

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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June 30, 2011

REVELATION ENERGY, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. KENT 2011-71-R
	:	Order No. 8247763;10/08/2010
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	S-1 Hunts BR
ADMINISTRATION, MSHA,	:	Mine ID 15-18280
Respondent	:	

ORDER ON MOTIONS

Before the Court are Contestant Revelation Energy, LLC’s Renewed Motion for Summary Decision (“Revelation’s” or “Contestant’s” Motion) and Respondent, Secretary of Labor’s Motion to Dismiss (“Secretary’s” or “Respondent’s” Motion). Revelation’s Motion presents the legal issue succinctly, that is, “whether a large rock leaving a mine site after a blast and landing in a residential yard, with no injuries, constitutes an ‘accident’ for purposes of a Section § (sic)103(k) Order.”¹ Revelation Motion at 1. Under the Mine Act, a section 103(k) order authorizes a mine inspector, in the event of an accident which occurs in a coal or other mine to issue such orders as he deems appropriate to insure the safety of any persons in the coal or other mine. 30 U.S.C. 813(k). This issue was addressed in the Court’s January 21, 2011 Order Denying Contestant’s Motion for Summary Decision and the parties acknowledge that the purpose behind their respective motions here is to place the case in a posture for review by the Commission. For the reasons which follow, the Court DENIES Contestant’s Renewed Motion and GRANTS the Secretary’s Motion to Dismiss Revelation’s Notice of Contest.

¹ Factually, Revelation’s description understates the event, as the “large rock” was about 6 feet in diameter and weighed approximately 2 tons. Although its Notice of Contest challenges “each and every allegation in the Order,” Revelation has never asserted different facts about the rock’s size, despite several opportunities to do so. Rather, its challenge has been solely about whether a section 103(k) accident event occurred.

Reduced to its essence, Contestant contends in its Renewed Motion for Summary Decision that the Secretary should be bounded by its definition of an “accident” per its regulation in Part 50 at 30 C.F.R. § 50.2(h). The regulations in Part 50 address “Notification, Investigation, Reports and Records of Accidents, Injuries, Illnesses, Employment and Coal Production in Mines.” Beyond Part 50, the Contestant also points to the Secretary’s Program Policy Manual, which cites the same regulation for the definition of an “accident.” Thus, Contestant asserts that the Secretary cannot escape the regulatory definition, as echoed by the Policy Manual. It is the Contestant’s position that to allow the Secretary to go beyond its regulatory and policy manual enunciations amounts to permitting “*ad hoc* definitions of the term ‘accident’ after the fact to justify 103(k) orders.” Contestant’s Motion at 2.

In its Response to Revelation’s Motion, the Secretary notes this Court’s January 21, 2011 ruling and urges that there is no need for the Court to reconsider its earlier decision but that, if it elects to do so, the same result should be reached and the Renewed Motion denied. It asserts that the Court’s earlier ruling “did not overlook controlling precedent, controlling legal principles and did not misapprehend the facts or law in any way, much less in any way that affected the outcome stated in the Order.” Sec’s Response at 4.

Alternatively, the Secretary argues that the Contestant has misconstrued the MSHA Program Policy Manual. While the Secretary agrees that the Policy Manual does note that the term “accident” is defined at 30 C.F.R. Part 50.2(h), it does not follow that the statutory definition of an “accident,” per 30 U.S.C. § 802(k) is not authoritative in this proceeding, because the Manual does not preclude the broader definition’s use. Thus, “accidents” are not limited to those spelled out in the regulation. The Secretary sees logic in this distinction, maintaining that the Part 50.2(h) provisions identify those types of accidents which must be reported, but that they do not otherwise constrain the statutory provision. *Id.* at 6. Last, the Secretary notes that neither policy statements by the Agency, nor views expressed by other administrative law judges, are binding upon this administrative tribunal. *Id.*

Turning to the Secretary’s Motion to Dismiss Revelation’s Notice of Contest, the Secretary states that the basis for Contestant’s Contest was its claim that “there was no basis for any enforcement action against [Revelation Energy, LLC] in this case,” because there was no “accident” at the S-1 Hunts Branch Mine. As with its response to Contestant’s Renewed Motion for Summary Decision, the Secretary notes that 30 C.F.R. § 50.2 itself provides that it applies only to “this part,” by which it is clearly referring to Part 50 of the Mine Act. In contrast, 30 U.S.C. § 802, the “Definitions” section of the Mine Act, which includes subsection (k) “accident,” applies to “this chapter,” a reference to Chapter 22 of the Act. Given that, the Secretary contends that, as there was an accident, the basis for Contestant’s Contest fails and dismissal must follow.

