ORAL ARGUMENT NOT YET SCHEDULED

No. 20-1369

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Secretary of Labor,
Mine Safety and Health Administration,

Petitioner

v.

M-Class Mining, LLC and
Federal Mine Safety and Health Review Commission,

Respondents

On Petition for Review of a Decision of the
Federal Mine Safety and Health Review Commission

Brief for the Secretary of Labor

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Certificate as to Parties, Rulings, and Related Cases

Under the D.C. Circuit Rule 28(a)(1)(A), the Secretary of Labor certifies as follows:

1. Parties

The following parties participated in the underlying proceeding before the Federal Mine Safety and Health Review Commission, *M-Class Mining, LLC*, LAKE 2018-0188-R:

- M-Class Mining, LLC
- Federal Mine Safety and Health Review Commission
- Secretary of Labor, Mine Safety and Health Administration

Petitioner in this case is the Secretary of Labor. Respondents are M-Class Mining, LLC and the Federal Mine Safety and Health Review Commission. There are no amici curiae.

2. Rulings Under Review

The ruling under review is the August 17, 2020 final order of the Federal Mine Safety and Health Review Commission in *M-Class Mining, LLC*, No. LAKE 2018-0188-R, vacating an accident control order the Secretary of Labor issued under 30

U.S.C. 813(k). The decision is not yet reported, but is available at *M-Class Mining, LLC*, No. LAKE 2018-0188-R, 2020 WL 4924047 (FMSHRC Aug. 17, 2020).

3. Related Cases

This case has not previously been before this Court. The Secretary of Labor is not aware of any related cases currently pending in this Court or any other.

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[1] Per the Court's briefing schedule, the deferred joint appendix will be filed by February 10, 2021, and final briefs with updated citations to the joint appendix will be filed by February 24, 2021. Citations to the joint appendix in the present brief appear in this form: JA ____ and will be updated with page numbers in the final briefs.

Jurisdictional Statement

The Federal Mine Safety and Health Review Commission had jurisdiction over this case because M-Class Mining, LLC, contested the validity of a terminated section 103(k) order issued under the Federal Mine Safety and Health Act of 1977 by the Mine Safety and Health Administration. See 30 U.S.C. 813(k). Though the Mine Act is silent with respect to the Commission's ability to review section 103(k) orders, courts have recognized its power to conduct such review. See, *e.g.*, *Am. Coal Co.* v. *Fed. Mine Safety & Health Review Comm'n,* 796 F.3d 18, 21 (D.C. Cir. 2015) (reviewing the issuance of a section 103(k) order and noting that a mine operator may contest any citation, order, or penalty before the Commission); *Am. Coal Co.* v. *U.S. Dep't of Labor*, 639 F.2d 659, 660-661 (10th Cir. 1981) (concluding that the Commission has authority to review section 103(k) orders).

Before the Commission, the Secretary argued that any contest of the section 103(k) order was moot, because the order had been terminated and no longer carried legal consequences under the Mine Act. *M-Class Mining, LLC*, No. LAKE 2018-0188-R, 2020 WL 4924047, at *5 (FMSHRC Aug. 17, 2020) ("Dec."), JA ____. The Commission determined that M-Class retained a legally cognizable interest in adjudicating the validity of the terminated section 103(k) order, and found in the alternative that the order fell within the "capable of repetition, yet

evading review" exception to mootness. Dec. 7, JA ____. The Secretary does not appeal this issue.

The Commission issued its final decision on August 17, 2020. The Secretary filed his petition for review with this Court on September 16, 2020, within 30 days of the Commission's decision, as required by the Mine Act. 30 U.S.C. 816(b). This Court has jurisdiction under section 106(b) of the Mine Act. *Ibid.*

Introduction and Statement of the Issues

Under the Federal Mine Safety and Health Act of 1977, the Mine Safety and Health Administration is authorized to issue "safety orders" to ensure onsite safety "in the event of any accident occurring in a coal or other mine." 30 U.S.C. 813(k). Section 103(k) orders are issued in response to an apparent accident to preserve evidence and to prevent additional injuries or deaths. See *ibid.*; see also *Jim Walter Res.*, 37 FMSHRC 1868, 1868 (2015). Section 103(k) orders "allow inspectors to wield broad authority as they deem necessary," and are "broad, flexible tools, authorizing inspectors to confront many different circumstances that present immediate risks." *Am. Coal Co.,* 796 F.3d at 21.

Discretionary agency actions, such as issuances of section 103(k) orders, are reviewed for abuse of discretion. See *Jim Walter Res.*, 37 FMSHRC at 1871; *Pattison Sand Co.* v. *Fed. Mine Safety & Health Review Comm'n*, 688 F.3d 507, 512

(8th Cir. 2012). This standard requires consideration of whether the order was rationally related to the information before the agency at the time of the decision. See *Jim Walter Res.*, 37 FMSHRC at 1871; *PBGC* v. *LTV Corp.*, 496 U.S. 633, 654 (1990).

After local police reported to MSHA that a miner had been hospitalized and diagnosed with carbon monoxide poisoning, MSHA issued a section 103(k) order, which suspended for just over two and a half hours the operations in the section of the mine where the miner initially became ill. MSHA's purpose—consistent with its overall mission—was to keep miners safe while the agency investigated the apparent accident. Following its investigation, MSHA terminated the order.

Over two years later, the Federal Mine Safety and Health Review Commission eschewed the abuse-of-discretion standard and vacated the order. Rather than determining whether MSHA abused its discretion by issuing the order in response to the apparent accident, the Commission determined that since no accident in fact occurred, no 103(k) order should have been issued. Rather than considering the information available to MSHA when it issued the order, the Commission considered information that became available only *after* the order was issued and a weeks-long accident investigation had taken place. The Commission apparently

ignored the purpose of the 103(k) order: to protect miners from hazards posed by apparent accidents.

1. Is the standard of review that applies to MSHA's decision to issue the section 103(k) order abuse of discretion?

2. In determining whether MSHA's decision to issue the section 103(k) order was an abuse of discretion, is the relevant information the information that was available to MSHA at the time it issued the order?

3. Was MSHA's decision to the section 103(k) order within its discretion?

4. If the Commission properly considered later-available information that arose after the accident occurred, did substantial evidence support the Commission's finding that no accident occurred?

Statement of the Case

1. Statutory Framework

The Mine Act was enacted to improve and promote safety and health in the Nation's mines. 30 U.S.C. 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's… mines in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. 801(c).

The Mine Act authorizes the Secretary, acting through MSHA, to promulgate mandatory safety and health standards, inspect mines, issue citations and orders for

violations of the Act or mandatory standards, and propose penalties for those violations. 30 U.S.C. 811(a), 813(a), 814(a), 815(a), 820(a). The Mine Act also established the Commission, an independent agency, to adjudicate many Mine Act disputes. Commission administrative law judges adjudicate citations, orders, and penalties that mine operators contest, subject to discretionary review by the Commission and judicial review by a United States Court of Appeals. 30 U.S.C. 823(d), 816(a)(1).

a. MSHA's Power Under Section 103(k) of the Mine Act

At the time of the Mine Act's passage in 1977, the mining industry was plagued by accidents. Over one hundred thousand coal miners had been killed in the United States by that point in the twentieth century alone. See, *e.g.*, MSHA, *Coal Fatalities for 1900 through 2019*, https://arlweb.msha.gov/stats/centurystats/coalstats.asp. Mine accidents can be unpredictable, their danger can be extreme, and their origins and surrounding circumstances can be obscure, particularly as they are happening, or in their immediate aftermath.

