

ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

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

BRIEF FOR THE SECRETARY OF LABOR

TABLE OF CONTENTS

	Page
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	
A. Factual Background	1
B. The Judge’s Decision	4
ARGUMENT	
I. Applicable Standard Of Review	6
II. The Judge Properly Accepted The Secretary’s Interpretation Of Section 103(j) Of The Mine Act As Authorizing Her To Issue An Order Withdrawing Miners To Preserve Evidence Even If Rescue And Recovery Work Is Not Necessary.	7
III. “Rescue And Recovery Work” Within The Meaning Of Section 103(j) Was Necessary In This Case	11
IV. Even If The Secretary Was Not Authorized To Issue The Section 103(j) Order, That Would Not Be A Basis For Vacating Citation No. 8428712 Because Citation No. 8428712 Was Issued For Violating The Order After It Was Converted To A Section 103(k) Order	13
V. The Commission Should Accept The Secretary’s Interpretation Of The “When Present” Language In Section 103(k) Of The Act As Meaning That The Secretary Must Be Present To Issue An Order, Not That The Secretary Must Be Present When The Accident Occurs	14
VI. The Commission Should Accept The Secretary’s Interpretation That The Term “Accident” In Section 3(k) Of The Act Applies To The Term “Accident” In Section 103(j) Of The Act And To The Term “Accident” In Section 103(k) Of The Act.	19
CONCLUSION	24

STATEMENT OF THE ISSUES

1. Whether the judge properly accepted the Secretary's interpretation of Section 103(j) of the Act as authorizing her to issue an order withdrawing miners to preserve evidence even if rescue and recovery work is not necessary.

2. Whether "rescue and recovery work" within the meaning of Section 103(j) of the Act was necessary.

3. Whether, if the Secretary was not authorized to issue the Section 103(j) order, that would be a basis for vacating Citation No. 8428712 when the citation was issued for violating the order after it was converted to a Section 103(k) order.

4. Whether the Commission should accept the Secretary's interpretation of the "when present" language in Section 103(k) as meaning that the Secretary must be present to issue an order, not that the Secretary must be present when the accident occurs.

5. Whether the Commission should accept the Secretary's interpretation that the term "accident" in Section 3(k) of the Act applies to the term "accident" in Section 103(j) of the Act and to the term "accident" in Section 103(k) of the Act.

STATEMENT OF THE CASE

A. Factual Background

On May 16, 2011, at around 3:15 a.m., a seven-foot long, two-foot wide, and one-to-eight inch thick piece of rock dislodged and fell from the roof of the Willow Lake Portal Mine, an underground coal mine in Saline, Illinois, and struck Unit Mechanic Tim Borders. Stip. 29. Borders suffered a broken left wrist, a laceration to his upper left arm

that required twenty-five stitches, and multiple abrasions to his body, including his head. Stip. 41.

The rock fall occurred after a Joy continuous mining machine became stuck in the 9L crosscut at around 2:45 a.m., during the first full cut of the third shift on Unit 2. Stip. 7, 16, 18. Unit 2 was a super-section, a fact that permitted two production crews to work simultaneously. Stip. 10. The left cat-track of the continuous mining machine was not in contact with the ground, because of a rut or ground sloping. Stip. 24.

Shift Leader Brian Duty, who was supervising one of two crews working on the unit, sent for timbers or crib ties to try to extricate the continuous mining machine by placing them under the elevated cat-track. Stip. 11, 25. Ram car operators Robert Roach and Jon Farmer, continuous miner operator Reuben Markham, and unit mechanic Borders were present when the crib ties were delivered. Stip. 11, 12, 26.

Unit mechanic Borders was positioned to the right and behind the rear of the continuous mining machine's tail when he tossed a crib tie toward the cat-track. Stip. No. 28. Just after Borders tossed the crib tie, the roof popped and cracked and the seven-foot long, two-foot wide rock fell from the roof onto the continuous miner's tail, causing the rock to break apart. Stip. 29, 30. Borders was kneeling at the right side of the end of the continuous miner's tail and was struck by a piece of the rock. Stip. 30.

Shift Leader Duty and ram car operator Roach removed the rock from Borders. Stip. No. 32. Duty helped Borders to his feet. Ibid. Borders' left arm was bleeding. Stip. 33. It was wrapped in ram car operator Roach's bandana at the scene and pressure was applied. Stip. 33. Mine Manager Nathan Genesio drove Borders to the surface in Genesio's four-wheeled electric vehicle. Stip. 11, 34, 35. Along the way, Genesio

stopped at the dinner hole to get additional bandages that were used to treat Borders' arm. Stip. 35.

When Genesio and Borders reached the surface at approximately 3:41 a.m., an ambulance was present. Stip. 38, 39. Borders was treated at the Harrisburg Medical Center. He suffered a broken left wrist, a laceration to his upper left arm that required 25 stitches, and multiple abrasions to his body, including his head. Stip. 41. Borders was unable to return to his full duties during his next shift on May 17, 2011. Stip. 44.

