

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-1194

PATTISON SAND COMPANY, LLC,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

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

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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SUMMARY OF THE CASE

With the exception of the statement that the Section 103(k) order at issue in this case has "shuttered almost the entire underground portion of the Mine," the Secretary of Labor does not take issue with the Summary of the Case set forth in Pattison Sand Company's opening brief. In light of the importance to miner safety that Section 103(k) orders play in the aftermath of mine accidents, the Secretary also does not take issue with the request for oral argument, but believes 20 minutes per side will be sufficient. For purposes of scheduling oral argument, the Secretary advises the Court that a related case, arising from an order of the United States District Court for the Northern District of Iowa, Pattison Sand Co. v. FMSHRC, No. 12-1196, is pending before this Court. See Br. 47 n.22.

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STATEMENT OF JURISDICTION

On November 9, 2011, after a roof fall accident at Pattison Sand Company's ("Pattison's") underground sand mine on November 7, 2011, the Secretary of Labor ("Secretary"), acting through her authorized representative, an inspector of the Mine Safety and Health Administration ("MSHA"), issued an order under Section 103(k) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 813(k), closing a portion of the underground mine pending implementation of remedial roof control measures. On December 13, 2011, pursuant to Section 113(d)(1) of the Act, 30 U.S.C. § 823(d)(1), an administrative law judge ("judge") of the Federal Mine Safety and Health Review Commission ("Commission") issued a decision affirming the inspector's order,¹ denying Pattison's request for temporary relief from the order, and denying Pattison's request to modify the order. On January 18, 2012, pursuant to Section 113(d)(2)(A)(iii) of the Act, 30 U.S.C. § 823(d)(2)(A)(iii), the Commission denied Pattison's petition for discretionary review of the judge's decision, rendering that decision the final agency action eligible for review by this Court. On January 24, 2012, pursuant to Section 106(a)(1) of the Act, 30 U.S.C. § 816(a)(1), Pattison filed a timely petition for review with the Court.

¹ On January 12, 2012, the judge issued an Amended Decision and Order, incorporating technical corrections to his initial decision. References to, and citations of, the judge's decision are to the amended decision. See J.A. 539-87.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the judge properly affirmed the Section 103(k) order MSHA issued after the November 7, 2011, accident at Pattison's mine.

Most apposite cases and provisions: Moreland v. United States, 968 F.2d 665 (8th Cir. 1992); Aluminum Co. of America, 15 FMSHRC 1821 (1993); 30 U.S.C. §§ 802(k), 813(d), 813(k).

2. Whether the judge properly concluded that Pattison was not entitled to temporary relief from the Section 103(k) order during the pendency of the litigation challenging the merits of the Section 103(k) order.

Most apposite cases and provisions: Performance Coal Co. v. FMSHRC, 642 F.3d 234 (D.C. Cir. 2011); 30 U.S.C. §§ 813(k), 815(b)(2).

3. Whether the judge properly concluded that the Commission and its judges lack the authority to modify a Section 103(k) order.

Most apposite cases and provisions: FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972); Miller Mining Co. v. FMSHRC, 713 F.2d 487 (9th Cir. 1983); 30 U.S.C. § 813(k).

STATEMENT OF THE CASE

A. Statutory and Regulatory 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). Titles II and III of the Act establish interim mandatory health and safety standards. Section 101(a) of the Act authorizes the Secretary to promulgate improved mandatory health and safety standards for the protection of life and prevention of injuries in coal and other mines. 30 U.S.C. § 811(a).

Under Section 103(a) of the Act, inspectors from MSHA, acting on behalf of the Secretary, regularly inspect mines to ensure compliance with the Act and with standards. 30 U.S.C. § 813(a). Section 104 of the Act provides for the issuance of citations and orders for violations of the Act or of standards. 30 U.S.C. § 814.

Under Sections 105(d) and 113(d) of the Act, a mine operator may contest a citation, order, or proposed civil penalty before the Commission, an independent adjudicatory agency established under the Act to provide trial-type administrative hearings and appellate review in cases arising under the Act. 30 U.S.C. §§ 815(d) and 823(d). See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994).

Final Commission action is subject to judicial review by an appropriate United States Court of Appeals. 30 U.S.C. § 816.

In the event of an accident, Section 103(k) of the Act empowers MSHA to "issue such orders as [MSHA] deems appropriate to insure the safety of any person in the * * * mine * * * ." 30 U.S.C. § 813(k).² Nothing in the Act expressly states that an operator is entitled to a hearing on a contested Section 103(k) order (or the modification or termination thereof), but case law so holds. See American Coal Co. v. United States Dep't of Labor, 639 F.2d 659, 661 (10th Cir. 1981); Eastern Associated Coal Co., 2 FMSHRC 2467, 2469-71 (1980). See also Performance Coal Co. v. FMSHRC, 642 F.3d 234, 238-39 (D.C. Cir. 2011) (holding that temporary relief is available under Section 105(b)(2) from the modification or termination of a Section 103(k) order); Miller Mining Co. v. FMSHRC, 713 F.2d 487 (9th Cir. 1983) (reviewing a Commission decision concerning a modification of a Section 103(k) order).

Section 105(b)(2) of the Act authorizes the Commission to "grant temporary relief from any modification or termination of any order or from any order issued under Section 814 of this title [i.e., Section 104 of the Act] * * * ." 30 U.S.C.

² Similarly, where "rescue and recovery work is necessary," Section 103(j) of the Act empowers MSHA to "take whatever action [MSHA] deems appropriate to protect the life of any person, and [MSHA] may, if [MSHA] deems it appropriate, supervise and direct the rescue and recovery activities in such mine." 30 U.S.C. § 813(j).

§ 815(b)(2). Temporary relief may be granted if : (i) a hearing is held, (ii) the applicant shows a “substantial likelihood” of success on the merits, and (iii) “such relief will not adversely affect the health and safety of miners.” 30 U.S.C.

§ 815(b)(2).

B. Facts and Procedural History

Pattison mines and processes sandstone both underground and above ground in order to produce "frac sand"³ in its Clayton County, Iowa, mine. J.A. 10 (Stip. 4); J.A. 10, 35 (Tr. 35, 134-35).⁴ The Pattison Mine operates on 12-hour shifts, working 7 days a week and 365 days per year, and employs about 190 miners. Ibid. The underground part of the mine is roughly one-half mile long and one-quarter mile wide. J.A. 35 (Tr. 134).⁵

At approximately 3:00 a.m. on Monday, November 7, 2011, a roof fall occurred at the Pattison Mine, where passageway 12 AR intersects with passageway 12 AQ, during excavation ("milling" or "scaling") of the mine roof using mechanical equipment with a canopy that protects the equipment operator.

³ Frac sand possesses certain properties that make it especially suited for use in the fracking process used to release oil and gas from rock formations containing those energy sources.

⁴ The area of the active surface mine is larger than the area of the underground mine. J.A. 35 (Tr. 134).

⁵ Pattison began operating the mine in 2010, after it had been closed as a sand mining operation and put to other use. J.A. 53-54, 83 (Tr. 209-10, 328-29).

J.A. 10 (Stip. 12). MSHA Inspector James Alan Hines was assigned to conduct an inspection in response to a hazard complaint of an unreported accident and roof fall at the mine in which someone could have been injured. J.A. 35 (Tr. 135-36).⁶

Hines arrived at the mine around 4:00 p.m. and was joined underground by Kyle Pattison, the owner of the mine. J.A. 35, 36 (Tr. 136-37, 140). Hines observed and photographed the accident site, which showed a roof fall partially covering an excavator. J.A. 154, 155 (Exs. G-1, 2); J.A. 35-37, 46-47 (Tr. 136-43, 181-83).⁷

Hines and Pattison agreed that the material that had fallen was caprock,⁸ and that the rocks on top of and around the excavator were twelve to eighteen inches thick. J.A. 36 (Tr. 140).⁹

⁶ Hines has been an inspector with the MSHA North Central District in Fort Dodge, Iowa, since July 2001. J.A. 34, 42, 58 (Tr. 132, 162, 227). Hines came to MSHA with 10 to 12 years of underground mining experience in limestone mines. J.A. 42 (Tr. 162). In 2010, he was assigned to regularly inspect the Pattison Mine. J.A. 34 (Tr. 132). In that year, Hines conducted four regular inspections, each five to six weeks in duration. J.A. 34, 42 (Tr. 133, 163-64). In all, Hines has been at the mine on 15 to 20 occasions since 2010. Ibid.

⁷ The excavator is also referred to as a scaling machine ("scaler") and a milling machine. J.A. 37-38 (Tr. 145-46). It has a 24-foot long arm which reaches to the mine roof. J.A. 76 (Tr. 298). See J.A. 155, 171 (Exs. G-2, 9).

⁸ "Caprock" is a dense type of sandstone approximately twice as strong as the main bed of sandstone beneath it. J.A. 23, 72 (Tr. 88, 282).

⁹ Hines also talked to Mine Manager Chris Lehman and Day Shift Supervisor Ryan Rodenberg, both of whom agreed that the material that had fallen was caprock. J.A. 38, 55 (Tr. 147-48, 214, 216).

Hines and Pattison jointly made a "guesstimate" of the weight of the fallen rock to be between 20 and 30 tons. J.A. 36 (Tr. 141). No one could get near the roof fall area, which had been bermed-off by Pattison, but Hines took measurements at an equivalent location and estimated the dimensions of the fall at between 30 and 35 feet, with the width of the mine passageway measured at 35 feet, 11 inches. J.A. 21, 36-37 (Tr. 78, 140-43). See J.A. 154, 155, 170, 171 (Exs. G-1, 2, 7, 9 (photographs of excavator and berm after the accident)).

