FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

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SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. LAKE 2011-699-R
	:	LAKE 2011-700-R
v.	:	LAKE 2012-475
BIG RIDGE, INC.	:	

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

DECISION

BY THE COMMISSION:

These proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"), present issues involving the Secretary of Labor's authority to issue orders under Mine Act sections 103(j) and 103(k), 30 U.S.C. § 813(j) and (k), commonly referred to as "control orders."[1] In particular, the case raises the following issues: (1) whether the Secretary's authority to issue an order pursuant to section 103(j) is dependent upon an accident necessitating "rescue and recovery work," (2) what definition of "accident" should apply to sections 103(j) and (k), and (3) whether an order under section 103(k) may only be issued when an authorized representative of the Secretary is "present" at the time of the accident.

An Administrative Law Judge upheld the use of section 103(j) and (k) orders to preserve evidence after an accident and affirmed a citation alleging that Big Ridge, Inc. violated the terms of the orders. 34 FMSHRC 845 (Apr. 2012) (ALJ).

For the reasons that follow, we hold that the plain meaning of section 103(j) precludes the Secretary from issuing a section 103(j) control order unless "rescue and recovery work is necessary" and that the Judge did not find, nor does the record substantiate, that rescue and recovery work occurred. We further hold that the definition of "accident" at section 3(k) of the Mine Act (30 U.S.C. § 802(k)) applies to sections 103(j) and (k). Finally, we affirm the Judge's finding of a violation and uphold the citation in this case because we determine that the subsequent section 103(k) order was validly issued and that Big Ridge violated its terms.

[1] The Commission in *UMWA v. Greenwich Collieries*, 8 FMSHRC 1302, 1303 n.2 (Sept. 1986), described section 103(j) and (k) orders as "control orders" since they are the means by which the Secretary may "assume initial control of a mine in the event of an accident."

I.

Factual and Procedural Background

Big Ridge operates the Willow Lake Portal Mine, an underground coal mine. On May 16, 2011, a continuous miner became stuck at 2:45 a.m. on the third shift. Although the tail of the continuous miner was located underneath supported roof, the body of the continuous miner was beyond the last row of bolts under unsupported roof. In order to extricate the continuous miner, a number of miners were tossing "crib-ties"[2] towards the continuous miner's left side cat track.

At approximately 3:15 a.m., a slab of rock approximately 7 feet long and 2 feet wide and 1 to 8 inches thick fell from the unsupported roof. The rock struck the continuous miner's tail causing it to break apart. A portion of the broken rock struck the unit mechanic, Tom Borders, who was kneeling at the right side of the end of the continuous miner's tail. Two miners removed the rock from Borders and helped him to his feet. His left arm was bleeding, and pressure was applied. He was driven out of the mine by the mine manager, who stopped to retrieve additional bandages to treat Borders' arm. Borders never lost consciousness and was able to converse normally. Borders was taken by ambulance to the Harrisburg Medical Center, where he was treated for the following injuries: a broken left wrist; a laceration to his upper left arm that required 25 stitches; and multiple abrasions to his body, including his head. Borders was never admitted to the hospital.

At 5:10 a.m., an inspector with the Department of Labor's Mine Safety and Health Administration ("MSHA") issued a verbal section 103(j) order over the telephone to Big Ridge that prohibited all activity in the area where the accident occurred, until MSHA determined that it was safe to resume normal operations. Upon the arrival of MSHA inspectors at the mine, the section 103(j) order was modified to a section 103(k) order at 6:28 a.m. Section 103(k) Order No. 8424291-01 provided that:

> The initial order is hereby modified to reflect that MSHA is now proceeding under the authority of Section 103(k) of the Federal Mine Safety and Health Act of 1977. This section 103(k) order is intended to protect the safety of all persons on-site, including those involved in rescue and recovery operations or investigation of the accident. The operator shall obtain prior approval from an Authorized Representative of the Secretary for all actions to recover and/or restore operations in the affected area. Additionally, the operator is reminded of its existing obligations to prevent the destruction of evidence that would aid in investigating the cause or causes of the accident.

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[2] American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 131, 573 (2d ed. 1997) ("*DMMRT*") defines "crib" in relevant part as a "construction of timbering made by piling logs or beams horizontally one above another . . . each layer being at right angles to those above and below it," and "tie" as "a beam, post, rod, or angle to hold two pieces together . . . ."

