission or a majority vote of a duly constituted panel of the Commission." 29 C.F.R. § 2700.76(a)(2). Therefore, in the absence of a quorum the Commission may not undertake interlocutory review.

hospitalization of a miner positively diagnosed with carbon monoxide poisoning constitutes an injury that requires quick action to ensure the safety of other miners." 41 FMSHRC at 7-8. Alternatively, the Judge found that Mullins' hospitalization was an injury which constituted an independent basis for an accident. *Id.* at 8.

The Judge implicitly acknowledged that Mullins' harm might not have been caused by mining conditions. He stated that "M-Class presented credible evidence demonstrating that no elevated carbon monoxide levels were detected . . . and that Mullins' original diagnosis may not have risen to the level of carbon monoxide poisoning." *Id.* at 9. The Judge's focus, however, was on MSHA's issuance of the order "in response to the information it possessed at the time," finding that the agency reasonably relied on the escalation report, which "rationally connect[ed] Mullins' injury to a potential . . . elevation of carbon monoxide at the mine." *Id.* at 8. Consequently, the Judge's determination of an "accident" was based upon what MSHA thought *at the time of the issuance* of the order rather than whether an "accident" had *actually occurred.*

In addition, the Judge upheld the second modification to the order, under which the inspector removed the air compressor from service. The Judge held that the second modification was limited in scope, *i.e.,* it only applied to the air compressor, and the inspector reasonably suspected that the compressor was a source of elevated carbon monoxide because the compressor was the only equipment to which the miner was not normally exposed. *Id.* at 10-11.

III.

Disposition

In its Petition for Discretionary Review, the operator lists three assignments of error. First, the operator claims that the Judge erred in finding that an "accident" had occurred under the Mine Act because MSHA was unable to show that "there was carbon monoxide present in the underground mine which injured or sickened a miner." PDR at 13. Second, the operator claims that the Judge erred in finding that the section 103(k) order, which was modified twice, was reasonably tailored in scope. Third, the operator claims that the Judge, by failing to grant the operator's request for an expedited hearing, erroneously denied the operator an appropriate remedy for MSHA's removal of a valuable compressor from service for an extended period.

The Secretary argues on appeal that the section 103(k) order is moot because it has been terminated and therefore does not pose any legal consequences under the Mine Act. In addition, the Secretary claims that the order does not fall within the capable-of-repetition-yet-evading-review exception to mootness.[6]

[6] The Secretary also claims that the Judge erred in using the operator's reputational concerns to find that this matter was not moot. However, as set forth below, the operator has a legally cognizable interest, separate from its reputational concerns, in having the order vacated.

A. The Section 103(k) Order is Not Moot

In *North American Drillers,* we addressed the mootness doctrine as applied to the Commission:

> [W]hile the article III constitutional requirement of "case or controversy" does not literally apply to federal administrative agencies like the Commission, "an agency receives guidance from the policies that underlie the 'case or controversy' requirement of article III …. An agency acts within its discretion in refusing to hear a case that would be considered moot if tested under the article III 'case or controversy' requirement" . . . A case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome.

34 FMSHRC 352, 358 (Feb. 2012). In that case, we determined that the Secretary's vacation of the citation combined with the Judge's dismissal of the civil penalty with prejudice meant that the parties no longer had a legally cognizable interest in the outcome. In contrast, here, Order No. 9104295 has been terminated, but not vacated.

In *Wyoming Fuel Co.,* 14 FMSHRC 1282, 1288-89 (Aug. 1992), we determined that termination of a citation/order "is a common administrative function of the Secretary . . . meant only to convey that a violative condition has been abated." Notably, we determined that a terminated order continues to exist for other legal purposes besides abatement, which in turn permits the terminated enforcement action to be contested in subsequent civil proceedings. In contrast, vacation of an order means that the order no longer exists for legal purposes. In this case, the order outlives its termination and continues to indicate on the record that an accident occurred at the mine.

Therefore, we must examine whether the terminated order at issue can pose any legal consequences for the operator. If so, the operator retains a legally cognizable interest in having the order vacated.

We note that the subject section 103(k) order does not currently allege the violation of any health or safety standard. Nevertheless, as noted above, it remains an order finding the occurrence of an "accident." The issuance of any section 103(k) order necessarily initiates an investigation at a mine, which is what occurred in this case. Accident investigations have multiple purposes, including the finding of facts to support allegations of violations, both civil and criminal.

The mere listing of an "accident," in the form of a section 103(k) order, in the compliance history of a mine, is a clear implication to the public that *something* occurred at that mine that affected the health and safety of miners. That has a diminishing effect on the operator's compliance history. Thus, there is legislative legal precedent and reputation is far from a hollow concern.

Moreover, section 103(k) orders can be modified, as was the case here. Such modifications, in general, could allege the violation of a health or safety standard. Our case-law permits the Secretary to make such a modification, even though the order at issue has been terminated, and despite the fact that the order does not currently allege a violation of any standard. First, in *Wyoming Fuel,* 14 FMSHRC at 1288-89, we found that termination of a citation only meant that the violative condition had been abated and did not preclude the citation from subsequently being modified. We have recognized that this principle – that terminated citations can be modified – also applies to withdrawal orders such as those issued under section 103(k) of the Mine Act. *See Ten-A-Coal Co.,* 14 FMSHRC 1296, 1298 (Aug. 1992). Second, we have determined that a withdrawal order which did not allege a violation of a standard could be modified to allege such a violation. *Westmoreland Coal Co.,* 8 FMSHRC 1317, 1328 (Sept. 1986).[7]

Our dissenting colleagues accept that an inspector *must* issue a citation if a violation is discovered. That requirement reinforces the valid premise that section 103(k) orders can lead to the issuance of one or more citations for violations discovered during the course of the investigation. Therefore, if an order is not vacated, the Secretary retains the ability to modify the order to allege a violation of a safety or health standard, which could in turn affect the operator's repeat violation history. In contrast, if the order is vacated, it may not serve as a basis for a citation that would appear in the operator's repeat violation history or affect future penalties assessed against the operator.

Thus, the operator retains a legally cognizable interest in having the terminated order vacated. Accordingly, we find that Order No. 9104295 is not moot

We further find that the order is also within the capable-of-repetition-but-evading-review exception to mootness. In *Performance Coal Co.,* 642 F.3d 234, 237-38 (D.C. Cir. 2011), the Court explained that this exception applies when there is a reasonable expectation that the party seeking to avoid mootness will be subjected to the same action again and the duration of the challenged action is too short for the action to be litigated fully before the action expires. The Court explained that when applying this exception, courts should focus on whether the alleged legal wrong is likely to recur, not whether the precise historical facts are likely to recur. *Id.*

In this case, the Secretary *does not dispute* that the duration of the order was too short for the order to be litigated fully, *i.e.* the Secretary does not contest that the order would evade review. Instead, the Secretary argues that the operator has not shown that it is likely to contest terminated section 103(k) orders and their modifications in the future.

However, under *Performance,* 642 F.3d at 237-38, the relevant issue is whether the general legal wrong, not the precise historical facts, is likely to recur. Furthermore, it is

[7] Despite these precedents our dissenting colleagues apparently disregard *stare decisis* on this point, querying "[w]hether MSHA would have the legal authority to do so is unclear." Slip op. at 21.

sufficient for a party, when claiming the recurrence of a general legal wrong, to assert that it will challenge the same action in the future. *Id.*

Here, the general legal wrong concerns the harmful impact of section 103(k) orders on the operator's ability to use equipment at a mine. This order, as modified on February 26, 2018, prevented the operator from using a diesel air compressor from February 26 until April 4. In other words, the order, as modified, removed a compressor from service for the entire month of March. MSHA does not dispute that in the future, it might issue similar orders under section 103(k). M-Class's contest of the terminated order suggests that the operator will challenge such agency actions in the future, even if they are later terminated, because they restrict the operator's ability to use equipment.