On May 16, 2011, at 5:10 a.m., MSHA issued an oral Section 103(j) order to prevent the destruction of evidence that would assist in investigating the cause of the accident. The order prohibited all activity in the Unit No. 2 area where the accident occurred until MSHA could determine that it was safe to resume normal mining operations. Ex. B. to Secretary's Response To Motion To Dismiss; Stip. No. 42. The order was memorialized and converted to a Section 103(k) order when MSHA arrived at the mine at 6:28 a.m. Stip. 43.

On May 17, 2011, the Section 103(k) order was modified to allow Big Ridge to implement the approved plan to recover the continuous mining machine and to install permanent roof support in the crosscut left, number 9 entry, surveyor station 11+55. Ex. D to Secretary's Response To Motion To Dismiss. After recovering the continuous miner and installing the roof support, Big Ridge continued to mine in violation of the recovery plan and, in doing so, destroyed any additional evidence that might have assisted in MSHA's accident investigation. Ibid.; Dec. at 7; Second Set of Stipulations. As a result, MSHA issued a citation alleging a violation of the Section 103(k) order. Id.

Big Ridge has stipulated that, to the extent the underlying Section 103(k) order was valid, it violated the order. Dec. at 7; Second Set of Stipulations.

B. The Judge's Decision

Noting that Section 103(j) of the Mine Act applies “in the event of any accident” at a mine, the judge determined that, regardless of whether rescue and recovery work was necessary at the mine, the plain language of Section 103(j) authorized the Secretary to issue the Section 103(j) order in this case. Dec. at 8-9.¹ In so determining, the judge noted that to interpret Section 103(j) not to permit the Secretary to issue orders to preserve evidence and to allow the Secretary to properly investigate the cause of the accident would constitute an “unconscionable vitiation of the Secretary’s authority” to investigate extremely dangerous accidents, and prevent them from reoccurring, merely because no rescue or recovery was necessary. Dec. at 9-10.

Although concluding that the plain meaning of Section 103(j) authorized the Secretary to issue the Section 103(j) order regardless of whether rescue and recovery was necessary, the judge also noted that Big Ridge’s extraction of unit mechanic Borders from under the rock, the emergency treatment of Borders on the scene and during his evacuation to the surface of the mine, and Borders’ transportation to the hospital in an ambulance arguably constituted “rescue” within the meaning of Section 103(j). Dec. at 8.

Relying on the statutory definition of “accident” in Section 3(k) of the Act as including “a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of any persons,” the judge held that the roof fall in this case constituted an

¹ “Dec.” refers to the judge’s April 5, 2012, Amended Decision.

“accident” within the meaning of Section 103(j) and Section 103(k). Dec. at 9 (emphasis by judge). The judge noted that it was undisputed that unit mechanic Borders suffered an injury from the roof fall. Id. In addition, the judge held that the plain language of Section 103(d) establishes that an unplanned roof fall, such as the roof fall in this case, is an “accident” for purposes of Sections 103(j) and 103(k). Id.

The judge rejected Big Ridge’s interpretation that language added to Section 103(j) by the MINER Act referring to “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” limited the Secretary’s authority under Sections 103(j) and 103(k) to the specific types of accidents referred to in the amendment. The judge held that the language added by the MINER Act was plainly meant to describe the type of accidents that operators are required to report within fifteen minutes, rather than to narrow the definition of the term “accident” in Section 3(k). Dec. at 10 (citing S. Rep. No. 109-365 at 9 (2006)).

Having concluded that the Secretary had the authority to issue the Sections 103(j) and 103(k) orders in this case, the judge found that the Secretary acted reasonably in issuing the Section 103(j) order to preserve evidence and in issuing the Section 103(k) order to preserve evidence and to ensure that no other miners were injured from the unsupported and dangerous roof conditions. Dec. at 11. Stating that there was clearly a rational connection between the facts found and the choices made, the judge also found that the Secretary’s actions in issuing the orders were not arbitrary and capricious. Dec. at 11.

ARGUMENT

I.

APPLICABLE STANDARD OF REVIEW

Statutory Interpretation

This case involves questions of statutory interpretation including : (1) whether the Secretary has the authority under Section 103(j) of the Act to issue an order to preserve evidence even if rescue and recovery work is not necessary; (2) whether “rescue and recovery work” within the meaning of Section 103(j) was necessary in this case; (3) whether, in the event of any accident at the mine, the Secretary has the authority under Section 103(k) to issue an order to ensure the safety of any person when she is present at the mine, even if she was not present when the accident occurred; and (4) whether the definition of “accident” in Section 3(k) of the Act applies to the terms “accident” in Section 103(j) and Section 103(k) of the Act.