A primary purpose of the Mine Act is to prevent accidents—and, when accidents do occur, to give MSHA the tools to respond to them. One of the most important tools sanctioned by the Mine Act is section 103(k), which was enacted in

order to equip MSHA with the authority necessary to reduce mine accidents and their human cost.

Under section 103(k), in the event of an accident, MSHA is empowered to "issue such orders as [it] deems appropriate to insure the safety of any person in the…mine." 30 U.S.C. 813(k). MSHA is also empowered to control recovery and rescue operations while a section 103(k) order is in place. *Ibid.* To enable MSHA to respond to the unpredictable and dangerous nature of mine accidents, Congress gave "plenary power" to MSHA to exercise broad discretion in responding to emergency situations at mines. *Miller Mining Co., Inc.* v. *Fed. Mine Safety & Health Review Comm'n*, 713 F.2d 487, 490 (9th Cir. 1983). The legislative history captures the expansive authority accorded to MSHA:

> [t]he unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that [MSHA] 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 [MSHA] with flexibility in responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 95-181, at 29 (1977).

In section 103(k), MSHA's power to intercede in mining operations in order to save lives and investigate immediate hazards is at its zenith. Section 103(k) orders

allow MSHA to assume "complete control" of the mine "in order to preserve life in the face of an existing hazard." *Miller Mining Co., Inc*, 713 F.2d at 490.

Section 103(k) orders also give MSHA flexibility: they "allow inspectors to wield broad authority as they deem necessary," and are "broad, flexible tools, authorizing inspectors to confront many different circumstances that present immediate risks." *Am. Coal Co.,* 796 F.3d at 21, 27. In utilizing this powerful and flexible tool, MSHA inspectors may "impose whatever restrictions or requirements they judge appropriate to deal with the accident in question." *Id*. at 27. As events unfold, MSHA inspectors may modify section 103(k) orders to respond to changing circumstances or information, and may refine or expand the scope of a section 103(k) order as they navigate a complex scene. See *id.* at 27; *Performance Coal Co.* v. *Fed. Mine Safety & Health Review Comm'n*, 642 F.3d 234, 237 (D.C. Cir. 2011). Section 103(k) orders may require a variety of things based on the circumstances of a particular emergency, including evacuation of a section, training on safety procedures, or requiring MSHA approval before engaging in certain mining activities. See *Jim Walter Res.*, 37 FMSHRC at 1871; *Revelation Energy, LLC*, 35 FMSHRC 3333, 3334-3335 (2013) (requiring the operator seek MSHA approval before engaging in blasting.).

Section 103(k) gives MSHA authority to act "[i]n the event of any accident occurring in a coal or other mine," and the Mine Act defines "accident" broadly: 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). This list is not exhaustive; the term "includes" is understood to be "a term of enlargement and not of limitation… the term 'accident' extends beyond the definition's enumerated items…." *Pattison Sand Co.*, 688 F.3d at 512 (internal citations omitted). The Secretary, the Commission, and courts have understood the term "accident" to include "events that are similar in nature or have similar potential to cause death and injury as the listed items." *Ibid.* It includes illnesses as well as injuries. See *Aluminum Co. of Am.*, 15 FMSHRC 1821, 1825 (1993). Importantly, section 103(k) does not require the Secretary to "be aware of exactly what the accident entailed let alone have completed an investigation into the accident before issuing a section 103(k) order." *Jim Walter Res.*, 37 FMSHRC at 1870-1871.

2. Factual Background

In February 2018, a crew of miners working at the M-Class #1 Mine, an underground coal mine in Illinois, was closing gaps in the roof that had occurred after a roof fall. Tr. 221-223, JA ____. The crew was using a diesel air compressor to fill the gaps with expanding foam. Tr. 244, JA ____.

After about an hour of work underground, one miner, Mitchell Mullins, began to experience dizziness, headache, nausea, chest pains, stomach pains, a racing heartrate, and difficulty breathing. Tr. 75, 244, JA ____; Ex. 2, p. 17-18, JA ____. He was administered oxygen, removed from the mine, and taken by ambulance to the emergency room, where he was treated for carbon monoxide poisoning. Tr. 64, JA ____; Ex. 2, p. 18, 20, JA ____; Ex. 7, JA ____. Mr. Mullins ultimately spent 72 hours on oxygen. Tr. 71, JA ____; Exhibit 6, p. 12, JA ____. The diagnosing doctor, Dr. Dean Bosley, called the local police department to report that the miner had suffered carbon monoxide poisoning, and urged that the mine be closed to protect others from exposure. Ex. 6, p. 6, JA ____; Ex. 7, JA ____. The police, in turn, called the MSHA hazard-reporting hotline. Ex. 7, JA ____.

The MSHA hazard-reporting hotline is a 1-800 hotline, designed for members of the public—in particular miners and mine operators—to notify MSHA of complaints and issues at mines. Tr. 154-157, JA ____. Hotline operators ask callers a series of standardized questions and create an escalation report. Tr. 155, 157, JA ____. Escalation reports are short documents that summarize the information provided by callers. See Ex. 7, JA ____. MSHA uses these to make initial determinations about what to do in response. See Tr. 29-30; JA ____.

After hearing from the police at 7:59pm, the MSHA hotline staff generated an escalation report which read in part:

> Someone at the mine called 911 at approximately 2:00 PM today because a miner was sick. The miner was transported around 3:00PM to the Emergency Room at Herrin Hospital in Herrin, IL, which is about 30 minutes away from the mine. The Emergency Room doctor contacted [police] dispatch at approximately 6:50 PM today. He stated that the miner has very high levels of Carbon Monoxide poisoning, and wants the mine to be shut down immediately. The doctor's name is Dr. Bosley…. He stated if the mine is not shut down immediately that he is afraid that there will be more miners admitted with carbon monoxide poisoning. The caller does not have the authority to shut down the mine.

Ex. 7, JA____. The hotline staff distributed the escalation report, as is routine, to several MSHA managers. Tr. 150-151, JA ____. The hotline staff also called a local MSHA supervisor, Bob Bretzman, who was also the manager on call that evening in the event of an emergency at a mine. Tr. 153, JA ____.

Mr. Bretzman immediately called one of the mine's managers. Tr. 153, 241, 247, JA ____. He told the mine manager that MSHA would send an inspector, asked whether the mine manager was aware of the carbon monoxide poisoning diagnosis, and suggested that the mine manager evacuate the section. Tr. 248-249, JA ____. The manager declined to evacuate the section, but told a miner to take a

carbon monoxide reading of the area, which did not reveal elevated levels of carbon monoxide. Tr. 231-232, JA ____. MSHA did not yet know the results of the readings.

After speaking with the mine manager, Mr. Bretzman then called MSHA inspector Brandon Naas and told Mr. Naas to review the escalation report and travel to the mine. Tr. 29, JA ____.