More importantly in this case, the operator was required to comply with the order mandating the lengthy loss of use of equipment as though there had been an accident until it raised a legal challenge to the Secretary's actions. Only at that point did MSHA capitulate and terminate the order. Commissioner Jordan would hold this case moot, and Commissioner Traynor would require that we uphold the continued fiction that an "accident" had occurred (in the absence of any evidence of such), despite the fact that section 103(k) operates prospectively as a limit on the operator's activities. Here, despite the fact that the agency had apparently conducted all of the investigation it intended to undertake and had found no evidence of any "accident," the operator required MSHA approval to regain control of its property and return, formally, to "normal" mining.

In addition to the particular and ongoing harm suffered by the operator, which has been forced to undertake significant trouble and expense to vindicate its constitutional right to maintain control over its property and resume its lawful activities (absent an important government need to prevent it from doing so), there is a general harm. If the agency is not countered here, it may be presumed that it will operate similarly in the future, because there is no means of holding the agency accountable, absent threatening or commencing litigation – at which point the agency will again withdraw and await the next opportunity to act with temporal impunity.

This is the classic paradigm for the exception, in which a government agency terminates an enforcement action when challenged, but retains the ability to file subsequent actions because its enforcement action has not been adjudicated as improper. *See S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911) (establishing the exception to mootness where a parties' rights, "capable of repetition yet evading review," could be determined by the agency's short-term orders without a chance of redress); *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (the capable-of-repetition exception to mootness applies where "(1) the challenged action [is] in its duration too short to be fully litigated prior to *cessation* or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again" (emphasis added; internal quotation marks omitted)); *U.S. v. Concentrated Phosphate Export Assn., Inc.*, 393 U.S. 199, 203 (1968) (party whose actions threaten to moot a case must make "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur"); *U.S. v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953) (voluntary cessation of illegal

activity will not render case moot unless there is "no reasonable expectation that the wrong will be repeated" (internal quotation marks omitted)).

Therefore, we find there was a continuing existence of an official and potentially legally harmful order finding that an "accident" had occurred at the operator's mine. The general legal wrong posed by Order No. 9104295 is likely to recur, *i.e.* is capable of repetition. Thus, the exception to mootness applies to this case.

B. The Judge's Accident Determination Is Vacated.[8]

Section 103(k) of the Mine Act provides that "[i]n the event of any accident occurring in a . . . mine, [an MSHA inspector], when present, may issue such orders as he deems appropriate to insure the safety of any person in the . . . mine." 30 U.S.C. § 813(k). Therefore, an accident is a prerequisite for a section 103(k) order, as stated in *Aluminum Co. of America ("Alcoa"),* 15 FMSHRC 1821, 1824 (Sept. 1993). Section 3(k) of the Mine Act defines an "accident" as including "a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k). We have recognized that the definition of "accident" in section 3(k) applies to the entire Mine Act. *Revelation Energy, LLC*, 35 FMSHRC 3333, 3339 (Nov. 2013); *Big Ridge, Inc.*, 37 FMSHRC 1860, 1866 (Sept. 2015).

The federal courts have followed our determination that the term "accident" as used in section 103(k) encompasses events that are similar in nature to or that have a similar potential to cause injury as a mine ignition, mine inundation, mine fire or mine explosion. *See Pattison Sand Co.*, 688 F.3d 507, 513 (8th Cir. 2012) (*citing Alcoa,* 15 FMSHRC at 1825-26). In *Alcoa*, the Commission stated, "Mine explosions, ignitions, fires and inundations typically are sudden events that pose an immediate hazard to miners and require emergency action." 15 FMSHRC at 1826. Therefore, in *Alcoa*, the Commission found the predicate for an accident must be an incident, occurrence, or condition in a mine.[9]

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[8] Commissioner Jordan confined her dissent to the mootness issue. Therefore, our references to the dissent in the following text refer only to Commissioner Traynor.

[9] Curiously, our dissenting colleague finds fault with this logical conclusion drawn from *Alcoa.* In *Alcoa*, the Commission acknowledged that "a mercury release that involves injury to, or causes the death of any person," would qualify as an accident, by the express terms of section 3(k) of the Act. 15 FMSHRC at 1824. We also agreed that "an event . . . 'similar in nature or present[ing] a similar potential for injury or death as a mine explosion, ignition, fire or inundation'" might qualify as an "accident." *Id.* at 1825-26. However, we noted that this determination must be made on a case-by-case basis. Thus, we expressly rejected the limitless scope he would have us impose through this case, in favor of an evidentiary determination grounded on a question of similarity to "events" – "mine explosions, ignitions, fires, and inundations" – that must be recognized as incidents, occurrences or conditions in the mine. *Alcoa* is, in fact, the obverse of the case before us. There, the Secretary presented evidence of a contaminant, but no evidence of any illness resulting from exposure. Here, of course, there is evidence of an illness, but none whatsoever of any contaminant, or any other incident, occurrence, or condition similar to an explosion, fire, ignition, or inundation. In both cases, the

Our dissenting colleague urges upholding the order on the basis of an expansive construction of the term "accident." Slip op. at 29. But such a construction cannot exceed the boundaries of the Mine Act. MSHA and the Commission have limited jurisdiction over the areas delegated by Congress to our respective stewardship. As such, the Supreme Court's approval of broad, sweeping powers over the activities of persons engaged in mining activities, *Donovan v. Dewey*, 452 U.S. 594, 602-06 (1981), must be limited to the activities within the scope of that authority. Thus, our colleague's suggestion that any "injury" – including any illness from any cause, mining-related or not – may be subject to MSHA's plenary control under Section 103(k) is erroneous. *See Sec'y of Labor v. National Cement Co. of California*, 573 F.3d 788, 795 (D.C. Cir. 2009) (Mine Act cannot be interpreted in a way that extends its coverage to matters which are not within operator's control or supervision).

This erroneous interpretation not only distorts the meaning of the term "accident," it departs from the stated purpose of Section 103(k), which is "to insure the safety of any person in the coal or other mine." It thus entirely misses the point of designating any incident as an "accident." A fundamental purpose of examining an "accident" is to protect other miners in the mine from whatever harmed the injured. *See* 30 U.S.C. § 813(k) (Secretary's representative "may issue such orders as he deems appropriate to insure [sic] the safety of any person in a coal or other mine, and the operator of such mine shall obtain the approval of such representative" of any plan to recover persons or coal or return affected areas of the mine to normal). It is prospective, in that a Section 103(k) investigation of an "accident" is aimed at preventing the same consequence to other miners post-incident

Such a limitless interpretation of the term "accident" would encompass incidents totally unrelated to mining—for example, complications from diabetes or a bout of influenza. Indeed, our dissenting colleague concludes that, given Mullins' symptoms here while at the mine, "[s]ubstantial evidence supports a finding that Mullins suffered an injury." Slip op. at 29. Thus, our colleague would broaden the term "accident" to encompass *illness* while at work—perhaps even including an upset stomach or an allergic reaction. The clear meaning of Section 103(k) binds the Commission as clear authority in this and future enforcement proceedings.