“If the statute is clear and unambiguous, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Coal Employment Project v. Dole, 889 F.2d 1129, 1131 (D.C. Cir. 1989) (internal citations and quotation marks omitted). Courts use the traditional tools of statutory construction in determining whether the meaning of a statutory provision is plain. Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1287 (D.C. Cir. 2000). The traditional tools include the statutory text, the overall structure and design of the statute,

the legislative history of the statute, and the purpose of the statute. Id. See also Consolidation Coal Co., 15 FMSHRC 1555, 1557 (1993) (applying traditional tools to ascertain a standard's plain meaning).

If a provision does not have a plain meaning, the Secretary's interpretation is owed deference and is entitled to affirmance as long as it is reasonable. Pattison Sand Company, LLC v. FMSHRC, ___ F.3d ___, 2012 WL 3079200, *4 (8th Cir.) July 31, 2012 (No. 12-1194, 12-1196) ; Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (2003); Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 460 (D.C. Cir. 1994) (citing Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)). See also Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc., 80 F.3d 110, 113-16 (4th Cir. 1996) (deferring to the Secretary's interpretation of Section 105(c)(2)'s remedial provisions).

II.

THE JUDGE PROPERLY ACCEPTED THE SECRETARY'S INTERPRETATION OF SECTION 103(j) OF THE MINE ACT AS AUTHORIZING HER TO ISSUE AN ORDER WITHDRAWING MINERS TO PRESERVE EVIDENCE EVEN IF RESCUE AND RECOVERY WORK IS NOT NECESSARY

Section 103(j) of the Mine Act states:

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(j). The first sentence of Section 103(j) requires operators, “in the event of any accident occurring in any [] mine,” to notify the Secretary of the accident and to “take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof.” 30 U.S.C. 813(j) (emphasis added). The requirement plainly applies to all accidents, regardless of whether rescue and recovery work is necessary. See Manning v. United States, 546 F.3d 430, 436 (7th Cir. 2008) , cert. denied, 130 S. Ct. 552 (2009) (“[A]ny’ means ‘any.’”) As the judge recognized, a self-evident purpose of the immediate notification and preservation of evidence requirements is to facilitate the Secretary’s investigation of any accident. Dec. at 10. See BHP Copper, Inc., 21 FMSHRC 758, 765 (1999) (recognizing that the Secretary’s authority under the Act to investigate mine accidents and to obtain assistance from the mine operator in doing so should be broadly interpreted). As the judge also recognized, by using the phrase “in the event of any accident occurring in a coal or other mine” in the first sentence of Section 103(j) without the qualifier “where rescue and recovery work is necessary,” and using the phrase “in the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary” in third sentence of Section 103(j), “Congress created two distinct classes of accidents: those where there was an accident and those where the accident also necessitates rescue and recovery work.” Dec. at 10 (internal citations and quotation marks omitted). See Center for Special Needs Trust Administration v. Olson, 676 F.3d 688, 701 (8th Cir. 2012) (“Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the

disparate inclusion or exclusion.’ This presumption is much stronger when, as here, the comparison is between two paragraphs of the same subsection of a statute.’ (citing and quoting Russello v. United States, 464 U.S. 16, 23 (1984)).

Because, in the event of an accident, the resumption of mining and the presence of people in the affected area will have the potential to destroy evidence that would assist in investigating the cause of the accident, the Secretary interprets the requirement that operators “take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes [of an accident]” to generally require the operator to withdraw miners from the affected area — so that the area is controlled -- until MSHA completes its investigation of the accident. This is so unless entering the area is necessary to conduct rescue and recovery operations or to eliminate an imminent danger. This interpretation is consistent with common sense and with well-known law enforcement practices that prevent the destruction of evidence by removing persons from areas under investigation.

Insofar as the Secretary’s interpretation of the phrase “appropriate measures to prevent the destruction of any evidence” in Section 103(j) generally requires operators to withdraw miners from the affected area, the Secretary’s issuance of the Section 103(j) order in this case, in which she directed Big Ridge to preserve evidence by withdrawing miners from the area, was plainly authorized.

The Secretary’s interpretation of Section 103(j) is supported by the legislative history of the Act. In discussing the Mine Act, the Senate Committee stated:

The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary of his

authorized representative be permitted to exercise broad discretion in order to protect the life or insure the safety of any person. The grant of authority in Section 104(i) to take appropriate actions and in Section 104(j) to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.² Further, the circumstances surrounding the accident may be such that an order necessary to preserve evidence may be appropriate. It is intended that by preventing possible destruction of evidence, the Secretary may be better able to determine the cause of the accident and thereby prevent the future occurrence of a similar accident.