Consistent with its view of the applicability of Section 802(k), the Secretary observes that “blasting a 2 ton piece of rock off of mine property and into a nearby yard presented a potential for injury similar to that of a mine explosion, mine ignition, mine fire, mine inundation or injury or death of any person.” Sec’s Motion at 4. (emphasis removed). In support of this perspective, the Secretary notes that the Commission itself has stated that Section 802(k) was “drafted to provide an inclusive, broad definition of the term ‘accident,’” and that it has observed that the definition employs the word *includes* in then listing specific events. *Id.* at 4, citing *Aluminum Co. of Am.*, 15 FMSHRC 1821 (Sept. 1993). “Includes,” it points out, is rather obviously a term of enlargement and as such the specific events then listed cannot then be turned around as if the statute had provided “*includes only*” followed by specific listed events.

Last, the Secretary asserts that Section 802(k), as the statutory provision, must be the source consulted in determining whether an “accident” has occurred. However, even if one could argue that there was some ambiguity as to whether that section or the regulatory provision at 30 C.F.R. § 50.2(h)(2) should control, under the well-established *Chevron* analysis, deference must be afforded to the Agency’s interpretation of its regulation if it is reasonable. *Id.* at 5, citing *Chevron U.S.A. Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837 (1984). Accordingly, even if a reviewing body might come to a different choice in its own interpretation, it is not entitled to substitute its wisdom for that of the agency’s reasonable view.

In its Response to the Secretary’s Motion to Dismiss, Contestant, as did the Secretary for its part, repeats the arguments made in its original motion for summary decision, and which arguments the Court outlined in its January 21st Order denying that motion. One difference is that it characterizes the Court’s earlier ruling, stating that under it, “the occurrence of an ‘accident,’ for purposes of a §103(k) Order, is left to the sole discretion of the Secretary.” Contestant’s Response at 2. Contestant adds that “[a]bsent any controlling definition, an operator has no advance knowledge of what constitutes an ‘accident’ for purposes of a §103(k) . . . [and such an] interpretation is inconsistent with the intent of §§ 103(j) and 103(k) and [would] violate[] Revelation’s due process rights. *Id.* As the Court will explain *infra*, the Contestant overstates the consequences of the ruling.

At least it may be said that the Contestant clearly stakes out its position in this matter, contending, as it does, that “events that constitute an ‘accident’ *cannot* be enlarged beyond those events set forth in 30 C.F.R. §50.2(h).” *Id.* at 3 (emphasis added). Yet, the Contestant seems to acknowledge that there is not a single source to consult in figuring out when an “accident” has occurred, as it states “[e]ven when an incident does not fall within the **statutory** or **regulatory** definition of accident, and **no one is injured**, the Secretary believes she has the authority to proceed pursuant to §103(k).”² *Id.* (emphasis in original).

²Contestant then repeats itself, maintaining that it is then in the posture of lacking “advance warning as to what type of incident could be considered an ‘accident’ for purposes of §103(k) liability.” Contestant’s Response at 3. Again, as will be explained *infra*, this dire forecast is unwarranted.

Contestant also asserts that the event giving rise to the issuance of the 103(k) Order here must be similar to the incidents enumerated in that statutory provision or those in 30 C.F.R. §50.2(h). Contestant's Response at 6. Under its "similar" test, Contestant notes that the event here is not "similar" to a mine explosion, mine ignition, mine fire, or mine inundation – and did not cause death or bodily injury to an individual.³ Then, consulting 30 C.F.R. §50.2(h), it interprets that provision as speaking to incidents occurring off of mine property only at subsection (h)(12) and for that to apply, there must be death or bodily injury to an individual. *Id.* at 7.

DISCUSSION

The first point which needs to be made is that this matter is appropriately disposed of at this time. The parties do not have any genuine factual dispute; that is to say that none have been raised by either of them. The dispute is purely a legal one and whether the rock that blasted off of the mine property was in fact about 6 feet in diameter and weighing about 2 tons has not been challenged, nor would the rock's exact diameter or weight be determinative of the present issue. Instead the issue is whether a 103(k) Order can be issued in these circumstances:

A non injury blasting accident occurred at this surface at approximately 6:30 pm resulting in a rock about 6 feet in diameter and weighing approximately 2 tons leaving the mine property. This rock rolled down the hill through a citizens yard and came to rest in the creek next to the roadway below the citizens residence. This 103 (k) order is issued to protect the safety of all persons on mine site and off mine site.