In analyzing the reactions to Mullins' illness underground, the Judge notes that "Mullins' diagnosis and the rapid response of all involved parties demonstrate that his injury was a sudden event similar in nature to those requiring quick action under § 3(k)." 41 FMSHRC at 7. The "sudden event" posited by the Judge in this case was Mullins' feeling ill, not an inundation of carbon monoxide—which was never found. The only rapid event in this incident was the transportation of Mullins off the section when he complained of chest pains. Hopefully the illness of any miner, for any reason, would be met with a rapid response. There is no evidence of any mining event adversely affecting the health or safety of miners on the section. No immediate action was or could be taken on the section to remedy any condition affecting miners because no hazard was found. No citations were ever issued for lack of an appropriate response to any conditions in the mine. Moreover, the section 103(k) order was not issued until nearly

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causal nexus between a predicate "event" and a resulting "injury" fails on evidentiary grounds. Our decision today is therefore entirely consistent with *Alcoa* and the terms of the Act as we have interpreted them in our precedents.

eight hours after Mullins got sick on the section. Nothing in the statute equates response time of reactions to a miner's illness as being the determining factor of an "accident."

In *Pattison*, 688 F.3d at 513, the Eighth Circuit recognized that the accident determination should focus on the presence of dangerous mining conditions. In other words, the predicate for an accident as defined by the Mine Act is an event in or condition of the mine. Under *Pattison, Id.* at 512-14, the Judge's determination that an incident in a mine constituted an "accident" must be supported by substantial evidence.[10] The Eighth Circuit found that neither the Mine Act nor our case-law had specified a standard of review for orders issued by MSHA under section 103(k) of the Mine Act. Therefore, the Eighth Circuit held that the Judge should apply the arbitrary and capricious test for any non-factual agency determinations related to a section 103(k) order, 688 F.3d at 513, but noted that the substantial evidence test applied to factual determinations, a point overlooked by our dissenting colleague. *Id.* at 514. Similarly, in *Alcoa*, 15 FMSHRC at 1824, we suggested that the accident determination was "evidentiary in nature" (in this context, we reviewed whether the evidence established that miners were overexposed to mercury vapor or had come into contact with liquid mercury). *Id.*

Our colleague misses and misstates the issue before the Commission. The issue, therefore, is not whether the issuance of the 103(k) order was an abuse of discretion. When a Judge does not find substantial evidence to support a finding that an accident has occurred, the Judge must vacate any such order. In our colleague's line of reasoning, any time a miner gets sick in a mine it would prove an "accident" has occurred regardless of the nature or cause of the sickness. That, of course, is wholly at odds with the plain meaning of accident and the statutory definition.[11]

When reviewing a Judge's factual determination, we are bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). We have defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support [the Judge's] conclusion." *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989)(quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Accordingly, the proper test for the existence of an "accident," here, is the substantial evidence test.

In his decision, the Judge recognized that "M-Class presented credible evidence demonstrating that no elevated carbon monoxide levels were detected." 41 FMSHRC at 9.

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[10] In *Friends of Richards-Gebaur Airport*, 251 F.3d 1178, 1184-85 (8th Cir. 2001), the Eighth Circuit distinguished an agency's non-factual determination, which the court reviewed under the arbitrary and capricious standard, from an agency's factual finding, which the court reviewed under the substantial evidence test. Both the Mine Act and the statute at issue in *Friends of RGA* specify that the substantial evidence standard shall be used to evaluate findings of fact.

[11] Our dissenting colleague states that, because in his estimation our interpretation of section 103(k) is plainly wrong, it is not binding precedent and need not be followed. Slip op. at 29. A unanimous decision is no prerequisite for binding precedent.

Rather than ruling on this basis, the Judge essentially found there was an accident because the inspector had reason to believe there was an accident when he arrived at the mine.[12] Thus, the Judge found that the inspector's *belief*, however unfounded, that there was an accident could validate a section 103(k) order even if the evidence showed no accident *actually occurred*.

Therefore, the case raises two questions. First, did the event involving Mullins constitute an accident? If so, that would be the end of the matter. If not, the second question arises - is a section 103(k) order valid when an inspector issues the order with a good faith belief that an accident occurred when, in actuality, an accident did not occur?

1. The Event Involving Mullins was Not an Accident within the Meaning of the Mine Act.

In his determination of an "accident," the Judge found the event could be classified as an "inundation" of carbon monoxide or as an "injury."[13] Regardless of whether such an event were called an injury, illness, or sickness, the gravamen of an "accident" is that it must arise from a condition, practice or occurrence in the mine.

The one item of evidence—the escalation report (Sec'y Ex. 7)—purportedly supporting an allegation of carbon monoxide poisoning is seriously problematic. That report contains hearsay of a purported telephone call from Dr. Bosley reporting that Mullins suffered carbon monoxide poisoning. A police dispatcher took the call from Dr. Bosley. A police dispatcher named "Amos Abbot," without it being clear whether Mr. Abbot was the same dispatcher who spoke with the doctor, called an unidentified person on the MSHA hotline who, in turn, called the district office. None of this evidence purports to be quoting Dr. Bosley directly. Although the gist of what the doctor said may be accurate, there is no certainty that the message passed through four calls accurately reflects Dr. Bosley's statement.

In fact, there is no verification of Dr. Bosley's statement whatsoever. Dr. Bosley was never interviewed by the inspector. The Secretary failed to call Dr. Bosley as a witness.

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[12] The Judge determined that an accident had occurred because when the inspector issued the order, he relied on the escalation report, which "rationally connect[ed] Mullins' injury to a potential . . . elevation of carbon monoxide at the mine." 41 FMSHRC at 8-10. Our colleague would hold that Mullins felt sick and that this is sufficient under the Act. Of course, that entirely misses the point of section 103(k) and the definition of an accident. A miner who enters the mine with a broken bone most definitely has suffered an "injury" at some point in the miner's life. However, it would be nonsense to say that when a miner enters the mine with a previously broken bone such entry constitutes an accident within the meaning of section 103(k) justifying closure of a section of the mine.

[13] While section 3(k) of the Mine Act states an "accident includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person," we need not discuss whether carbon monoxide poisoning would constitute an "injury" or would fit within section 3(k) by virtue of Congress' use of the word "includes" in defining an accident because there is no evidence of excess carbon monoxide in the mine at any relevant time.

Therefore, the only evidence of a carbon monoxide inundation is quadruple hearsay from a witness who did not testify at the trial and whom MSHA did not interview. Further, as noted, Mullins himself did not testify.

All the other evidence rebuts any indication that Mullins was poisoned by an inundation of carbon monoxide while working in the mine.

- There is no evidence that any other miner who worked with Mullins that day was exposed to any elevated level of carbon monoxide. For example, Parker Phipps used a gas spotter to measure levels of carbon monoxide *while he worked with Mullins* that day. Phipps did not detect any elevated levels of carbon monoxide, as he informed Bob Bretzman, a MSHA field office supervisor, during a phone call later that evening.
- There is no evidence that any other miner who worked with Mullins on February 24 suffered chest pains, breathing difficulties, or any other symptoms consistent with exposure to excessive carbon monoxide.
- After speaking with Bretzman on that February 24 evening call, Phipps sent a miner to inspect the area where Mullins had been working. The miner reported back to Phipps that he did not detect any elevated levels of carbon monoxide in the area.
- On the night of the event, shortly after arriving at the mine, Inspector Naas reviewed the records of the monitoring system and of a gas spotter. The inspector reviewed these records before proceeding underground. He did not find any evidence of elevated carbon monoxide for the time and area at issue.
- During his underground inspection that immediately followed, the inspector used a gas spotter to measure the levels of carbon monoxide in the area at issue. He did not detect any elevated levels of carbon monoxide.
- In the early morning hours of February 25, Inspector Naas started the air compressor, the only machine that was even a possible source of carbon monoxide, to check it while it was running. There was no evidence of carbon monoxide emissions during the inspector's test, or any other evidence indicating that the compressor may have exposed miners to elevated levels of carbon monoxide.
- Mullins carried a gas spotter to measure the levels of carbon monoxide during his work on February 24. Although his gas spotter was not found following the accident, our dissenting colleague fails to observe that Mullins *did inform* the inspector that he *did not detect* any elevated levels of carbon monoxide with his spotter.
- The state enforcement agency took bottle samples of the air in the mine area where Mullins worked. The results were well within permissible limits for carbon monoxide.
- No witness identified any other possible source of carbon monoxide.
- During the hearing, Dr. Michael Mullins,[14] an expert toxicologist, testified as to his review of Mitchell Mullins' medical records while he was hospitalized from

[14] Dr. Michael Mullins is unrelated to Mitchell Mullins, the miner at issue.