S. Rep. No. 181, 95th Cong. 1st Sess. 1, 29 (1977), reprinted in Legis. Hist. at 617 (emphases added). Moreover, the Conference Report highlights Congress' intent that Sections 103(j) and 103(k) "require[] operators to take steps to assist in the investigation of accidents." Conference Report on S. 717 at 47, Legis. Hist. at 1325. This history makes clear the breadth of the Secretary's authority under both Section 103(j) and Section 103(k), and makes clear that that authority includes the right to issue a withdrawal order to preserve evidence.

The Secretary's interpretation of Section 103(j), unlike Big Ridge's, is also consistent with the purpose of the Act. When the Secretary issues a Section 103(j) order directing an operator to preserve evidence -- and notifies the operator what measures it must take -- the Secretary is taking action to ensure that potentially critical evidence will be preserved. The Secretary's interpretation therefore promotes miner safety and health. See Eastern Associated Coal Corp., 2 FMSHRC 2467, 2472 (1980) (recognizing that an order withdrawing miners to preserve evidence promotes miners' safety by allowing the Secretary to determine the cause of the accident to prevent a reoccurrence). Indeed, the

² The language of Sections 104(i) and 104(j) of the Senate Bill was in all relevant respects identical to the language Congress enacted in Sections 103(j) and 103(k) of the Mine Act.

Commission has long recognized the central role “control” orders play in the Secretary’s initial response to an accident:

Orders issued pursuant to section 103(j) or section 103(k) of the Mine Act are commonly known as “control orders” since they are the means by which the Secretary may assume initial control of a mine in the event of an accident in order to protect lives, initiate rescue and recovery operations, and preserve evidence.

UMWA v. Greenwich Collieries, 8 FMSHRC 1302, 1308 n.2 (1986) (statutory citation omitted).³

III.

“RESCUE AND RECOVERY WORK” WITHIN THE MEANING OF SECTION 103(j) WAS NECESSARY IN THIS CASE

Even if, as Big Ridge asserts, the Secretary’s authority under Section 103(j) is limited to issuing orders when rescue and recovery work is necessary, the Section 103(j) order in this case was properly issued because, as the judge suggested (Dec. at 10), the event in this case required “rescue and recovery.”

“Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry their ordinary, contemporary, common meaning.” Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P’ship, 507 U.S. 380, 388 (1993) (internal citations and quotation marks omitted). Webster’s Third New International Dictionary 1930 (2002) (“Webster’s”) defines the term “rescue” to mean, “to free from confinement, violence, danger, or evil: liberate from actual restraint.” It is undisputed that a piece of the seven-foot long, two-foot wide and one-to-eight inch thick

³ Thus, contrary to Big Ridge’s argument (Br. at 15), the Secretary does not interpret Section 103(j) to authorize her to “take whatever action [s]he deems appropriate” whenever there is an accident. Rather, she interprets Section 103(j) to authorize her to issue orders to preserve evidence whenever there is an accident.

piece of rock that fell on the tail of the Joy continuous mining machine struck unit mechanic Borders. Stip. 29, 31. It is also undisputed that continuous miner operator Markham and ram car operator Roach removed the rock from Borders and that Shift Leader Duty helped Borders to his feet. Stip. 31, 32. In addition, it is undisputed that Borders was treated for bleeding on the scene and was driven by Mine Manager Genesio out of the mine in Genesio's EMU, a four-wheeled electric vehicle. Stip. 34. During the ride out of the mine, additional bandages were retrieved to treat Borders' arm injury. Stip. 35. When Borders reached the surface, an ambulance was present that drove Borders to a medical center where he was treated. Borders suffered a broken left wrist, a laceration to his upper left arm that required 25 stitches, and multiple abrasions to his body and head. Stip. 41. The removal of the rock from Borders, the treatment of Borders, and the transportation of Borders out of the mine "free[d] [Borders] from confinement . . . [and] danger." As a result, rescue work was necessary.

Moreover, Webster's defines the term "recover" to mean: "to save from loss and restore to usefulness: "reclaim." Webster's at 1898. As a result of the May 16, 2011, event, the Joy continuous mining machine had to be "save[d] from loss and restore[d] to usefulness: reclaimed." See Exhibit D to Secretary's Response To Contestant's Motion To Dismiss (indicating that the Section 103(k) order was modified "to allow the operator to implement the approved plan of action to recover the Joy Continuous miner".) Thus, not only were rescue operations necessary, so were recovery operations.

IV.

EVEN IF THE SECRETARY WAS NOT
AUTHORIZED TO ISSUE THE SECTION 103(j) ORDER, THAT WOULD NOT BE A
BASIS FOR VACATING CITATION NO. 8428712 BECAUSE CITATION NO.
8428712 WAS ISSUED FOR VIOLATING THE ORDER AFTER IT WAS
CONVERTED TO A SECTION 103(k) ORDER

Even if Big Ridge were correct that the Secretary does not have the authority to issue an order under Section 103(j) to preserve evidence unless rescue and recovery work is necessary, which it is not, and even if rescue and recovery work was not necessary in this case, which it was, Big Ridge's assertion that Citation No. 8428712 is invalid would fail.

