

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

SEP 09 2015

JIM WALTER RESOURCES, INC.

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

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Docket Nos. SE 2011-477-R
SE 2011-478-R

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

DECISION

BY THE COMMISSION:

These contest proceedings, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”), involve 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,” and (2) whether an order under section 103(k) and its subsequent modification were validly issued after an ignition occurred at the mine.

An Administrative Law Judge upheld the Secretary’s use of section 103(j) and (k) orders to withdraw miners and preserve evidence after an accident and dismissed the contests of those orders filed by Jim Walter Resources, Inc. (“JWR”). 34 FMSHRC 31 (Jan. 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.” We affirm the Judge in result because we determine that the section 103(k) order and its modification were validly issued.

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

On March 25, 2011, at approximately 6:00 a.m., Keith Pylar, Safety Supervisor at the Jim Walter Resources No. 7 Mine, called MSHA Field Office Supervisor Jacky Shubert, to report an ignition on the No. 4 section where JWR was “doing some burning and welding.” Shubert orally issued a section 103(j) order, which prohibited JWR from working in the area of the welding ignition.

Shubert then immediately contacted MSHA Inspector Joe Turner at his home and directed him to investigate the incident. When Inspector Turner arrived at the mine, there were no ambulances, rescue vehicles, or fire trucks present. At that point, approximately two hours after the issuance of the (j) order, he modified the (j) order to a section 103(k) order. The (k) order shut down activity in by the feeder on the Number 4 section, the loading point where the coal travels before it hits the conveyor belt. Turner went underground, interviewed miners, and investigated the ignition.

The (k) order was modified at 3:00 p.m., between shifts, so that all miners were required to take an hour-long training course on ignition safety and prevention before they could enter the mine. This training requirement stemmed in part from the mine’s history of approximately 22 or 23 ignitions in the past 14 or 15 months. The No. 7 Mine is the gassiest mine in MSHA District 11, liberating 20 million cubic feet of methane every 24 hours, and is subject to five-day spot inspections.² The training was staggered so that all miners received the training before going underground, and production was not entirely halted.

JWR contested both the (j) and (k) orders, and a hearing was held before an Administrative Law Judge. The Judge affirmed the orders and dismissed JWR’s contest. 34 FMSHRC at 31. The Judge agreed with the Secretary’s interpretation that section 103(j) gives the Secretary the authority to issue orders to preserve evidence because that provision requires an operator to take appropriate measures to prevent the destruction of evidence, including withdrawal of miners from the affected area. *Id.* at 53-54. The Judge rejected JWR’s argument that, under section 103(j), the Secretary possesses the authority to preserve the accident scene only where rescue and recovery work is necessary. *Id.* at 60-61. Instead, he reasoned that the plain meaning of section 103(j) did not resolve the question of the Secretary’s authority and therefore “deference should be afforded to the Secretary’s reasonable interpretation of the provision at issue.” *Id.* at 50. The Judge concluded that “[g]iven that the Congress’ stated intention under the Mine Act was to protect miners’ safety and health, and given the central role that ignitions have played in most mine disasters, it would seem odd that Congress would provide for (j) orders only when that goal effectively has been defeated when the need for rescue and recovery has arisen.” *Id.* at 61.

² Section 103(i) requires the Secretary to provide one spot inspection every five days for mines that liberate “excessive quantities” of methane, which is more than one million cubic feet of methane during a 24-hour period. 30 U.S.C. § 813(i).

Likewise, the Judge found that MSHA had the authority to impose whatever reasonable measures it deems to be appropriate and necessary in the event of an accident under section 103(k) once the inspector arrived at the mine. *Id.* at 54. Additionally, the Judge determined that MSHA's decision to modify the section 103(k) order so as to require a mine-wide ignition training course was a "reasonable decision . . . in view of the high number of ignitions during the past 15 months" at the No. 7 mine. *Id.* at 55-56, 60.

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

The issue of 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 is fully addressed in our decision in *Big Ridge, Inc.*, Nos. LAKE 2011-699-R, et al., which we also issue this date. As we have concluded in *Big Ridge*, the Commission holds that the Secretary has statutory authorization to issue a control order under section 103(j) only in situations where rescue and recovery work is necessary. Because rescue and recovery work was not necessary in this case, the 103(j) order is vacated.³

B. Whether the Section 103(k) Order Was Validly Issued

Section 103(k) of the Mine Act states in relevant part:

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 . . . , 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).

JWR argues that the section 103(k) order was erroneously issued prior to the Secretary's investigation of the facts relating to the accident. However, the terms of section 103(k) do not limit the Secretary in this fashion. Section 103(k) grants the Secretary the authority to issue

³ JWR petitioned to overturn the Judge's credibility determination with respect to MSHA Supervisor Shubert's testimony in support of issuance of the 103(j) order. In light of the ruling set forth above, that issue is now moot. JWR's further argument that issuance of the 103(j) order deprived it of an opportunity to challenge a modification of an existing 103(k) order is also moot. Regarding the 103(k) order, if an operator believes a newly issued 103(k) order is a modification of an existing 103(k) order, it may seek temporary relief, but it must demonstrate that the challenged order is a modification of an existing order. Here, the 103(k) order was based on separate events and is neither duplicative nor a modification of the existing 103(k) order.

orders the Secretary deems appropriate to ensure the safety of any person in the mine in the event of any accident. Under the plain language of section 103(k), an order under this section may be issued when the Secretary's representative is present at the mine and an accident has occurred.