February 24 through February 27, particularly regarding the levels of carbon monoxide in the miner's blood following his evacuation from the mine.

- Mitchell Mullins' initial carboxyhemoglobin concentration, measured at around 4:24 p.m. on February 24, was 4.8%. The next morning, at around 6:18 a.m. on February 25, it had decreased to 3.4%. However, the following morning, at around 5:45 a.m. on February 26, it had increased to 4.2%.
- Dr. Michael Mullins' testimony was that symptoms of carbon monoxide poisoning occur when the carboxyhemoglobin concentration is above 15%.
- Mitchell Mullins' initial carboxyhemoglobin measurement at the hospital was only 4.8% – a level too low to cause symptoms.
- Dr. Michael Mullins also testified that the increased carboxyhemoglobin concentration during the hospital stay suggested that the level of carbon monoxide in Mitchell Mullins' blood was caused by a condition unrelated to the mine, such as a smoking habit.

Dr. Mullins' testimony and interpretation of the carboxyhemoglobin data was not rebutted by any other witness. Consequently, not only was there *no corroboration* whatsoever of the hearsay statement attributed to Dr. Bosley, upon which the Secretary premises an "accident" occurred, but indeed, there is mountainous unrebutted evidence to the contrary. The Judge's finding that there was an inundation of carbon monoxide sickening Mullins is not merely unsupported by substantial evidence. It is rebutted by virtually all the evidence in the case.

In light of this mountainous evidence, our dissenting colleague refrains from making a finding that substantial evidence supports a view that Mullins suffered carbon monoxide poisoning in the mine. That would be clearly erroneous, given the established facts. Instead, a different equally erroneous suggestion is offered—that, whatever the cause, Mullins felt sick, and so an "accident" has occurred. It is our duty to follow the law—it is not our job to expand the law beyond the intent of Congress and common sense.

Moreover, our colleague's dissent contains a number of errors, and statements counter to his position. First, our colleague states that Mullins was working near a compressor and that *"[n]o other* potential cause of the injuries was identified during the investigation" Slip op. at 28 (emphasis added). We agree. Testing by MSHA and the State agency demonstrated that the compressor was not emitting any consequential, much less sickening, levels of carbon monoxide. Consequently, those tests eliminate the compressor as a potential source of injury. It follows, therefore, that there was *no* potential cause of carbon monoxide poisoning to Mullins in the mine.

Our colleague states that "M-Class failed to produce Mullins' gas spotter to investigators." *Id.* Use of the word "failed" leaves an implication that M-Class may have been less than forthcoming. There is no support for such an implication in the record and the Administrative Law Judge did not draw such implication. Again, the Judge found that "Mullins acknowledged that his spotter did not go off while he was working." 41 FMSHRC at 5. Nor

did any other miner's spotter alert at any time. *Id.* There is no basis for drawing an adverse inference here, because there is no close evidentiary question at issue. There is no evidence at all, from any source, supporting excessive carbon monoxide at any relevant time. Mullins was transported rapidly from the mine during what was perceived as a medical emergency. A reasonable conclusion from the evidence suggests that Mullins' spotter may have been lost in transit, which is probably why the Judge found the absence of the spotter to be unremarkable.

In a footnote, our colleague states that our opinion may lead to an absurd finding that an "accident" may not arise from an injury or death due to an "unknown origin." Slip op. at 29 n.6. Again, he mischaracterizes our holding and misses the point. The gravamen of an "accident" is that it must arise from a condition, practice or occurrence in the mine. That is the qualification for determination of an accident attributed to any death or injury.

2. A Valid Section 103(k) Order Requires the Occurrence of an Accident

The Judge found the inspector had a reasonable basis to believe an accident occurred when he issued the section 103(k) order. This leads us to our second question. Is a section 103(k) order valid when an inspector issues the order with a good faith belief that an accident occurred when, in actuality, an accident did not occur?

The Commission follows the cardinal rule of statutory interpretation and application. We apply the statute as written, looking first to the ordinary meaning of the words and remaining faithful to the plain words of the statute. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011); *see also Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 253 (2004) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose")(quoting *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985)); *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)("When terms used in a statute are undefined, we give them their ordinary meaning")(citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994)). If the words are clear, we may not make any further inquiry. *Schindler Elevator Corp.*, 563 U.S. at 412 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997)). Section 103(k) could not be clearer. It states in relevant part that,

> 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 . . . .

30 U.S.C. § 813(k)(emphasis added).

The Mine Act authorizes issuances of orders under section 103(k) "in the event of an accident . . . ." It does not say "if the inspector thinks there is an accident," or "if there might have been an accident." It says plainly and without room for doubt that a section 103(k) order may be issued in the event of an *occurrence* of an "accident." Few legal principles match the clarity of our obligation to apply the words of the Mine Act as they appear in the statute and the Mine Act clearly and unequivocally authorizes a section 103(k) order "in the event of an accident." Turning again to *Pattison*, the Eighth Circuit found, "Because the Act only provides

for issuance of a § 103(k) order '[i]n the event of an[ ] accident,' 30 U.S.C. § 813(k), the Secretary lacked authority to issue the order if the roof fall was not an accident." *Pattison*, 688 F.3d at 513. This holding accords completely with the command that we apply the Mine Act as written and are holding today. We find no basis to suggest that MSHA may issue a valid order when it clearly lacked the authority to do so.

In a footnote, our colleague suggests that our opinion would "narrow the broad discretion Congress intended to provide MSHA to investigate injuries in mines and protect the life and safety of miners." Slip op. at 29 n.6. That is not our holding. When an inspector arriving at a mine has sufficient information to form a good faith belief that an accident has occurred, he may issue an appropriate section 103(k) order. Neither the inspector nor MSHA will suffer any adverse repercussions from an inspector's exercise of a reasonable, good faith judgment, albeit erroneous, in the interest of miner safety.

However, such actions do not sustain an order or a citation when the statutory requirements for issuance of an order or citation do not exist. For example, inspectors issue citations based upon a belief that a violation has occurred. Sometimes the inspector is wrong. No violation has occurred. It would be nonsensical to argue that an erroneous citation must be affirmed because the inspector reasonably thought he was right at the time even though the evidence shows no violation occurred. There would be little purpose to providing a right to contest the government's action. Government edicts issued outside the bounds of statutory authority must be vacated.[15]

Moreover, history tells us that there is no chilling effect to the vacation of erroneously issued citations—inspectors continue to issue them. Likewise, there is no chilling effect from the vacation of an erroneously issued section 103(k) order.

