ORAL ARGUMENT SET FOR MARCH 22, 2021

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

Supplemental Brief for the Secretary of Labor

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Summary of Argument

This case is moot because once MSHA terminated the section 103(k) order at issue, the Commission could not provide M-Class effective relief. Reputational injury is not redressable under the Mine Act. And even if it were, no such injury occurred here.

This case also does not fall within the capable-of-repetition-yet-evading-review exception to mootness. Here, the controversy is that MSHA issued a 103(k) order based on evidence of an accident, M-Class contested the order on the basis that no accident occurred, and MSHA terminated it before an ALJ could render a decision. This is an unusual posture that is unlikely to recur.

Argument

I. This case is moot.

Though mootness arises from the constitutional "case or controversy" requirement applicable to Article III courts, the Commission has incorporated the doctrine. See *North Am. Drillers*, 34 FMSRHC 352, 358 (2012). As in federal court, a case before the Commission is moot "when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome." *Ibid.*

When events following the filing of a legal action result in the inability of the tribunal to provide any effective relief to a prevailing party, the case is moot. See *Church of Scientology of California* v. *United States*, 506 U.S. 9, 12 (1992).

In general, the Mine Act does not recognize reputational interests. See, *e.g.*, 30 U.S.C. 820(a) (operators are strictly liable for any violation regardless of negligence). Even if it did, such interests are limited: this Court has held that "[a]t some point… claims of reputational injury can be too vague and unsubstantiated to preserve a case from mootness." *O'Gilvie* v. *Corp. for Nat'l Community Service,* 802 F.Supp.2d 77, 81 (D.C. Cir. 2011) (internal citations omitted). Parties alleging reputational injury as an ancillary result of an otherwise moot action must show "some tangible, concrete effect remain[s], susceptible to judicial correction." *Ibid.*

A terminated 103(k) order poses no non-speculative legal consequences. While an operator's "history of violations" for future penalty calculations includes citations and orders MSHA issues under 30 U.S.C. 814, it does not include terminated accident control orders. Nor does vacating a terminated 103(k) order confer any legal benefits. When MSHA terminated this 103(k) order, M-Class was able to use its air compressor. When the Commission later vacated the order, nothing changed.

The Commission asserts that the order could harm M-Class's reputation, noting that a terminated 103(k) order might indicate to the public "that *something* occurred at the mine." Dec. 6 [JA 237]. But the fact that "something" may (or may not) have occurred does not rise to the level of tangible effect this Court requires. See *O'Gilvie*, 802 F.Supp.2d at 81.

A terminated order does not suggest wrongdoing. An accident control order simply is MSHA's mechanism to exert authority over an accident scene; it implies nothing about an operator's negligence. For example, MSHA could issue a 103(k) order in response to a death at a mine even if the death were from natural causes. 30 CFR 50.10(a); *Richmond Sand & Stone*, 41 FMSHRC 402, 406-407 (2019); see also Dec. 20 [JA 251] ("[Such orders] are not a *per se* black mark against an operator's reputation.") (Comm'r Jordan, dissenting). The Commission attempts to link 103(k) orders to wrongdoing, theorizing that a 103(k) order's ensuing investigation could give rise to allegations of "civil and criminal violations," Dec. 6 [JA 237]. But MSHA's decision to cite an operator is not related to MSHA's need to control an accident scene. And in any event, MSHA issued no citations here.

Nor does a terminated 103(k) order have any other ongoing consequences for an operator. The Commission suggests that a 103(k) order can be modified to a citation after it is terminated. Dec. 7 [JA 238]. That is incorrect and is not how the

Mine Act works. Section 103(k) authorizes accident control orders. This section of the Act gives MSHA the ability to control a mine's operations to prevent injury and death. Section 104, by contrast, authorizes enforcement against operators through citations and orders for unlawful conduct. Though MSHA can terminate a 103(k) order and, separately, issue a 104 citation, there is no authority to *convert* a 103(k) order into a citation. And to the extent the Commission suggests that a 103(k) order can be modified in other ways after it is terminated, that also is not correct. A terminated order is exactly that: finished. MSHA terminates 103(k) orders when miners are no longer in danger and the order is no longer needed. See MSHA Accident Investigation Procedures Handbook, PH20-I-4 at 7 (2020) (https://arlweb.msha.gov/READROOM/HANDBOOK/PH20-I-4.pdf).

The Commission also suggests that a terminated 103(k) order can be the basis for a citation. Dec. 7 [JA 238]. But MSHA's duty and authority to issue citations for the violation of mandatory health and safety standards stems from section 104, not from any 103(k) order. See 30 U.S.C. 814(a).