A natural reading of section 103(k) supports the Secretary's view that the inspector must be at the mine site to issue the section 103(k) order, not that the Secretary must be aware of exactly what the accident entailed let alone have completed an investigation into the accident before issuing a section 103(k) order. In *Miller Mining Co. v. FMSHRC*, 713 F.2d 487, 488-491 (9th Cir. 1983), the Ninth Circuit upheld a section 103(k) withdrawal order that was issued by a mine inspector at the mine site after the accident (a fire) occurred. The Court stated that "[s]ection 103(k) gives MSHA plenary power to make *post-accident* orders for the protection and safety of all persons." *Id.* at 490 (emphasis in original). We conclude based on the plain language of section 103(k) that the Secretary was authorized under section 103(k) to issue the withdrawal order to insure the safety of miners until the investigation was completed and MSHA had determined that it was safe to return in by the feeder.

JWR further challenges the section 103(k) order on the basis that the Mine Act does not permit the Secretary to convert a section 103(j) order to a section 103(k) order. The Mine Act permits an inspector present at the mine to issue a 103(k) order to protect persons in the mine. We will not exalt form over substance by finding a 103(k) order invalid because it was issued as a conversion of a 103(j) order. Thus, although we determine that the section 103(j) order is invalid, the (k) order meets all the requirements of the Mine Act and is an independently valid order.

C. Modification of the Section 103(k) Order to Require Mine-Wide Training

JWR also asserts that the inspector committed an abuse of discretion by modifying the (k) order to require training of all miners on ignition issues. We agree with the Judge's holding that the one-hour training requirement was "prudent under the circumstances" of the ignition history and the gassy conditions of the mine. 34 FMSHRC at 45, 49, 55-56 & n. 34. In *Miller Mining*, 713 F.2d 489-90, the court determined that modifications to a (k) order requiring training and other conditions before miners could re-enter, were "reasonably tailored to the situation." Likewise, in this case, Order No. 8519555-02 requiring the training was reasonably tailored to the circumstances given the extensive ignition history at the mine. Thus, we conclude that the modification to the (k) order was not an abuse of discretion.

D. Evidentiary Issues

JWR appeals a number of the Judge's evidentiary rulings and his credibility determinations. Both of these types of determinations are reviewed under an abuse of discretion standard. *Shamokin Filler Co.*, 34 FMSHRC 1897, 1907 (Aug. 2012), *aff'd*, *Shamokin Filler Co. v. FMSHRC*, 772 F.3d 330 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 1549 (2015) (mem.); *Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1174 (Sept. 2010). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Pero v. Cyprus Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000) (citations omitted). Thus, JWR asks the Commission to take the extraordinary step of overturning evidentiary rulings and credibility determinations that reside in the unique province of the fact-finder.

JWR argues that the Judge made a number of evidentiary errors that prejudiced it with respect to the section 103(k) order's training requirement. However, this, too, is a matter especially entrusted to the Commission's Judges. The Commission's Procedural Rules grant a Judge the power to "[r]ule on offers of proof and receive relevant evidence," "[r]egulate the course of the hearing" and "[d]ispose of procedural requests or similar matters." 29 C.F.R. § 2700.55.

We are unpersuaded by JWR's argument that the Judge erroneously discounted the circumstances of the prior ignitions when evaluating the training requirement. JWR asserts that the evidence revealed that the prior ignitions did not result in any injuries and that the ignitions were significantly different; therefore, it was allegedly an abuse of discretion to order mine-wide training. The Judge allowed JWR's summary of the ignition events to be admitted and acknowledged that there were "no injuries, entrapments, property damage, ongoing emergencies, or conditions requiring rescue and recovery work," and no violations were found. 34 FMSHRC at 60. However, the Judge ruled that the particular facts involving each ignition were not relevant to the issuing of the order. *Id.* at 46.

Given that it is the province of the Judge to efficiently run the hearing, and that he did accept JWR's summary of the prior ignitions, it was not an abuse of discretion to exclude additional evidence of the prior ignitions, which was of limited probative value and may have unduly delayed the hearing. *See Shamokin Filler Co.*, 34 FMSHRC at 1906-08 (upholding Judge's exclusion of evidence that was of "limited probative value" and would have "consum[ed] an inordinate amount of time.").


We also decline to overturn the Judge's evidentiary rulings with respect to the exclusion of evidence offered by JWR in connection with the training requirement in the section 103(k) order. JWR takes issue with the Judge's exclusion of methane readings from two spotters at the time of the ignition to rebut the Secretary's methane evidence. Inspector Turner noted that he recorded one reading at 4.8 percent. Tr. 230-31; 34 FMSHRC at 44 n.23. Even assuming the readings showed low methane levels at the specific time of the ignition, the training requirement arose from uncontroverted evidence that the mine is extremely gassy and has an extensive history of ignitions. Thus, low methane readings at a particular moment do not offset the continuing dangers of working in a methane-rich mine – dangers that support the training element of the 103(k) order.


Similarly, the Judge did not abuse his discretion by excluding training rosters indicating how many miners took the training nor a JWR plan for ignition prevention. The Judge determined that the material was irrelevant to the reasonableness of the Secretary's decision to order mine-wide training. *Id.* at 49. Although JWR asserts that the training significantly delayed production, the Judge found the hour-long training minimally burdensome and prudent under the circumstances. *Id.* at 60, 61 n.45 (the Judge finds that there was a "rational connection" between the facts and the Secretary's choices.)

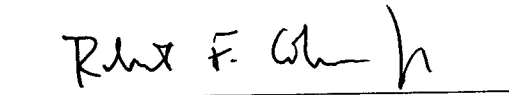
III.


Conclusion

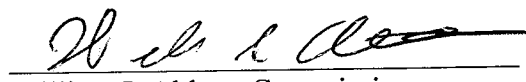
Based on the foregoing, we vacate the section 103(j) order and uphold the section 103(k) order and its modification. We affirm the Judge's dismissal of the contest proceedings.


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