Order No. 8247763, the Section 103(k) Order in issue here.

The Court incorporates and reaffirms its original Order addressing this legal issue. For convenience, that Order is attached at the end of this Order. However the Court augments its January 21, 2011 Order with the following additional remarks. First, Contestant elides over the fact that the statutory definition of an "accident" begins with the expansive verb "includes." Accordingly, the fact that it then lists a number of events so included does not operate to exclude events not expressly named. The word "includes" is usually a term of enlargement, and not of

³Contestant notes that the Court did find that similarity to the listed events is not a requirement for issuance of a 103(k) Order, but that the fly rock was an exquisitely similar event to events listed in that provision. However, it is Contestant's position that it is not similar because fly rock is not listed in the definition of an accident, at Section 3(k) of the Act. The short answer is that section 802(k) does not restrict the definition of "accident" to events *similar* to those expressly included.

limitation.⁴

It is the words employed by the statute, not those of a regulation, and even less so the statements within a program policy,⁵ that control the outcome here. The term defined, “accident,” is succinctly expressed in the Mine Act:

DEFINITIONS Sec. 3. 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

It seems clear that, beyond using the non-restrictive term “includes” for the definition of “accident,” Congress cited some of the more frequent examples of mine accidents, but that, just as clearly, by referring to injury or death, all conjoined by use of the alternative conjunction “or,” that it intended an expansive meaning to “accidents.”⁶ Accordingly, any analysis of the scope of

⁴*U.S. v. Alvarez*, 638 F.3d 666 (9th Cir. 2011) quoting *Burgess v. United States*, 553 U.S. 124, 131 n.3 which refers to Singer & J. Singer, *Sutherland on Statutory Construction*, at §47:7, at 305 (7th ed. 2007). See also, *Jones v. American Postal Workers Union*, 192 F.3d 417 (4th Cir.1999), for the same principle that words which follow “includes” do not constitute an all-embracing definition nor an exhaustive list. Further, as noted in *U.S. v. Angelilli*, 660 F.2d 23, (C.A. N.Y. 1981) using “includes” is quite different from a statutory definition which instead employs the term “means.” Here, Congress used the phrase ‘accident *includes*,’ it did not express the definition as ‘accident *means*.’

⁵ In *Tilden Mining company, L.C.*, 2011 WL 1924263 (F.M.S.H.R.C.), April 18, 2011, Administrative Law Judge Paez addressed whether a program and policy manual’s provisions (“PPM”) are substantive rules. The judge noted that the Commission has held that, “the Enforcement Guidelines and the PPM are not binding on the Secretary or the Commission,” and in citing to *King Knob Coal Company* noted that “the Manual’s ‘instructions are not officially promulgated and do not prescribe rules of law binding upon this Commission.’... [T]he express language of a statute or regulation ‘unquestionably controls’ over material like a ... manual.” *Sec’y of Labor v. D.H. Blattner & Sons*, 18 FMSHRC 1580, 1586 (Sept. 1996) (quoting *King Knob Coal Co.*, 3 FMSHRC 1417, 1420 (June 1981) (citations omitted)). The judge observed that the PPM and the PPL are not rules of law but are the Secretary’s interpretations of a particular regulation and that neither were binding on the Commission or the Secretary.

⁶ The Commission has agreed that “includes” as used in the definition of “accident” is a term of enlargement. In *Aluminum Co. of Am.*, 15 FMSHRC 1821 (Sept. 1993), the Commission dealt with a Section 103(k) order which had been issued upon an inspector’s determination that an area of a plant was contaminated by mercury. Upon hearing, the administrative law judge held that the Secretary had failed to prove that there had been an “accident.” While the Commission affirmed the judge, it did so on an evidentiary basis, stating that the Secretary was

the definition of “accident” must also take into account the ordinary meaning of that term. It is certainly not an esoteric term, nor otherwise difficult to understand, being defined in the dictionary as “An unexpected and undesirable event.” *See, for e.g., Webster II New Riverside University Dictionary* 1984.