Hines' investigation continued through Tuesday, November 8, 2011. J.A. 38 (Tr. 149). Hines interviewed miner Brandon Millin, who was operating the excavator and scaling the mine roof at the time of the roof fall. J.A. 37-38 (Tr. 144-47). Everything had looked normal, Millen stated, but then he saw some material dribbling from the roof, hit the excavator's controls to go backwards, and was caught in the roof fall. J.A. 37 (Tr. 144-45). See J.A. 10 (Stip. 12). The roof fall damaged the door of the excavator, but Millin was able to kick the door open and get out, at which point he put his head down and ran from the area. J.A. 37 (Tr. 145). Millin was uninjured in the roof fall. J.A. 10 (Stip. 5); J.A. 37 (Tr. 145). Inspector Hines was later joined at the mine by MSHA Inspector

Anthony Duane Runyon, who also visited and photographed the accident site.

J.A. 170, 171 (Exs. G-7, 9); J.A. 49-50 (Tr. 193-95).¹⁰

The parties stipulated that "[t]he ground fall occurred when Pattison was following an MSHA reviewed, negotiated, and accepted comprehensive ground control plan." J.A. 36 (Stip. 13). See J.A. 162-68, 169 (Exs. G-5, 6 (plan and mine map)); J.A. 40 (Tr. 156).¹¹ The ground control plan was agreed to at the beginning of October 2011, as part of a settlement of a contested Section 107(a) "imminent danger" order¹² that MSHA issued because there had been roof falls at the mine, some causing injuries, and some that almost caused injuries. J.A. 58

¹⁰ Runyon has been an inspector with the MSHA North Central District in Fort Dodge, Iowa, for six and one-half years. J.A. 34, 58 (Tr. 132, 227). Before that, Runyon spent 16 years working in sand, gravel, and limestone quarries. J.A. 49 (Tr. 191-92). On October 1, 2011, Runyon was assigned to regularly inspect the Pattison Mine. J.A. 49 (Tr. 192).

¹¹ In the context of this case, the terms "ground control" and "roof control" mean the same thing -- measures aimed at preventing the mine ceiling from falling to the floor below -- and are used interchangeably. See J.A. 77 (Tr. 302) (mine roof is also referred to as "back" or "crown").

¹² The Secretary is authorized to issue a closure order covering the area of a mine where an "imminent danger" exists; the order controls the area until the cited condition no longer exists. 30 U.S.C. § 817(a).

(Tr. 229). The ground control plan specified that no supplemental engineered support system, such as the installation of roof bolts and mesh,¹³ was required in areas of the underground mine containing at least four feet of caprock above the bed of sandstone to be mined, if the sandstone was scaled to the level of caprock, or in areas of the mines that did not contain "brows" or "potholes" (see J.A. 51 (Tr. 201)). J.A. 163 (Ex. G-5, at 2); J.A. 25, 26, 33, 59-60, 63 (Tr. 96, 99, 126, 233-34, 236-37, 248).

Inspector Hines testified that he and his colleagues in the MSHA Fort Dodge, Iowa, Field Office were given a copy of the ground control plan and its map by the District Manager and the Assistant District Manager. J.A. 40 (Tr. 155-57). District Manager Steve Richetta testified that he accepted the ground control plan in partial settlement of the imminent danger litigation. J.A. 60, 66 (Tr. 236, 259).¹⁴

¹³ Bolts and mesh compensate for the inherent weakness in the roof structure and create an "overall stable structure," and have been demonstrated to prevent roof falls or minimize the hazards of roof falls. J.A. 33, 64 (Tr. 127-28, 252).

¹⁴ Richetta has been the District Manager in the MSHA North Central District Office in Duluth, Minnesota, for six and a half years, following four years as Assistant District Manager. J.A. 58 (Tr. 226-27). Prior to that, Richetta was an MSHA field office supervisor for six years and an MSHA inspector for 10 years. J.A. 58 (Tr. 227). Before working for MSHA, Richetta worked for seven years at an underground copper mine and eight years at an underground limestone mine. J.A. 58 (Tr. 227-28).

Inspector Hines testified that he had seen "a lot of roof falls that were in caprock" at the mine. J.A. 41 (Tr. 159). See also J.A. 41 (Tr. 161). MSHA's ground control expert, Dr. Christopher Mark,¹⁵ testified that, during an underground examination of the mine on August 19, 2011, he observed "a lot of evidence of roof falls," with "fresh debris on the floor of the mine" evidencing "recent falls of ground from the roof" in areas marked on the map "mined to caprock." J.A. 22-23 (Tr. 85-87). MSHA Staff Assistant William Pomroy testified that he photographed evidence of two caprock falls in August 2011. J.A. 54-55, 57 (Tr. 212-16, 225). See J.A. 174, 175 (Exs. G-11, 12 (photographs)).¹⁶ Inspector Runyon testified that, during his October and November 2011 inspections of the mine, he observed several potholes where 12 to 18 inches of roof had fallen to the mine floor. J.A. 51 (Tr. 201). District Manager Richetta testified that he had

¹⁵ Dr. Mark has been long recognized as an expert in ground control. He conducted ground control research at the Bureau of Mines and has conducted geotechnical surveys at more than 300 mines. J.A. 17-18 (Tr. 64-66). He had a working familiarity with the ground conditions at Pattison's mine prior to the November 7, 2011, accident, having examined the mine and reviewed documents pertaining to the mine in August 2011. J.A. 20 (Tr. 74-75). See J.A. 176-84 (Ex. G-13) (Dr. Mark's curriculum vitae).

¹⁶ Pomroy has been a staff assistant for four years in the MSHA North Central District Office in Duluth, Minnesota. J.A. 53 (Tr. 207). Before that, Pomroy spent four years as a safety specialist in that office, followed by eight years as an industrial hygienist. J.A. 53 (Tr. 207-08). Since 2005 or 2006, he has been to the Pattison Mine about 12 times. J.A. 53 (Tr. 208). Pomroy's first visits to the mine were made at the request of the mine operator before commencing mining operations; thereafter, he made eight to 10 further visits in an advisory capacity regarding several issues including ground control. J.A. 53-54 (Tr. 208-11).

observed areas of roof that had fallen to about the same thickness as the roof fall of November 7, 2011, and had reviewed an inspector's photographs showing similar falls. J.A. 63-64 (Tr. 249-50).

Inspector Hines and District Manager Richetta testified that, at the time of the November 7, 2011, accident, Pattison was not violating the ground control plan. J.A. 41, 44, 45, 65 (Tr. 158, 173, 177, 255). See J.A. 10 (Stip. 13). Hines and Richetta also testified, however, that the ground control plan was not working because caprock was continuing to fall. J.A. 40, 41, 44-45, 59-60 (Tr. 154, 159, 161, 173-74, 233-37). Richetta stated that the Section 103(k) order was issued to protect Pattison's miners. J.A. 64 (Tr. 250, 251-52). The following exchange from Pattison's cross-examination of Richetta explains MSHA's concern:

A The caprock was supposed to be the best part of your mine. The caprock failed. It was not bolted and meshed. This area is either going to be mined up to the caprock, which then, in my opinion, needs – is going to behave like the caprock. Or if it was worse than the caprock and needed to be bolted and meshed to start with, it needs to be done now before it can fall on someone.

Q You don't have any specific information about that particular intersection. Your conclusion is based upon your general understanding of caprock?

A It's been -- it's based on the history of the falls in that mine.

Q Okay. And if caprock in your view fell at AR, then the caprock at AC 3 must behave the same way; is that right?

A It was Pattison's contention that the caprock would behave the same all over the mine.

Q Someone from Pattison told you that?

A Their plan said that all they had to do to the caprock was mill it, examine it. And if there was brows and potouts less than 4-foot thick, it would be bolted. Otherwise, the caprock would not create a problem.

Q So you know that the ground control plan that you approved discusses different kinds of things that can happen in caprock. It can brow. It could form a pothole. It could be 4-foot thick. It can be less than 4-foot thick, right? The plan addresses all those contingencies, doesn't it?

A Right. But the plan also leaves open the possibility that something can happen like happened in AR where there wasn't a brow or a potout. And it wasn't less than 4-foot thick.

Q Okay. And that was the plan you approved, right?

A As a settlement.

J.A. 65-66 (Tr. 257-59).

Dr. Mark testified that there is no way to discern whether caprock in areas of the mine beyond the area of the November 7, 2011, fall were sufficiently different to prevent a similar fall in those areas, and that miners are at risk of roof falls anywhere they work or travel that is "not protected by the engineered support system such as bolts and mesh," which "make up for the inherent weaknesses and weakening factors in the ground [and] create an overall stable structure." J.A. 29-30, 33 (Tr. 112-14, 127-28). See also J.A. 26-27 (Tr. 99-100, 101-02) (Dr. Mark

stated that the accident "is indicative that the caprock is not an effective support" and "proved what [MSHA] very strongly suspected earlier").¹⁷

On November 9, 2011, after completing his inspection and consulting with his colleagues, Inspector Hines issued a Section 103(k) order to Pattison stating as follows:

A roof fall accident occurred at this mine on November 7, 2011. A roof fall estimated at 20 to 30 tons occurred in 12 AR, an unbolted area of the mine and a portion of the fall landed on top of the scaling equipment being operated by a miner causing extensive damage to the equipment. This could have resulted in a fatality. This order is issued to assure the safety of persons at this operation. It prohibits all activity in all areas of the mine South of crosscut L that are not bolted and meshed until

¹⁷ Dr. Mark testified that he was involved in the development of Pattison's ground control plan, but that he was of the opinion that an engineered support system consisting of bolting and meshing should have been required in areas including where the November 7, 2011, accident occurred in order to prevent unpredictable roof falls at the mine. J.A. 24-25 (Tr. 90, 93-94). Dr. Mark testified that he agreed to Pattison's ground control plan "reluctantly." J.A. 26 (Tr. 98-100).