Thus, when an initial belief turns out to be incorrect and an accident did not occur, it behooves MSHA to vacate the order rapidly to permit resumption of operations. When MSHA fails to do so, the operator has a right to contest the validity of the order. Further, when the interruption is significant, an operator should be able to rely upon the availability of an expedited hearing to obtain a speedy adjudication of its right to continue mining.[16]

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[15] Our colleague seems to believe that a 103(k) order must be upheld in the absence of an accident, or that substantial evidence supports a finding of an "accident" in this case. Neither premise is valid, and our reference to citations for violations is intended simply to illustrate the fallacy of his suggestion that a challenged government action may be sustained as "valid" in the absence of a necessary element or substantial evidentiary support.

[16] Commission rules provide for the filing of motions to expedite. 29 C.F.R. § 2700.52. The availability of a motion for expedited hearing provides the route for expedited consideration of orders that may cause significant damage to the operator during their duration. If MSHA insists upon claiming an accident occurred when, as here, substantial evidence does not support such an event, the Commission provides the only source of redress for the operator.

When it turns out the inspector was wrong and an accident did not occur, we cannot affirm an invalid section 103(k) order because the inspector's belief was a good faith mistake. Contrary to Commissioner Jordan's comment, Slip op. at 21, evidentiary questions, such as those raised and unresolved in this case, *are relevant* in subsequent section 103(k) proceedings. In this case, not only is there not substantial evidence of an accident but the evidence compellingly demonstrates the *absence* of an accident. That being the case, there was no "event of an accident" upon which to base a section 103(k) order, and the issued section 103(k) order must be vacated.[17]

C. We Need Not Consider the Second Modification to the Order

On February 25, Inspector Naas modified the section 103(k) order, releasing the area at issue for normal operations. However, on February 26, Inspector Naas made a second modification to the order, removing the air compressor from service. On March 15, the operator requested an expedited hearing on the section 103(k) order, a request the Judge denied on March 30. Throughout this period, MSHA continued to hold the compressor. A few days later, on April 4, MSHA decided to terminate the order. Therefore, the second modification, which removed a compressor from service, remained in effect from February 26 to April 4. There is no evidence in the record regarding whether MHSA did any testing of the compressor after it took control of it, let alone evidence of findings of such testing.[18]

The operator claims that the Judge erred in finding that the second modification to the order was reasonably tailored to the circumstances at issue. In addition, the operator contends that, by denying its request for an expedited hearing, the Judge failed to provide a remedy for MSHA's failure to release the compressor.

The second modification was limited to the removal of a specific piece of equipment, and was subsequently modified permitting the equipment's return to service without restriction prior to the adjudication of the section 103(k) order. Hence, the operator's arguments regarding the modification are subsumed in the general issue of whether the section 103(k) order is valid. For

[17] M-Class obeyed the order throughout its duration. Therefore, we need not consider application of penalties for disobeying a section 103(k) order while it is in force if the order is later vacated. Case law provides a strong caution to any operator contemplating such ill-advised action. *DQ Fire & Explosion Consultants, Inc.,* 36 FMSHRC 3090 (Dec. 2014) (finding that a citation issued for an operator's non-compliance with a section 103(k) order should be designated high negligence) *aff'd by* 632 Fed.Appx. 622 (D.C. Cir. 2015) (upholding our determination of high negligence). In *Wyoming Fuel,* 14 FMSHRC at 1293, we also found that an invalid imminent danger order did not excuse non-compliance/ disobedience with that order ("we find no indication in the Mine Act . . . that the validity of an imminent danger order is a prerequisite to finding failure to comply with that order").

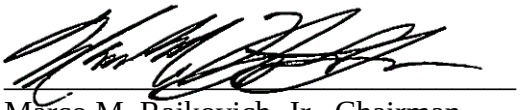
[18] Of course, a section 103(k) order may not be used improperly to allow MSHA to pursue matters beyond the regular administration of the Mine Act as applied to a specific operator. Misuse of a section 103(k) order would be a serious abuse.

those reasons, and since we have vacated the specific order, we need not address arguments related to the second modification and decline to do so.

IV.

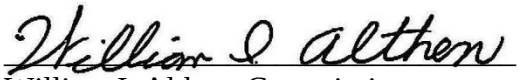
Conclusion

For the foregoing reasons, the Judge's decision finding an accident is reversed, and Order No. 9104295 is vacated.



Marco M. Rajkovich, Jr., Chairman

Michael G. Young, Commissioner



William I. Althen, Commissioner

Commissioner Jordan, dissenting:

The section 103(k) order at issue here has been terminated.[1] Nothing the Commission can say or do will have any concrete effect on the operator or its use of the air compressor. Accordingly, this case is moot, and thus the Commission is without jurisdiction to decide it.

A. <u>This Case is Moot</u>

A case is moot when "the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome." *North American Drillers, LLC*, 34 FMSHRC 352, 358 (Feb. 2012), citing *Climax Molybdenum Co.*, 703 F.2d 4476, 451-52 (10th Cir. 1983). Here, because the initial section 103(k) order was terminated and the air compressor was subsequently released back into service with no restrictions on its use, the order does not affect any activities at the mine. In fact, the mine has the right to continue to operate as if the section 103(k) order never existed. The operator's financial interests are not at stake because no penalty was issued. There is simply no justiciable controversy at issue, as the operator has no tangible interest in the outcome. Despite the contentions of my colleagues, even if the Commission were to vacate the order, this would have no practical impact on M-Class.

Nevertheless, the majority claims that the operator has a "legally cognizable interest" in having the terminated 103(k) order vacated. Slip op. at 6-7. But they fail to identify any but the most speculative of legal consequences.

My colleagues acknowledge that the section 103(k) order does not allege a violation of any health or safety standard. Slip op. at 6. Furthermore, the Secretary does not factor the issuance of a section 103(k) order into any of the progressive enforcement mechanisms under the Mine Act, e.g. penalty proposals pursuant to section 110, 30 U.S.C. § 820, or pattern of violations under section 104(e), 30 U.S.C. § 814(e). In addition, because neither this type of order nor an accident that triggers it constitutes a violation, the issuance of such an order is not considered in a mine's history of violations for purposes of MSHA's future proposed penalty assessments.

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

> 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).

Nonetheless, the majority makes the vague assertion that "[t]he mere listing of an 'accident," in the form of a section 103(k) order, in the compliance history of a mine, is a clear implication to the public that *something* occurred at that mine that affected the health and safety of miners." Slip op at 6. My colleagues appear to be suggesting that the Commission should use its resources to decide this case so that M-Class will have the opportunity to vindicate its reputation. However, they fail to persuasively explain what economic, psychic or other harm will befall an operator whose record indicates that it was subject to a section 103(k) order.[2]

Members of the mining community are well aware that, while perhaps not welcome, such orders are not uncommon.[3] They are not a *per se* black mark against an operator's reputation. Even if they were, the majority points to no legal precedent supporting the view that reputational harm is a cognizable interest under the Mine Act. As the D.C. Circuit has cautioned, "[a]t some point . . . claims of reputational injury can be too vague and unsubstantiated to preserve a case from mootness." *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 57 (D.C. Cir. 2001). This is an apt description of the majority's assertions here.

Also speculative is the majority's supposition that MSHA might modify the terminated section 103(k) order to allege a violation of a health or safety standard, which would then adversely affect the operator's repeat violation history. Slip op. at 7. Why MSHA would do so more than two years after this incident occurred is mystifying. Whether MSHA would have the legal authority to do so is unclear. My colleagues cite to no precedent in which, after a hearing and an appeal to the Commission, MSHA has attempted to modify a section 103(k) order to charge a violation.[4]

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[2] As a threshold matter, they also fail to substantiate their implicit premise that members of the public would either be motivated to research M-Class's safety record, or would be scrolling through the Mine Safety and Health Administration's extensive Data Retrieval System (where this information is displayed), and would thereupon determine that M-Class had been subject to a section 103(k) order.

