FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 17, 2010

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEVA 2010-1190-R
PERFORMANCE COAL COMPANY	:	

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

DIRECTION FOR REVIEW AND ORDER

BY: Jordan, Chairman; Cohen and Nakamura, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act"). On July 21, 2010, Performance Coal Company ("Performance") filed with the Commission a petition for review which the company styled as an "Emergency Petition for Expedited Discretionary Review." On August 2, 2010, the Secretary filed an opposition to Performance's petition. In its petition, Performance seeks review of Commission Administrative Law Judge Margaret A. Miller's unpublished order dated July 8, 2010, denying the company's application for temporary relief.[1] Unpublished Order (July 8,

[1] Temporary relief is available under section 105(b)(2) of the Mine Act, which states as follows:

> An applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under section 104 together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if —
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> (A) a hearing has been held in which all parties were given an opportunity to be heard;
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> (B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the

2010). (As explained in section II.A, *infra*, Performance has sought review on several other issues which concern interlocutory rulings made by the judge that are not appropriate for review at this time.) Performance had sought temporary relief from an order issued by the Secretary of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 103(k) of the Mine Act,[2] 30 U.S.C. § 813(k), under which MSHA established protocols governing the investigation of the mine accident at Performance's Upper Big Branch Mine that occurred on April 5, 2010, and which resulted in the deaths of 29 miners. We grant in part the petition for discretionary review filed by Performance. We grant review only as to the issue of whether temporary relief may be sought under section 105(b)(2) from the modification or termination of an order issued by the Secretary pursuant to section 103(k) of the Mine Act. For the reasons that follow, we affirm the judge's decision denying Performance's application.

I.

Factual and Procedural Background

Performance operates the Upper Big Branch Mine-South near Montcoal, West Virginia. The explosion at the mine that occurred on April 5, 2010, is still under investigation by MSHA

> applicant; and
>
> (C) such relief will not adversely affect the health and safety of miners.
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> No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 104. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

30 U.S.C. § 815(b)(2).

[2] Section 103(k) states as follows:

> 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).

and State authorities, who have not yet determined a cause. As the Secretary explains in her opposition to Performance's petition, "[t]he investigation remains ongoing," and "MSHA continues to confront safety issues at the mine." Sec'y Opp. at 3. Under its section 103(k) order, MSHA has allowed representatives from Performance to accompany investigation teams entering the mine, but has limited the number of persons doing so and the nature of their participation on safety grounds. *Id*. at 3-4.

On June 28, 2010, Performance filed an application for temporary relief seeking modifications to MSHA's control order. On July 8, 2010, the judge denied Performance's application on the grounds that under Commission precedent, "section 104 [is] the only section [of the Mine Act] under which temporary relief may be sought pursuant to [section] 105(b)(2)." Unpublished Order at 2 (July 8, 2010) (citing *Utah Power and Light Co.*, 11 FMSHRC 953, 956 (June 1989) ("*UP&L*")).

II.

Disposition

Performance maintains that the plain language of section 105(b)(2) supports its position. According to the company, the language of that section stating that an applicant may request that the Commission grant temporary relief "from any modification or termination of any order" necessarily includes relief from a modification of a section 103(k) order. In her opposition to Performance's petition, the Secretary contends primarily that the issues raised in the petition, including whether the company may seek temporary relief from the section 103(k) order, should be subject only to interlocutory review under the requirements of Commission Procedural Rule 76, 29 C.F.R. § 2700.76. She maintains further that Performance has failed to demonstrate that the requirements for interlocutory review have been met.

In a motion to dismiss for lack of jurisdiction filed with the judge on July 2, 2010, however, the Secretary argued that the language of section 105(b)(2) should be read to foreclose the Commission from granting temporary relief from a modification to a section 103(k) order. She argued that the phrase "issued under section 104" modifies the entire phrase "any modification or termination of any order or from any order." Mot. Dismiss at 7-8. The Secretary further contended that her interpretation of the statute was reasonable and thus entitled to deference by the Commission, as well as consistent with Commission precedent. *Id*. at 9-10 (citing *UP&L*, 11 FMSHRC at 956).