In Dr. Mark's expert opinion, there are no reliable warning signs of a pending roof fall to enable one to know that one area of the mine is any more dangerous than any other, and that the caprock structure of the roof at Pattison's mine is essentially the same throughout the mine. J.A. 25, 29, 33 (Tr. 95, 112-13, 126). Dr. Mark stated that the November 7 accident, which "very nearly caused a fatality," "is indicative that caprock is not [alone] an effective support." J.A. 26-27, 33 (Tr. 100-02, 126). Dr. Mark opined that miners are at risk of a roof fall anywhere they work or travel underground "not protected by the engineered support system such as bolts and mesh." J.A. 30 (Tr. 114). He believed it was "purely speculation" to say that, because the November 7, 2011, fall occurred in the vicinity of some surface feature, other areas of mine roof would not be just as likely to experience a fall. J.A. 33 (Tr. 126-27).

an MSHA examination and/or investigation has determined that it is safe to resume mining operations in the area.¹⁸ The mine operator shall obtain prior approval from an authorized representative for all actions to restore operations to the affected area.

J.A. 158 (Ex. G-4, at 1) (Section 103(k) Order No. 8659953); J.A. 39 (Tr. 152-53).¹⁹ Hines testified that he believed the hazard addressed by the order could reasonably be expected to prove fatal to any unprotected miner affected by such a roof fall. J.A. 43 (Tr. 168-69). District Manager Richetta testified that, if Pattison continued mining in the manner it had prior to the November 7, 2011, accident, someone would be injured. J.A. 60, 64 (Tr. 234-35, 251). Richetta further stated that the type of fall that occurred on November 7 resembled the other falls he had

¹⁸ Contrary to Pattison's assertion (Br. i, 5, 37), the Section 103(k) order does not require the installation of bolts and mesh in the "entire mine." The order applies only to unbolted and unmeshed areas south of crosscut L. J.A. 158-61 (Ex. G-4); J.A. 41 (Tr. 161). Some of the most heavily traveled and active working places are north of crosscut L, such as the crusher area and the underground mine office. J.A. 42 (Tr. 165). The order prohibits all activity (i.e., work and travel) south of crosscut L in areas that are not bolted and meshed. Areas of the mine south of crosscut L in which no work or travel is anticipated, and which are bermed-off or barricaded, do not need to be bolted and meshed. See J.A. 158 (Ex. G-4, at 1).

¹⁹ Concurrent with the issuance of the Section 103(k) order, Inspector Hines issued a Section 104(a) citation alleging that "[t]he ground control system in use by the mine [was not] adequately designed, installed and maintained to control the ground conditions found where persons work or travel," in violation of 30 C.F.R. § 57.3360. J.A. 156-57 (Ex. G-3) (Citation No. 8659952); J.A. 39 (Tr. 151-52). The judge vacated the citation, finding that Pattison lacked fair notice that it was violating the mandatory standard (J.A. 575-78 (Dec. 37-40)). That aspect of the judge's decision is not at issue here.

observed at the mine in early October 2011, after the ground control plan was implemented. J.A. 60 (Tr. 235).

The Section 103(k) order was subsequently modified three times. Modification 8659953-01, on November 9, 2011, allowed the retrieval of equipment needed for bolting and allowed Pattison to institute the bolting process. Modification 8659953-02, on November 15, 2011, allowed evaluation of underground conditions south of Crosscut L for no more than 20 hours, starting on November 15, 2011, and ending on November 19, 2011, by three individuals working with limited equipment. Modification 8659953-03, on November 16, 2011, allowed up to four individuals to evaluate ground conditions for no more than 20 hours ending on November 20, 2011. J.A. 159-61 (Ex. G-4, at 2-4). See J.A. 50-51 (Tr. 197-200).

Maintaining that, without providing the baseline protections against future roof fall incidents set forth in the Section 103(k) order,²⁰ it can safely reintroduce its miners underground to carry out ground strength research and to resume

²⁰ The Section 103(k) order requires bolting and meshing "until an MSHA examination and/or investigation has determined that it is safe to resume mining operations in the area." It also requires Pattison to "obtain prior approval from an authorized representative for all actions to restore operations to the affected area." J.A. 158 (Ex. G-4). Clearly, the Section 103(k) order acknowledges the possibility that Pattison may be able to set forth an alternative roof support system capable of providing the necessary assurance that the roof is stable and that an occurrence similar to the November 7, 2011, accident will not occur. To date, Pattison has not done so.

production frac sand mining, Pattison challenged the validity of the order and sought expedited relief from a Commission administrative law judge. An expedited hearing was held by Judge Thomas McCarthy on November 18, 2011. See J.A. 541 (Dec. 3).²¹

More than two weeks after the hearing -- which had focused on whether the Section 103(k) order was valid, as issued -- on December 6, 2011, Kyle Pattison sent District Manager Richetta an e-mail requesting that MSHA again modify the Section 103(k) order to permit Pattison to enter the underground portion of the mine covered by the order to evaluate conditions, install monitoring equipment, and conduct tests. J.A. 311-13 (Kyle Pattison e-mail of December 6, 2011). On December 7, 2011, Richetta sent Pattison an e-mail denying the requested modification because (1) the proposed activities were merely "research oriented," and (2) the proposed ground movement monitors were not an acceptable substitute for roof support. See J.A. 311 (District Manager Richetta e-mail of December 7, 2011). Just four days before the judge issued his decision, on December 9, 2011,

²¹ On November 21, 2011, after the parties had agreed to an expedited briefing schedule at the conclusion of the hearing, Pattison moved the judge to issue a decision without briefing. On November 30, 2011, the judge issued an order denying Pattison's motion. J.A. 207-15. In his order, the judge found that the Secretary did not abuse her discretion in the issuance or scope of the Section 103(k) order. J.A. 209-15. He also reaffirmed his ruling at the hearing (J.A. 12-13 (Tr. 45-46) that temporary relief is available only from the modification or termination of a Section 103(k) order, and not from the issuance of a Section 103(k) order. J.A. 208 n.1.

Pattison filed with the judge an "Emergency Motion to Modify 103(k) Order" to permit its experts to enter the underground portion of the mine "to evaluate conditions, install monitoring equipment, and conduct tests." J.A. 301-16 (Emergency Motion).

C. The Decision of the Administrative Law Judge

In his December 13, 2011, decision, Judge McCarthy affirmed the Section 103(k) order as "validly issued" (J.A. 578-85 (Dec. 40-47)), and denied Pattison's application for temporary relief under Section 105(b)(2) of the Mine Act (J.A. 586-87 (Dec. 48-49)). The judge concluded that, "while the Commission can grant temporary relief under Section 105(b)(2) of the Act from the modification or termination of a Section 103(k) order, it cannot grant temporary relief from the issuance of a Section 103(k) order, which is the relief initially sought by [Pattison] in this case." J.A. 586 (Dec. 48).

The judge further found that the relief sought by Pattison in its December 9, 2011, emergency motion -- i.e., to change the conditions of the Section 103(k) order to permit activity expressly prohibited under the order, as issued -- was essentially another attempt to "improperly seek[] relief to modify the 103(k) Order, which the Commission is without authority to do." J.A. 586 (Dec. 48) (emphasis supplied). The judge also found that, even if he were to treat the emergency motion as a request for temporary relief, none of the three conditions set forth in

Section 105(b)(2) had been met. Specifically, the judge found that (1) because Pattison's emergency motion referenced post-hearing matters and transactions, no "hearing ha[d] been held in which all parties were given an opportunity to be heard" (citing Section 105(b)(2)(A)), (2) Pattison failed to show a "substantial likelihood that the findings of the Commission [would] be favorable" to it (citing Section 105(b)(2)(B)), and (3) Pattison failed to show that the relief it sought "[would] not adversely affect the health and safety of miners" (citing Section 105(b)(2)(C)). J.A. 586 (Dec. 48).

Judge McCarthy's December 13, 2011, decision became a final Commission action, appealable to this Court, when on January 18, 2012, the Commission denied Pattison's petition for discretionary review of the judge's decision. J.A. 588 (Commission order of January 18, 2012).

SUMMARY OF ARGUMENT

In Section 103(k) of the Mine Act, Congress gave the Secretary plenary power to issue post-accident orders for the protection and safety of all persons. Whether the issuance and scope of a particular Section 103(k) order is lawful must be reviewed under the arbitrary and capricious standard. That standard presumes the validity of agency action as long as there is a rational basis for the action. The facts of this case, as credited by the judge, present a compelling case for the issuance and scope of the disputed Section 103(k) order. In particular, the

November 7, 2011, unintended roof fall in which a miner was lucky not to lose his life, and the mine's history of similar roof falls, provided ample justification for the issuance and scope of the order.

