ORAL ARGUMENT SET FOR MARCH 22, 2021

No. 20-1369

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Secretary of Labor,
Mine Safety and Health Administration,

Petitioner

v.

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

Respondents

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

Reply Brief for the Secretary of Labor

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

Summary of Argument

This case involves a miner's serious illness under suspicious circumstances. MSHA issued a section 103(k) order to protect the remaining miners from further harm. Only later did facts arise indicating the miner's illness may not have been due to mine conditions.

M-Class attempts to frame the issue in this case as one of statutory interpretation: whether an accident is a prerequisite to the issuance of a section 103(k) order. But the Secretary agrees that a section 103(k) order cannot issue unless an accident has occurred. The real issue in this case is whether MSHA's determination that an accident occurred is based on the information available to the agency at the time of the order's issuance, and is a determination within its discretion subject to an abuse of discretion review; or instead whether a court can examine evidence that was not available to MSHA when it issued the 103(k) order, essentially requiring the Secretary to prove that an accident in fact occurred based on information gathered after the order was issued.

M-Class argues the latter. Because it frames the determination of an accident as an objective fact, it suggests that the Secretary must prove this fact at trial, and that substantial evidence is the appropriate standard of review of the ALJ's finding that

an accident occurred. But MSHA's determination that an accident occurred cannot be divorced from its broad and discretionary powers under section 103(k)—designed to protect miners from further harm—and M-Class does not rebut authority demonstrating that abuse-of-discretion review must be applied to discretionary agency actions where the statute is silent as to the applicable standard. Nor does M-Class persuasively explain why section 103(k) orders should be reviewed differently than other comparable Mine Act emergency provisions.

Moreover, adopting M-Class's position would be unspeakably dangerous and impermissibly limit the agency's broad authority. M-Class apparently understands this, and echoes the Commission's suggestion that an inspector may issue a section 103(k) order out of an "abundance of caution" if MSHA later vacates the order when accounting for later-gathered information. Such a suggestion implies that Congress intended MSHA to engage routinely in unlawful agency action to save miners from accidents, an absurd result that chills both inspectors' efforts in responding to accidents and operators' incentives to report them.

Finally, M-Class argues that the Commission was right to overturn the ALJ's factual findings because substantial evidence did not support them. But the Commission did not in fact evaluate the ALJ's finding that MSHA did not abuse its

discretion under a substantial evidence standard of review; instead it re-considered all the evidence and drew its own independent evidentiary conclusions.

Argument

1. The appropriate standard of review of MSHA's decision to issue a section 103(k) order is abuse of discretion.

a. Abuse of discretion is the appropriate standard of review of MSHA's decision when the Mine Act is otherwise silent.

The Mine Act contains no information about the appropriate standard of review a court must consider in determining the validity of a section 103(k) order issuance. The Mine Act's silence means that the default abuse-of-discretion standard that applies to discretionary agency action also should apply to the issuance of a section 103(k) order. Sec'y Br. 22-24. M-Class does not challenge the significant authority the Secretary adduced on this point. And although M-Class attempts to distinguish the Eighth Circuit's decision in *Pattison Sand*, M-Class readily concedes that "[t]he Eighth Circuit held that due to Mine Act and Commission silence as to the appropriate standard, the ALJ's use of the APA's arbitrary and capricious standard was not erroneous" when reviewing MSHA's decision. M-Class Br. at 34.

b. MSHA's determination of an accident, its 103(k) order issuances, and its 103(k) order modifications all fall under its broad 103(k) authority.

Although M-Class agrees that an ALJ reviews MSHA modifications of section 103(k) orders under the abuse-of-discretion standard, see *DQ Fire & Explosion Consultants, Inc.* v. *Sec'y of Labor*, 632 F. App'x 622, 624-625 (D.C. Cir. 2015), it argues that the determination of whether an accident occurred and concomitant issuance of 103(k) orders are not included in that broad authority. Specifically, M-Class argues that because a statutory "accident" is a prerequisite to issue an order, but not a prerequisite to modify one, the determination of an accident and the issuance of a section 103(k) order should be evaluated separately from MSHA's authority to modify a section 103(k) order. In explaining that Congress purportedly intended modifications to section 103(k) orders to be much broader than issuances (by making an accident a prerequisite for an issuance), M-Class argues that "[d]ecisions to modify such orders are left to the agency's discretion 'to issue such orders as [it] deems appropriate' to effectively respond to accidents." M-Class Br. 33.