A. The Propriety of Appellate Review

Before turning to the merits of Performance's petition, we must address the threshold question of whether a judge's decision denying or granting temporary relief in a proceeding under section 105(b)(2) is properly the subject of a petition for discretionary review. We conclude that it is.

In section 105(b)(2), Congress clearly gave the Commission jurisdiction to consider applications for temporary relief from the issuance, modification, or termination of certain orders issued by the Secretary. We have explicitly recognized that section 105(b)(2) is one of the Mine Act provisions which "grant subject matter jurisdiction to the Commission by establishing specific enforcement and contest proceedings and other forms of action over which the Commission judicially presides." *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1169 (Sept. 1988). Because Congress created a specific right to seek temporary relief in section 105(b)(2), it follows that any party should have the corresponding right to seek Commission review of an adverse, conclusive decision issued by a judge in a section 105(b)(2) proceeding. Moreover, because the right to request temporary relief under section 105(b)(2) is specifically granted in the statute, the appropriate procedural vehicle for obtaining review of an adverse decision is a petition for discretionary review filed pursuant to section 113(d)(2)(A)(i) of the Mine Act, 30 U.S.C. § 823(d)(2)(A)(i) ("Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision").

Because we conclude that a party may seek Commission review of a section 105(b)(2) decision by filing a petition for discretionary review, it follows that Performance's petition in the instant proceedings need not satisfy the requirements for interlocutory review set forth in Commission Rule 76. In particular, Performance need not show that the matter "involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(2). It is sufficient that the petition seek review of an adverse decision denying or granting temporary relief in a section 105(b)(2) proceeding. We thus conclude that it is well within our discretion to consider the petition for discretionary review filed by Performance in this matter.

However, this is true only as to the proceedings before the judge related to Performance's application for temporary relief. In its petition, Performance enumerates several other issues, including whether the judge constructively denied the company's motion for an expedited hearing, and erred in holding that the Commissioner is not authorized by law to modify section 103(k) orders, granting the Secretary's motion to dismiss before providing the company an opportunity to respond, holding that the company did not sufficiently present a challenge to the section 103(k) order at issue, and granting a motion to strike made by the Secretary. Performance Pet. at 13-14. All of these issues relate to interlocutory rulings made by the judge which were not properly preserved for appellate review on an interlocutory basis, i.e., through a request to the judge to certify to the Commission that any one ruling "involves a controlling question of law and that . . . immediate review will materially advance the final disposition of the proceeding," or, if the judge denies a motion to certify, through the filing of a petition for interlocutory review. 29 C.F.R. § 2700.76. We thus do not reach any of them. We note that these issues may be properly raised in an appeal from the judge's final order.

B. The Scope of Relief Available under Section 105(b)(2) of the Mine Act

Based on our review of the statutory language and legislative history of section 105(b)(2), we conclude that Congress did not intend for temporary relief to be available from a modification to or termination of a section 103(k) order. The statute provides that temporary relief is available from "any modification or termination of any order or from any order issued under section 104." 30 U.S.C. § 815(b)(2). Performance argues that in the phrase "any modification or termination of any order," the words "any order" mean literally *any* order. This reading of the statute treats the two phrases "any modification or termination of any order" and "any order issued under section 104" as independent clauses, an interpretation that implicitly places a comma after the first clause ("any modification or termination of any order[,] or from any order issued under section 104").

In this case, we construe the qualifying phrase "under section 104" in section 105(b)(2) as modifying the entire phrase "modification or termination of any order or from any order." In other words, we conclude that a grant of temporary relief is only available for orders issued under section 104, whether one is seeking temporary relief from the modification, termination or issuance of the order. This construction avoids the anomalous result of allowing a party to seek temporary relief from the modification or termination of any order the party would not have been able to challenge when it was issued.