Pattison's argument that the November 7, 2011, unintended roof fall did not constitute an "accident" covered by Section 103(k) of the Act because it did not result in an injury or fatality lacks merit and would defeat the entire safety purpose of that provision. The Secretary's plain meaning interpretation of Section 3(k)'s definition of "accident" advances safety, is lawful, and should be adopted by the Court. The judge properly rejected Pattison's theory that a surface gully in the vicinity of the unintended roof fall created a unique circumstance at that location because its expert witness who set forth that theory lacked credibility, and because he failed to adequately explain the theory. The other limitations on the issuance and scope of Section 103(k) orders suggested by Pattison -- such as a requirement that such orders may only be issued for the protection of MSHA investigators, that such orders must be subordinated to the conditions of an existing MSHA-accepted mining plan, and that such orders may only be issued after advance notice to a mine operator -- should be rejected because they read into the statute limitations Congress did not impose.

The judge's decision to deny Pattison temporary relief from the issuance of the Section 103(k) order comports with the statute and is supported by his findings that the evidence does not satisfy the requirements for temporary relief.

The judge's decision to deny Pattison a modification of the Section 103(k) order by substituting his evaluation of the evidence for MSHA's evaluation comports with the case law and is consistent with the evidence.

ARGUMENT

I.

APPLICABLE LEGAL PRINCIPLES AND STANDARD OF REVIEW

This case presents three questions of statutory interpretation: (1) whether an "accident" occurred within the meaning of Section 103(k) of the Act, (2) whether the Commission is authorized to grant temporary relief from a Section 103(k) order, as issued, and (3) whether the Commission is authorized to modify a Section 103(k) order.

This Court reviews legal conclusions de novo. Little Rock School District v. Arkansas, 664 F.3d 738, 744 (8th Cir. 2011). "[W]here a statute is plain and unambiguous, and its meaning clear, construction and interpretation have no place; [] it is the intention expressed in the statute and that alone to which the courts may give effect * * *." Goldberg v. United States, 277 F. 211, 216 (8th Cir. 1921). Accord Secretary of Labor on behalf of Bushnell v. Cannelton Industries, Inc.,

867 F.2d 1432, 1435 (D.C. Cir. 1989) (quoting Chevron U.S.A. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843 (1984)). If the statute is silent or ambiguous with respect to the question presented, the Secretary's interpretation of the provision is owed deference and is entitled to affirmance as long as it is reasonable. Hernandez-Perez v. Holder, 569 F.3d 345, 347 (8th Cir. 2009). Accord Cannelton, 867 F.2d at 1435. When the Commission agrees with the Secretary's interpretation of a statutory provision, that interpretation is emphatically owed deference. RAG Cumberland Resources v. FMSHRC, 272 F.3d 590, 596 (D.C. Cir. 2001).

"In the statutory scheme of the Mine Act, the Secretary's litigating position before the Commission is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a * * * health and safety standard, and is therefore deserving of deference." Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003) (internal quotation marks and citations omitted). The Secretary's interpretation is entitled to deference even where it pertains to a provision setting forth the Commission's authority. See Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc., 80 F.3d 110, 113-15 (4th Cir. 1996) (granting deference to the Secretary's interpretation of a provision setting forth the Commission's authority to fashion remedies in discrimination cases).

This case also presents factual questions. The Court reviews factual findings of the judge below under a substantial evidence standard. Green v. Union Sec. Ins. Co., 646 F.3d 1042, 1050 (8th Cir. 2011). "Substantial evidence" is "more than a scintilla but less than a preponderance." Midgett v. Wash. Group Int'l Long Term Disability Plan, 561 F.3d 887, 897 (8th Cir. 2009).

Finally, although the Commission and Courts of Appeals have never decided the appropriate standard for reviewing a Section 103(k) order, the Secretary submits that, in light of the broad discretion afforded the Secretary under Section 103(k), review by a fact-finder of a Section 103(k) order should be conducted under the arbitrary and capricious standard. See S. Rep. 95-181, 95th Cong., 1st Sess. 29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., Senate Subcommittee on Labor, Committee on Human Resources, Legislative History of the Federal Mine Safety and Health Act of 1977 ("Legis. Hist."), at 617 (1978) (Section 103(k) authorizes the Secretary "to exercise broad discretion in order to protect the life or to insure the safety of any person" and provides the Secretary "with flexibility in responding to accident situations, including the issuance of withdrawal orders") (emphases supplied); see also Miller Mining, 713 F.2d at 490 ("Section 103(k) gives MSHA plenary

power to make post-accident orders for the protection and safety of all persons") (emphasis supplied).²²

This Court has held that the arbitrary and capricious standard is especially appropriate when "the resolution of a dispute involves primarily issues of fact and analysis of the relevant information requires a high level of technical expertise," in which case the Court "must defer to the informed discretion of the responsible federal agenc[y]." Friends of the Norbeck v. U.S. Forest Service, 661 F.3d 969, 976 (8th Cir. 2011); petition for cert. filed Feb. 14, 2012 (No. 11-1040) (internal quotation marks and citations omitted). See also Quest v. Boyle, 589 F.3d 985, 991 (8th Cir. 2009) (same). This case is such a case.

This Court has also held that the arbitrary and capricious standard is appropriate when the authorizing statute fails to "specifically enunciate a standard for reviewing [an agency's] nonfactual determinations." Friends of Richards-Gebaur Airport v. FAA, 251 F.3d 1178, 1184-85 (8th Cir. 2001), cert. denied, 535 U.S. 927 (2002). This principle should apply with even greater vigor here, where Congress did not specifically provide for any review of Section 103(k)

²² In this case, the parties and the judge have used both the phrase "arbitrary and capricious" and the phrase "abuse of discretion." This Court has held that the "arbitrary and capricious" standard of review is functionally indistinct from the "abuse of discretion" standard of review. "Review for an 'abuse of discretion' or for being 'arbitrary and capricious' is a distinction without a difference, because the terms are generally interchangeable." Jackson v. Prudential Ins. Co. of America, 530 F.3d 696, 701 n.6 (8th Cir. 2008) (internal quotation marks and citations omitted).

orders. If Section 103(k) orders are reviewable at all, they should be reviewable under the most deferential standard, i.e., the arbitrary and capricious standard.²³

Under the arbitrary and capricious standard of review, the burden of persuasion is on the party seeking to set aside the governmental action. South Dakota v. U.S. Department of Interior, 423 F.3d 790, 800 (8th Cir. 2005), cert. denied, 549 U.S. 813 (2006). The arbitrary and capricious standard "presume[s] the validity of agency action as long as a rational basis for it is presented." See American Farm Bureau Federation v. EPA, 559 F.3d 512, 519 (D.C. Cir. 2009) (citations and internal quotation marks omitted). See also J.A. 580-82 (Dec. 42-44). In Performance Coal Co., 32 FMSHRC 811, 823 (2010), rev'd, 642 F.3d 234 (D.C. Cir. 2011), dissenting Commissioners Duffy and Young recognized, in the context of an application for temporary relief, that "the Secretary's authority in command of an accident site is, and must be, plenary," that "the judge should presume, in the absence of compelling evidence to the contrary, that the Secretary's agents are acting in good faith to advance" that authority, and

²³ For the reasons set forth above, Pattison's argument (Br. 19-22) that the Commission and the Courts must apply a reasonableness standard of review, which is thought to be "less deferential to the agency," (South Trenton Residents Against 29 v. Federal Highway Admin., 176 F.3d 658, 663 n.2. (3d Cir. 1999)), to Section 103(k) orders should be rejected. In any event, for the reasons set forth below, the Secretary's actions in this case also satisfy a "reasonableness" standard.

that an operator challenging that authority bears the "burden of proving an abuse of discretion."

II.

THE JUDGE PROPERLY AFFIRMED THE SECTION 103(k) ORDER MSHA ISSUED AFTER THE NOVEMBER 7, 2011, ACCIDENT AT PATTISON'S MINE

A. The Issuance of the Section 103(k) Order, and the Scope of the Order, Were Not Arbitrary and Capricious

In finding that the issuance and the scope of the Section 103(k) order were not arbitrary and capricious (see J.A. 582-85 (Dec. 44-47)), the judge relied primarily on two factors: (1)"the testimony, photographs, and/or documentary evidence" regarding the November 7, 2011, roof fall accident, which occurred in an area of the mine that Pattison "had represented was the safest," and (2) the mine's "history of other recent falls in areas mined to cap rock." J.A. 583 (Dec. 45).²⁴ In essence, the judge agreed with the Secretary that changed circumstances, as demonstrated by the roof fall accident in one of the putatively "safest" areas of the mine after Pattison's adoption of the roof control plan in October 2011, demonstrated the need for the Section 103(k) order to protect miners.

²⁴ The judge also noted that the August 2011 imminent danger order supported his finding that the mine had a problem with roof support. J.A. 583 (Dec. 45).

The judge's conclusion that the issuance of the Section 103(k) order was not an abuse of discretion is supported by substantial evidence. First, the judge credited the testimony of the Secretary's expert witness, Dr. Mark.²⁵ Based on his earlier concerns after an on-site evaluation of the mine after two August 2011 roof falls, and based on the occurrence of the November 7, 2011, roof fall, Dr. Mark testified that, in his opinion, caprock alone is not effective roof support. J.A. 24-27 (Tr. 93-102). Mark also testified that, with the benefit of hindsight, MSHA had erred in permitting mining under scaled caprock without engineered roof support in the accepted ground control plan. J.A. 26 (Tr. 98-101). The judge concluded that Mark's testimony was fully supported by the analyses of Inspector Hines and District Manager Richetta -- both of whom he found also testified credibly that caprock without engineered support could not provide effective roof support.