[3] According to the MSHA Mine Data Retrieval System, M-Class received 14 section 103(k) orders in 2018 and 10 in 2019. That system also reveals that approximately 40 accidents occurred at the mine in 2018, but the events of February 24 that led to the section 103(k) order at issue here are not included among them.

[4] The cases they rely on, slip op. at 7, do not even mention the modification of such orders. Rather, in *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1288-89 (Aug. 1992), the Commission held that modification of a citation to a different safety standard was not precluded. In *Ten-A Coal Co.*, 14 FMSHRC 1296, 1298 (Aug. 1992), we permitted a modification of a citation to a section 104(d) withdrawal order 24 hours after the termination of the original citation. Finally, we recognized the Secretary's right to modify a section 107(d) imminent danger order to allege a violation in *Westmoreland Coal Co.*, 8 FMSHRC 1317, 1328 (Sept. 1986) because the Mine Act explicitly states that the issuance of an imminent danger order shall not preclude the issuance of a citation under section 104. 30 U.S.C. § 817(a).

They also fail to take into account that a mine inspector has no choice but to issue a citation whenever the inspector observes a violation of a mandatory safety standard. 30 U.S.C. § 814(a) ("If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine . . . has violated this Act, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this Act, he *shall*, with reasonable promptness, issue a citation to the operator.") (emphasis added). Thus the Secretary *must* issue a citation upon discovery of any violation of a mandatory standard. Thus, operators are cited whenever an inspector finds a violative condition, whether or not a section 103(k) order is in place. Hence, the majority's concern regarding a possible modification of the section 103(k) order to a citation is completely unfounded.

B. The "Capable of Repetition yet Evading Review" Exception to the Mootness Doctrine Does Not Apply in this Case

My colleagues also rely on a frequently-used exception to claims of mootness, concluding that this issue is capable of repetition yet evading review. Slip op. at 7-8. However, a careful examination of the purpose of this exception and the case-law interpreting it demonstrates that it does not apply to this case.

The courts have sensibly carved out this exception in cases where a dispute between the parties is resolved before a ruling can be handed down, and when there is a substantial likelihood that the question will recur. *North American Drillers*, 34 FMSHRC at 358. There is a sound rationale for this doctrine: if a party can establish that the duration of a challenged action is too short to be litigated before it expires and there is a reasonable expectation that the party will be subjected to the same action again, a legal ruling relevant to that future action is a justifiable use of a court's resources. This is so because the ruling will be relevant in subsequent proceedings where the same issue appears. Here though, it is unlikely that the majority's opinion, which is based almost entirely on its analysis of the singular circumstances presented in this proceeding, will be the basis of a ruling in a future case.

Although the majority attempts to characterize this controversy as a legal one, *infra* at 6-7, its ruling is clearly based on my colleagues' view of the evidentiary record. *See S*lip op. at 12-15. The fact-based controversy before us involves specific inquiries such as (1) whether the miner in fact had carbon monoxide poisoning; (2) if he did, was it caused by something in the mine; (3) could the air compressor have caused his illness? Resolution of these questions will in all probability be irrelevant in subsequent section 103(k) proceedings.[5]

[5] Nonetheless, the majority relies on the concept that a case is not moot when an "agency terminates an enforcement action when challenged, but retains the ability to file subsequent actions because its enforcement action has not been adjudicated as improper." Slip op. at 8. But the only enforcement action the majority adjudicates as "improper" in this case is the Secretary's decision to issue an order under section 103(k) when a miner was hospitalized for carbon monoxide poisoning. I daresay that the chances of this unique situation being repeated in subsequent cases are slim, and even if this fact pattern occurs again, the specific circumstances might lead to a different legal result.

In this regard, this case is similar to *North American Drillers*, 34 FMSHRC at 352. In *North American Drillers*, the operator was charged with violating its shaft plan because it used non-permissible equipment. The Secretary subsequently vacated the citation and the Judge dismissed the proceedings as moot. North American argued that this was erroneous because it faced recurrent harm, given that the Secretary allegedly declared that he would continue to enforce the permissibility regulation against the operator in the future under identical circumstances. The Commission disagreed, stating:

> Shaft plans are mine-specific and are thus designed to address the unique conditions of a particular mine. . . . Therefore, whether North American is cited in the future for use of a non-permissible pump below the shaft collar will have to be considered in the context of the specific language of the plan in question. . . . Thus there is not a substantial likelihood that the question before us will reoccur, causing North American additional harm. Hence, resolution of whether North American violated the shaft plan . . . is not determinative of whether North American will violate some other plan for failure to use permissible equipment.

Id. at 359. *See also Spivey v. Barry*, 665 F.2d 1222, 1234-35 (D.C. Cir. 1981) (concluding that case was moot because "[a] legal controversy so sharply focused on a unique factual context does not present 'a reasonable expectation that the same complaining party would be subjected to the same actions again").

Clearly the series of events here that led to the initial section 103(k) order and the subsequent removal of the air compressor were "idiosyncratic and highly unlikely to recur." *See Marek v. Rhode Island*, 702 F.3d 650, 654 (1st Cir. 2012) (concluding that the exception did not apply in a case in which an opponent of a planned development appealed the issuance of a permit but the permit expired and the development proposal was abandoned); *see also Hamilton v. Bromley*, 862 F.3d 329, 336 (3rd Cir. 2017) (ruling that the case was moot because the '"conduct complained of was . . . necessarily predicated on the *unique* features of [a] particular series of [events]' and '[n]othing on this record apprises us of the likelihood of a similar chain of events.'" (citation omitted)); *Fund for Animals, Inc. v. U.S. Bureau of Land Management*, 460 F.3d 13, 23 (D.C. Cir. 2006) (case could not be saved from mootness because it was "highly dependent upon a series of facts unlikely to be duplicated in the future"); *PETA v. Gittens*, 396 F.3d 416, 424 (D.C. Cir. 2005) (finding a First Amendment challenge moot because "[t]o conclude that a dispute like this would arise in the future requires us to imagine a sequence of coincidences too long to credit. . . . The essential point is that the case before us is highly dependent upon a series of facts unlikely to be duplicated in the future"). Thus a Commission decision as to whether MSHA erred in closing a portion of this mine for a finite period of time will in all likelihood not inform future controversies regarding section 103(k) orders. *See Public Utilities Comm. of the State of Cal. v. FERC*, 100 F.3d 1451, 1460 (9th Cir. 1996) ("When resolution of a controversy depends on facts that are unique or unlikely to be repeated, the action is not capable of repetition and hence is moot").

Perhaps mindful of the one-of-a-kind fact pattern underlying this case, my colleagues repeatedly invoke the potential reoccurrence of a "general legal wrong," Slip op. at 8, as a rationale for going forward with this matter. They characterize such wrong as "the harmful impact of section 103(k) orders on the operator's ability to use equipment at a mine," and cite to the removal of the air compressor as justifying the adjudication of this matter. Slip op. at 8. Ironically, although they rely on its removal as a reason to go forward with this case, Slip op. at 8, they ultimately conclude that they need not address this issue. Slip op. at 17.