Mr. Naas traveled to the office to retrieve the report and a multi-gas detector to take gas-level readings underground, and then drove to the mine as quickly as possible. Tr. 29-30, 125, 127, JA ____. He arrived at the mine and verbally issued a section 103(k) order to suspend operations in the section where Mr. Mullins became ill, in response to Mr. Mullins's illness and the possibility of carbon monoxide exposure at the mine. Tr. 32, 33, 34, 39, JA ____; Ex. 1, p. 1; Ex. 2, p. 1, JA ____. (This was routine procedure, as section 103(k) orders can be issued only when MSHA is at the mine. Tr. 138, JA ____.) When issuing the section 103(k) order, the only information Mr. Naas had was the information in the escalation report. Tr. 129, 134-135, JA ____.

Mr. Naas reviewed data from carbon monoxide detectors mounted in the mine and from the section foreman's handheld detector. Tr. 43, 46, 49, JA ____. Neither had registered elevated levels of carbon monoxide. *Ibid.* But Mr. Naas could not

review data from the injured miner's handheld detector, since it could not be found. Tr. 46, JA ____.

Mr. Naas then went into the mine to measure carbon monoxide levels in the area where the crew had been working. Tr. 49-50, JA ____. Neither the data nor the inspection revealed elevated carbon monoxide levels, so Mr. Naas modified the section 103(k) order to allow for the resumption of normal mining operations. Tr. at 49-50, JA ____; Ex. 2, p. 6, JA ____, Ex. 1, JA ____. Under the section 103(k) order, operations in the section of the mine where Mr. Mullins first became ill had been suspended for just over two and a half hours. Tr. at 32, 39, 49-50, JA ____; Ex. 2, pp. 1, 6, JA ____. Having finished his inspection of the section, Mr. Naas committed the section 103(k) order and its modification to writing. Ex. 1, JA ____.

From start to finish, the entire process—MSHA's receiving the hotline call, and Mr. Naas's inspection process— retrieving his equipment from the office and driving out to the mine, reviewing the carbon monoxide reader data, traveling underground and conducting an inspection of the area, returning to the surface, and committing the order to writing—took just five hours and twenty five minutes.

Over the next two days, after conducting interviews with miners, including Mr. Mullins, Mr. Naas determined that the likely source of carbon monoxide was the diesel air compressor, because it was the only piece of equipment that Mr. Mullins

was not normally exposed to in his daily work. Tr. 54, 56, 128, JA ____; Ex. 2, pp. 11-13, JA ____. Mr. Naas traveled back to the mine and modified the section 103(k) order again to remove the air compressor from service, in order to conduct tests to determine whether it was emitting toxic levels of carbon monoxide. Ex. 1, JA ____.

MSHA investigated the air compressor for five-and-a-half weeks, but the inspection did not conclusively reveal whether it was emitting carbon monoxide, so MSHA released it back to service. Tr. 124, 163, JA ____. MSHA terminated the section 103(k) order the same day, April 4, 2018. Tr. 163, JA ____. The source of the carbon monoxide poisoning was never determined definitively.

3. ALJ Proceedings

M-Class Mining contested the validity of the section 103(k) order. The ALJ determined that a terminated order is reviewable and the matter was not moot. Order Den. Secy's Mot. to Dismiss, *M-Class Mining, LLC*, 40 FMSHRC 1288, 1291-1292 (2018) (ALJ), JA ____. The ALJ also evaluated whether an accident had occurred and determined that the Secretary had proven that there was an "accident" based on the evidence available at the time MSHA issued the section 103(k) order. *M-Class Mining, LLC*, 41 FMSHRC 1, 7-10 (2019) (ALJ) ("ALJD"), JA ____. The ALJ found that an "accident" could be established in two ways under the text of the statute. First, the ALJ found that the potential threat of carbon

monoxide, which required emergency action, was similar in nature to the enumerated events that section 103(k) was written to address—particularly an inundation of gas—and was thus an accident. ALJD 7, JA ____. The ALJ determined that carbon monoxide poisoning can be indicative of a gas inundation, or buildup or elevation of carbon monoxide that presents a similar potential for injury or death as an inundation. ALJD 7-8, JA ____. The ALJ found that the "rapid response" undertaken by M-Class and by MSHA showed that carbon monoxide poisoning "was a sudden event similar in nature to those requiring quick action under [section] 3(k)." ALJD 7, JA ____.

Second, the ALJ found that Mr. Mullins's illness (carbon monoxide poisoning), which began in the mine, constituted an injury, which itself constitutes an accident under section 103(k). ALJD 8, JA ____. The ALJ relied on the evidence that Mr. Mullins was diagnosed with carbon monoxide poisoning by Dr. Beasley and was on 100% oxygen for 72 hours. ALJD 6, 7, 10; JA ____. An expert toxicologist for M-Class testified that the level of carbon monoxide in his blood was unlikely to produce symptoms of carbon monoxide poisoning. ALJD 9, JA ____. But, the witness testified that while carbon monoxide poisoning did not typically occur at those levels, it was not impossible. *Ibid.* The ALJ concluded that while the

witness was credible, his testimony was not dispositive on the issue of Mr. Mullins's diagnosis. *Ibid.*

M-Class argued that the Secretary failed to prove that an "accident" occurred because MSHA could not prove that any injury actually occurred as the result of carbon monoxide exposure at the mine. ALJD 8, JA ____. Though it is undisputed that Mr. Mullins began to show symptoms of illness at the mine, M-Class argued that MSHA needed to prove that the source of that illness be traceable to the mine as well. In support of its argument, M-Class pointed to the results of the tests of the air compressor, which did not conclusively reveal whether it had been emitting carbon monoxide at toxic levels. *M-Class Post-Trial Br.* at 13; Tr. at 124, JA ____. M-Class also pointed to Mr. Mullins's medical records showing his carbon monoxide levels, and suggested, based on expert testimony, that the carbon monoxide levels were unlikely actually to result in carbon monoxide poisoning. *M-Class Post-Trial Br.* at 13, JA ____. The ALJ disagreed.

The ALJ acknowledged that M-Class had put forward credible later-gathered evidence demonstrating that unsafe levels of carbon monoxide were not detected at the mine. But he reasoned that this could not invalidate the section 103(k) order, because a finding otherwise would unreasonably require MSHA to "be aware of exactly what the accident entailed," prior to issuing an order. ALJD 9, JA ____.

The ALJ also found that MSHA did not abuse its discretion by issuing or setting the scope of the section 103(k) order. Given the information available at the time of the section 103(k) order, the inspector reasonably believed that the hospitalized miner had been poisoned at the mine and that other miners also were at risk of exposure to carbon monoxide. ALJD 7, JA ___. The ALJ noted that MSHA issued the section 103(k) order in response to the potential of unsafe levels of carbon monoxide in the mine, and after the inspector found no evidence of generally unsafe levels, promptly narrowed it to only the diesel air compressor. ALJD 10, JA ___. Additionally, MSHA's modified section 103(k) order covering only the diesel air compressor was reasonable, given that MSHA believed the air compressor could be the source of the carbon monoxide. ALJD 10, JA ___.

4. Commission Decision

A divided Commission affirmed in part and reversed in part. *M-Class Mining, LLC* No. LAKE 2018-0188-R, 2020 WL 4924047 (FMSHRC Aug. 17, 2020) ("Dec."), JA ___. Three Commissioners determined that the matter was not moot and vacated the section 103(k) order. A fourth dissented on the grounds that the case was moot and did not meet any exception. A fifth agreed that the case was not moot, but would have affirmed the section 103(k) order as a valid exercise of MSHA's discretion.