²⁵ In crediting the witnesses he credited, the judge stressed that he considered "the demeanor of the witnesses, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for testimony given, and consistency or lack thereof within the testimony of witnesses and between the testimony of witnesses." J.A. 542 (Dec. 4 n.5). This Court defers to the fact-finder's credibility determinations as long as they are "supported by good reasons and substantial evidence." Guilliams v. Barnhart, 393 F.3d 798, 801 (8th Cir. 2005).

J.A. 547-49 (Dec. 9-11). See J.A. 40, 41, 44-45, 59-60, 64, 65-66 (Tr. 154, 159-60, 173-74, 233-37, 252, 257-59).²⁶

The judge also credited Dr. Mark's opinion that the theory of Pattison's expert, Mr. West, that the caprock at the accident site was unique and atypical of the caprock in the rest of the mine because it underlay a surface gully that permitted water leakage into the caprock was "pure speculation." J.A. 584 (Dec. 46). See J.A. 29 (Tr. 112-13) (there is no basis for believing the caprock in 12AR where the fall occurred is any different than the caprock anywhere else in the mine). See also J.A. 33 (Tr. 126-27).²⁷

Second, the judge relied on evidence of the mine's history of several prior unintended roof falls that had occurred in areas where the roof had also been scaled to caprock. J.A. 583-84 (Dec. 45-46). See J.A. 41, 54-55, 57 (Tr. 159) (Inspector Hines testified that he has seen a "a lot of roof falls that were in caprock" at the

²⁶ District Manager Richetta stated that he based his opinion on the history of roof falls at the mine, including the November 7, 2011, accident, which occurred in caprock that was supposed to be representative of the best roof in the mine. J.A. 65-66 (Tr. 257-58).

²⁷ The judge rejected Pattison's assertion that Dr. Mark's opinion should be discounted because he "has no experience in sandstone mines or in ground control issues beyond the coal mine environment." J.A. 544 (Dec. 6). The judge noted that Dr. Mark observed caprock falls at the mine on or about August 19, examined inspection photographs after the November 7 roof fall, and believed that there was no way of determining that the caprock at the site of the November 7 fall was different from the caprock anywhere else in the mine. J.A. 544-46 (Dec. 6-8). See J.A. 22-23 (Tr. 85-87).

mine), 212-16, 225 (MSHA Staff Assistant Pomroy testified that he photographed evidence of two caprock falls in August 2011). See also J.A. 174, 175 (Exs. G-11, 12 (photographs)).²⁸ The judge also noted that the mine's ground control plan had resulted from settlement of an imminent danger order MSHA issued because of the degree of concern it had regarding roof stability at the mine. J.A. 583 (Dec. 45).

In sum, the judge concluded:

Given the instant roof fall and the mine's history of recent roof falls, including falls from roof mined to cap rock * * *, MSHA made a reasoned judgment to reverse course from the approved ground control plan and consider bolting and meshing to be the best method to insure miner safety in areas south of crosscut L going forward. The court is not in a position to second guess that expert agency judgment, nor substitute its judgment for that of MSHA.

J.A. 582 (Dec. 44). Because substantial evidence supports the judge's conclusion that the Section 103(k) order was necessary to ensure the safety of Pattison's miners by preventing yet another unintended roof fall where miners worked and traveled, the judge's finding that MSHA's issuance of the Section 103(k) order was not arbitrary and capricious should be affirmed.

²⁸ In addition, Inspector Runyon testified that, during his October and November 2011 inspections of the mine, he observed several potholes where 12 to 18 inches of roof had fallen to the mine floor. J.A. 51 (Tr. 200). District Manager Richetta testified that he had observed areas of roof that had fallen to about the same thickness as the roof fall of November 7, 2011, and had reviewed an inspector's photographs showing similar falls. J.A. 63-64 (Tr. 249-50).

B. Pattison's Objections to the Issuance of the Section 103(k) Order Lack Merit

The judge correctly observed that MSHA's authority to oversee accident sites pursuant to Section 103(k) has been described as giving MSHA "plenary power" and "complete control." J.A. 581 (Dec. 43). See Miller Mining, 713 F.2d at 490. Pattison asserts several errors with respect to MSHA's issuance of the Section 103(k) order in this case. The judge properly rejected all of them.

1. The unintended roof fall of November 7, 2011, constituted an "accident" within the meaning of Section 103(k)

First, Pattison asserts, contrary to the testimony of MSHA District Manager Richetta (J.A. 60 (Tr. 234)), that the unintended roof fall event that resulted in the issuance of the Section 103(k) order did not constitute an "accident" as that term is used in Section 103(k) of the Act. Br. 26-35. The judge, citing the Commission's decision in Aluminum Co. of America, 15 FMSHRC 1821 (1993), correctly concluded that the examples of accidents set forth in Section 3(k) of the Mine Act, 30 U.S.C. 802(k), are merely illustrative, not all-inclusive. J.A. 578-79 (Dec. 40-41). Moreover, the judge noted that another subsection of Section 103 of the Act, Section 103(d), explicitly refers to "accidents" as including unintended roof falls. Ibid. Finally, because of the remedial nature of the Act, the judge correctly determined that the term "accident" must be broadly construed to effectuate the purpose of the Act. J.A. 579 (Dec. 41). The Secretary's interpretation of the term

"accident" -- which matches the judge's -- as including an unintended roof fall with the potential of causing the serious injury or death of a miner should be accepted because it is reasonable and promotes miner safety. See Excel Mining, 334 F.3d at 6; RAG Cumberland Resources, 272 F.3d at 596.²⁹

The plain meaning of Sections 3(k) and 103(k) of the Act is that the definition of "accident" in Section 3(k) applies to the term "accident" in Section 103(k). Section 3 of the 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 (emphases supplied). Inasmuch as Section 103(k) of the Act is part of the same chapter as Section 3(k) -- both are part of Chapter 22, i.e., 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 Section 103(k).

"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

²⁹ Contrary to Pattison's assertion (Br. 30), the Secretary's interpretation of "accident" does not grant the Secretary "closure authority * * * any time any ground [falls]." (Emphasis by Pattison). The Secretary's interpretation of "accident" grants the Secretary closure authority when, as in this case, an unintended roof fall with the potential of causing a miner's injury or death occurs.

it appears throughout the statute." Florida Dept. of Banking and Finance v. Board of Governors of Federal Reserve System, 800 F.2d 1534, 1536 (11th Cir.1986), cert. denied, 481 U.S. 1013 (1987) . See 1A Sutherland (Singer &Singer), Statutes and Statutory Construction § 20.8 at 136 (7th ed. 2009).

Because the definition of "accident" in Section 3(k) applies to the term "accident" in Section 103(k), this case turns on the meaning of "accident" in Section 3(k). As already stated, the Secretary has long interpreted the definition of "accident" in Section 3(k) to encompass events not specifically listed in the definition when the events are similar in nature or present a similar potential for injury or death as the events specifically listed in the definition. Aluminum Co., 15 FMSHRC at 1825-26.³⁰ The Secretary's interpretation is consistent with the language, the history, and the purpose of Section 103(k), and should be accepted in this case.

³⁰ Pattison misreads Section 3(k)'s definition of "accident" to cover only events that actually result in injury or death. Br. 26-31. Section 3(k) lists several types of events that may or may not result in injury or death before it uses the words "or injury to, or death of, any person." (Emphases supplied). Clearly, Congress' use of the word "or" implies that the terms preceding are conceptually different from the terms appearing after that word. See Rine v. Imagitas, Inc., 590 F.3d 1215, 1224 (11th Cir. 2009) (use of the disjunctive "or" indicates that "something different" is meant). Just as importantly, there is no logical or safety-promoting reason why Congress would want the Secretary to be able to issue a Section 103(k) order after an unintended event that resulted in an injury or fatality, but not be able to issue such an order after an unintended event that reasonably could have resulted in injury or death, but fortuitously did not.

As the judge recognized (J.A. 578 (Dec. 40)), Congress' use of the word "includes" in Section 3(k)'s definition of "accident" indicates Congress' intent that the events listed in that section be examples of "accidents," not that the events listed in that section be exhaustive. Aluminum Co., 15 FMSHRC at 1825-26 (agreeing with the Secretary that the term "includes" in Section 3(k) is a term of "enlargement"). See In re Huckfeldt, 39 F.3d 829, 831 (8th Cir. 1994) ("[u]se of the introductory word 'including' means that the [items listed thereafter] are nonexclusive"). See also Adams v. Dole, 927 F.2d 771, 776 (4th Cir.), cert. denied, 502 U.S. 837 (1991) (the word "'including' is perhaps more often than not the introductory term for an incomplete list of examples").

Moreover, "[i]t is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded every word." Regions Hospital v. Shalala, 522 U.S. 448, 467-68 (1998) (internal citation omitted). Reading Section 3(k) in the manner suggested by Pattison (Br. 31-32) would impermissibly read the word "includes" out of Section 3(k). Instead, Section 3(k) must be read to include things that are similar in nature or present a similar potential for injury or death as the events specifically listed in the definition. See, e.g., United States v. Philip Morris USA, Inc., 396 F.3d 1190, 1200 (D.C. Cir.), cert. denied, 546 U.S. 960 (2005) (applying doctrine of ejusdem generis to expand the list of specific remedies to include "remedies similar in nature to those enumerated"). See also

U.S. v. Stanko, 491 F.3d 408, 414 n.5 (8th Cir. 2007), cert. denied, 552 U.S. 1314 (2008) (discussing doctrine of eiusdem generis).