We recognize that a qualifying word or phrase usually applies to the provision or clause immediately preceding it. This construct is commonly referred to as the "last antecedent" principle of statutory construction. However, where the sense of the entire statute requires that a qualifying word or phrase apply to several preceding clauses, the word or phrase will not be restricted to its immediate antecedent. 2A Singer, *Sutherland Statutory Construction* § 47.33 (7th ed. 2008). Here, although application of the "last antecedent" principle might suggest that the phrase "issued under section 104" modifies only the phrase immediately preceding it, i.e., "from any order," this leads to the anomalous result mentioned above. Moreover, it would permit temporary relief in situations Congress did not intend.

For example, under the construction urged by Performance, an operator could seek temporary relief from the modification of an imminent danger order. If an MSHA inspector issues an imminent danger order requiring the withdrawal of miners from a section of the mine but subsequently concludes that the danger is greater in scope than first determined, the inspector would modify the order to require withdrawal of miners from the entire mine. Under the construction urged by Performance, it could seek temporary relief from the inspector's decision to withdraw miners from the additional area, although the company was precluded from seeking temporary relief from the initial withdrawal order.[3] Statutes should be construed to avoid such loopholes which here would undermine the purposes of the Mine Act.

[3] Congress specifically prohibited the grant of temporary relief from the issuance of an imminent danger order in section 107(e) of the Mine Act. 30 U.S.C. § 817(e)(1).

Similarly, section 103(k) of the Mine Act provides that where a mine accident has occurred, such as that at the Upper Big Branch mine, the authorized representative of the Secretary "may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine." 30 U.S.C. § 813(k). The scope of the Secretary's authority under section 103(k) is reflected in the Senate report, which states:

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

S. Rep. No. 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) ("*Legis. Hist.*"). The scene of a mine accident is similar to an area from which miners have been withdrawn because of an imminent danger. In fact, a mine that has experienced a major explosion can be far more dangerous than an operating mine because of, for example, interruptions in ventilation. As a mine is recovered after an accident, conditions in the mine are ever changing as recovery proceeds. Under such dynamic circumstances, an initial control order must be repeatedly modified to take into account changes in the mine. Yet under Performance's interpretation of section 105(b)(2), we are met with the same anomaly with regards to section 103(k) as with section 107(a) – that Performance could seek temporary relief from MSHA's decision to modify a section 103(k) order in response to ever changing conditions, although the company would be precluded from seeking temporary relief from the initial withdrawal order.

Moreover, if Performance could seek temporary relief from protocols adopted after the initial issuance of a section 103(k) order, this would be inconsistent with the "plenary power" section 103(k) gives MSHA "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). For the Commission to attempt in any way to micro-manage section 103(k) orders in a temporary relief proceeding would in our view be ill-advised, especially given that parties can obtain review of such orders after the fact in contest proceedings. *See American Coal Co. v. Dep't of Labor*, 639 F.2d 659, 661 (10th Cir. 1981); *Eastern Associated Coal Co.*, 2 FMSHRC 2467, 2469-71 (Sept. 1980).

We are particularly unwilling to extend the scope of temporary relief to include pre-contest litigation over MSHA's discretion to respond – as it deems appropriate – in the aftermath of a major mine disaster. We reject the interpretation of the Mine Act offered by Performance because such a reading would interfere with the flexibility Congress intended the

Secretary to have when she responds to disasters of such enormity as the explosion at Performance's Upper Big Branch Mine.

We also find Performance's reading of section 105(b)(2) to be at odds with that section's textual history. The predecessor to section 105(b)(2) was section 105(d) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 815(d) (1976) ("Coal Act"). It provided that temporary relief was available "(1) from any modification or termination of any order, or (2) from any order issued under section 104 of this title." The two explicit provisions were modified by the clause: "Pending completion of the investigation required by this section, the applicant may file with the Secretary a written request that the Secretary grant temporary relief." The "investigation" to which this clause referred was mandated under section 105(a)(1), which provided that an operator could apply to the Secretary for review of an order issued "*pursuant to the provisions of section 104*." (Emphasis added.) Section 105(a)(1) went on to provide: "Upon receipt of such application, the Secretary shall cause *such investigation* to be made as he deems appropriate." (Emphasis added.) In other words, by its plain terms, the temporary relief afforded mine operators under the Coal Act was limited to orders issued "pursuant to the provisions of section 104" of that Act. When Congress enacted section 105(b)(2) of the Mine Act, it did not intend to depart from the scope of temporary relief afforded under the Coal Act. In conference, the scope of temporary relief was limited to "all the situations encompassed by the House amendment," which in turn were situations drawn from section 104 of the Coal Act – which did not include accident control orders. *See* S. Conf. Rep. No. 95-461, at 51 (1977), *reprinted in Legis. Hist.* at 1329.