Rather than addressing whether MSHA abused its discretion in issuing the section 103(k) order, the Commission majority held that, when determining whether a section 103(k) order is valid, ALJs must determine whether the Secretary proved that an "accident" occurred based on *all* available evidence. Dec. 11, JA ____. According to the Commission, an evaluation of this determination is not confined to what MSHA knew at the time it issued the order, but can rather take into account all relevant information, including information gathered after the incident giving rise to the section 103(k) order takes place. See Dec. 13-14, JA ____. The majority held that the issue in this case is not whether the inspector abused his discretion by issuing the order based on his *belief* that an accident occurred, given the facts known at the time the order was issued, but rather whether the Secretary objectively proved that an accident had *actually* occurred based, in part, on facts unearthed after the issuance of the section 103(k) order. Dec. 11-12, JA ____.

The Commission noted that an accident includes an injury that occurs at a mine. Although it was not disputed that Mr. Mullins fell ill at the mine, the Commission found that, in this case, MSHA could not determine the source of the miner's poisoning, and so the evidence did not support a finding that the miner's carbon monoxide poisoning actually occurred at the mine. Thus, the Commission held that MSHA had not proved that an accident occurred. Dec. 12-15, JA ____.

The Commission also suggested that it was appropriate for the inspector to issue a section 103(k) order based on his good faith belief that an accident had occurred given the information available at the time of the section 103(k) order. Dec. 16, JA ____. But, it went on to rule that the section 103(k) order should have been vacated after the investigation, concluding, "[w]hen it turns out the inspector was wrong and an accident did not occur, we cannot affirm an invalid section 103(k) order." Dec. 16, JA ____.

In reviewing the ALJ's factual findings, the Commission nominally applied the substantial evidence standard of review, but focused on facts that it found compelling while discounting other facts that the ALJ had incorporated into his own analyses, and ultimately drew different conclusions. Dec. 13-14, JA ____.

The Commissioner who dissented on the merits believed that the correct standard of review was whether MSHA abused its discretion based on the facts available at the time MSHA issued the section 103(k) order, rather than whether all available evidence, including evidence gathered later, objectively established the occurrence of an accident. Dec. 26-27, JA ____.

Summary of Argument

MSHA's decision to issue a section 103(k) order should be reviewed for an abuse of discretion. Though the Mine Act does not specify which standard of review is appropriate for reviewing section 103(k) orders, abuse of discretion is normally applied to discretionary agency actions, and section 103(k) orders are precisely that. Section 103(k) gives MSHA plenary authority over a mine in the event of an accident, and, by extension, requires MSHA to employ its institutional and technical expertise. This Court has recognized that the abuse-of-discretion standard is appropriate when reviewing MSHA's decision to modify a section 103(k) order, and to issue similar orders under other sections of the Mine Act. See *DQ Fire and Explosion Consultants, Inc.* v. *Sec'y of Labor*, 632 F. App'x 622, 624-625 (D.C. Cir. 2015); *Energy West Mining Co.* v. *Fed. Mine Safety & Health Review Comm'n*, 111 F.3d 900, 902 (D.C. Cir. 1997). Likewise, MSHA's decision to issue a section 103(k) order is also subject to that standard.

In determining whether MSHA's decision to issue a section 103(k) order was an abuse of its discretion, the relevant universe of information is what was available to MSHA at the time of the decision-making, not information that became available afterwards which MSHA, by definition, could not have known about when it issued the section 103(k) order. This principle is consistent with review under the abuse-

of-discretion standard, which focuses on an agency's rationale at the time of the decision. This is also consistent with review of other, similar emergency Mine Act provisions, such as "imminent danger" withdrawal orders, which are reviewed for abuse of discretion based on information available when they were issued. And practically, when MSHA issues a section 103(k) order, it typically does so urgently, in response to incomplete or evolving information so that it can expeditiously address potential threats to miners' lives. As a result, it can act only on the information available in those early moments. Affirming the Commission's decision would dissuade MSHA from rapidly responding to unfolding mine accidents, a result that subverts the core purpose of section 103(k).

MSHA's decision to issue this section 103(k) order was within its discretion based on the information available at the time it issued the order. Specifically, MSHA knew that a doctor had contacted the police to tell them that a miner had been evacuated and treated for carbon monoxide poisoning. MSHA did not yet know whether there was carbon monoxide in the mine (or how much, or where), and so, out of an abundance of caution, issued the section 103(k) order to temporarily shut down work in order to locate the source of and eliminate the risk of carbon monoxide. MSHA promptly narrowed the order to the diesel air compressor in order to determine whether it was the source of the carbon

monoxide poisoning. This was the prudent course of action, and precisely how Congress intended section 103(k) to be utilized. Information gathered later—from tests conducted in the section and on the diesel air compressor, or testimony from an expert witness retained for the hearing and not involved at the time—is not relevant.

In the alternative, if the Court determines that later-gathered information is relevant to an accident inquiry, the Commission's finding—that no accident occurred—was not supported by substantial evidence. The Commission disregarded the ALJ's reasonable finding that the miner had fallen ill in the mine and been diagnosed with carbon monoxide poisoning—an "illness" that constitutes an "accident" under the Mine Act. The Commission also disregarded the ALJ's reasonable finding that the facts of this case constituted a "sudden event," also an "accident" under the Mine Act. Overall, the Commission improperly substituted its own findings for those of the ALJ.

Standing

The Secretary has standing to seek review under section 106(b) of the Mine Act, 30 U.S.C. 816(b). See D.C. Cir. R. 28(a)(7). It authorizes the Secretary to seek review of any final Commission order in this Court. 30 U.S.C. 816(b); see *Secretary of Labor* v. *Nat'l Cement Co. of Cal.*, 573 F.3d 788, 792 (D.C. Cir. 2009).

Argument

1. The Commission should have assessed MSHA's decision to issue the section 103(k) order under the deferential abuse-of-discretion standard.

a. Standard of review

This Court reviews de novo the Commission's legal conclusions, such as the correct standard of review in evaluating MSHA's decision to issue a section 103(k) order. See *Pattison Sand*, 688 F.3d at 513; *Secretary of Labor* v. *Twentymile Coal Co.*, 456 F.3d 151, 156 (D.C. Cir. 2006) (applying de novo review to determine what standard of review applies to MSHA's decision to charge a mine operator for safety violations committed by a contractor); *Prairie State Generating Co.* v. *Sec'y of Labor*, 792 F.3d 82, 89-93 (D.C. Cir. 2015) (applying de novo review to determine what standard of review applies to MSHA's determinations about mine ventilation plans).

b. Because the Mine Act does not specify what standard of review applies to MSHA's decision to issue a section 103(k) order, the abuse-of-discretion standard that applies to discretionary agency action applies.

The issuance of 103(k) orders should be reviewed under the abuse-of-discretion standard. *Pattison Sand Co.*, 688 F.3d at 513. This standard is indistinct from the "arbitrary and capricious" standard of review, and courts have applied both terms

in reviewing a single agency action. See *Pattison Sand Co.*, 688 F.3d at 513; *Block* v. *Pitney Bowes, Inc.*, 954 F.2d 1450, 1454 (D.C. Cir. 1992) ("The distinction, if any, between 'arbitrary and capricious review' and review for 'abuse of discretion' is subtle… [and] largely semantic").