The cases the Commission cites do not suggest otherwise. Two of those cases concern the modification of terminated section 104 citations or orders. Section 104 issuances are enforcement actions that penalize operators for such factors as negligence and violation gravity; a correct evaluation of those factors can change

based on the evidence. These cases did not involve accident control orders issued under section 103(k). See *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1288-89 (1992); *Ten-A-Coal Coal Co.*, 14 FMSHRC 1296, 1298 (1992). MSHA and the Commission modify terminated citations routinely; most citations contested before the Commission have been terminated.

Also, these two cases discussed termination only in the context of operator abatement under section 104(b), 30 U.S.C. 814(b). The cases are clear that terminating a section 104 citation simply means "that the cited condition no longer exists, since abatement has been accomplished." *Wyoming Fuel*, 14 FMSHRC at 1288. But terminating a cited condition does not end proceedings concerning the citation. There is no analogous abatement provision for 103(k) orders and when MSHA terminates such an order, the order is finished; all proceedings related to the order end.

These cases therefore do not suggest the Secretary can modify a terminated 103(k) order, which, unlike an enforcement citation or order under section 104, is designed to allow MSHA to take temporary control of a mine and does not have penalty implications. And they certainly do not suggest that it would be appropriate for MSHA to convert a terminated 103(k) order into a 104 citation *three years* after termination.

The third case the Commission relied on only bolsters the Secretary's position. See *Westmoreland*, 8 FMSHRC 1317, 1319-1321 (1986). The issue in *Westmoreland* was whether, for loss of pay purposes, a section 107(a) imminent danger withdrawal order could be the basis for miners to claim an entitlement to full compensation under 30 U.S.C. 821 when the order did not set forth a violation of MSHA standards. (The statute requires that the order be "for" a violation of MSHA standards for full compensation.) The Commission held that the order itself need not allege a violation; a separate section 104 citation issued for the same conditions qualified the miners for full compensation. It cited the text of section 107(a): "[t]he issuance of an order under this subsection shall not preclude the issuance of a citation under section 814." 30 U.S.C. 817(a).

The case did not address at all whether MSHA could convert a 107(a) order into a citation either before or after it was terminated. Thus, *Westmoreland* does not support the proposition that a 103(k) "withdrawal order … could be modified to allege such a violation" after being terminated. Dec. 7 [JA 238]. Instead, *Westmoreland* confirms that citations and orders under section 104 are independent enforcement actions and do not arise out of 103(k) or 107(a) orders.

In sum, no potential continuing consequences exist from a terminated 103(k) order. Vacating an already-terminated 103(k) order provided M-Class no effective relief; no live case or controversy existed. In short, this case is moot.

II. This case does not fall within the "capable-of-repetition-yet-evading-review" exception to mootness.

There are exceptions to mootness, including where an issue is "capable of repetition yet evading review." Under this exception, a prevailing party must show first, that the challenged action is too short in duration to be litigated fully, and second, that there is a reasonable expectation that the same complaining party would be subjected to the same action again in the future. *Performance Coal Co.* v. *Fed. Mine Safety & Health Review Comm'n*, 642 F.3d 234, 237 (D.C. Cir. 2011).

There is no dispute that this order "evaded review," because it was in effect too briefly to be litigated.[1] There is no reasonable expectation, however, of repetition.

[1] The Commission noted that "the operator was required to comply with the order… until it raised a legal challenge to the Secretary's actions. Only at that point did MSHA capitulate and terminate the order." Dec. 8 [JA 239]. This is a mischaracterization. MSHA terminated the order 20 days after M-Class filed the notice of contest, the same day it concluded its inspection of the air compressor. Tr. 124, 163 [JA 93, 121]. MSHA properly followed protocol in conducting a thorough investigation. When MSHA concluded that the air compressor was safe to use, it returned the machine to service and promptly terminated the order.

In determining whether an injury is "capable of repetition," this Court has explained that "it is not whether the precise historical facts that spawned the plaintiff's claims are likely to recur, but instead whether the legal wrong complained of by the plaintiff is reasonably likely to recur." *Performance Coal Co.*, 642 F.3d at 237. Whether the "legal wrong" is capable of repetition "must be defined in terms of the precise controversy it spawns, to wit, in terms of the legal questions it presents for decision." *J.T.* v. *District of Columbia*, 983 F.3d 516, 524 (D.C. Cir. 2020). "This prong requires that the parties will engage in litigation over the same issues in the future… [There must be] a reasonable degree of likelihood that the issue will be the basis of continuing controversy between the two parties." *Ibid*. It follows that "[w]hen estimating the likelihood of an event's occurring in the future, a natural starting point is how often it has occurred in the past." *Planned Parenthood of Wisconsin, Inc.* v. *Azar*, 942 F.3d 512, 518 (D.C. Cir. 2019) (citing *Clarke* v. *United States*, 915 F.2d 699, 704 (D.C. 1990)).