As the D.C. Circuit has cautioned, when defining "the injury that is capable of repetition":

> [t]he opportunities for manipulation are great. The more broadly we define the wrongful conduct, the more numerous are the possible examples, and the greater the likelihood of repetition. . . .[W]here plaintiffs are resisting a mootness claim we think they must be estopped to assert a broader notion of their injury than the one on which they originally sought relief. Cf. *Tallahassee Memorial Regional Med. Ctr. v. Bowen*, 815 F.2d 1435, 1449-50 & n. 28 (11th Cir. 1987) (looking to complaint to determine scope of plaintiff's alleged injury).

Clarke v. U.S., 915 F.2d 699, 703 (D.C. Cir. 1990) (en banc).

My colleagues' reliance on *Performance Coal Co.*, 642 F.3d 234 (D.C. Cir. 2011) is also unavailing. That case, which the Court held was not moot, involved the Secretary's modification of a section 103(k) order. The operator sought temporary relief from the restrictions pursuant to section 105(b)(2) of the Mine Act. 30 U.S.C. § 815(b)(2). Before the Court could rule, the Secretary removed the offending protocols. The issue before the Court was one of classic statutory interpretation: does section 105(b) of the Mine Act permit an operator to seek temporary relief from a section 103(k) order? Resolution of this question clearly had ramifications for future cases in which temporary relief is requested under similar circumstances.

Unlike the instant case, in *Performance Coal*, the legitimacy of the section 103(k) order was not at issue. In ruling on the mootness question, the Court made this clear, stating that "[t]he question then is not whether Performance Coal will again be subjected to the precise protocols at issue, but whether it will be subjected to further modifications from which it will seek temporary relief." *Id*. at 237.

In analyzing the "capable of repetition yet evading review" exception, the First Circuit has noted:

> the exception is not a juju, capable of dispelling mootness by mere invocation. Rather, the exception applies only if there is "a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 1184,

71 L.Ed.2d 353 (1982) (quoting *Weinstein v. Bradford,* 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975)).

Oakville Dev. Corp. v. F.D.I.C., 986 F.2d 611, 614–15 (1st Cir. 1993). Because this test has not been met here, this exception to the mootness doctrine does not apply.

In sum, because the adjudication of this case will provide no tangible legal benefit to the operator, and because it does not meet the standard for the exception to the mootness doctrine, I conclude that the matter is moot. Consequently, the Commission has no jurisdiction to hear this case. Accordingly, I respectfully dissent.

Mary Lu Jordan, Commissioner

Commissioner Traynor concurring in part and dissenting in part:

I join my colleague Commissioner Jordan to conclude M-Class's contest of the section 103(k) "control order" is moot. However, I join the majority's decision to review the order under an exception to the mootness doctrine. But the majority's misapplication of the incorrect standard of review leaves me no choice but to strongly dissent from their judgment. My colleagues ignore that our review of the issuance or modification of a section 103(k) order looks to whether the agency's discretionary decision was reasonable based on the facts known to the inspector at the time the decision was made. We do not engage in a retrospective second-guessing of the issuance of a section 103(k) order using information the decision-maker only knew or could have known after the decision was made. I also dissent from the majority's attempt to limit the issuance of section 103(k) orders to "accidents" where the Secretary is able to prove the specific cause of the injury by a preponderance of the evidence.

On February 24, 2018, MSHA Inspector Brandon Naas arrived at the M-Class No. 1 underground mine to conduct an investigation into the injuries that hospitalized miner Mitchell Mullins. Naas issued an order pursuant to section 103(k) of the Mine Act to suspend operations at the Headgate #6 section.[1] Naas started his investigation by reviewing pertinent records, including those of the mine's carbon monoxide monitoring system. Naas was not able to locate the injured miner's gas spotter, which would have indicated if he had been personally exposed to elevated levels of carbon monoxide. The inspector proceeded underground and took carbon monoxide measurements around Headgate #6. Naas did not find any evidence of elevated levels of carbon monoxide or any other dangerous conditions and, accordingly, modified the 103(k) order to permit M-Class to resume normal mining operations in the area.

On February 26, Naas returned and interviewed other miners who had worked with Mullins on February 24. He learned that Mullins had been operating and working around the diesel air compressor prior to falling ill and this was the only piece of equipment in use to which Mullins was not regularly exposed. Naas modified the section 103(k) order to prohibit further use of the compressor pending an investigation into whether it was defective. On March 1, M-Class submitted a proposed action plan to prevent exposure to carbon monoxide. MSHA determined that the proposal was insufficient. On March 15, M-Class contested the order with the Commission. On April 4, MSHA terminated the order.

A. M-Class's Contest of the Order is Moot, but Review is Appropriate under an Exception to the Mootness Doctrine.

I join Part A of Commissioner Jordan's dissenting opinion, finding the operator's case is entirely moot. Slip op. at 19-21.

However, I join my colleagues in the majority taking review of the decision below under the 'capable of repetition but evading review' exception to the mootness doctrine. The exception

[1] Section 103(k) of the Mine Act provides in pertinent part that "[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 . . . ." 30 U.S.C. § 813(k) (emphasis added).

applies when "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subjected to the same action again." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). When examining whether the action at issue is likely to repeat, "it is not whether the precise historical facts that spawned the plaintiff's claims are likely to recur, but instead whether the legal wrong complained of by the plaintiff is reasonably likely to recur." *Performance Coal Co. v. FMSHRC*, 642 F.3d 234, 237 (D.C. Cir. 2011) (quoting *DelMonte Fresh Produce v. United States*, 570 F.3d 316, 324 (D.C. Cir. 2009)).

I find that a condition imposed during the pendency of the order – the restriction against using certain equipment – is a putative harm capable of repetition, but otherwise evading review because the pendency of a 103(k) order is often too short to be fully litigated. Slip op. at 7-9. Therefore, I agree it is appropriate here to take review of the otherwise moot question of whether the challenged decisions to issue and modify the now terminated 103(k) order were an abuse of discretion.

B. The MSHA Inspector Did Not Abuse his Discretion in Issuing and Modifying the section 103(k) order.

Section 103(k) provides an MSHA inspector the authority to "assume control of the mine in the event of an accident." *Jim Walter Res., Inc*., 37 FMSHRC 1868, 1868 n.1 (Sep. 2015); *see e.g., DQ Fire & Explosion Consultants, Inc*., 36 FMSHRC 3090, 3091 (Dec. 2014) (section 103(k) order issued following an explosion that killed 29 miners at a coal mine). It provides the inspector the "plenary power to make post-accident orders for the protection and safety of all persons." *Miller Mining Co., v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983).

The Commission reviews the issuance of a section 103(k) order, the scope of the order and any subsequent modification for an abuse of discretion.[2] *See Jim Walters*, 37 FMSHRC at 1871; *see also Pattison Sand Co. v FMSHRC*, 688 F.3d 507, 513 (8th Cir. 2012). "Given the broad discretion afforded the Secretary, her issuance of a 103(k) order, or subsequent modification, is reviewable for an abuse of discretion." *Clintwood Elkhorn Mining Co.*, 32 FMSHRC 1880, 1893-94 (Dec. 2010). Under the abuse of discretion standard, the Judge considers whether "the agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its actions including a rational connection between the facts found and the choice made." *Id.* at 1893-94.

Consistent with the purpose and nature of abuse of discretion review, a reviewing court looks to whether the challenged decision bears a rational connection to the facts and information available to the decision-maker at the time the relevant discretionary decision was made. *See PBGC v. LTV Corp*., 496 U.S. 633, 654 (1990) (under an abuse of discretion standard the court

[2] A mine operator that contests issuance or modification of a section 103(k) order may move for expedited consideration of its contest pursuant to Commission Procedural Rule 52, 20 C.F.R. § 2700.52. The grant or denial of a motion for expedited review is within the discretion of the Judge, but exercise of the discretion should take into consideration the parties' positions as to the likelihood expedited review would prevent substantial harm.

evaluates "the agency's rationale at the time of decision."). "When examining whether an agency decision "was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. § 706(2) (A) . . . the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see, e.g. Golden Oak Mining*, 12 FMSHRC 1360, 1365 (June 1990) (ALJ) ("In determining whether [a District Manager] abused his discretion, I have to look to the facts and circumstances which were made known to him at the time. Subsequent developments or changes in the mine situation cannot be used to show an abuse of discretion.")