Though the Mine Act does not specify which standard of review is appropriate for review of section 103(k) orders, abuse of discretion is the standard of review typically applied to discretionary agency action. See 5 U.S.C. 706(2)(a); see, *e.g.*, *Airmark Corp.* v. *FAA*, 758 F.2d 685, 691 (D.C. Cir. 1985). Section 103(k) orders are certainly that: they give MSHA "complete control" over a mine, *Miller Mining*, 713 F.2d at 490, and allow MSHA "to wield broad authority as [it] deem[s] necessary" in order "to confront many different circumstances that present immediate risks." *Am. Coal Co.,* 796 F.3d at 21, 27. Decades of institutional experience inform MSHA's ability to investigate mine accidents. The decision to issue a section 103(k) order is made not only with the understanding that urgency and flexibility are essential in responding to evolving accident situations, but also by applying a high degree of technical expertise.

The abuse-of-discretion standard "presume[s] the validity of agency action as long as a rational basis for it is presented." *Am. Farm Bureau Fed'n* v. *EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009) (internal quotations omitted). The standard is

"highly deferential." *United Mine Workers of Am.* v. *Dole*, 870 F.2d 662, 666 (D.C. Cir. 1989). Only where an agency has committed a "clear error of judgment" or "failed to consider an important aspect" of its decision-making is an agency action considered an abuse of discretion. But review under the standard is "narrow, and [courts] refuse to substitute [their] judgement for that of the agency." *Jicarilla Apache Nation* v. *U.S. Dep't of Interior*, 613 F.3d 1112, 1118 (D.C. Cir. 2010) (citing *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)) (internal quotations omitted).

MSHA's decision here to issue a section 103(k) order is thus entitled to review under the deferential abuse-of-discretion standard.

c. This Court and others have reviewed MSHA's decision-making with respect to section 103(k) orders and analogous actions for abuse of discretion.

Importantly, this Court recently has applied the abuse-of-discretion standard to MSHA's decision to modify a section 103(k) order. *DQ Fire and Explosion Consultants*, 632 F. App'x at 624-625 (finding that MSHA did not abuse its discretion in retroactively modifying a section 103(k) order to allow the operator to enter a restricted zone on one day, but not subsequent days). The Commission has also applied the standard to MSHA's decision to modify a section 103(k) order. *Jim Walter Res.*, 37 FMSHRC at 1871; see also *Performance Coal Co.*, 32 FMSHRC

811, 823 (2010) (Comm'rs Duffy and Young, dissenting) (opining that operators should be able to seek temporary relief from amendments to a section 103(k) order only if they can prove an abuse of discretion), rev'd, 642 F.3d 234 (D.C. Cir. 2011). While a decision to issue a section 103(k) order differs slightly from the decision to modify such an order, MSHA's discretion applies equally to both kinds of decisions, and the standard of review for both agency actions should be the same. The Eighth Circuit, for example, has applied the abuse-of-discretion standard when reviewing MSHA's decision to issue a section 103(k) order. *Pattison Sand Co.*, 688 F.3d at 512. If this Court accepts the Commission's approach, it will create an unnecessary circuit split. See *U.S.* v. *Philip Morris USA, Inc.*, 396 F.3d 1190, 1201 (D.C. Cir. 2005) (This Court "avoids[s] creating circuit splits when possible...").

Additionally, this Court has applied this standard when reviewing other actions entrusted to MSHA's judgment under the Mine Act. In *Energy West Mining Co.*, 111 F.3d at 902, this Court affirmed the Commission's holding that substantial evidence supported the ALJ's finding that the MSHA inspector did not abuse his discretion in issuing a withdrawal order under Section 104(b) of the Mine Act.

Other courts have applied the standard in reviewing other, similar actions as well. In *Old Ben Coal Co.* v. *Interior Bd. of Mine Operations Appeals*, the Seventh Circuit held that the decision to issue an "imminent danger" order must be upheld

"unless there is evidence that [the agency] abused [its] discretion or authority." 523 F.2d 25, 31 (7th Cir. 1975) (discussing MSHA's predecessor agency and statute).

2. Whether MSHA acted within its discretion in response to an apparent accident depends on information available to MSHA at the time of decision-making, not on information that became available after the time of decision-making.

a. Standard of review

As discussed above, this Court reviews legal conclusions, such as the standard of review that applies to MSHA's decision to issue a section 103(k) order, de novo. *Am. Coal. Co.*, 796 F.3d at 23; *Prairie State Generating Co.*, 792 F.3d at 89-93. So the Commission's legal conclusions about what information to consider when reviewing MSHA's decisions is subject to de novo review.

b. Abuse of discretion review focuses on information available to an agency at the time it made its decision.

Under the abuse-of-discretion standard, courts consider whether an agency's decision was rationally related to the facts before the agency decision-maker at the time of the decision. See *Jim Walter Res.*, 37 FMSHRC at 1871; *PBGC* v. *LTV Corp.*, 496 U.S. at 654; *Dickson* v. *Sec'y of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995) (abuse of discretion review entails an evaluation of "the agency's rationale at

the time of decision"). An agency cannot be found to have abused its discretion on the basis of information that was not reasonably available to it when it exercised its discretion. See *Walter O. Boswell Mem'l Hosp.* v. *Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a court is to review an agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision."). The Commission adheres to this principle as well. *Wyoming Fuel*, 14 FMSHRC 1282, 1291-1292 (1992) (an MSHA inspector's decision to issue an imminent danger order must be evaluated "under the circumstances" and "based on the facts known to him, or reasonably available to him."); *Island Creek Coal Co.*, 15 FMSHRC 339, 346-348 (1993) (determining the reasonableness of the inspector's action "given the particular circumstances and "based on the information available at the time.").

Ignoring this well-settled principle, the Commission focused on information—the results of carbon monoxide tests done in the section and on the diesel air compressor, and expert testimony on Mr. Mullins's medical records—which was not available to MSHA at the time it issued the section 103(k) order. But because MSHA's decision to issue a section 103(k) order is reviewed for abuse of discretion, the Commission should have reviewed the section 103(k) order based on information available to MSHA at the time it issued the order. Because the

Commission relied on evidence unavailable to MSHA when it issued the section 103(k) order, it necessarily failed to apply the abuse-of-discretion standard.

c. Section 103(k) orders are issued before MSHA has the chance to investigate or fully understand the accident, so their validity should not depend on information that becomes available to MSHA after the order is issued.

Issuing a section 103(k) order is often one of the first steps that MSHA takes in response to an apparent accident. See *Am. Coal Co.*, 796 F.3d at 27 (noting that MSHA "sometimes issue[s] section 103(k) safety orders first, while trying to deal with an accident, and [then] issue[s]… withdrawal orders to shut the mine down completely."). In responding to an emergency situation, MSHA initially is aware only of information that has come through the hazard-reporting hotline. Often, callers are not sure of the details or severity of the accident, and MSHA receives escalation reports that refer to a possible fatality, or evidence that something has gone wrong, such as smoke pouring from the mine, but no additional details illuminating the cause or even the magnitude of the incident. After receiving a call relaying a possible emergency, MSHA dispatches an inspector to the mine. Often, this inspector will know almost nothing about what has transpired and is armed only with the barest details from the escalation report, and with his best judgment

and mining industry expertise. For that reason, MSHA's decision to issue a section 103(k) order should not be second-guessed based on 20/20 hindsight.