But the Secretary's authority to "issue such orders as he deems appropriate" under 103(k) contains no such restriction; its plain language applies with equal force to both issuances and modifications. 30 U.S.C. 813(k). The only reasonable

analysis is to examine whether an accident occurred in the context of MSHA's broad 103(k) authority, as the only challenged agency action here is MSHA's decision to issue a section 103(k) order.

c. Decisions to issue section 103(k) orders should be evaluated under an abuse-of-discretion standard like other similar MSHA actions.

Because other similar MSHA actions, such as issuances of section 107(a) orders and injury reporting requirements under section 103(j) all are reviewed for an abuse of discretion, the same review standard should apply here.

M-Class argues that section 103(k) orders cannot be analogized to section 107(a) imminent danger orders, because section 107(a) explicitly incorporates language requiring reasonableness. M-Class Br. 39-41. M-Class notes that "imminent danger" is defined as "the existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such practice can be abated." 30 U.S.C. 802(j); M-Class Br. 39-40. M-Class then argues that the phrase "reasonably be expected to cause death" serves as a subjective reasonableness requirement that distinguishes imminent danger orders from section 103(k) orders. M-Class Br. 39-41. But this language, on its face, would appear to require proof that a situation in fact reasonably could be expected to cause death.

In his opening brief, the Secretary explained that an imminent danger order does not require proof that an imminent danger actually existed, only that, based on the information available at the time of decision-making, the facts indicated that an imminent danger exists. Sec'y Br. 31-32. This has nothing to do with whether the danger objectively is reasonably likely to cause death when all facts are known. It has only to do with whether MSHA concludes, based on available information at the time of the order, that the imminent danger existed. In other words, there is no statutory difference, in terms of MSHA's actions taken based on the available facts, between the *existence* of an imminent danger and the *occurrence* of an accident. Moreover, section 107(a) provides that MSHA "shall" issue a withdrawal order upon finding that an imminent danger "exists." So the fact that section 107(a) orders are still reviewed for an abuse of discretion undermines M-Class's assertion that the "prerequisite" of an accident, by itself, displaces the abuse of discretion standard, since similar preconditions must be met before issuing a section 107(a) order.

Additionally, M-Class argues that an imminent danger order is proactive while a section 103(k) order is reactive. This framing glosses over the purpose of section 103(k) orders, which is "to protect the life or to insure the safety of any person in the…mine." 30 U.S.C. 813(k); Sec'y Br. 6-7. Section 103(k) orders give MSHA

"complete control" of a mine in order to "preserve life in the face of an existing hazard." *Miller Mining Co., Inc.* v. *Fed. Mine Safety & Health Review Comm'n*, 713 F.2d 487, 490 (9th Cir. 1983); Sec'y Br. 7. A section 103(k) order is a proactive tool as chaotic, ongoing accident scenes unfold and miners are subject to "existing hazards." Thus, like an imminent danger order, in issuing a section 103(k) order MSHA "must act quickly to remove miners from a situation [it] believes is hazardous." *Blue Bayou Sand & Gravel*, 18 FMSHRC 853, 859 (1996). And, like an imminent danger order, the relevant information is that available at the time of decision-making. See *Cumberland Coal*, 28 FMSHRC 545, 555 (2006), aff'd on other grounds, 515 F.3d 247 (3d Cir. 2008) (evaluating the issuance of an imminent danger order based on the facts available at the time of the decision); Sec'y Br. 31-32.

M-Class also argues that injury reporting requirements under section 103(j) are not analogous to section 103(k) orders because injury reporting requirements incorporate an explicit reasonableness standard: operators must report an injury which has a reasonable potential to cause death. M-Class Br. 41-42; 30 U.S.C. 813(j). But whether an injury has a reasonable potential to cause death usually can be determined objectively after a person has been examined medically; some injuries do not have a reasonable potential to cause death and others do. An

operator still must decide based only on the information immediately available to it whether the injury is reportable. Further, M-Class does not answer the Secretary's argument that section 103(k), like sections 103(j) and 107(a), is intended to facilitate an urgent, flexible response to an emergency. Sec'y Br. 33. To require the Secretary to prove after the fact that an accident occurred based on later-gathered evidence would frustrate MSHA's ability to respond quickly to accidents in order to take control of an emergency scene and save lives. Sec'y Br. 33-34.

d. Abuse-of-discretion review would limit section 103(k) orders to mining accidents.