It is undisputed that on May 16, 2011, at 6:29 a.m., when MSHA arrived at the mine, the Section 103(j) order was converted to a Section 103(k) order. Stip. 43. To protect the safety of all persons on-site, the Section 103(k) order required the operator to obtain prior approval to recover and/or restore operations in the affected area. Exhibit C, Secretary's Response To Contestant's Motion To Dismiss. The Section 103(k) order also required the operator to prevent the destruction of evidence. Id. On May 17, 2011, the Section 103(k) order was amended to allow the operator to implement an approved plan of action to recover the continuous mining machine and to install permanent roof support in the affected area. Exhibit D, Secretary's Response To Contestant's Motion To Dismiss.

Citation No. 842712 alleges that Big Ridge violated the Section 103(k) order by failing to follow the approved plan of action, because, after recovering the miner and installing the roof support, Big Ridge continued cutting coal. Id. The citation also alleges that, by continuing to cut coal, Big Ridge destroyed any additional evidence. Id.

Significantly, in Section 9B of the citation, which identifies the “Section of [the] Act” allegedly violated, the citation states “103(k)”. Id. Big Ridge has stipulated that the facts as alleged in the citation are true. Dec. at 6-7; Joint Stipulation of Fact, dated February 28, 2012. Because Citation No. 842712 alleges a violation of Order No. 842491 after the order was converted to a Section 103(k) order, Big Ridge’s argument concerning the proper interpretation of Section 103(j) is legally irrelevant to whether the citation is valid.

V.

THE COMMISSION SHOULD ACCEPT THE SECRETARY’S INTERPRETATION OF THE “WHEN PRESENT” LANGUAGE IN SECTION 103(k) OF THE ACT AS MEANING THAT THE SECRETARY MUST BE PRESENT TO ISSUE AN ORDER, NOT THAT THE SECRETARY MUST BE PRESENT WHEN THE ACCIDENT OCCURS

Big Ridge unconvincingly asserts that, even after the Section 103(j) order was converted to a Section 103(k) order, the order was invalid because the Secretary only has the authority to issue a Section 103(k) order “based on an event that occurs when the authorized representative is present.” Br. at 16 n.5. Big Ridge’s interpretation is at odds with the plain meaning of Section 103(k).

Section 103(k) provides:

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 a mine or to recover the coal or other mine or to return the affected area of such mine to normal.

30 U.S.C. 813(k) (emphasis added). Contrary to Big Ridge’s interpretation, the plain meaning of the “when present” requirement is that the Secretary must be present to issue

Section 103(k) orders, not that the Secretary must have been present when the accident in question occurred. The Secretary's plain meaning interpretation is consistent with the language, the structure, the history, and the purpose of Section 103(k). Big Ridge's strained interpretation is not.

The Secretary's reading, unlike Big Ridge's, is the most natural reading of Section 103(k). Indeed, if, as Big Ridge asserts, Congress had intended to limit the Secretary's authority to issue Section 103(k) orders to those accidents occurring when the Secretary happens to be present at the time the accident occurs, the first part of Section 103(k) would have used language along the lines of "in the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, if present at the time of the accident, may issue" It did not. The phrase "when present" is an adverbial phrase modifying the phrase --"may issue" -- that immediately follows it. See United States v. Montejo, 442 F.3d 213, 215 (4th Cir.), cert. denied, 594 U.S. 879 (2006).

Moreover, the Secretary's interpretation, unlike Big Ridge's, is consistent with the structure of Section 103(k). Section 103(k) provides that, "[i]n the event of any accident . . . the operator . . . shall obtain the approval of such representative [of the Secretary] . . . 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" (emphases added). Thus, Section 103(k) plainly authorizes the Secretary to respond to all accidents which involve recovery plans or in which affected areas need to be returned to normal, not merely to respond to accidents which involve recovery plans or in which affected areas need to be returned to normal when the accident occurred when she was present. Under Big Ridge's interpretation, she would not have that authority.

The Secretary's interpretation, unlike Big Ridge's, is also consistent with the structure of the Act as a whole. The Act plainly authorizes the Secretary to investigate all accidents – not just accidents that occur when she is present. See 30 U.S.C. § 813(a) (“Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year for the purpose of (1) obtaining . . . information relating to . . . the causes of accidents.”) Towards that end, Section 103(j) requires that, “in the event of any accident,” operators provide the Secretary with prompt notice of the accident and prevent the destruction of evidence that would assist in determining the cause of the accident. See 30 U.S.C. 813(j) (emphasis added). Congress would not have provided for the Secretary's investigation of accidents that occur when she is not present without also providing the Secretary with the authority to issue orders protecting persons during those investigations. Under Big Ridge's interpretation, she would not have that authority. See Miller Mining Co. v. FMSHRC, 713 F.2d 487, 490 (9th Cir. 1983) (“Section 103(k) gives MSHA plenary power to make post-accident orders for the protection and safety of all persons”) (emphasis in original).