Reflecting these realities, the Commission has held that, while an MSHA inspector must be at the mine site in order to issue an order, section 103(k) does *not* require "that the Secretary must be aware of what [an] accident entailed, let alone have completed an investigation into the accident before issuing a section 103(k) order." *Jim Walter Res.*, 37 FMSHRC at 1871.

In *Jim Walter Resources*, a mine supervisor called MSHA to report an ignition in a coal mine. 37 FMSHRC at 1869. An MSHA inspector arrived, and, based on his understanding of what had occurred, issued a section 103(k) order to shut down production in the section where the ignition was located. *Ibid.* The inspector then went underground to investigate the ignition, and interviewed miners about what had occurred. After the investigation, the inspector modified the section 103(k) order to require that all miners receive training. *Ibid.* The operator contested the section 103(k) order's validity, arguing that it had been issued prior to MSHA's investigation of the facts. *Id.* at 1870. The Commission held that the section 103(k) did not require that the Secretary wait until *after* an investigation to issue a section 103(k) order, or to understand what had occurred prior to issuing a section 103(k) order. The Commission concluded that, "based on the plain language of section

103(k)… the Secretary was authorized… 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….” *Id.* at 1871.

This is the correct approach. The inspector learned of an apparent accident, went immediately to the mine, issued the section 103(k) order, and *then* engaged in fact-finding. The relevant information, both in *Jim Walter Resources* and here, in determining whether an accident occurred, is what was available to MSHA at the time. Had the *Jim Walter Resources* inspector found no fire, his section 103(k) order would still have been issued on the reasonable belief that there was a potential fire in the mine, and that miners were in danger.

This approach does not mean that section 103(k) orders are set in stone once they are issued. On the contrary, MSHA routinely modifies section 103(k) orders as it learns more about apparent accidents, as it did in this case. See *Performance Coal Co.*, 642 F.3d at 236. MSHA’s approach respects both operators’ interests and MSHA’s authority to protect miners’ lives.

d. Evaluating section 103(k) orders based on the information available at the time of the decision making is consistent with the way other emergency Mine Act provisions are reviewed.

As discussed, the relevant information in determining whether an accident occurred is information that was available to MSHA at the time took action. Section 103(k) orders are analogous, in this regard, to two provisions in the Mine Act: imminent danger orders and injury-reporting requirements.

The Mine Act authorizes MSHA to issue a withdrawal order covering the area of a mine where an "imminent danger" exists, until MSHA determines that the imminent danger and the conditions or practices which caused it no longer exist. 30 U.S.C. 817(a). In issuing an imminent danger order, an inspector "must act quickly to remove miners from a situation he believes is hazardous." *Blue Bayou Sand & Gravel*, 18 FMSHRC 853, 859 (1996). Courts review these orders under an abuse-of-discretion standard, based on the facts available at the time. *Cumberland Coal*, 28 FMSHRC 545, 555 (2006), aff'd on other grounds, 515 F.3d 247 (3d. Cir. 2008); *Warrior Met Coal Mining, LLC* v. *Sec'y of Labor*, 663 F. App'x 809, 813 (11th Cir. 2016).

An imminent danger order can issue in any "situation in which a reasonable man would estimate that, if normal operations… should proceed, it is at least just

as probable as not that the feared accident or disaster would occur…." *Freeman Coal Mining Co.* v. *IBMA*, 504 F.2d 741, 745 (7th Cir. 1974). Thus, the validity of an imminent danger order does not require the Secretary to prove that an imminent danger *actually* existed.

Like an imminent danger order, a section 103(k) order requires MSHA to act quickly to determine whether an apparent accident has occurred, and how to respond to avoid putting miners' lives at risk. As in the context of an imminent danger order, the actual feared accident necessitating a section 103(k) order may not come to pass. So, as with an imminent danger order, if based on the facts before MSHA at the urgent moment of decision-making, an apparent accident has occurred, placing limits on MSHA's ability to issue section 103(k) orders would be "gambling with human lives." See *Freeman Coal Mining Co.*, 504 F.2d at 744.

The Mine Act also requires a mine operator to contact MSHA within fifteen minutes of the occurrence of an injury that has a reasonable potential to cause death. 30 U.S.C. 813(j); 30 C.F.R. 50.10(b). The Third Circuit has affirmed the Commission's holding that the determination of whether the injury has the potential to cause death "focuses on the reasonably perceived severity of an accident in the moment[, which] reinforces the incentive for mine operators to notify MSHA quickly, when the agency can take effective action." *Consol*

Pennsylvania Coal Co. v. *Fed. Mine Safety & Health Review Comm'n*, 941 F.3d 95, 107 (3d Cir. 2019), aff'g 40 FMSHRC 998 (2018). Whether the injury is later determined to be *actually* life-threatening is irrelevant to the analysis.

In determining that the injury-reporting requirement should be analyzed based on the "perceived severity of the accident in the moment," the Third Circuit considered the history and purpose of the Mine Act and of the reporting requirement in particular. *Consol Pennsylvania Coal Co.*, 941 F.3d at 104-106. "[T]he requirement is plainly designed to encourage rapid notification so that MSHA can respond effectively in an emergency and preserve evidence to facilitate later investigation." *Id.* at 105. The court noted that to require that an injury *actually* be life threatening would "frustrate rather than facilitate reporting." *Id.* at 107-108.

Like the injury-reporting requirement, the decision to issue a section 103(k) order should focus on whether MSHA reasonably determines, based on the limited information available to it, that an accident has occurred and a section 103(k) order is needed. Like the injury-reporting requirement, section 103(k) is designed to facilitate a rapid and flexible response to accidents. Requiring that an accident *actually* have occurred, rather than determining whether the facts available at the time would suggest to a reasonable inspector that an accident had occurred, would

frustrate, rather than facilitate, MSHA's critical mandate to address the potential accident and protect miners' lives.

It is true that section 103(k) orders must be issued in response to "accidents," as defined by the Mine Act, rather than in response to any perceived hazard at a mine. 30 U.S.C. 813(k); see 30 U.S.C. 802(k). But whether there has been an "accident" for section 103(k) purposes depends not on information gathered later, but on information available to MSHA at the time it issues the order. That is consistent with how the Commission and courts approach imminent danger orders and the injury-reporting requirement. The Mine Act authorizes MSHA to issue orders in response to "an imminent danger," not a "possible imminent danger," but MSHA's orders are reviewed based on whether a danger apparently met that definition at the time. See 30 U.S.C. 817(a); *Wyoming Fuel*, 14 FMSHRC at 1291-1292. And the Mine Act requires operators to report any injury "which has a reasonable potential to cause death," not any injury "which might have a reasonable potential to cause death," but whether an injury should have been reported is reviewed based on whether the injury apparently met that definition at the time of reporting. See 30 U.S.C. 813(j); *Consol Pennsylvania Coal Co., LLC*, 941 F.3d at 107. The same approach should apply to section 103(k) orders.

e. As a practical matter, the Commission's approach would hamstring MSHA's ability to respond effectively in emergency situations

The Commission's approach—determining whether a section 103(k) order was valid based on information available long after MSHA needed to issue the order—also is bad policy, as it would hamstring MSHA's ability to respond to apparent accidents. It would deprive MSHA of its Congressionally-granted "broad, flexible, plenary" authority to assess the apparent threat to human life and issue a section 103(k) order in response to the particulars of an emergency situation. Instead, an MSHA inspector would have to simultaneously conduct an emergency investigation and constantly reevaluate whether the apparent accident is, in fact, an actual, statutory accident. Requiring MSHA to focus on whether new information has changed its determination of whether an accident has *actually* occurred would detract from its safety- and health-protecting responsibilities at the time when those responsibilities are most urgently needed.