M-Class suggests that evaluating MSHA's decision to issue a section 103(k) order under the abuse-of-discretion standard, based on the information available to MSHA at the time, would endow MSHA with "nearly limitless" power and "encompass events totally unrelated to mining." M-Class Br. 24 (citing Dec. 10, JA ___). But the Secretary does not dispute that an accident giving rise to a 103(k) order must occur in a mine. 30 U.S.C. 813(k) ("In the event of any accident occurring *in a coal or other mine*….") (emphasis added).

Nor does the Secretary argue that the Commission must rubber-stamp every order. Sec'y Br. 37-38. MSHA must act *reasonably*, based on the facts available, as here. Mr. Mullins fell ill while working at the mine, a situation which suggested a

potential urgent threat to miners in the mine. Though M-Class implies that perhaps Mr. Mullins had the flu or was experiencing a panic attack, M-Class Br. 6, at the hospital he was not diagnosed with either of those ailments. He was diagnosed with carbon monoxide poisoning. It was on these facts—Mr. Mullins' illness and subsequent diagnosis— that MSHA reasonably issued its order. Sec'y Br. 36-39. While M-Class argues that MSHA could issue any order according to its whim, that is not what abuse-of-discretion review allows and it is not what occurred here.

2. Under abuse of discretion review, only the information available at the time of issuance is relevant.

a. Only information before MSHA at the time of decision-making is relevant.

Because abuse-of-discretion review applies, it ineluctably follows that only the information available to MSHA when it issued the section 103(k) order is relevant. M-Class does not refute the well-settled principle that discretionary agency actions, under abuse-of-discretion review, are evaluated based on the information that was available to the agency at the time of decision-making. *Dickson v. Sec'y of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995) (under abuse-of-discretion review, a court evaluates "the agency's rationale at the time of decision"); Sec'y Br. 26-28. So

MSHA satisfied the statutory prerequisite of an accident when it determined, based on the information available at the time it issued the section 103(k) order, that an accident had occurred. Sec'y Br. 26-30, 38-40.

b. Under *Jim Walter Resources*, MSHA may issue a section 103(k) order based on the information available at the time of decision-making.

M-Class's efforts to distinguish Commission precedent supporting the Secretary's position fail. In *Jim Walter Resources*, the Commission determined that while an MSHA inspector must be at the mine site to issue an order, section 103(k) does not require "that the Secretary must be aware of what [an] accident entailed, let alone have completed an investigation into the accident before issuing a section 103(k) order." *Jim Walter Res.*, 37 FMSHRC 1868, 1871 (2015); Sec'y Br. 28-30. For that reason, the Commission rejected the argument that a section 103(k) order "was erroneously issued prior to the Secretary's investigation of the facts relating to the accident," as the "terms of [s]ection 103(k) do not limit the Secretary in this fashion." *Jim Walter Res.*, 37 FMSHRC at 1870.

M-Class interprets *Jim Walter Resources* to mean that MSHA may issue a section 103(k) order only after an accident has undisputedly occurred, even if MSHA is not aware of exactly what the accident entailed. M-Class Br. 37-38. But

the opinion contains no such limitation based on the "undisputed" nature of an accident. Under *Jim Walter Resources*, MSHA may issue a section 103(k) order based on any and all information available to it—including information about the occurrence of the accident—when MSHA arrives at the mine. 37 FMSHRC at 1871. The Commission determined that MSHA may issue a 103(k) order at the time MSHA arrives at an accident scene, prior to undertaking an investigation, when MSHA may know very little and the facts MSHA may think it knows could change.

c. M-Class's statutory interpretation framing should be rejected.

M-Class endeavors to frame the central question of this case as one of simple statutory interpretation. M-Class Br. 20-23. Specifically, M-Class argues that the plain language of section 103(k) requires that MSHA's decision to issue a section 103(k) order be premised on the occurrence of an accident. M-Class Br. 20-23. The Secretary agrees, and that conclusion is self-evident from the statutory text. But the question here is different: what is the scope of information that MSHA uses to determine that an accident necessitating a section 103(k) order has occurred?

Unlike *Pattison Sand*, in which the Eighth Circuit employed tools of statutory interpretation to determine whether a roof fall qualified as an accident within the meaning of section 103(k), 688 F.3d at 513, this appeal raises no statutory

interpretation questions. M-Class does not advocate for a categorical bar on deeming instances of carbon monoxide poisoning "accidents" within the meaning of section 103(k). Instead, the sole question is what universe of facts is germane in reviewing MSHA's decision to issue a section 103(k) order. M-Class's invocation of the plain text distracts from this question.