On May 19, 2011, MSHA issued Citation No. 8428712, which alleged that Big Ridge had violated Order No. 842491-01 by continuing to mine in the area of the roof fall, without the approval of MSHA, and had destroyed any additional evidence in the accident investigation.

Big Ridge contested both the citation and order and moved to dismiss the citation on the ground that the section 103(j) order and its subsequent modification to a section 103(k) order were invalid. The Judge denied its motion and found Order No. 8424291 to be valid. Since the denial was not appealable as a final decision, Big Ridge preserved its argument for appeal, and the parties stipulated that a violation of Order No. 8424291-01 occurred as set forth in Citation No. 8428712, and that the proper negligence designation was "high." The parties waived a hearing, and the Judge's decision was based upon the record, including the pleadings, stipulations of fact, and briefs.

The Judge determined that the Secretary had authority to issue section 103(j) and 103(k) orders in incidents where rescue and recovery work was not necessary. 34 FMSHRC at 851-52. Concluding that the "triggering event for the issuance of a 103(j) order is the occurrence of an 'accident' as that term is defined in Section 3(k) of the Mine Act," 30 U.S.C. § 803(k), the Judge determined that the roof fall and associated miner's injury constituted an accident that authorized the Secretary to issue a section 103(j) order. *Id.* He rejected Big Ridge's contention that rescue and recovery work must be necessary before a section 103(j) order is issued. Instead, the Judge reasoned that the language of section 103(j) grants MSHA "broad authority . . . to impose whatever reasonable measures it deems to be appropriate and necessary." *Id.* at 854. The Judge also observed that, although not necessary to the decision, the stipulated facts arguably fell within the definition of "rescue" in section 103(j). *Id.* at 852.

The Judge further found that the Secretary reasonably exercised his authority in issuing the section 103(k) order. *Id.* at 855. He concluded that the section 103(k) order was properly issued when the inspector arrived at the mine to insure the safety of the miners until an investigation of the causes of the roof fall could be completed. *Id.* Given that Big Ridge stipulated that it violated the terms of the section 103(j) and 103(k) orders as set forth in Citation No. 8248712, the Judge upheld the citation. *Id.* at 856.

II.

Disposition

A. Whether the Mine Act Authorizes the Secretary to Issue a Section 103(j) Order in the Event of an Accident Where Rescue and Recovery Work Is Not Necessary[3]

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to

[3] On this same date, we issue our decision in *Jim Walter Resources, Inc.*, Nos. SE 2011-477-R, et al., which also involves this question.

an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted).

In ascertaining the plain meaning of the statute, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole," to determine whether Congress had an intention on the specific question at issue. *Id.*; *Local Union 1261, UMWA*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron I*" analysis. *See Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994).[4]

Section 103(j) of the Mine Act states as follows:

> In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death had occurred. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate, to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

30 U.S.C. § 813(j).

The initial step under a *Chevron I* analysis is to decide whether Congress directly addressed the question of whether and when the Secretary may issue a section 103(j) control order. The Secretary contends that Congress was silent, in the first sentence of section 103(j), on the issue of what measures are appropriate to preserve evidence and who makes the determination. Thus, the Secretary argues that section 103(j) is ambiguous. Oral Arg. Tr. 41-44. However, we conclude that Congress did directly speak to that issue.

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[4] If the statute is ambiguous or silent on a point in question, a second inquiry, commonly referred to as a "*Chevron II*" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin Coal* Co., 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13.

The first sentence of section 103(j) states that in the event of an accident, "the operator shall notify the Secretary . . . and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof." We discern no ambiguity in this sentence. The sentence applies to operators and does not include a grant of authority to the Secretary. Accordingly, we conclude from the plain statutory language that the first sentence of section 103(j) applies only to the obligations of operators, not to the authority of the Secretary. *See Performance Coal v. FMSHRC*, 642 F.3d 234, 238 (D.C. Cir. 2011) (when statutory language is clear, a party must show that "Congress did not mean what it . . . said . . . or . . . surely could not have meant it."); *see also Thunder Basin Coal Co.*, 18 FMSHRC at 586-87 (rejecting Secretary's argument that Mine Act section 109 implicitly included Commission orders in the posting requirements, reasoning that "Congress [clearly] did not intend such result . . . and the statute must be construed to effectuate that intent.").