Mine catastrophes are not typically simple, straightforward events. Their origins, development, and consequences are not always readily apparent. Smoke billowing out of a mine can have many causes; shaking ground can signal a roof collapse miles away; the source of poisonous gas may not be immediately clear. MSHA's role in an accident is to assume control in order to prevent the

destruction of evidence and the loss of life. To require MSHA inspectors to divine whether information gathered in the future would (or would not) ultimately sustain a section 103(k) order prior to issuing the order is to invite neglect of the statute's remedial purposes.

The Commission noted in an aside that an MSHA investigator, acting in good faith, will not suffer adverse consequences for issuing a section 103(k) order where there has apparently been an accident, if, after discovering that there is no evidence of an accident, he vacates the order. Dec. 16, JA ____. But that observation does not cure the Commission's error; vacatur is appropriate for orders that were erroneously issued, not for orders that were properly issued where an inspector, moving quickly under emergency circumstances, issued a section 103(k) order adequately supported by the information before him at the time of the decision.

The Commission suggested there would be no chilling effect on MSHA's issuing of section 103(k) orders based on this decision. Dec. 16, JA ____. That is plainly incorrect. The Commission's holding is that MSHA does not have the authority to issue section 103(k) orders at the outset of an accident investigation based on the available information unless the investigation ultimately concludes that an accident occurred, a significant limitation on MSHA's plenary power. Commission after-the-fact second-guessing of MSHA's on-the-ground

enforcement decisions—which could include requiring the inspectors managing the accident to testify before an ALJ regarding information they might not have had at the time—could well deter inspectors from taking actions they believe are necessary.

Additionally, the Commission did not consider the effect this might have on mine operators' willingness to abide by a reasonably issued section 103(k) order. See *Consol Pennsylvania Coal Co., LLC*, 941 F.3d at 107 (noting that, in the context of injury reporting, requiring that an injury be *actually* life-threatening "would encourage mine operators to forego calling MSHA after an accident in the hopes that the true but presently unknown medical facts would turn out to be better than those perceived in the moment."). The Commission's approach would create incentives for operators to challenge these orders and potentially interfere with MSHA's safety- and health-promoting responsibilities.

The Commission also expressed concern that, if the validity of a section 103(k) order were analyzed based on the facts available at the time of decision-making, any illness at work, including "an upset stomach or an allergic reaction" could trigger a 103(k) order. Dec. 20, JA ___. But abuse of discretion review is not a rubber stamp; MSHA must act *reasonably* based on the information. Should an "upset stomach" be coupled with additional information suggesting a threat to other

miners, the prudent action would be to address the potential threat with caution and urgency. The Commission's fear also ignores the facts of this case, which are far afield from a mild work illness: the onset of symptoms consistent with carbon monoxide poisoning, followed by a diagnosis of carbon monoxide poisoning.

3. MSHA's decision to issue this section 103(k) order was within its discretion.

The Commission did not apply the abuse-of-discretion standard, and did not evaluate whether the facts available that evening to the MSHA inspector were rationally related to the section 103(k) order. But there is no need for remand on that question, because the facts compel the conclusion that MSHA did not abuse its discretion here. See *Donovan ex rel. Anderson* v. *Stafford Constr. Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (remand is unnecessary when "only one conclusion would be supportable"); see also *NLRB* v. *Wayman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969) ("To remand would be an idle and useless formality …. the substance of the Board's command is not seriously contestable.").

At the time the section 103(k) order was issued—a moment during which it was still unclear whether miners were in danger of exposure to carbon monoxide—the decision to issue the order was rationally related to the facts at hand. At the time of the order, MSHA was aware that a miner had become ill, had been evacuated from

the mine, was rushed to the emergency room, and was diagnosed with and treated for "very high levels" of carbon monoxide poisoning. Tr. 129, 134-135, JA ____; Ex. 7, JA____.

The MSHA inspector reasonably believed both that the miner had been injured at the mine and that other miners were potentially at risk of exposure to toxic levels carbon monoxide. Carbon monoxide is a typical problem in underground coal mines, where it can accumulate when coal interacts with oxygen. Inspectors are trained to recognize signs of carbon monoxide build-up, as occupational exposure in mines is a prevailing hazard. See Tr. 25-26, JA ____. It was reasonable for the inspector to suspect that there might be carbon monoxide present. He issued the section 103(k) order to prevent additional injuries while he conducted an investigation. As the investigation went on, he reasonably (and quickly) narrowed the scope of the section 103(k) order to the diesel air compressor, which he determined was the most likely source of carbon monoxide poisoning, based on his interviews with miners and his review of the scene.

In addition to being a valid exercise of MSHA's authority under the Mine Act, MSHA's issuance of the section 103(k) order was, at the very least, a reasonable course of action to take in order to ensure the safety of other miners. This scenario was precisely the kind contemplated by Congress: upon learning of an apparent

accident, the MSHA inspector arrived at the mine and exercised MSHA's broad authority by issuing a section 103(k) order to protect other miners from harm. Then, he began to review the information available at the site, and narrowed the scope of the section 103(k) order as he learned more in an effort to determine what occurred and protect lives. After learning from police that a miner had been evacuated and treated for carbon monoxide poisoning, and not yet knowing whether there were toxic levels of carbon monoxide in the mine, the inspector took control of the mine site, ordered the section temporarily closed, and began investigating for signs of toxic gas. This was consistent with MSHA's remedial purpose and the intent of section 103(k).

4. Even under the Commission's approach of evaluating later-gathered evidence, substantial evidence does not support the Commission's finding that no accident occurred.

If this Court determines that the Commission correctly reviewed MSHA's section 103(k) order based on information available after MSHA issued the section 103(k) order, then the appropriate standard of review of the ALJ's decision that an accident occurred is the substantial evidence standard. See 30 U.S.C. 816(a)(1); *Am. Coal Co.*, 796 F.3d at 23. Under this standard, the Court "determine[s] whether there is such relevant evidence as a reasonable mind might accept as adequate to support the judge's conclusion." *Jim Walter Res., Inc.* v. *Sec'y of Labor*,

103 F.3d 1020, 1023-1024 (D.C. Cir. 1997). The Commission may not "substitute a competing view of the facts for the view the ALJ reasonably reached … and even if the Commission's own view [finds] support in the record as well, it [is] bound to uphold the ALJ's determinations" if they are supported by substantial evidence. *Donovan ex rel. Chacon* v. *Phelps Dodge Corp.*, 709 F.2d 86, 92 (D.C. Cir. 1983). An ALJ's credibility determinations are entitled to great weight and may not be overturned lightly. *Puerto Rican Cement Co.* v. *Fed. Mine Safety & Health Review Comm'n*, 950 F.2d 797 (D.C. Cir. 1991). Indeed, "there is no material difference between the APA's 'arbitrary and capricious standard' and its 'substantial evidence' standard as applied to court review of agency factfinding." *Crooks* v. *Mabus*, 845 F.3d 412, 423 (D.C. Cir. 2016).