The Secretary's interpretation, unlike Big Ridge's, is also consistent with the legislative history and the purpose of Section 103(k). As set forth above, in discussing the Mine Act, the Senate Committee made clear the breadth of the Secretary's authority under Section 103(k). See S. Rep. No. 181, 95th Cong. 1st Sess. 1, 29 (1977), reprinted in Legis. Hist. at 617. Similarly, the Conference Report made clear the breadth of the Secretary's authority in the event of an accident:

Both the Senate bill and the House amendment contained substantially similar provisions, adopted from Section 103(e) and (f) of the Coal Act, requiring operators to take steps to assist in the investigation of accidents. The Senate bill made it clear that this requirement applied even if the

accident did not result in injury or death. Both the Senate Bill and the House amendment contained identical provisions establishing the Secretary's authority to take steps to prevent death or injury in the case of accidents, and to take appropriate actions with respect to rescue and recovery work.

Conference Report on S. 717 at 47, Legis. Hist. at 1325.

Moreover, the Senate Report accompanying the Coal Act states: "This section requires that the operator obtain approval of an inspector, when present, of any plan to recover persons in the mine or to recover the mine or to return it to its normal operating condition." S. Rep. No. 91-411, 91st Cong., 1st Sess. 88 (1969), reprinted in 94th Cong., 1st Sess., Senate Subcommittee on Labor, Committee on Labor and Public Welfare, Legislative History of the Federal Coal Mine Health and Safety Act of 1969, at 214 (1975). This language makes clear that the "when present" language -- language that was carried over without change from the Coal Act -- is intended to require the inspector to be present when issuing Section 103(k) orders, not to require the inspector to have been present when the accident occurred.

Moreover, the self-evident purpose of Section 103(k) -- ensuring the safety of persons in the event of an accident -- is fundamentally inconsistent with Big Ridge's interpretation. Under Big Ridge's interpretation, the Secretary would not have the authority to protect persons from dangerous conditions that may have caused an accident, or from dangerous conditions that may have resulted from the occurrence of the accident, except in those extremely rare instances when the Secretary happened to have been

present when the accident occurred. The Commission should reject such a drastically restrictive interpretation.⁴

For all of these reasons, the plain meaning of the "when present" language in Section 103(k) is that the Secretary must be present to issue an order, not that the Secretary must be present when the accident occurs. Even if the meaning of the "when present" language is not plain, the Commission must accept the Secretary's interpretation because it is reasonable. Excel Mining, LLC, 334 F.3d at 6.⁵

⁴ Although Big Ridge asserts that a Section 103(k) order must be based on an event that happens to occur when the Secretary is present (Br. at 16 n.5), Big Ridge also seems to acknowledge that the Secretary has the authority to issue a Section 103(k) order if, when the Secretary arrives at the mine, "the accident scene persists." Br. at 17. The Secretary reads Section 103(k) to plainly authorize her, in the event of an accident, to issue orders to insure the safety of persons at the mine, until she has completed her investigation of the accident, until she has determined that it is safe to continue mining operations, and during the pendency of any recovery plan or plan to return affected areas of the mine to normal.

In this case, the Section 103(k) order was issued before the Secretary's accident investigation was complete, and while the Joy continuous mining machine remained stuck under unsupported, unstable roof and needed to be recovered in a safe manner.

⁵ Big Ridge's reliance on American Coal Co., 32 FMSHRC 1387 (2010) (ALJ), petition for review granted November 2, 2010, is misplaced. In American Coal, the parties stipulated that the sole issue concerned whether the event in question constituted a "fire" within the meaning of Section 3(k) of the Act. See 32 FMSHRC at 1388-89. The issue of the meaning of the phrase "when present" in Section 103(k) was not before the judge.

In any event, even if the ALJ's decision supported Big Ridge's argument, which it does not, an unreviewed judge's decision is not precedent binding on the Commission. 29 C.F.R. § 2700.69(d).

VI.

THE COMMISSION SHOULD ACCEPT THE SECRETARY'S INTERPRETATION THAT THE TERM "ACCIDENT" IN SECTION 3(k) OF THE ACT APPLIES TO THE TERM "ACCIDENT" IN SECTION 103(j) OF THE ACT AND TO THE TERM "ACCIDENT" IN SECTION 103(k) OF THE ACT

The plain meaning of Section 3(k), Section 103(j), and Section 103(k) of the Act is that the definition of "accident" in Section 3(k) applies to the term "accident" in Section 103(j) and in Section 103(k).