The third sentence of section 103(j)[5] provides the Secretary authority to take "whatever action he deems appropriate, to protect the life of any person" but that authority arises upon the occurrence of "any accident . . . where rescue and recovery work is necessary." Thus, the Secretary's authority to issue any section 103(j) control order stems solely from the third sentence of section 103(j) and occurs in the event of an accident where there is "rescue and recovery work."

Based on the foregoing, we reject the Secretary's argument that the issuance of a section 103(j) order is authorized in the absence of rescue and recovery work. In fact, the statutory language unambiguously points to the contrary – that the Secretary's authority is contingent upon an accident involving rescue and recovery work. Accordingly, we vacate the Judge's decision that in the event of an accident alone, the Secretary may issue a control order under section 103(j).[6]

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[5] This had originally been the second sentence of the section until the Mine Improvement and New Emergency Response Act of 2006, Pub. L. No. 109-236, § 5, 120 Stat. 493 ("MINER Act") added the present second sentence. Thus, until 2006, section 103(j) contained two sentences, the first sentence beginning, "In the event of any accident occurring in a coal or other mine," and the second sentence beginning, "In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary . . . ."

[6] Commissioner Cohen joins the majority in this decision with some reluctance. Big Ridge, through its actions and arguments, has identified a divide between the Mine Act's goals and its limitations. We accept Big Ridge's argument that the first sentence in section 103(j) plainly obligates an operator to prevent the destruction of evidence. However, it is apparent that Big Ridge did not take the obligation very seriously. For instance, the Judge concluded that "Respondent not only failed to preserve evidence at the accident site, it continued to mine in the exact area of the roof fall for [] an additional two feet in entry number 10 and removed approximately five feet of the number 10 entry for a distance of approximately eighteen feet squaring the face." 34 FMSHRC at 854-55.

Commissioner Cohen further notes that Big Ridge's disregard for the importance of accident investigations demonstrates precisely why the Secretary requires enhanced authority to

We note that the Judge stated in dicta that the stipulated facts "arguably fall within the definition of 'rescue.'"[7] *Id.* at 852. However, this case was decided on the basis of stipulations, and the parties did not argue the rescue and recovery issue before the Judge. The parties focused their arguments on the first sentence of section 103(j), not on the third. Accordingly, we conclude that the record is not sufficiently complete to determine whether rescue and recovery work took place. Given the lack of substantial evidence on this point, together with the foregoing discussion of the limitation of control orders under section 103(j) to "rescue and recovery work," we decline to uphold the section 103(j) order.[8]

B. Definition of "Accident"

Big Ridge contends that the Judge erred in applying the definition of "accident" in section 3(k) of the Mine Act in finding that an accident had occurred authorizing issuance of 103(k) Order No. 8424291-01.[9] It contends the Judge should have applied the more limited definition of accident found at 30 C.F.R. § 50.2(h).[10] The use of the definition of accident found at 30 C.F.R. § 50.2(h) rather than the definition in section 3(k) of the Mine Act would mean that

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preserve accident scenes, regardless of whether rescue and recovery work is necessary. In the absence of Congressional action, the Secretary currently lacks the tools necessary to immediately order the preservation of evidence at all accident scenes and to ensure that the root causes of those accidents will be identified in furtherance of the general protective purposes of the Mine Act. 30 U.S.C. § 801. Instead, until an authorized representative arrives at the mine, the Secretary must rely on an operator to fulfill its obligation to preserve evidence, well aware that it may have disincentives to do so. This policy problem requires a legislative solution.

[7] The Judge relied on the definition of "rescue" in the 1968 edition of the *DMMRT* at 913, that defines "rescue" as "to move men or dead bodies from a mine after a mine disaster. Sometimes called recover." (The 1997 *DMMRT* at 454 inserts the word "live" before "men."). He explained that "arguably" a rescue occurred because after the roof collapse, fallen rock had to be moved from Borders by two other miners. The mine manager moved the miner by driving him to the surface, and he was again moved by ambulance to the Harrisburg Medical Center for further treatment. 34 FMSHRC at 852.