3. The appropriate decision point for ALJ review is MSHA's decision to issue section 103(k) orders.

Both M-Class and the Commission concede that it is appropriate for an MSHA inspector to issue a section 103(k) order, if, based on the information available at the time, he reasonably believes an accident has occurred. M-Class Br. 16, 22 ("[T]he Commission clarified that it was not, in any way, limiting MSHA's ability to respond to apparent accident situations."); Dec. 16, JA ____; Sec'y Br. 36-38. Per the Commission, "[w]hen an inspector arriving at a mine has sufficient information to form a good faith belief that an accident has occurred, he may issue an appropriate section 103(k) order." Dec. 16, JA ____.

But, according to M-Class and the Commission, if later-gathered information suggests that an accident did not in fact actually occur, the order should be vacated as invalidly issued, as opposed to merely terminated. *Id.* Under this approach, if no accident occurred, the 103(k) order would have been issued unlawfully in the first

place. But section 103(k) orders are frequently issued during the chaotic aftermath of an accident, when the accident's origins are unclear. Sec'y Br. 5, 28-29. The Commission's approach suggests that Congress expected MSHA to engage routinely in unlawful agency action in an attempt to save miners' lives, and then to vacate that action afterwards. This absurd result ignores the unquestioned mission of MSHA: to prevent, or at least mitigate, injuries to and deaths of miners. This result would necessitate a continual focus on re-evaluating whether an accident had occurred, distracting from the essential matter at hand: protecting miners at scenes of injury, death, and disaster. Such a distraction would cause the agency to move with hesitancy in a moment that requires decisive action.

Shifting MSHA's focus to whether an order continues to be valid would distract from and diminish MSHA's capacity to respond to accidents and focus its efforts on controlling the scene and saving lives. Sec'y Br. 35-36. Though the Commission speculated that this would have no chilling effect on the issuance of section 103(k) orders, it offered no support for that contention. Dec. 16, JA ____. This could discourage MSHA from taking necessary action if it was not 100% clear that an "accident" had occurred and also would encourage operators to defy orders they perceive as invalid. Sec'y Br. 36-38. In addition to being illogical, this approach is dangerous and significantly limits MSHA's broad, plenary authority. The only

decision under review should be MSHA's decision to issue the 103(k) order in the first place.

4. Even if examining later-gathered information were appropriate, the Commission misapplied the substantial evidence standard in reviewing the ALJ's decision.

a. The Commission did not properly apply the substantial evidence standard.

As discussed above, in reviewing for substantial evidence the ALJ's factual findings on whether MSHA abused its discretion, the Commission should have confined itself to the facts before MSHA at the time it issued the section 103(k) order, as the ALJ did. Even if later-gathered information were properly included, however, the Commission still misapplied the substantial evidence standard.

M-Class repeats the Commission's holding that the ALJ was incorrect in determining that Mr. Mullins' illness, evacuation, and diagnosis with carbon monoxide poisoning supported MSHA's finding of an accident on two distinct grounds: that it was an injury, and that it was a sudden emergency event similar to an inundation of gas.

As the Secretary has explained, while the Commission nominally applied substantial evidence review to the ALJ's finding that MSHA did not abuse its

discretion, it in fact improperly re-weighed and ignored evidence and drew de novo conclusions. Sec'y Br. 40-46. Substantial evidence supports the ALJ's findings underpinning his decision that MSHA acted within its discretion. M-Class does not refute the fact that hearsay evidence is admissible; the ALJ's reliance on the escalation report was appropriate. Nor does M-Class challenge the principle that weighing and resolving inconsistent testimony is the responsibility of the factfinder. So the Commission, which does not engage in fact-finding, should not have overturned the ALJ's conclusion that the expert witness's testimony was not dispositive.

M-Class also argues that the ALJ's characterization of the abrupt onset of and rapid, emergency response to Mr. Mullins's illness as a "sudden event," similar to an inundation of gas, was incorrect. M-Class Br. 24. But the ALJ properly reasoned that, under *Aluminum Company of America ("Alcoa")*, this situation suggested an "immediate hazard to miners and require[d] emergency action." 15 FMSHRC 1821, 1826 (1993); ALJD 7, JA ___. The ALJ's application of the facts to Commission precedent was appropriate and should not have been overturned, despite the Commission's disagreement as to what information was relevant.