Section 3 of the Mine Act, the definitions section of the Act, states in relevant part:

For the purpose 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. § 802 (emphasis added). "It is an elementary precept of statutory construction that the definition of a term in the definitional section of a statute controls the construction of that term wherever it appears throughout the statute." Florida Department of Banking & Finance v. Board of Governors of Federal Reserve System, 800 F.2d 1534, 1536 (11th Cir. 1986), 481 U.S. 1031 (1987) (citing 1A Sutherland, Sutherland on Statutory Construction § 20.08 at 88 (4th ed. 1985)). Accord Neff v. Capital Acquisitions & Management Co., 352 F.3d 1118, 1121 (7th Cir. 2003).

Insofar as Section 103(j) and Section 103(k) of the Mine Act, 30 U.S.C. §§ 813(j) and 813(k), are part of the same chapter as Section 3(k) of Act -- i.e., both are part of Chapter 22 which is the Mine Act -- the plain meaning of Section 3 of the Act is that the definition of the term "accident" in Section 3(k) applies to the term "accident" in Sections 103(j) and 103(k).

Such a plain meaning reading of Section 3(k) is consistent with the Eighth Circuit's recent decision in Pattison and longstanding Commission case law recognizing that the Secretary has authority to issue a Section 103(k) order if an event falls within the definition of the term "accident" as that term is defined in Section 3(k). See Pattison, 2012 WL 3079200 at *5 (applying the definition of "accident" in Section 3(k) to determine whether a Section 103(k) order was properly issued); Aluminum Company of America, 15 FMSRHC 1821. 1825-27 (1993) (same).⁶

Big Ridge unconvincingly asserts that Section 5(a) of the MINER Act -- which amended Section 103(j) by inserting after the first sentence in Section 103(j) the sentence, "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

⁶ Plainly, the roof fall in this case was an "accident" within the meaning of Section 3(k). Section 3(k) defines the term "accident" to "include[] a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of any person." The definition includes mine explosions, mine ignitions, mine fires, and mine inundations, events that are similar in nature or have a similar potential to cause death or injury as the specifically enumerated events, and injury or death. See Pattison, 2012 WL 30709200 at *5; Aluminum Co., 15 FMSHRC at 1825-26.

As the judge found, the event in this case was an "accident" within the meaning of Section 3(k) for two reasons. First, it caused "injury" to Borders. The term "injury" means "an act that damages, harms, or hurts: an unjust or undeserved infliction of suffering or harm." Webster's at 1164. Borders suffered a broken left wrist, a laceration to his upper left arm that required twenty five stitches, and multiple abrasions to his body including his head (Stip. No. 41) -- plainly "injuries" within the common meaning of that term.

Second, the roof fall in this case was an event that was similar in nature or had a similar potential to cause death or injury as the events enumerated in Section 3(k). As the judge noted (Dec. at 9), another subsection of Section 103 of the Act, Section 103(d), explicitly refers to "accidents" as including unintended roof falls. Ibid. Certainly, a roof fall consisting of a seven-foot long, two-foot wide, and one-to-eight inch thick piece of rock, occurring in an area where people, are working has a similar potential to cause death or injury as the events enumerated in Section 3(k). See Pattison, 2012 WL 30709200 at *6.

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” -- narrowed Section 3(k)’s definition of “accident.” Nothing in the inserted language, or in any other provision of the MINER Act, remotely suggests that the amendment was intended to narrow Section 3(k)’s definition of the term “accident.” As the judge concluded, Big Ridge’s interpretation of the amendment “flies in the face of the plain language of the Act’s definition Section.” Dec. at 9.

Far from amending Section 3(k)’s definition of the term “accident,” the Section 103(j) amendment was plainly intended to require that operators report the subset of accidents specified in the amendment -- i.e., accidents resulting in the death of an individual, or an injury or entrapment which has a reasonable potential to cause death -- within 15 minutes of the time the operator realizes that an accident falling within that subset has occurred. If, as Big Ridge suggests, Congress had intended to amend Section 3(k)’s definition of the term “accident,” Congress would have amended Section 3(k)’s definition of the term “accident.”⁷ It did not.

⁷ To avoid this conclusion, Big Ridge appears to suggest that Congress did not amend Section 3(k)’s definition because it intended that definition to still apply to the other references to the term “accident” in the Act. Br. at 21 and n.7. The argument is meritless. If Congress had intended for Section 3(k)’s definition of accident not to apply to Section 103(j) or to Section 103(k), Congress would have amended Section 3(k) to so state, or would have included specific language in Sections 103(j) and 03(k) stating that for purposes of those sections the term “accident” is defined differently. It did neither.

Even if the MINER Act's amendment to Section 103(j) could be read as limiting the definition of "accident" in Section 103(j) to events resulting in deaths, or injuries or entrapments that have a reasonable potential to cause death, which it cannot, that would not be a basis for interpreting the term "accident" in Section 103(k) to also be so limited. Such an interpretation would read into Section 103(k) a limitation that has no support in its language. As a result, it must be rejected. Thunder Basin Coal Co. v. FMSHRC, 56 F.3d 1275, 1280 (10th Cir. 1995).