Thus, Commission Judges review a decision to issue, modify, continue or terminate a section 103(k) order by looking to whether the decision was rationally connected to the facts before the decision-maker, and *not* whether such facts were supported by substantial evidence.[3] The Commission in turn gives *de novo* review to our Judges' determinations as to whether agency action is arbitrary and capricious, and we review our Judges' findings of fact for substantial evidence. *Pattison Sand*, 688 F.3d at 514 (holding that a judge's findings of fact - *not* the factual predicates for the inspector's discretionary decision-making - are subject to substantial evidence review).

Here, the MSHA inspector's decision to issue the section 103(k) order was rationally based on the information available to him. He determined that a miner was working in the mine, experienced a headache, dizziness, chest pains, a rapid heart rate, and difficulty breathing. The miner – Mitchell Mullins - was administered oxygen and evacuated by ambulance to the local hospital where the treating physician diagnosed him with carbon monoxide poisoning.[4] Mullins had been working in close proximity to a diesel motor exhausting carbon monoxide. On the basis of this information, the inspector reasonably concluded there had been an "injury to . . . [a] person" at the mine and thus an "accident" according to section 3(k). Accordingly, I would affirm the Judge's conclusion that the inspector did not abuse his discretion in issuing the order.

Furthermore, I would affirm the Judge's conclusion that the inspector did not abuse his discretion in modifying the order based upon his belief that a miner suffered carbon monoxide poisoning. *See Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983) (requiring modifications of section 103(k) orders to be "reasonably tailored to the situation."). First, Inspector Naas quickly modified the order to allow the return of normal mining after concluding that there was no present danger to miners in the Headgate #6 section. Naas later modified the order to prevent the return of the air compressor to service pending further investigation for a

[3] The "substantial evidence" test can be applied to set aside agency action only in "certain narrow, specifically limited situations." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) (overruled on other grounds, *Califano v. Sanders*, 430 U.S. 99, 105 (1977)). "Review under the substantial-evidence test is authorized only when the agency action is taken pursuant to a rulemaking provision of the Administrative Procedure Act itself, or when the agency action is based on a public adjudicatory hearing." *Citizens to Preserve Overton Park*, 401 U.S. at 414.

[4] Mullins went on to spend 72 hours in the hospital on 100% oxygen.

defect. Mullins had operated the compressor immediately before his hospitalization. No other potential cause of the injuries was identified during the investigation. M-Class failed to produce Mullins' gas spotter to investigators. I conclude that substantial evidence supports a finding that the modification to the order was rationally connected to the facts then available to MSHA and the temporary removal of the diesel air compressor was reasonably tailored to the situation. The record evidence fully supports a finding that the inspector did not abuse his discretion.

C. The Majority Errs in their Interpretation of the term "Accident."

Section 103(k) provides the Secretary the authority to issue a control order "in the event of an accident." According to the statutory text at section 3(k) of the Act, an "'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) (emphasis added).[5] In *Pattison Sand,* 688 F.3d at 512-13, the Court held that the term "accident" should be interpreted expansively and section 3(k)'s use of the term "includes" indicates that the enumerated list of types of accidents was not intended to be exclusive. The Eighth Circuit held that it was appropriate to defer to the Secretary's reasonable interpretation of an "accident" and affirmed the Judge's finding that a roof fall was an accident. *Id*. at 513-14 (citing *Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003)).

My colleagues ignore the Eight Circuit's analysis in their majority opinion, including our own precedents the Court relied upon to conclude that section 3(k) should be construed expansively and in deference to the Secretary's reasonable interpretation. Moreover, my colleagues ignore that the plain language of section 3(k) provides that an "accident" includes an "injury to . . . any person." Misconstruing section 3(k), the majority fabricates a requirement that for an "injury to . . . any person" to constitute an "accident" the Secretary must also provide proof as to how the injury occurred. Slip op. at 9 ("the predicate for an accident must be an incident or occurrence, or condition in a mine"). Because this interpretation is inconsistent with the plain language of the Mine Act and produces absurd results, it is unlikely to be easily applied in future enforcement proceedings.[6]

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[5] We have held that an accident is "a necessary precondition to the issuance of a section 103(k) order." *Aluminum Co. of America*, 15 FMSHRC 1821, 1824 (Sep. 1993) ("*Alcoa*"). Thus, an MSHA agent may only issue a section 103(k) order where the decision to do so is rationally connected to facts available to him or her indicating an "accident" under section 3(k) has occurred. My colleagues claim that *Alcoa* also establishes that an "accident" must have a predicate "incident, occurrence or condition in a mine." Slip op. at 9. It does not. *Alcoa* involved a section 103(k) order issued after an MSHA inspector observed evidence of mercury contamination at a plant. The record contained no evidence of any resulting "injury" to any miner. Accordingly, the Judge found that the Secretary failed to demonstrate the occurrence of an "accident." The Commission affirmed the Judge, stating that "[o]ur conclusion in this case is based solely on the record developed before the judge" and that it did "not disagree with the Secretary's broad interpretation of section 103(k) of the Act." 15 FMSHRC at 1828.

[6] The majority's interpretation is not only inconsistent with the plain text of the statute and our precedents, it would lead to absurd results; an injury or death that resulted from an

I would affirm the Judge's finding of fact that an accident occurred. Substantial evidence supports a finding that Mullins suffered an injury, subsequently diagnosed by a doctor as carbon monoxide poisoning. Though reasonable minds may differ as to whether the balance of medical and other evidence developed at hearing supports a conclusion that Mullins suffered an injury, the Judge's conclusion is supported by substantial evidence. And I have no hesitation deferring to an interpretation of the term "injury" in section 103(k) as covering a doctor's diagnosis of carbon monoxide poisoning following the onset of physical symptoms that first manifested in close proximity to a potential source of carbon monoxide and prompted his emergency evacuation.

Nothing in the majority opinion should discourage MSHA inspectors from readily issuing control orders under section 103(k) upon reaching a reasonable conclusion that an accident has occurred when a miner has suffered an injury, even if it manifests only as an illness of indeterminate etiology. Though the majority opines that the inspector did not have a statutory basis for issuing the section 103(k) order, it must be emphasized that the majority agrees that the issuance of the control order in this case was not an abuse of the inspector's discretion. In reality, it was the only reasonable course of action.

Substantial evidence supports the Judge's finding that an "accident" occurred in this case. Were that not so, and the order not already terminated (rendering any further contest moot), the majority is correct that it would at that point need to be vacated. But that is neither the posture nor the factual record before us, and because I find that the control order was validly issued and modified, I would affirm.

Arthur R. Traynor, III, Commissioner

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unknown origin would not qualify as an "accident" and the Secretary would lack the authority under section 103(k) to remove the remaining miners from the potential danger.

In addition, the majority's requirement that the Secretary demonstrate the cause of the injury in order to validly issue a section 103(k) order would narrow the broad discretion Congress intended to provide MSHA to investigate injuries in mines and protect the life and safety of miners. *See* slip op. at 9-10 n.9; S. Rep. No. 95-181, 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) ("The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary . . . be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person.").

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