

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

REVELATION ENERGY, LLC,)
)
 Petitioner,)
)
 v.) Docket No. KENT 2011-71-R
)
SECRETARY OF LABOR,)
 MINE SAFETY AND HEALTH)
 ADMINISTRATION (MSHA),)
)
 Respondent.)

RESPONSE BRIEF FOR THE SECRETARY OF LABOR

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STATEMENT OF THE ISSUES

1. Whether the judge properly accepted the Secretary's interpretation of the term "accident" in Section 103(k) of the Mine Act as encompassing the blasting event in this case.

2. Whether the Secretary's interpretation of the term "accident" in Section 103(k) of the Mine Act is so vague as to violate due process.

3. Whether the Secretary's statutory interpretation constitutes a substantive rule subject to the Administrative Procedure Act's rulemaking requirements.

STATEMENT OF THE CASE

A. Factual Background

Revelation Energy, LLC ("Revelation") operates the S-1 Hunts BR Mine, a surface coal mine in Pike County, Kentucky. On October 7, 2010, during blasting operations, a two-ton rock about six feet in diameter was blasted off the mine property. The rock rolled down a hill through a citizen's yard and came to rest in a creek near a roadway below the citizen's home. Dec. at 4.

As a result of the event, and to protect miners from a similar event, an MSHA inspector issued Revelation an order on October 8, 2010, pursuant to Section 103(k) of the Mine

Act. The order required Revelation to obtain MSHA's approval before undertaking activities at Pit No. 41 or engaging in blasting operations. See Oct. 8, 2010 citation, attached to Notice of Contest. MSHA modified the order on the same day it was issued to allow Revelation to implement a plan of action. See id. On October 20, 2010, MSHA terminated the order after Revelation revised its ground control plan to include additional blasting precautions to prevent similar occurrences.

On October 21, 2010, Revelation contested the Section 103(k) order. On October 29, 2010, Revelation filed a motion for summary decision asserting that the Section 103(k) order was invalid because the blasting event was not an "accident" within the meaning of Section 103(k) of the Act. The Secretary opposed the motion.

Determining that the blasting event was an "accident" within the meaning of Section 103(k), the judge issued an order on January 21, 2011, denying Revelation's motion. Based on the judge's determination, the Secretary filed a motion on February 22, 2011, to dismiss Revelation's notice of contest. Revelation opposed the motion and, on May 4, 2011, filed a renewed motion for summary decision.

On June 30, 2011, the judge issued a decision granting the Secretary's motion to dismiss and denying Revelation's renewed motion for summary decision.

Revelation filed a petition for discretionary review of the judge's decision, which the Commission granted.

B. The Judge's Decision

Recognizing that Section 3(k) of the Mine Act defines the term "accident" and specifically provides that that definition applies "for purposes of this Chapter," i.e., for purposes of the Mine Act, the judge concluded that Section 3(k)'s definition of the term "accident" controls the meaning of the term "accident" in Section 103(k). Dec. at 5, 10.

In so doing, the judge rejected Revelation's argument that the definition of "accident" in the Secretary's reporting rules in 30 C.F.R. Part 50 ("Part 50") applies to the term "accident" in Section 103(k) of the Act. The judge noted that, as the title to Part 50 indicates, Part 50 applies to the notification, investigation, reporting, and recording of accidents, injuries, illnesses, employment, and coal production in mines, and does not purport to apply to the statutory definition of "accident." Dec. at 7. The judge also recognized that the Commission has held that the narrower definition of "accident" in Part

50 "is for reporting purposes," not for purposes of Section 103(k). Dec. at 5-6 n. 6 (citing Aluminum Co. of America, 15 FMSHRC 1821, 1826 (1993), 10.

The judge also rejected Revelation's argument that the definition of "accident" in Part 50 applies to the term "accident" in Section 103(k) based on a statement in the Secretary's Program Policy Manual ("PPM"). In so doing, the judge noted that the provision of the PPM on which Revelation relied omits any direct reference to Section 103(k) and held that, in any event, the PPM could not restrict a statutory provision. Dec. at 5, 6 and n.5.

The judge then determined that the definition of "accident" in Section 3(k) encompassed the October 10, 2010, blasting event, and that that event was therefore an "accident" within the meaning of Section 103(k). In so doing, the judge pointed out that Section 3(k)'s reference to specific types of "accidents" is preceded by the term "includes." Dec. at 5. Recognizing that "it is a fundamental tenet of statutory construction" that the term "includes" is "a term of enlargement, and not one of limitation," the judge determined that reading Section 3(k)'s definition of "accident" to encompass only the specific types of accidents listed by Congress would

impermissibly read the term "includes" out of the statute. Dec. at 10.