The Secretary's interpretation of the definition of "accident" in Section 3(k) as encompassing events that are similar in nature or present a similar potential for injury or death as the events specifically listed in the definition is corroborated by Section 103(d) of the Act. Section 103(d) provides that "all accidents, including unintentional roof falls (except in any abandoned panels or in areas which are inaccessible or unsafe for inspections), shall be investigated by the operator or his agent to determine the cause and the means of preventing a recurrence." 30 U.S.C. § 813(d) (emphasis supplied). Unintentional roof falls are not one of the examples of accidents listed in Section 3(k). Congress' characterization of unintended roof falls as accidents in Section 103(d) bolsters the Secretary's interpretation of the term "accident" in Sections 3(k) and 103(k) as including unintended roof falls capable of resulting in injury or death.

In the absence of anything in the statute clearly indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout; and where its meaning in one instance is clear, this meaning will be attached to it elsewhere.

Moreland v. United States, 968 F.2d 655, 662 (8th Cir. 1992) (internal quotation marks and citations omitted).

The Secretary's interpretation of Sections 3(k) and 103(k) is also consistent with the history and purpose of Section 103(k). In enacting the Mine Act, Congress indicated its intent to give the Secretary broad authority to respond to accidents to protect life. See S. Rep. No. 181 at 29, reprinted in Legis. Hist. at 1325. Reading Section 103(k) broadly to give the Secretary authority to protect miners in the event of an incident that is similar in nature or presents a similar potential for injury or death as the events specifically listed in Section 3(k) is consistent with Congress' intent to give the Secretary broad authority to protect persons in the event of an accident. Pattison's narrow interpretation is not.

As the judge recognized in this case, the unintended fall of between 20 and 30 tons of caprock, covering an area measuring approximately 35 feet by 35 feet plainly has a similar potential for injury or death as the events specifically listed in Section 3(k). J.A. 579 (Dec. 41). See J.A. 154, 155, 170 (Exs. G-1, 2, 7) (photographs).

Pattison relies on the fact that an MSHA inspector told the operator that the November 7, 2011, roof fall was not a reportable accident under the Secretary's 30 C.F.R. Part 50 reporting regulations as proof that there was not an "accident" within the meaning of Section 103(k). Br. 33-35.³¹ The fact that the Secretary has

³¹ Part 50 "governs a mine operator's duty to report accidents, occupational injuries and occupational illnesses." Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 459 (D.C. Cir. 1994).

specifically defined the term "accident" in her reporting regulations does not control here. See 30 C.F.R. § 50.2(h). Part 50 sets forth operators' obligations in the event of an "accident," as defined therein. Section 103(k) authorizes the Secretary to issue orders to protect miners in the event of an "accident," as defined in the Mine Act.

Section 50.2, the definitions section of Part 50, plainly limits its application to terms "used in this part." 30 C.F.R. § 50.2. Nothing in Part 50 applies to or even refers to the Secretary's authority to issue orders under Section 103(k).

Section 50.1 states that the purpose of Part 50 is to "implement MSHA's authority to investigate, and to obtain and utilize information pertaining to, accidents." In setting forth Part 50's purpose and scope, however, the Secretary made no reference to Section 103(k), a statutory provision from Congress.

Moreover, the title of Part 50 -- which refers to "NOTIFICATION, INVESTIGATION, REPORTS AND RECORDS OF ACCIDENTS, INJURIES, ILLNESSES, EMPLOYMENT, AND COAL PRODUCTION IN MINES," and which does not refer to Section 103(k) -- provides additional support for the Secretary's plain meaning reading of Section 50.2(h) as not applying to Section 103(k). See Florida Department of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 47 (2008) ("[S]tatutory titles and section headings are tools available for the resolution of a doubt about the meaning of a statute").

Contrary to Pattison's assertion, nothing in Section 50.1, or in any other part of Part 50, suggests that any part of Part 50 was intended to apply to the Secretary's authority to issue Section 103(k) orders to protect miners in the event of an accident. Inasmuch as the definition of "accident" in Section 50.2(h) by its terms applies only to Part 50, and Part 50 does not pertain to the Secretary's authority to issue orders under Section 103(k) to protect miners, Section 50.2(h) plainly does not apply to Section 103(k).

Even if it were not plain that the definition of "accident" in Section 50.2(h) does not apply to the term "accident" in Section 103(k), and even if it were not plain that the definition of "accident" in Section 3(k) does apply to the term "accident" in Section 103(k), the Secretary's interpretation that the definition of "accident" in Section 3(k), and not the definition of "accident" in Section 50.2(h), applies to Section 103(k) is reasonable and entitled to deference. See Excel Mining, 334 F.3d at 6.³²

³² Even if an MSHA inspector's statement that an event not reportable to MSHA by an operator under 30 C.F.R. Part 50 were also a statement that the same event was not one over which MSHA has the authority to issue a Section 103(k) order, such a statement by an MSHA inspector cannot bind the Secretary. See, e.g., Spirit Lake Tribe v. North Dakota, 262 F.3d 732, 742 (8th Cir. 2001), cert. denied, 535 U.S. 988 (2002) (deference is owed to the authoritative interpretation of the agency itself, not to the views of lower-level agency employees) .

2. Pattison's remaining arguments that the issuance of the Section 103(k) order was arbitrary and capricious lack merit

Pattison argues that the judge erred by failing to accept that the geological conditions above the November 7, 2011, accident site -- a gully approximately 80 feet away from that location³³ -- allowed water to drain into the sandstone caprock and weaken it, thereby creating a condition "unique" to that location. Br. 24-25.³⁴ The judge, however, found that Pattison's expert, Dave West, "failed to testify with specificity about how he concluded that water from the gully reached the area of the November 7 fall and proximately caused the collapse." J.A. 583 (Dec. 45). The judge found West's testimony "weak and speculative on proximate cause, i.e., 'the presence of the gully on the topography which might

³³ Pattison's expert, Dave West, testified that the surface gully he believed was uniquely responsible for causing the November 7, 2011, roof fall was not even in "a direct vertical line" above the area of the fall. J.A. 82 (Tr. 322).

³⁴ Pattison repeatedly misstates the record evidence in support of this theory, asserting that the excavator operator told Inspector Hines that he had seen "water" or "liquid" dribbling from the roof shortly before it fell onto the excavator. Br. 6, 13, 18 n.12, 24. The record contains no testimony that any witness at the mine observed water or liquid dribbling from the mine roof at the November 7 accident site or elsewhere. Instead, the record establishes that Inspector Hines stated that Millin, the excavator operator who was performing scaling at the time of the accident, stated that he saw material "dribbling" immediately before the roof fell. See J.A. 37 (Tr. 144). Far from implying the presence of a liquid, "dribbling" is a mining term of art understood to mean "[i]n underground excavation, fall of small stones and debris from roof, warning that a heavy fall may be imminent." Dictionary of Mining, Mineral, and Related Terms, at 169 (2d ed. 1997).

allow the preferential ingress of water and moisture * * *." J.A. 584 (Dec. 46) (emphasis by the judge). See J.A. 75 (Tr. 294).

Indeed, the judge found that the testimony, including Mr. West's own testimony, established that "there is a moisture problem in the underground workings that extends beyond the 12 AR [where the accident occurred] and would cause cap rock in unbolted and unmeshed areas to become friable * * * thereby creating an ongoing hazard of additional roof falls, the gully theory notwithstanding." J.A. 583 (Dec. 45). The judge noted that Pattison admitted that the sandstone caprock deteriorates once "any sort of moisture" is introduced into the mine, including humidity. Ibid. Moreover, the judge discounted West's testimony on credibility grounds, finding his testimony "unconvincing," "just too convenient," and "contrived." J.A. 584-85 (Dec. 46-47).

The judge also rejected Pattison's assertion that the testimony of the Secretary's expert, Dr. Mark, was unreliable because he was unaware of the potential effect of the gully on the November 7 roof fall beneath it. The judge found that Dr. Mark "discounted any significance of the gully where he examined it in August [2011]." J.A. 584 (Dec. 46).

Substantial evidence supports the judge's analysis. Mr. West himself testified that the type of sandstone in Pattison's mine is

stable and exhibits pretty good strength until it gets wet, and then it becomes extremely friable.

* * * * *

When it gets wet, the angle of internal friction decreases to pretty much zero. It's one of those materials that, if you put a solid piece of rock and immerse it in water, in a very short time, it will disintegrate.

* * * * *

It's initially strong. But throw water on it or any sort of moisture, and the level of moisture can be absorbed through the air, for example, the ventilation system within a mine, and it starts to do funny things.

J.A. 72, 73 (Tr. 284-85, 286 (emphases supplied)).³⁵

Dr. Mark testified that he noted the contours on the surface map of the areas he visited in August 2011. J.A. 31 (Tr. 119-20). He noted that the gully was approximately 80 feet away from the area of the November 7, 2011, accident, but that caprock degrades over time in the presence of humidity, and therefore requires scaling on a relatively continual basis to take down loose rock. J.A. 31, 32 (Tr. 120-21, 123). Dr. Mark explained that it is "purely speculation" to conclude that, because the November 7, 2011, fall occurred in the general vicinity of some surface feature, other areas of mine roof would not be just as likely to experience a fall. J.A. 33 (Tr. 126-27). District Manager Richetta testified that the caprock at the accident site appeared to him as of the "same type" as in the location of other

³⁵ Counsel for Pattison acknowledged that Pattison's mine was "particularly susceptible to moisture and humidity," a description with which MSHA District Manager Richetta expressed agreement. J.A. 64 (Tr. 252). Mr. West acknowledged that other roof falls at Pattison's mine may have resulted from moisture in mine air being absorbed into the caprock. J.A. 79 (Tr. 313).

falls in the mine, which occurred to approximately the same depth in the caprock. J.A. 60, 63 (Tr. 235, 249). Inspector Hines testified that he had seen "a lot of falls that were in caprock." J.A. 41 (Tr. 159). See J.A. 41 (Tr. 161).