In determining that no accident occurred, the Commission did not properly apply the narrow substantial evidence standard to the ALJ's decision. Even taking into account the later-gathered information that M-Class offered, the ALJ reasonably determined that the facts demonstrated that Mr. Mullins had suffered an "injury," the onset of which began in the mine, and which suggested that other miners were at risk of harm. The ALJ also found that the facts supported that an event similar in nature to an "inundation" had occurred. Both of these findings fall

easily within the plain meaning of "accident" in section 103(k) and the facts the ALJ relied on to substantiate these findings constitute substantial evidence.

a. The Commission did not consider all the facts the ALJ considered and substituted its weighing of the evidence for the ALJ's.

Both the Commission and ALJ cited evidence suggesting that there were not toxic levels of carbon monoxide in the mine: the fact that no dangerous levels were detected in the area or emanating from the air compressor. But the ALJ also relied on additional facts in making his determination that an accident occurred in the mine: Mr. Mullins was visibly ill, presented with symptoms requiring a mid-shift evacuation and ambulance ride to the emergency room, spent 72 hours on 100% oxygen, and a physician diagnosed him with carbon monoxide poisoning. ALJD 8, JA ____. The ALJ weighed all this evidence and determined that Mr. Mullins had suffered an "injury." Rather than reviewing the ALJ's consideration of those facts and evaluating whether they adequately supported his conclusions, the Commission instead focused principally on whether MSHA had proven that there was elevated carbon monoxide at the mine and drew its own de novo conclusions. Dec. 13-15, JA ____.

Additionally, the Commission objected to the ALJ's use of the escalation report, referring to it as "seriously problematic," because it is hearsay evidence. Dec. 12,

JA ____. But the Commission's rules permit hearsay. 29 C.F.R. 2700.63. And the rule against hearsay exists to prevent untruths and bias from influencing the fact-finder's understanding of what occurred, but the information here was trustworthy. The information in the escalation report traveled from an emergency room physician, to the police, to the MSHA hotline, where the operator transcribed it. Tr. 154-157, JA ____; Ex. 7, JA ____. The doctor who treated Mr. Mullins was motivated by concern for other miners vulnerable to exposure. The police who contacted the MSHA hotline were motivated by their duty to prevent and react to emergencies. The MSHA hotline operative who wrote down what they relayed did so because it was his job to receive and act on allegations of danger at mines. The report was the result of a standardized business procedure. There is little room for bias in these motivations, and no suggestion that the information was tainted with error as it passed from party to party. Moreover, it was up to the ALJ, as the factfinder, to determine how much weight to give the escalation report, and the Commission's re-weighing of the evidence was inappropriate.

The Commission also set aside the ALJ's decision not to rely on the testimony of M-Class's expert toxicologist. The Commission, in its review of the witness's testimony, noted that he testified that the levels of carbon monoxide in Mr. Mullins' blood were too low to cause symptoms of carbon monoxide poisoning.

Dec. 13-14, JA ____. The ALJ, however, wrote that while the witness was credible, he had also clarified that while in his opinion carbon monoxide poisoning was not likely to occur at the levels detected in Mr. Mullins' blood, it was not impossible. ALJD 9, JA ____. After hearing the full testimony, the ALJ logically concluded that it was not dispositive in determining whether an accident occurred, because carbon monoxide *was* in fact a plausible explanation for Mr. Mullins' illness. ALJD 9, JA ____. Rather than evaluating whether that constituted substantial evidence, the Commission determined de novo that no carbon monoxide poisoning occurred. But the evidence the ALJ relied on to support his conclusions was adequate, even if it was possible to draw different ones.

b. The Commission disregarded the ALJ's consideration of the rapid, emergency response to Mr. Mullins' illness

One of the factors the Secretary and the Commission consider in determining whether an accident has occurred is whether it involves a "sudden event." (Though a sudden event is not a required element of a Mine Act "accident," it may suggest one.) When those contemporaneously present respond with fast emergency action, that is evidence of a "sudden event." In *Aluminum Company of America ("Alcoa")*, 15 FMSHRC 1821, 1826 (1993), the Commission noted that some of the enumerated accidents discussed in the Mine Act, such as explosions,

ignitions, fires, and inundations, are "sudden events that pose an immediate hazard to miners and require emergency action" and wrote of additional situations enumerated in the Mine Act's accompanying regulations that "the events listed require quick action." *Ibid.* (citing 30 C.F.R. 50.2(h)).

Though acknowledging that a "sudden event" is not a necessary element of an accident, the ALJ relied on language from *Alcoa* in analyzing what occurred at the M-Class #1 Mine. In applying *Alcoa*, the ALJ determined that the rapid, emergency response elicited by the onset of Mr. Mullin's symptoms and the possibility of an immediate hazard—toxic levels of carbon monoxide—were similar to other situations requiring quick action. Though not precisely a gas inundation, the ALJ reasoned, exposure to carbon monoxide could constitute an emergency situation of the kind contemplated by section 103(k). ALJD 7, JA ____.

In short, the ALJ determined that a "sudden event" occurred based on the undisputed facts that Mr. Mullins suddenly became ill at the mine, was given emergency oxygen treatment at the mine, and was rushed to the hospital. The Commission disagreed that this constituted a "sudden event" and found instead that because the Secretary had not proven a sudden manifestation of carbon monoxide, a "sudden event" had not occurred. But it was reasonable, supported by the evidence, and consistent with case law for the ALJ to note both the sudden

illness and the rapid response in determining that a sudden event—whether an illness or an apparent inundation—had occurred.

Mr. Mullins exhibited symptoms about an hour to an hour and a half after he began work underground. He was evacuated and rushed to the hospital to receive treatment, and both M-Class and MSHA, upon learning of the possibility of carbon monoxide, moved quickly to protect other miners from risk of exposure. The Commission's task was only to look at the evidence the ALJ relied on to determine whether it supported the ALJ's findings; instead it found de novo that a sudden event had not occurred.

In sum, had the Commission applied the substantial evidence test, it would have found that substantial evidence supported the ALJ's findings both that an "injury" occurred and that an event akin to an "inundation" of toxic carbon monoxide had taken place, either of which constitutes a Mine Act "accident."

Conclusion

The Court should grant the petition for review, reverse the Commission's decision, and affirm the validity of the section 103(k) order.

Respectfully submitted,

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I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on December 14, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system:

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Addendum – Pertinent Statutes and Regulations

30 U.S.C. § 802(k)

For the purposes of this chapter, the term:

(k) "accident" includes a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person

30 U.S.C. 813(j)

(j) Accident notification; rescue and recovery activities

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, has 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(k)

(k) Safety orders; recovery plans

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. 817(a)

(a) Withdrawal orders

If, upon any inspection or investigation of a coal or other mine which is subject to this chapter, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 814(c) of this title, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 814 of this title or the proposing of a penalty under section 820 of this title.

30 C.F.R. 50.2(h)

As used in this part:

(h) "Accident" means:

(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;
(3) An entrapment of an individual for more than 30 minutes or which has a reasonable potential to cause death;
(4) An unplanned inundation of a mine by a liquid or gas;
(5) An unplanned ignition or explosion of gas or dust;
(6) In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery;
(7) An unplanned ignition or explosion of a blasting agent or an explosive;
(8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;

(9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour;

(10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank;

(11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes; and

(12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

30 C.F.R. 50.10(b)

The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1–800–746–1553, once the operator knows or should know that an accident has occurred involving:

(b) An injury of an individual at the mine which has a reasonable potential to cause death;