[8] When reviewing an Administrative Law Judge's factual determinations, the Commission is bound by terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'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 *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[9] Section 3(k) provides that "'accident' includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person." 30 U.S.C. § 802(k).

[10] In relevant part, 30 C.F.R. § 50.2(h) includes within the definition of accident, "(1) A death of an individual at a mine; (2) An injury to an individual at a mine which has a reasonable potential to cause death . . . ."

MSHA could issue a control order under section 103(j) or 103(k) for injury to a miner only if the injury was fatal or had "a reasonable potential to cause death."

The Commission has determined that the definition of "accident" in section 3(k) of the Mine Act applies throughout the Mine Act. *Revelation Energy, LLC*, 35 FMSHRC 3333, 3337 (Nov. 2013) ("section 3(k) . . . sets forth definitions '[f]or the purpose of this chapter."). *See also Aluminum Co. of Am.*, 15 FMSHRC 1821, 1825-27 (Sept. 1993) (applying the section 3(k) definition of "accident" when evaluating a section 103(k) order). The Commission in *Revelation* rejected the operator's argument, like Big Ridge's argument in the instant case, that the Secretary should be limited by the definition of "accident" set forth in the regulations at 30 C.F.R. § 50.2(h). 35 FMSHRC at 3338-39. In *Revelation*, the Commission concluded that a blast that caused the launch of a two-ton rock causing no injuries constituted an accident under section 3(k) for purposes of a section 103(k) order. *Id.* at 3339.

Likewise, we reject Big Ridge's argument that the Secretary's authority is limited by the second sentence in section 103(j). The second sentence refers specifically to the preceding sentence and requires that the operator's notification obligation must be fulfilled within 15 minutes of the death of an individual or an injury or entrapment that has a reasonable potential to cause death. As noted above, it was added by the MINER Act, whose legislative history clarified that the 15-minute notification time was introduced for certain types of accidents involving "death" or the "reasonable potential to cause death."[11] The second sentence of section 103(j) does not in any way modify what constitutes an accident under the Act.

Accordingly, the definition of "accident" in section 3(k) of the Mine Act applies to sections 103(j) and (k). The event injuring miner Borders was an "accident" within the meaning of sections 103(j) and (k).[12]

We affirm the Judge's determination that the section 103(k) order was validly issued and that Big Ridge violated its terms, as set forth in Citation No. 8428712. Accordingly, we affirm that citation.[13]

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[11] The Senate Report stated that the "committee intends the 15 minute requirement to apply only to accidents . . . that involve an injury or entrapment of an individual at the mine which has a reasonable potential to cause death." S. Rep. No. 109-365, at 9 (2006). The 15-minute notification did not change the definition of accident, but set forth a class of accidents that required "MSHA notification within 15 minutes."

[12] Big Ridge also argues that section 103(k) requires that an inspector be physically present at the mine when the accident occurs in order to issue a section 103(k) order. We summarily reject that contention: It is plainly refuted by the wording and purpose of section 103(k).

[13] We note that the parties have agreed to a $3,224 penalty for Citation No. 8428712 as set forth in an Amended Decision Approving Settlement dated October 1, 2013, in Docket No. LAKE 2012-475, which has been consolidated with this appeal.

III.

Conclusion

For the reasons set forth above, we affirm the Judge's decision in result.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

Distribution:

Arthur M. Wolfson, Esq.
Jackson Kelly PLLC
Three Gateway Center, Suite 1500
401 Liberty Avenue
Pittsburgh, PA 15222

R. Henry Moore, Esq.
Jackson Kelly PLLC
Three Gateway Center, Suite 1500
401 Liberty Avenue
Pittsburgh, PA 15222

Melanie Garris
USDOL/MSHA
OAASEI/CPCO
201 12th Street, Suite 401
Arlington, VA 22202

Robin Rosenbluth, Esq.
Office of the Solicitor
Division of Mine Safety and Health
201 12th Street South, Suite 500
Arlington, VA 22202-5450

W. Christian Schumann, Esq.
Office of the Solicitor
Division of Mine Safety and Health
201 12th Street South, Suite 500
Arlington, VA 22202-5450

Administrative Law Judge John Lewis
Federal Mine Safety and Health Review Commission
Office of the Administrative Law Judges
875 Green Tree Road
7 Parkway Center, Suite 290
Pittsburgh, PA 15220