Pattison asserts that Section 103(k) orders may only be issued to control the mine for the protection of MSHA's investigators, i.e., may only cover the location of the investigation, and may only last as long as the investigation lasts. Br. 35-38. Noting that the Ninth Circuit described MSHA's authority to manage accidents pursuant to Section 103(k) as one of "plenary power" and "complete control" (see Miller Mining, 713 F.2d at 490), the judge properly rejected this assertion:

Section 103(k) does not restrict imposition of a control order to "affected areas" of the mine, i.e., 12AR, the location of the roof fall." * * *. Section 103(k) [] authorizes MSHA, after an accident, * * * to issue such orders as it "deems appropriate to insure the safety of any person in the coal or other mine," and the operator shall obtain the approval of MSHA, when feasible, to " * * * recover the coal or other mine or return affected areas of such mine to normal."

J.A. 581 (Dec. 43) (emphases by the judge). The judge stressed that MSHA's "approval or disapproval of any plans to recover the mine is discretionary." Ibid. Pattison's assertion should be rejected because it would "read a limitation into the statute that has no basis in the statutory language." Thunder Basin Coal Co. v. FMSHRC, 56 F.3d 1275, 1280 (10th Cir. 1995) (citation and internal quotation marks omitted). Accord Hercules Inc. v. EPA, 938 F.2d 276, 280 (D.C. Cir. 1991)

(rejecting an interpretation that "read[] into the statute a drastic limitation that nowhere appear[ed] in the words Congress chose").

Pattison argues that, because it was mining in accordance with its recently-accepted ground control plan, MSHA was precluded from issuing a Section 103(k) order for any area of the mine extending beyond the immediate accident site.

Br. 51-53. As the judge recognized, the short answer is that changed circumstances were established by the roof fall accident, which demonstrated the need for a changed approach and immediate action to protect Pattison's miners from similar roof falls. J.A. 582-84 (Dec. 44-46). Pattison's argument is the equivalent of an argument that the Secretary is estopped from issuing a post-accident Section 103(k) order if the operator was in compliance with applicable mandatory safety standards at the time of the accident. In giving the Secretary Section 103(k) closure authority, however, Congress clearly recognized that compliance with existing mandatory standards and mine plans -- both of which are intended to prevent accidents -- may have been demonstrated to be insufficient to protect miners in the aftermath of an actual accident.

Finally, Pattison asserts (Br. 52) that the Section 103(k) order was invalid because Pattison had no "advance notice of the mandate" set forth in the order. Pattison misconstrues the concept of fair notice. The fair notice concept requires that laws give the person of ordinary intelligence "a reasonable opportunity to

know what is prohibited, so that he may act accordingly" -- i.e., so that he may "steer between lawful and unlawful conduct." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Accord Williams v. Nix, 1 F.3d 712, 716 (8th Cir. 1993) ("due process requires fair notice of prohibited conduct before a sanction can be imposed"). Pattison was not entitled to fair notice in advance of the Section 103(k) order because the order did not impose a sanction on Pattison for anything it had already done. Instead, the order informed Pattison what, in light of the accident, it was required to do in the future. Although Pattison could then be subject to sanctions for violating the order, it could not complain that it had not been informed what it was required to do. Under the fair notice concept, the order was the notice to which Pattison was entitled.

III.

THE JUDGE PROPERLY CONCLUDED THAT PATTISON WAS NOT ENTITLED TO TEMPORARY RELIEF FROM THE SECTION 103(K) ORDER DURING THE PENDENCY OF THE LITIGATION CHALLENGING THE MERITS OF THE SECTION 103(k) ORDER

A. The Judge Properly Concluded That the Commission
and Its Judges Lack the Authority to Grant Temporary
Relief From the Issuance of a Section 103(k) Order

Pattison asserts (Br. 43-47) that the Commission has the authority to grant temporary relief from a Section 103(k) order, as issued, and that the judge erred in failing to grant Pattison such relief here. The judge held, in agreement with the Secretary's position, that the Commission and its judges have no such authority.

J.A. 586 (Dec. 48). The judge acted properly.

Section 105(b)(2) of the Mine Act states in pertinent part:

An applicant may file with the Commission a written request that the Commission grant temporary relief from any modification or termination of any order or from any order issued under [Section 104] of the Act * * *.

30 U.S.C. 815(b)(2). The Secretary reads the quoted language to mean that a party may obtain temporary relief from a modification or termination of any order under the Act (i.e., including an order under Section 103(k) of the Act), but may obtain temporary relief from the issuance only of an order issued under Section 104 of the Act (i.e., not including an order under Section 103(k) of the Act). The Secretary's

reading should be accepted because it reflects the plain meaning of the statute. Excel Mining, 334 F.3d at 6 (applying the "Chevron I" analysis). If the statute does not have a plain meaning, the Secretary's reading should be accepted because it is reasonable. Ibid. (applying the "Chevron II" analysis).

In Performance Coal, the District of Columbia Circuit held that temporary relief is available under Section 105(b)(2) from the modification or termination of a Section 103(k) order. Although the Court was not called on to decide whether Section 105(b)(2) relief is available from the issuance of a Section 103(k) order, its discussion strongly suggests that it is not. The Court stated:

The [statutory] language suggests Congress intended temporary relief to be available not only from "any order issued under section [104]" but also from all modifications and terminations (excluding those expressly excepted). Congress's use of the disjunctive "or" to separate modifications and terminations from issuances, and its parallel use of the word "from" to begin each phrase indicates as much. * * *. We hold that § 105 means what it says: temporary relief is available from any modification or termination of any order or from any issuance of an order under § 104.

642 F.3d at 239 (emphases in original) (citations omitted). The statutory language, and the Court's language, could hardly be clearer with respect to the question here: Section 105(b)(2) relief is not available from the issuance of a Section 103(k) order.

Beyond fundamentally misstating the issue and the holding in Performance Coal (see Br. 44-45), Pattison does nothing to contradict the foregoing reading of the statutory language and the Court's language. Instead, Pattison attempts to erase the distinction between the issuance of a Section 103(k) order and the modification of a Section 103(k) order. See Br. 43-46. The Court should reject Pattison's attempt to obtain indirectly (i.e., by pretending that it is seeking temporary relief from the modification of a Section 103(k) order) what it cannot obtain directly (i.e., modification of the Section 103(k) order itself, as issued). See Great Plains Coop v. CFTC, 205 F.3d 353, 355 (8th Cir. 2000) (rejecting "an impermissible attempt to make an end-run around the statutory scheme").

In this case, the aspect of the Section 103(k) order from which Pattison seeks temporary relief -- the scope of the area covered by the order -- was present in the order, as issued.³⁶ Although the Secretary subsequently made several modifications to the order -- modifications that were prompted by requests from the operator and that partially accommodated the requests of the operator -- the

³⁶ Contrary to Pattison's suggestion (Br. 45-46), the modifications sought by the operator and partially adopted by MSHA were not the temporary undoing of the entire Section 103(k) order, as issued. Instead, those modifications tightly defined the scope of the activity permitted and left unaffected the balance of the Section 103(k) order, as issued. Stated differently, with very limited exceptions spelled out in the modifications, the substance of the Section 103(k) order has remained in effect at all times since its issuance.

modifications did not alter the scope of the order, as issued. Section 103(k) orders are frequently modified after they are issued. See Performance Coal, 642 F.3d at 237 (noting, in rejecting the Secretary's mootness argument, "the near certainty of further modifications"); Performance Coal, 32 FMSHRC at 821 (Commissioners Duffy and Young, dissenting) (noting, in discussing modifications, that Section 103(k) orders implicate the Secretary's judgments "on measures needed to protect miners in a fluid situation"). If all aspects present in a Section 103(k) order, as issued, became subject to temporary relief simply because the order was subsequently modified in unrelated aspects, Section 105(b)'s distinction between the issuance of a Section 103(k) order and the modification of a Section 103(k) order would simply be eliminated. See George's, Inc. v. Allianz Global Risks U.S. Insurance Co., 596 F.3d 989, 993 (8th Cir. 2010) (rejecting an interpretation that would "eliminate[] the distinction" drawn by the statute). The Secretary would be faced with a Hobson's choice between two options -- never modifying the order, as issued, or modifying the order, as issued, and rendering all aspects of it subject to temporary relief -- both of which would be irreconcilable with Section 103(k)'s grant to the Secretary of "plenary power" to exercise "complete control" to protect the health and safety of persons. Miller Mining, 713 F.2d at 490.

B. In Any Event, the Judge Properly Found That
Pattison Did Not Satisfy the Requirements
for Temporary Relief

1. Applicable principles

Section 105(b)(2) of the Mine Act states in pertinent part that the Commission may grant temporary relief if

(1) a hearing has been held in which all parties were given an opportunity to be heard;³⁷

(2) the applicant shows that there is substantial likelihood that the findings of the Commission will be favorable to the applicant; and

(3) such relief will not adversely affect the health and safety of miners.