In addition to determining that Congress' use of the term "includes" in Section 3(k) indicates Congress' intent to give an expansive meaning to the term "accident," the judge also determined that Section 3(k)'s inclusion of more frequent examples of mine accidents as well as events causing "injury or death," "all conjoined by the use of the alternative conjunction `or,'" indicates Congress' intent to give the term "accident" an expansive meaning. Dec. at 5.

The judge further determined that in interpreting the term "accident," one must take into account its ordinary meaning. Dec. at 6. Noting that "accident" is ordinarily defined as "[a]n unexpected and undesirable event," the judge determined that it would be hard to conclude that a two-ton rock, six feet in diameter, leaving mine property, travelling down a hill through a citizen's yard, and coming to rest in a creek below the citizen's home was not an "unexpected and undesirable" event. Ibid. (citing Webster II New Riverside University Dictionary 1984).

Having determined that the interpretation of the term "accident" must take into account the ordinary meaning of that term, the judge rejected Revelation's argument that

unless the term "accident" in Section 103(k) is read to be consistent with the definition of "accident" in Part 50, the Secretary will have sole discretion to determine what is an "accident." Dec. at 6. The judge stated that one can apply the common definition of the term "accident" to a given set of facts and determine whether there has been an "accident." Dec. at 6.

Finally, the judge determined that even if the definition of "accident" set forth in Section 50.2(h) applied, the event in this case would come within that definition. In reaching that determination, the judge noted that Section 50.2(h)(7) includes within the definition of "accident" "an unplanned ignition or explosion of . . . an explosive." Dec. at 7 n.9 (citing Section 50.2(h)(7)). The judge found that although the explosion causing the flyrock in this case was planned, the effect of the explosion was not. Dec. at 7.

ARGUMENT

I.

THE JUDGE PROPERLY ACCEPTED THE SECRETARY'S
INTERPRETATION OF THE TERM "ACCIDENT"
IN SECTION 103(k) OF THE MINE ACT AS ENCOMPASSING
THE BLASTING EVENT IN THIS CASE

A. Standards of Review

Determination of whether the blasting event in this case was an "accident" within the meaning of Section 103(k) of the Act requires the Commission to review the Secretary's plain meaning reading of the definition of "accident" in Section 3(k) of the Act, 30 U.S.C. § 802(k), as applying to the term "accident" in Section 103(k) of the Act, 30 U.S.C. § 813(k).¹ The Commission must also review

¹ The relevant part of Section 103(k) states:

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

. . . .

30 U.S.C. § 813(k).

Section 3(k) states:

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

the Secretary's plain meaning reading of the definition of "accident" in Part 50, 30 C.F.R. § 50.2(h), as not applying to the term "accident" in Section 103(k).² In addition, the

30 U.S.C. § 802(k).

² 30 C.F.R. § 50.2 states in relevant part:

As used in this part:

* * *

(h) Accident means

(1) A death of an individual at a mine;

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

(3) An entrapment of an individual for more than 30 minutes or which has a reasonable potential to cause death;

(4) An unplanned inundation of a mine by a liquid or gas;

(5) An unplanned ignition or explosion of gas or dust;

(6) In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery;

(7) An unplanned ignition or explosion of a blasting agent or an explosive;

(8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib

Commission must review the Secretary's interpretation of the term "accident" in Section 3(k) of the Act as encompassing the blasting event in this case.

"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

fall in active workings that impairs ventilation or impedes passage;

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

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

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

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

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. Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 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)).

"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." Excel Mining, 334 F.3d at 6 (internal quotation marks and citations omitted).

If a regulation's meaning is plain, the regulation cannot be construed to mean something different from that plain meaning. Exportal Ltda. v. United States, 902 F.2d 45, 50 (D.C. Cir. 1990); Pfizer, Inc. v. Heckler, 735 F.2d

1502, 1509 (D.C. Cir. 1984) (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)). When the language of a provision is plain, that is the meaning of the provision, and the sole function of the courts is to enforce the language as written. Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000) ("when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms") (internal citation and quotation marks omitted).

It is also well established that if a regulation's meaning is not plain, an adjudicatory body should give great deference to the interpretation of the agency entrusted with enforcing the regulation, and the agency's interpretation must be accepted as long as it is not plainly erroneous or inconsistent with the language or the purpose of the regulation. Martin v. OSHRC, 499 U.S. 144, 148-49 (1991); Secretary of Labor v. Ohio Valley Coal Co., 359 F.3d 531, 534 (D.C. Cir. 2004); Bigelow v. Department of Defense, 217 F.3d 875, 877 (D.C. Cir. 2000), cert. denied, 532 U.S. 971 (2001).