We thus affirm the judge's denial of Performance's application for temporary relief.[4] Because we conclude that the judge was correct in concluding that temporary relief was not available to Performance as a matter of law, we need not consider what relief may have been appropriate if the company could have pursued such relief.

[4] In reaching this conclusion, we note that it is in accord with the Secretary's views expressed in her motion to dismiss made to the judge. On review, however, the Secretary has not requested that we accord deference to her interpretation of section 105(b)(2). Thus, although we are in accord with the Secretary, we do not reach the question of whether deference is due to the Secretary's interpretation. *See United Mine Workers Local 1248 v. Maple Creek Mining Co.*, 29 FMSHRC 583, 591 & n.1 (July 2007) (concluding that the Commission "need not defer to another agency's interpretation of the statutory language at issue" where "the Secretary has not requested that [the Commission] accord deference to her interpretation").

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision denying Performance's application for temporary relief.

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Mary Lu Jordan, Chairman

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

Commissioners Duffy and Young, dissenting:

We agree with the majority's position that Performance Coal Company's appeal of the judge's decision denying its request for temporary relief is the appropriate subject of a petition for discretionary review and join our colleagues in granting Performance's petition. We also agree that the other issues raised by Performance in its petition are interlocutory in nature and decline to consider those issues at this time. However, we depart with the majority on the issue of whether section 105(b)(2) permits temporary relief of a modification or termination of a section 103(k) order. We conclude that it does.

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 Resources 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 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 v. FMSHRC*, 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).

Section 105(b)(2) reads as follows:

> An applicant may file with the Commission a written request that the Commission grant temporary relief *from any modification or termination of any order or from any order issued under section 104* together with a detailed statement giving the reasons for granting such relief. The Commission may grant such relief under such conditions as it may prescribe, if—
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> (A) a hearing has been held in which all parties were given an opportunity to be heard;
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> (B) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

> (C) such relief will not adversely affect the health and safety of miners.
>
> No temporary relief shall be granted in the case of a citation issued under subsection (a) or (f) of section 104. The Commission shall provide a procedure for expedited consideration of applications for temporary relief under this paragraph.

30 U.S.C. § 815(b)(2) (emphasis added).

Based on our review of the statutory language and legislative history, we conclude that Congress intended that parties could seek temporary relief from a modification or termination of a section 103(k) order pursuant to section 105(b)(2). This is an instance where Congress "has directly spoken to the issue" under Step 1 of the test set forth in *Chevron*, 467 U.S. at 842. As stated above, the key language in section 105(b)(2) is "the Commission [may] grant temporary relief from any modification or termination of any order *or* from any order issued under section 104." 30 U.S.C. § 815(b)(2) (emphasis added). The most natural reading of that language is that the phrase before the disjunctive "or" (in italics) is parallel to, and distinct from, the phrase after that disjunctive "or." In other words, an applicant may seek relief "from any modification or termination of any order" or it may seek relief "from any order issued under section 104." If Congress had wanted the words "issued under section 104" to apply to both of these phrases, it could certainly have indicated so.

Indeed, both the majority and the Secretary concede that the "last antecedent" principle of statutory construction[1] would lead to the conclusion that the words "issued under section 104" modify only the second phrase. Slip op. at 5; S. Opp'n. to Emergency Appl. & Memo to Support Mot. to Dismiss at 8. However, the majority attempts to show that Congress would not have intended such a result by relying on the structure of the Mine Act as a whole. We find their reasoning unpersuasive.