That the amendment was not intended to narrow the definition of the term “accident” in Section 3(k) is made clear by Section 5(b) of the MINER Act, which amended Section 110(a)’s penalty provisions by adding the following language: “The operator of a coal or other mine who fails to provide timely notification to the Secretary as required under section 103(j) (relating to the 15-minute requirement) shall be assessed a civil penalty by the Secretary of not less than \$5000 and not more than \$60,000.” 30 U.S.C. § 820(a)(2). If the term “accident” in Section 103(j) only referred to deaths and injuries or entrapments with a reasonable potential to cause death, there would have been no need for Congress to include the phrase “relating to the 15 minute requirement” in the amendment to Section 110(a)(2), because the only requirement for notification in Section 103(j) would be the 15-minute requirement.⁸

To support its argument, Big Ridge relies on the definition of “accident” set forth in the Secretary’s Part 50 regulations. Br. at 20. Big Ridge asserts that it would be illogical for the Secretary to have the authority to issue orders under Section 103(j) or Section 103(k) in response to events that fall within the definition of the term “accident” in Section 3(k), when her reporting regulations and accident preservation requirements in Part 50 define the term “accident” more narrowly. Id. The Eighth Circuit in Pattison, however, rejected a virtually identical argument, reasoning that “the Secretary could reasonably have limited the instances in which an operator is required to report a roof fall

⁸ Contrary to Big Ridge's suggestion (Br. at 18), nothing in the Secretary's Program Policy Manual supports Big Ridge's interpretation of the term "accident" in Section 103(j) or in Section 103(k). See <http://www.msha.gov/REGS/COMPLIAN/PPM/PDFVersion/PPM%20Vol%20I.pdf> at 18. Even if it did, under long-standing precedent, the PPM is not binding on the Secretary. See King Knob Coal Co., 3 FMSHRC 1417, 1420 (1981). Accordingly, even if Sections 103(j) and 103(k) were ambiguous on the issue, that would not be a basis for rejecting the Secretary’s interpretation.

immediately without limiting her own ability to respond to such accidents.” 2012 WL 3079200 at *6.⁹

Also unconvincing is Big Ridge’s argument that the Secretary’s plain meaning reading is unreasonable because under that reading “any ‘injury,’ no matter how minor, would justify the issuance of a control order by the Secretary. Br. at 19. Contrary to Big Ridge’s argument, the Secretary’s issuance of orders under Section 103(j) and Section 103(k) is reviewable under an arbitrary and capricious standard. See Pattison, 2012 WL 3079200 at *8. If, under the circumstances, it was arbitrary and capricious for the Secretary to issue an order under Section 103(j) or Section 103(k), it would be impermissible for her to do so. Significantly, Big Ridge has not appealed the judge’s common-sense finding in this case that it was reasonable for the Secretary to issue the control orders given unit mechanic Borders’ injuries, which required emergency treatment

⁹ The Secretary’s Part 50 regulations apply only to events encompassed by the definition of “accident” in Section 50.1(h). Accordingly, 30 C.F.R. § 50.12’s accident preservation requirements apply only to such events. No language in Part 50, however, purports to limit the Secretary’s authority under Section 103(j) and Section 103(k) to issue orders to preserve evidence. The regulations therefore cannot be interpreted to do so. See Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986) (“At the very least the Commission, and we in our review of the Commission, must be reluctant to find a secretarial commitment to refrain from enforcement where none clearly appears.”) Indeed, it would be fundamentally inconsistent with the purposes of the Act if, after determining that she should investigate an accident, the Secretary lacked the power under Section 103(j) and Section 103(k) to take steps to prevent the destruction of evidence merely because all miners fortuitously escaped serious injury. See Pattison, 2012 WL 3079200 at *5. Of course, to the extent the Secretary’s regulations are ambiguous on the issue, the Secretary’s interpretation is owed deference. Martin v. OSHRC, 499 U.S. 144, 148-49 (1991); Udall, 380 U.S. at 16-17; Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 5-6 (D.C. Cir. 2003); Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 460-61 (D.C. Cir. 1994) .

at the mine and further medical treatment at a medical center, and given the dangerous and unstable roof conditions. Dec. at 8.

For all of these reasons, the definition of the term "accident" in Section 3(k) of the Act plainly applies to the term "accident" in Section 103(j) of the Act and to the term "accident" in Section 103(k) of the Act. Even if the meaning of the term "accident" is ambiguous, the Commission must accept the Secretary's interpretation because it is reasonable. Excel Mining, 334 F.3d at 6.

CONCLUSION

For the foregoing reasons, the Commission should affirm the judge's decision in this case.

Respectfully submitted,

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