B. The Present Case

1. The Definition of "Accident" in Section 3(k) of the Act Plainly Applies To the Term "Accident" In Section 103(k) of the Act

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

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). Insofar as Section 103(k) of the Mine Act, 30 U.S.C. § 813(k), is 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 Section 103(k).

Such a plain meaning reading of Section 3(k) is consistent with 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 Aluminum Company of America, 15 FMSRHC 1821. 1825-27 (1993) (applying the definition of "accident" in Section 3(k) to determine whether a Section 103(k) order was properly issued).

Contrary to Revelation's assertion (PDR at 3, 8), the fact that the Secretary has specifically defined the term "accident" in her reporting rules in 30 C.F.R. Part 50 does not change that result. See 30 C.F.R. § 50.2(h). Part 50 sets forth operators' obligations in the event of an "accident." Section 103(k) authorizes the Secretary to issue orders to protect miners in the event of an "accident."

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 (emphasis added). Nothing in Part 50 applies to or even refers to the Secretary's authority to issue orders under Section 103(k).

Section 50.1, which explains the "purpose and scope" of Part 50, states that Part 50 requires operators to "immediately notify [MSHA] of accidents," to "investigate accidents," and to "file reports pertaining to accidents," and "restricts disturbance of accident related areas." See also Aluminum Company, 15 FMSRHC at 1826 (Section 50.2(h)'s

definition of "accident" applies for "reporting purposes"); Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 459 (D.C. Cir. 1994) (Part 50 "governs a mine operator's duty to report accidents, occupational injuries and occupational illnesses.") Section 50.1 also 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, the Secretary made no reference to Section 103(k).

Further, Section 50.1, which was promulgated before the effective date of the Mine Act, specifically provides that "part 50 implements sections 103(e) and 111 of the Federal Coal Mine Health and Safety Act of 1969" (emphasis added). Section 103(k) of the Act was carried over virtually verbatim from Section 103(f) of the Coal Act, not Section 103(e).³ Thus, by its terms, Part 50 does not implement any part of Section 103(k).

Finally, the title of Part 50 -- which refers to "NOTIFICATION, INVESTIGATION, REPORTS AND RECORDS OF

³ Section 103(j) of the Mine Act was carried over from Section 103(e) of the Coal Act.

Section 50.1 also states that Part 50 implements Sections 4 and 13 of the Federal Metal and Nonmetallic Mine Safety Act, 30 U.S.C. § 721 et seq. (1968). Neither of the referenced provisions of the Metal and Nonmetallic Act related to the Secretary's authority to issue orders to protect miners in the event of an accident.

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").

Thus, contrary to Revelation's assertion, nothing in Section 50.1, or in any other part of Part 50, remotely 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. Insofar 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, LLC, 334 F.3d at 6.

Despite the plain meaning of Section 3(k) of the Act, and the plain meaning of the Part 50 provisions, Revelation asserts that the Secretary should be estopped from asserting that the definition of "accident" in Section 50.2(h) does not apply to Section 103(k) because of a reference to Section 50.2(h) in the Secretary's PPM. PDR at 8. Revelation's assertion fails for several reasons.

First, because the plain meaning of Section 50.2 is that it only applies to Part 50 -- and Part 50 plainly does not implement Section 103(k) of the Act -- Section 50.2(h) cannot be read as applying to Section 103(k). See King Knob Coal Co., 3 FMSHRC 1417, 1420 (1981) ("[T]he express language of a statute or regulation 'unquestionably controls' over material like a . . . manual"; Exportal Ltda. v. United States, 902 F.2d at 50 (if a regulation's meaning is plain, the regulation cannot be construed to mean something different from that plain meaning)).

Even if the meaning of Section 50.2(h) were not plain, Revelation's assertion would fail. First, the PPM cannot

fairly be read as interpreting Section 50.2(h) to apply to Section 103(k). As the judge noted, the statement in the PPM on which Revelation relies is in the Section 103(j) section of the PPM. Dec. at 5. Moreover, the statement does nothing more than state that Section 50.2(h) defines the term "accident." It does not indicate that that Section 50.2(h)'s definition of accident applies to the term "accident" in Section 103(k).

It would be particularly inappropriate to read the PPM's mere reference to Section 50.2(h) as interpreting Section 50.2(h) to apply to Section 103(k) in this case for two reasons. First, any such reading would be inconsistent with the Secretary's long-held interpretation, accepted by the Commission, that the definition of "accident" in Section 3(k) applies to the term "accident" in Section 103(k). See Aluminum Company, 15 FMSHRC at 1826. If the Secretary intended to affirmatively change that long-held interpretation, she would have done so explicitly.