An application for temporary relief under Section 105(b)(2) of the Mine Act is akin to a request for preliminary injunctive relief under Rule 65 of the Federal Rules of Civil Procedure. See Performance Coal, 32 FMSHRC at 823 (Commissioners Duffy and Young, dissenting) (stating that an operator seeking temporary relief from a modification of a Section 103(k) order is seeking, in effect, "a preliminary injunction against the enforcement of [the] amended order").

³⁷ It is undisputed that the November 18, 2011, hearing before the judge in this case satisfies this requirement for purposes of Pattison's prehearing request for temporary relief. As correctly noted by the judge (J.A. 586 (Dec. at 48)), no hearing was held in regard to the relief requested in Pattison's December 9, 2011, "Emergency Motion to Modify 103(k) Order."

Indeed, temporary relief under Section 105(b)(2) should be even more difficult to obtain than preliminary relief under Rule 65 because Section 105(b)(2), unlike Rule 65, does not call for a balancing of the likelihood that the moving party will succeed on the merits with the harm to the moving party. Similarly, Section 105(b)(2) unlike Rule 65, does not call for the balancing of the harm to the other parties with the harm to the moving party. Under Section 105(b)(2), temporary relief can be granted only if such relief "will not adversely affect the health and safety of miners" (emphasis supplied).

Consistent with the foregoing analysis, Commissioners Duffy and Young stressed in Performance Coal that, to obtain temporary relief from a modification of a Section 103(k) order, an operator must (1) establish, by "compelling evidence," that the modification involves "a clear abuse of discretion, such as a failure to articulate a safety-related reason for the provision at issue," and (2) establish, under its burden of persuasion, that the relief requested is "to permit the operator to engage in activities necessary to protect the health and safety of miners." 32 FMSHRC at 823.

2. Pattison failed to establish a substantial likelihood that it will succeed on the merits

The objections Pattison raises before this Court with respect to the merits of the issuance of the Section 103(k) order mirror the objections Pattison raises with respect to the application for temporary relief -- all of which the judge rejected.

As established above in Section II, the judge's analysis comports with applicable law and is supported by substantial evidence.

3. Pattison failed to establish that temporary relief would not adversely affect the health and safety of miners

In rejecting Pattison's argument that the scope of the Section 103(k) order was unjustified, the judge relied primarily on two factors establishing that the Section 103(k) order was necessary to protect the safety of Pattison's miners.

J.A. 583-85, 586-87 (Dec. 45-47, 48-49).

First, the judge relied on the November 7, 2011, roof fall accident, which occurred in an area where the roof was being scaled (Pattison's ground control measure of choice) and an area that exhibited the best roof conditions envisioned under the mine's accepted ground control plan. The judge found that, because the accident occurred in a roof area Pattison believed was the safest, it was rational for MSHA to conclude that other roof area south of crosscut L needed bolting and mesh to assure its safety. J.A. 583 (Dec. 45). As discussed above in Section II, the testimony of Dr. Mark and the Secretary's other witnesses support the judge's analysis.

Second, the judge relied on the mine's history of several prior unplanned roof falls that had occurred in areas where the roof had also been scaled to caprock. J.A. 583-84 (Dec. 45-46). Again, as discussed above in Section II, the testimony

of the Secretary's witnesses and supporting photographs provides substantial support for the judge's determination.

As the judge concluded, Pattison

failed to show that such relief will not adversely affect the health and safety of miners. Rather, * * * MSHA weighed the risks and concluded that the proposed work plan does not justify the exposure of individuals to the hazards of the unsupported roof at the Pattison Mine.

J.A. 586 (Dec. at 48).

IV.

THE JUDGE PROPERLY CONCLUDED THAT THE COMMISSION AND ITS JUDGES LACK THE AUTHORITY TO MODIFY A SECTION 103(k) ORDER

Pattison asserts (Br. 47-51) that the Commission has the authority to modify a Section 103(k) order. The judge held, in agreement with the Secretary's position, that the Commission has no such authority. J.A. (Dec. 47). Again, the judge acted properly.

It is a fundamental principle of administrative law that a federal administrative agency "is a creature of statute, having no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress." California Independent System Operator Corp. v. FERC, 372 F.3d 395, 398 (D.C. Cir. 2004) (citations and internal quotation marks omitted). Accordingly, "[a]s the Supreme Court has recognized, 'an agency literally has no

power to act * * * unless and until Congress confers power upon it." Ibid.

(quoting Louisiana Public Service Commission v. FCC, 476 U.S. 355, 374 (1986)).

In this instance, Pattison cites no provision, and the Mine Act contains no provision, that gives the Commission the authority to modify -- on an "emergency, expedited" basis, or on any other basis (see J.A. 388-90 (Petition for Discretionary Review at 20-22) -- Section 103(k) orders. The Court should reject Pattison's request that the Court give the Commission authority Congress did not give it.

The Court should also reject Pattison's position because it is incompatible with a second fundamental principle of administrative law. The Supreme Court has long recognized that, when a reviewing court concludes that an agency order that represents an application of agency judgment cannot be affirmed, the court can only remand the matter for further agency judgment; it cannot replace the agency's judgment with its own. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 249-50 (1972) (applying SEC v. Chenery Corp., 318 U.S. 80, 94-96 (1943)). As the Court stated:

[A reviewing court] can only affirm or vacate an agency's judgment * * *. If an order is valid only as a determination or policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. * * *. For the courts to substitute their or counsel's discretion for that of the [agency] is incompatible with the orderly functioning of the process of judicial review. This is not to deprecate, but to vindicate the administrative process, for the

purpose of the rule is to avoid propel(ling) the court into the domain which Congress has set aside exclusively for the administrative agency.

405 U.S. at 249 (citations and internal quotation marks omitted).

Section 103(k) orders tend to be modified frequently. See Performance Coal, 642 F.3d at 237 (noting, in rejecting the Secretary's mootness argument, "the near certainty of further modifications"); Performance Coal, 32 FMSHRC at 821 (Commissioners Duffy and Young, dissenting) (noting, in discussing modifications, that Section 103(k) orders implicate the Secretary's judgments "on measures needed to protect miners in a fluid situation"). When Section 103(k) orders are modified, the modifications represent an application of the Secretary's "plenary power" to exercise "complete control" (Miller Mining, 713 F.2d at 490) in order to protect the health and safety of persons by applying the Secretary's expertise and experience to specific and evolving conditions as the Secretary's representatives observe them at the mine. It is difficult to imagine a situation in which it would be more inappropriate and impractical for the Commission, or a court, to make "a judicial judgment * * * do service for an administrative judgment" (Sperry & Hutchinson, 405 U.S. at 249) by effectively rewriting an agency order itself.

Pattison's reliance on the Tenth Circuit's decision in American Coal, 639 F.2d 659, is unavailing. In American Coal, the parties and the Court assumed that Section 103(k) orders are reviewable; the question was simply whether they are to be reviewed in the first instance by the Commission or by a federal district court. The Court held that Section 103(k) orders are to be reviewed in the first instance by the Commission. The Court did not address, and was not called on to address, whether the Commission has the authority to modify Section 103(k) orders. Whether the Commission can review a Section 103(k) order and whether it can modify a Section 103(k) order are fundamentally different questions: under the Supreme Court's Chenery principle, the fact that a court can review an agency action means only that the court can either affirm or vacate and remand the action -- not that it can modify the action by replacing the agency's judgment with its own.³⁸

Also unavailing is Pattison's reliance on cases in which the Commission has modified citations and orders. In each of those cases, the Commission modified a citation or order because the Commission vacated the Secretary's "significant and

³⁸ The Court did, as Pattison points out, rely in part on a passage from the Senate Report stating that Commission judges shall issue decisions "affirming, modifying, or vacating" orders of the Secretary. American Coal, 639 F.2d at 661. That passage, however, is a generalized description of the Commission's role under the Mine Act and contains no reference to Section 103(k) orders. The passage in the legislative history that does specifically refer to Section 103(k) orders contains no suggestion that the Commission has the authority to modify Section 103(k) orders. See S. Rep. No. 95-181 at 29, reprinted in Legis. Hist. at 617.

substantial" finding, a special finding under the Act the vacating of which automatically converts an order into a citation (see 30 U.S.C. § 814(d)); because the Commission made a de novo finding regarding a penalty criterion under the Act, which it is allowed to do under the Secretary's existing regulations (see Sellersburg Stone Co. v. FMSHRC, 736 F.2d 1147, 1151-52 (7th Cir. 1984)); or because the Secretary agreed to a modification as part of a settlement. In none of the cases did the Commission modify a citation or order by setting aside a judgment committed to the Secretary and replacing that judgment with its own. A more apposite case is Mechanicsville Concrete, Inc., 18 FMSHRC 877, 879-80 (1996), in which the Commission held that a judge's authority under the Act to "affirm, modify, or vacate" a citation did not include the authority to intrude on the Secretary's enforcement discretion by designating as "significant and substantial" a violation the Secretary had not so designated.

In any event, even if the Court were to hold that the Commission and its judges possess the authority to modify a Section 103(k) order, the Court should, for the reasons set forth above in Sections II and III explaining why the Section 103(k) order was properly issued by the Secretary and why temporary relief from that order was properly denied by the judge, hold that the judge properly declined to modify the order here.

CONCLUSION

For the reasons set forth above, the Court should affirm the decision of the judge in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure and the rules of this Court, the Secretary hereby certifies that the Brief for the Secretary of Labor is in compliance with the applicable type volume and typeface limitations. This brief contains 13,931 words as determined by Microsoft WORD, the processing system used to prepare this brief, and was prepared in proportional Times New Roman 14 point type.

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CERTIFICATE OF SERVICE

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