First, section 105(b)(2) is a marvel of Congressional clarity: brief, clear, direct and susceptible to harmonization with other provisions in the Act. If our colleagues were to assume for argument's sake that Congress intended to include within the scope of the subsection "any order," we must ask how it might otherwise have secured that objective without using this term, as it has, here? Divining Congressional intent from cloudy or uncertain language in the Mine Act is sometimes necessary. It is not necessary or proper in this instance, unless one wishes to conclude that Congress did not mean what it precisely and unequivocally said.

The plain meaning of plain language in subsection (b)(2) is further buttressed by the express exclusion of some orders from its scope. This further evinces the directness and clarity

[1] *See, e.g.*, 2A Singer, *Sutherland Statutory Construction* § 47.33 (7th ed. 2008).

of the provision. Had Congress intended to further constrain the applicability of section 105(b)(2) to withdrawal orders under Section 104, it could have said so. It did not.

The majority attempts to avert the plain meaning of section 105(b)(2) by contorting the predecessor provisions of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act"), to divine Congress' intent of a limited reading of section 105(b)(2), which is not in the language. Slip op. at 7. Again, the majority ignores the plain language of the relevant provision in the Coal Act. We find it persuasive that the plain language of the same provision in the Coal Act, upon which section 105(b)(2) is based, clearly supports our interpretation. Section 105(d) of the Coal Act, as enacted, stated:

> [T]he applicant may file with the Secretary a written request that the Secretary grant temporary relief (1) from any modification or termination of any order, or (2) from any order issued under section 104 . . . .

30 U.S.C. § 815(d) (1976). Thus, the relevant language in both the Coal Act and the Mine Act is nearly identical. However, it is very significant that section 105(d) of the Coal Act contained the numbers "(1)" and "(2)" before the two phrases in question. The inclusion of the two numbers leaves no doubt as to Congress' intent: the two phrases were meant to be parallel and to provide two distinct avenues of review.[2] Thus, the reference to "section 104" in the second phrase clearly does not apply to orders included within the first phrase. Congress has directly spoken to the issue, and there is no doubt that an applicant can seek temporary relief from the modification or termination of an order that is not issued under section 104, i.e., a section 103(k) order.

The majority notes that section 104 is, indeed, mentioned in section 105 of the Coal Act, and relies on this to foreclose temporary relief for other orders. Slip op. at 7. However, what the majority ignores is that the design of the statute clearly provides for broader relief from orders issued under section 104 – which may have punitive or deterrent purposes in addition to protective ones – to include amendments or terminations of other orders more closely associated with direct protection of miners. Thus, operators may not seek temporary relief from orders that require abatement of hazardous conditions pursuant to subsections (a) and (f), because the statute says so, clearly and directly. 30 U.S.C. § 815(b)(2).

Yet some orders, including those issued under section 103(k), 30 U.S.C. § 813(k), implicate directly the Secretary's judgments on measures needed to protect miners in a fluid situation. As those circumstances change, and orders are amended or terminated, it is important to allow not only operators but representatives of miners to challenge amendments or

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[2] The fact that the drafters of the Mine Act subsequently omitted the two numbers in section 105(b)(2) of the Mine Act does not affect our analysis. There is no absolutely no indication in the legislative history that deletion of the numbers was intended to change the clearly expressed meaning of the Coal Act provision.

terminations which change the status quo in the mine.[3] These changes or terminations may pose difficulties or may present hazards to miners sent into the environment. Allowing those thus affected to seek temporary relief from the effects of the Secretary's decisions is wholly consistent with the Mine Act's graduated, measured approach to temporary relief, as reflected in the Act's express exclusion of some orders, and we submit is the only reasonable reading of the clear and direct language of the statute.

Our colleagues also look to the legislative history of the Mine Act to further support their interpretation of section 105(b)(2). Slip op. at 6-7. We find the legislative history unavailing. What they fail to acknowledge is that the legislative history is silent on whether temporary relief under section 105(b)(2) extends to section 103(k) orders.