In addition, Section 103(k) constitutes a broad grant of discretionary authority to the Secretary to protect miners in the event of a mine accident. 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). Insofar as the interpretation of the term "accident" in Section 103(k) pertains to MSHA's broad discretionary authority to issue orders to protect miners, the reference to Section 50.2(h) in the PPM must be read narrowly -- i.e., it must not be read to limit MSHA's broad discretionary authority absent a clear indication of an intent to do so. Cf., Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Circuit 1986) (The Courts and the Commission "must be reluctant to find a secretarial commitment to refrain from enforcement where none clearly appears.")

In any event, even if it were not plain that the definition of "accident" in Section 50.2(h) does not apply to Section 103(k), and even if the PPM could fairly be read as changing the Secretary's long-held interpretation that the definition of "accident" in Section 3(k) applies to the term "accident" in Section 103(k), the Commission has long recognized that the PPM is not binding on the Secretary or the Commission. D.H. Blattner & Sons, 18 FMSHRC 1580, 1586 (1996), aff'd, 152 F.3d 1102 (9th Cir. 1998) (citing Cathedral Bluffs, 796 F.2d at 538-39). For this reason also, Revelation's argument fails.

2. The Judge Properly Accepted the Secretary's Interpretation of the Term "Accident" In Sections 3(k) and 103(k) as Encompassing the Blasting Event In This Case

Because the definition of the term "accident" in Section 3(k) applies to the term "accident" in Section 103(k), this case turns on the meaning of the term "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 Company, 15 FMSHRC at 1825-26. The Secretary's interpretation is consistent with the language, the history, and the purpose of Section 103(k), and the Commission has generally agreed with that interpretation. Id. Accordingly, it should be accepted in this case.

As the judge recognized (Dec. at 5), Congress' use of the term "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 Company, 15 FMSHRC at 1825-26 (agreeing with the Secretary

that the term "includes" in Section 3(k) is a term of "enlargement.") See also Adams v. Dole, 927 F.2d 771, 776 (4th Cir.), cert. denied, 502 U.S. 837 (1991) (the term "'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 Revelation -- in which the only events that would be considered "accidents" would be the events specifically listed in the definition -- would impermissibly read the term "includes" out of Section 3(k).

The Secretary's interpretation of the definition of "accident" in Section 3(k) to encompass 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 added). Unintentional roof falls are not one of the examples of accidents listed in Section 3(k); nor are they, in all instances, events causing injury or death. 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). On the other hand, Revelation's interpretation, which would limit the events deemed "accidents" to those specifically listed in Section 3(k), cannot be harmonized with Congress' characterization of an unintended roof fall as an "accident" in Section 103(d). See Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609, 631-33 (1973) (the words of a statute should be harmonized internally and with each other to the extent possible).

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. The Senate Committee on Human Resources Report stated:

The unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted exercise broad discretion in order to protect the life or

to insure the safety of any person. The grant of authority in Section 104(i) to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders.

S. Rep. No. 181, 95th Cong., 1st Sess. 1, 29 (1977), reprinted in Subcommittee of Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 ("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. Revelation's narrow interpretation is not.

A blasting event in which a two-ton rock, approximately six feet in diameter, leaves the blasting area, rolls down a hill through a citizen's yard, and comes to rest in a creek near a roadway, plainly has a similar potential for injury or death as the events specifically listed in Section 3(k). Moreover, as the judge recognized, such an event is similar in nature to the events specifically listed in Section 3(k). Dec. at 11 n.10. As a result, the event in this case was an "accident" within

the meaning of Section 103(k) and the Section 103(k) order was properly issued.

II.

THE SECRETARY'S STATUTORY INTERPRETATION IS NOT VOID FOR VAGUENESS

Revelation's assertion that the Secretary's interpretation of Section 3(k) is so vague as to violate due process is unavailing for several reasons. See PDR at 12 (citing Grayned v. City of Rockford, 408 U.S. 102 (1972)). First, Revelation's void-for-vagueness challenge fails because the relevant part of Section 103(k) is not a prohibition against any specific action by an operator in the event of an "accident" or a requirement that an operator take specific action in the event of an "accident"; it is an authorization for the Secretary to issue orders to protect miners in the event of an "accident." See Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1996) ("It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case"); Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-

for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited"); Grayned v. City of Rockford, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined").