The Commission asserts the "general legal wrong" wrought by this order (that 103(k) orders like this one have a "harmful impact… on the operator's ability to use equipment at a mine") is capable of repetition because "MSHA does not dispute that in the future, it may issue similar orders under section 103(k)… [and] that the operator will challenge [them], even if they are later terminated." Dec. 8

[JA 239]. Yes, MSHA may issue a 103(k) order in the future. Yes, that order may be focused on equipment that MSHA believes has caused an accident and may prevent the operator from using that equipment while the order is in effect. But that is not enough. As this Court has observed, in determining what conduct is capable of repetition, "[t]he more broadly we define the wrongful conduct, the more numerous are the possible examples, and the greater the likelihood of repetition." *Clarke*, 915 F.2d at 703. Though the precise historical facts (a diagnosis of carbon monoxide poisoning without subsequent evidence of toxic levels of carbon monoxide) need not repeat, the "general legal wrong" of a 103(k) order that restricts access to equipment is too broad.

In *Performance Coal Company*, this Court determined that "repetition" was not the reinstitution of the exact restrictions imposed by a prior modification to a 103(k) order, but the institution of similar future modifications to that same 103(k) order. This Court framed the salient question as whether the operator "will be subjected to further modifications from which it will seek temporary relief." *Id.* at 207. Here, the analogous question would be whether M-Class again will have an apparent accident after which MSHA issues a 103(k) order and again will challenge the order's validity even after it is terminated, on the basis that an accident did not in fact occur. With most 103(k) issuances, it is clear that an accident has occurred,

even though the details and causes often are not known at the time. In fact, following the termination of this 103(k) order, from May 2018 through September 2018, MSHA issued and terminated three other 103(k) orders, none of which M-Class has contested. MSHA Mine Data Retrieval System (https://www.msha.gov/mine-data-retrieval-system). So the particular mystery of this case is unusual. And, as Commissioner Jordan correctly pointed out, because the controversy here is "idiosyncratic and highly unlikely to recur," "a Commission decision as to whether MSHA erred in closing a portion of this mine for a finite period of time will in all likelihood not inform future controversies regarding section 103(k) orders." Dec. 22 [JA 253].

This mootness exception requires a "reasonable expectation or demonstrated probability that the same controversy will occur involving the same complaining party." *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982). That standard simply has not been met. See *Spivey* v. *Barry*, 665 F.2d 1222, 1234-35 (D.C. Cir. 1981) ("A legal controversy so sharply focused on a unique factual context does not present a reasonable expectation that the same complaining party would be subjected to the same actions again.") (internal citations omitted).

Performance Coal, which the Commission invoked repeatedly, see Dec. 7 [JA 238], is readily distinguishable. There, this Court granted a mine operator's request

for temporary relief from restrictions imposed by a 103(k) order, though the order had since been modified and the restrictions at issue had been removed. 642 F.3d at 237–38. *Performance Coal* differs from this case in several ways. Most importantly, in *Performance Coal*, the 103(k) order was *still in effect.* It had not been terminated. *Ibid.* MSHA issued the order in connection with the catastrophic Upper Big Branch mine explosion, which spurred a years-long accident investigation. *Id.* at 235-236. MSHA issued the 103(k) order hours after the explosion and modified it 149 times by the time the case was before this Court. Oral Argument at 15:06, *Performance Coal*, 642 F.3d 234. At argument, the Secretary conceded the order likely would be modified again. *Ibid.* This Court held the restrictions the order imposed were capable of repetition "[g]iven the near certainty of further modifications" that might give rise to additional litigation based on the same, ongoing 103(k) order. *Ibid.* In other words, in *Performance Coal*, the challenged action was capable of repetition because the 103(k) order was still in effect, had been repeatedly modified, and was likely to be modified again in the future. Here, the 103(k) order has been terminated, and, as discussed, similar controversies over future 103(k) orders at M-Class are not likely.

Moreover, *Performance Coal* addressed a pure question of statutory interpretation: whether Mine Act section 105(b)(2) (which allows operators to

request temporary relief from modification or termination of any order) empowers operators to seek temporary relief from 103(k) orders. 642 F.3d at 238-39. This Court held that it did. That question had obvious implications for future cases concerning the scope of section 105(b). This appeal, by contrast, is fact-intensive and turns entirely on whether MSHA acted reasonably in issuing this particular (and terminated) section 103(k) order.

Conclusion

The Court should find that this case is moot and remand with instructions for the Commission to dismiss it for lack of jurisdiction. In the event this Court reaches the merits, the Secretary requests that the Commission's decision be reversed (but not remanded).

Respectfully submitted,

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