The majority seeks to avoid any reading of the Mine Act which results in a party being able to seek temporary relief from the modification or termination of any order the party would not have been able to challenge when it was issued, going as far as to characterize any reading which results in such as "anomalous." Slip op. at 5. Yet section 107 of the Mine Act plainly provides for such a result with respect to imminent danger orders:

> (e)(1) Any operator notified of an order under this section or any representative of miners notified of the *issuance, modification, or termination* of such an order may apply to the Commission within 30 days of such notification for reinstatement, modification or vacation of such order. The Commission shall forthwith afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, vacating, affirming, modifying, or terminating the Secretary's order. *The Commission and the courts may not grant temporary relief from the issuance of any order under subsection (a).*

30 U.S.C. § 817(e)(1) (emphases added). In other words, section 107(e)(1) only prohibits the granting of temporary relief from the issuance of an imminent danger order, not the modification or termination of such an order.

Thus, while the majority touts its interpretation of section 105(b)(2) as driven by the "sense" of the entire statute (slip op. at 5), it is, in fact, flatly inconsistent with the plain language

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[3] By distorting the language of the statute, the majority prevents representatives of miners from seeking temporary relief from amendments and terminations of orders under subsection 103(k). We need not address the parameters of such challenges in this decision, but foreclosing them altogether may significantly and adversely affect miners' advocacy on behalf of their own safety.

of other sections of the Mine Act that appear to us to have been drafted to be consistent with the plain meaning of section 105(b)(2) that we have set forth. Moreover, any attempt to perfectly reconcile the language of section 105(b)(2) with the language and placement of a similar provision in the Coal Act, which is what the majority appears to be attempting (slip op. at 7), is bound to founder, because the Coal Act did not provide for imminent danger orders in a section separate from its section 104, and the Mine Act does in its section 107.[4]

We would thus find the order at issue here to be within the scope of section 105(b)(2). However, we are mindful of the Secretary's special responsibility in this area, and operators should not have an untrammeled right to seek, in effect, a preliminary injunction against the enforcement of an amended order issued under subsection 103(k). As the majority correctly notes, the Secretary's authority in command of an accident site is, and must be, plenary. Slip op. at 6. Where the Act charges her with direct responsibility for protection of miners, we must preserve that authority against challenges that may distract her from that duty.

We would therefore hold that an operator may only seek temporary relief:

1) From amendments that present a clear abuse of discretion, such as a failure to articulate a safety-related reason for the provision at issue. In those cases, the judge should presume, in the absence of compelling evidence to the contrary, that the Secretary's agents are acting in good faith to advance her duty under the law, and the burden of proving an abuse of discretion must be on the applicant; and

2) For relief of limited duration and scope to permit the operator to engage in activities necessary to protect the health and safety of miners. Again, the burden would be on the operator to establish that relief is warranted.[5]

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[4] The majority justifies its clearly erroneous reading of the Mine Act based on its fear that giving effect to the plain meaning of section 105(b)(2) (and, though they don't state it, section 107(e)(1)) would permit operators to challenge modifications expanding the scope of a section 107 imminent danger order. Slip op. at 5. The Mine Act can be easily read, however, to permit the Secretary to terminate an inadequate section 107 order and issue a new one when an inspection or investigation shows the area affected by the danger is more extensive. Thus, the majority's concern about "loopholes" is entirely misplaced.

[5] We would therefore hold that Performance would be permitted in this case to seek temporary relief from the modified section 103(k) order, if it could demonstrate that the modification prevents it from carrying out its obligation to conduct its own investigation pursuant to 30 C.F.R. § 50.11(b), but only if the operator can show that the refusal to permit such activities represents a clear abuse of discretion or that the grant of temporary relief is necessary to effect the purposes of the Act and will not interfere in any way with the Secretary's duty to ensure the safety of any person in the mine.

We therefore respectfully dissent and would remand this case to the judge to determine whether limited temporary relief is warranted in this instance.

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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