Even if a void-for-vagueness challenge were appropriate when the relevant provision does not prohibit or require any action by the operator, Revelation's assertion would fail. The courts have held that, to satisfy constitutional due process requirements, statutes must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit. Grayned, 408 U.S. at 108; Freeman United Coal Mining Co. v. FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997) (involving a regulation). A statute may also be unconstitutionally vague if it does not "provide explicit standards for those who apply them." Grayned, 408 U.S. at 108. The courts have found statutes to satisfy due process as long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations

require. Grayned, 408 U.S. at 108-10; Freeman United, 108 F.3d at 362 (involving regulation).

Section 103(k) authorizes the Secretary to issue a Section 103(k) order in the event of an "accident." As the judge recognized, because the definition of "accident" contains a non-exhaustive list of examples of events that are accidents, the scope of the term must be construed within the context of the ordinary meaning of the term "accident." See Dec. at 6 (citing Webster II New Riverside University Dictionary 1984's definition of "accident" as "[a]n unexpected and undesirable event"). See also Webster's Third New International Dictionary, 2002 at 11 (defining accident to mean "a usu. sudden event or change occurring without intent or volition through carelessness, unawareness, ignorance or a combination of causes and producing an unfortunate result"). As already discussed, the Secretary interprets the scope of the statutory term "accident" to be limited to events that are similar in nature or have the same potential for injury or death as the events listed in the definition.

Contrary to the premise of Revelation's argument, the Secretary's interpretation plainly provides sufficient definiteness that a reasonably prudent mine operator would understand that an event is an "accident." See Chambers v.

Stengel, 256 F.3d 397, 401 (6th Cir. 2001) (rejecting a void-for-vagueness argument and holding that the term “accident or disaster” is a “common term[], and individuals of common intelligence do not have to guess at [its] meaning.”) A reasonably prudent mine operator would understand that a particular event was similar in nature or presented a similar potential for injury or death as the events specifically listed in the definition of “accident” in Section 3(k).

For similar reasons, the statute provides sufficiently clear standards to eliminate the risk that the Secretary will arbitrarily determine that an event is an “accident” so that she may issue a Section 103(k) order. See VIP of Berlin, LLC v. Town of Berlin, 593 F.3d 179, 190 (2d Cir. 2010) (a statute is not unconstitutionally vague if it “provides sufficiently clear standards to eliminate the risk of arbitrary enforcement”).

Moreover, where, as here, a vagueness challenge does not implicate any constitutionally protected conduct, the statute “must be examined in light of the facts of the case at hand.” Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 and n.7 (1982). Thus, even if the periphery of the Secretary’s interpretation of the definition of “accident” in Section 3(k) were vague,

which it is not, Revelation's challenge would fail because the event in this case plainly falls with the "core" meaning of that term. See, e.g., VIP of Berlin, 593 F.3d at 190. As the judge correctly recognized, "it would affront common sense" to conclude that a blasting event in which a rock about six-feet in diameter and weighing about two tons was blasted off the mine property, rolled down a hill through a citizen's yard, and came to rest in a creek below the citizen's home, and near a roadway was not an "accident." Dec. at 7. It would also affront common sense to conclude that such an event does not present a similar potential for injury or death as the events specifically listed in the definition of "accident" in Section 3(k).

III.

THE SECRETARY'S STATUTORY INTERPRETATION
DOES NOT CONSTITUTE A SUBSTANTIVE RULE
SUBJECT TO THE ADMINISTRATIVE PROCEDURE
ACT'S RULEMAKING REQUIREMENTS

The Secretary's interpretation that the event in this case is encompassed by the term "accident" in Section 103(k) merely represents what the Secretary believes the term "accident" in Sections 3(k) and 103(k) of the Act means. The Secretary's interpretation therefore does not constitute a substantive rule subject to the Administrative Procedure Act's rulemaking requirements. See Orengo

Caraballo v. Reich, 11 F.3d 186, 195 (D.C. Cir. 1993),
American Mining Congress v. MSHA, 995 F.2d 1106, 1112-1113
(D.C. Cir. 1993), Fertilizer Institute v. EPA, 935 F.2d 1303,
1307-1309 (D.C. Cir. 1991), and United Technologies Corp. v.
EPA, 821 F.2d 714, 718-720 (D.C. Cir. 1987) (all holding that
where an agency's position merely represents what the agency
thinks the underlying statutory or regulatory provisions
means, it is an interpretative rule exempt from the
Administrative Procedure Act's rulemaking requirements and
not a substantive rule subject to the APA's rulemaking
requirements). Revelation's argument that the Secretary's
interpretation in this case violates the Administrative
Procedure Act's rulemaking requirements therefore fails.
See PDR at 13-14.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Secretary's Response Brief was served on this 18th day of October, 2011 by U.S. mail on:

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