Even if the appropriate universe of facts included later-gathered information, the Commission did not determine whether there was "such relevant evidence as a

reasonable mind might accept as adequate to support [the ALJ's] conclusions." *Jim Walter Res., Inc.* v. *Sec'y of Labor*, 103 F.3d 1020, 1023-1024 (D.C. Cir. 1997); Sec'y Br. 40-41. Instead, the Commission reconsidered the facts and came to its own conclusions. Sec'y Br. 40-46.

Similarly, M-Class does not explain how the facts on which the ALJ relied (Mr. Mullins' symptoms, rapid evacuation, and diagnosis, his physician's alarmed call to the police, the escalation report, the testimony of M-Class' expert toxicologist who noted that carbon monoxide poisoning *was* a possible source of elevated carbon monoxide levels in Mr. Mullins' blood) are not substantial evidence that MSHA acted reasonably in determining that an accident occurred in the mine. There was no requirement that MSHA must prove conclusively that the mine emitted carbon monoxide, and the ALJ was entitled to substantial evidence deference given the facts he cited.

b. Under *Pattison Sand*, an ALJ's decision should be reviewed based on the evidence that the ALJ considered.

M-Class also proposes that, because the Eighth Circuit in *Pattison Sand* applied substantial evidence review to an ALJ's factual determinations, substantial evidence is the appropriate standard for the Commission to apply to the ALJ's determination that an accident occurred. M-Class Br. 34-35. The Secretary agrees

that the Commission should review for substantial evidence the ALJ's factual findings on whether MSHA abused its discretion when MSHA determined that an accident occurred and issued a 103(k) order. But unlike *Pattison Sand*, where the Eighth Circuit evaluated the "evidence before the ALJ," 688 F.3d at 514, here, the Commission applied an incorrect legal test by broadening the universe of relevant evidence. And instead of remanding the matter to the ALJ to consider all the evidence, the Commission conducted its own review de novo and then improperly overturned the ALJ's decision based on this new evidence. That is not substantial evidence review.

c. M-Class is actually advocating that the Commission conduct a de novo review of whether an accident occurred.

Although M-Class repeatedly argues the need to review an ALJ's determination of whether an accident occurred for substantial evidence, what M-Class really is advocating for is the Commission's ability to conduct a de novo evidentiary review of whether an accident occurred. The Commission reviews legal conclusions de novo, see *Lewis-Goetz and Co., Inc.*, 38 FMSHRC 1663, 1666 (2016), and this Court reviews de novo the Commission's analysis of the ALJ's decision and application of legal tests. See *Prairie State Generating Co.* v. *Sec'y of Labor*, 792 F.3d 82, 89-93 (D.C. Cir. 2015). But the standard by which the ALJ must review

MSHA's action is abuse of discretion, and the standard by which the Commission must review the ALJ's factual findings supporting his determination that MSHA did not abuse its discretion is substantial evidence. If the Commission believed that the ALJ applied an incorrect legal test in deciding what evidence was relevant, it should have remanded the matter. See, *e.g.*, *Georges Colliers, Inc.*, 27 FMSHRC 362, 364-365 (2005) (indicating that where an ALJ applies an "incorrect legal test," the remedy is remand). De novo evidentiary review is not appropriate to scrutinize either MSHA's discretionary actions or the ALJ's factfinding, and absent circumstances not present here, tribunals cannot "substitute de novo review for review of the agency's record." *Zevallos* v. *Obama*, 793 F.3d 106, 112 (D.C. Cir. 2015).

Conclusion

Throughout its reply, M-Class attempts to invoke a dispute that does not exist over the text of the statute. Both the Secretary and M-Class agree that an accident must precede a section 103(k) order. The only true dispute is as to *what information* is relevant to a determination that an accident necessitating a section 103(k) order occurred, and whether that determination is within MSHA's discretion. The Commission erred in holding that all information is relevant to that determination, even information that became available only after MSHA made the critical decision

to issue the order to protect miners from potential risk of injury or death. This retroactive application of later-gathered information to an emergency event contravenes the purpose of the Mine Act and makes no practical sense. And the Commission erred in failing to review for substantial evidence the ALJ's finding that MSHA did not abuse its discretion in determining an accident occurred, and instead reviewed de novo whether an accident had occurred.

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

Respectfully submitted,

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