Applying that common definition of the term, it would be hard to conclude that a rock of about 6 feet in diameter and weighing about 2 tons, which exited mine property, traveling down a hill and through a citizen’s yard before coming to rest in a creek below the citizen’s home, could be described in any other manner than as an accident. Certainly it was unexpected and equally so, it was undesirable. Further, it occurred in connection with a mine explosion. Blasting most often is an intended event but, intended or unplanned, it is an explosion and a mine explosion occurred at Revelation Energy’s S-1 Hunts Branch mine. Thus, it is inaccurate to claim that which constitutes an “accident” is left to the sole discretion of the Secretary. One can evaluate a given set of facts and apply that to the very common definition and determine whether there has been an accident.⁷

In addition to the Program Policy Manual’s inability to restrict a statutory provision, a fact which by itself is fatal to the Contestant’s assertion that it limits the statute,⁸ it is noteworthy

“[i]n general . . . correct,” agreeing with the Secretary that the use of the term “includes” in the definition of accident, per section 3(k) of the Mine Act, is a term of enlargement, and that events not specifically listed in section 3(k) do fall within the definition if they are similar in nature or present a similar potential for injury or death. Importantly, the Commission added that whether a given event is similar in nature must be determined on a case-by-case basis. Also, notably, indirectly addressing one of the arguments made by the Contestant here, the Commission stated that in 30 C.F.R. Part 50 the Secretary set forth the meaning of the term accident “for *reporting* purposes.” * 1826 (emphasis added).

⁷ For the same reasons, the claim that a mine operator would have no advance knowledge what constitutes an “accident” is without merit. The Contestant’s theory, if adopted, would mean that the statutory provision would be entirely unenforceable absent a regulation or a policy statement, an untenable conclusion.

⁸ As noted by Administrative Law Judge Miller in *Performance Coal Co.*, 32 FMSHRC 1352, 2010 WL 3826411, (Sept. 2010), a “section 103(k) provides that it is MSHA, not the operator, who is in charge of the investigation. . . . [and the] Act gives MSHA plenary power to make post-accident orders for the purpose of protection and safety of all persons. . . . [Consequently,] MSHA has broad authority to issue 103(k) orders to effectuate this purpose.” at * 1357, citing *Rockhouse Energy Mining Co.*, 26 FMSHRC 599, 602 (July 2004) (ALJ), *Miller Mining Company, Inc. v. FMSHRC*, 713 F.2d 487, 490 (9th Cir. 1983), *Buck Mountain Coal Co.*, 15 FMSHRC 539 (Mar. 1993) (ALJ) and *West Ridge Resources, Inc.*, 31 FMSHRC 287 (Feb. 2009) (ALJ). Judge Miller also observed that “[t]his broad grant of authority is recognized in the legislative history, which states that: [t]he unpredictability of accidents in mines and uncertainty

that, as pertinent here, the Manual focuses primarily on Section 103(j) and only tangentially on 103(k).⁹

In sum, the construction urged by the Contestant would deny MSHA authority to deal with an event which, by any rational measure, was clearly an accident. As such, it is within the reach of a section 103(k) Order. To reach the result urged by Contestant would affront common sense and be at odds with the remedial nature of the Mine Act.¹⁰

Accordingly, for the reasons articulated in this Order and in the Court's earlier Order as to the circumstances surrounding them requires that the Secretary or his authorized representative be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person. The grant of authority under section [103(k)] to take appropriate actions and ... to issue orders is intended to provide the Secretary with flexibility in responding to accident situations, including the issuance of withdrawal orders." quoting S. Rep. No. 95-181, at 29 (1977, reprinted in Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 617 (1978).

⁹ In fact, MSHA's Program Policy Manual, at Volume I, while addressing many aspects of section 103 of the Mine Act, omits any direct attention to section 103(k), which, as mentioned, is referenced only in the context of addressing section 103(j), dealing with Mine Accident and Rescue, Recovery and Preservation of Evidence. So too, 30 C.F.R. Part 50, by its very title, is of broad coverage, speaking to the notification, investigation, reports and records of accidents, injuries, illnesses, employment and coal production in mines. As applicable here, it is in the context of such investigations and reports that accident is defined, but it in no way purports to corral the statutory definition of accident, nor could it. Even if, for arguments sake, one were to claim that it did limit the statute, accidents included within 30 C.F. R. § 50.2 (h) can be considered to apply to the situation which occurred here, as (h)(7) references an "unplanned ignition or explosion of . . . an explosive." Certainly, the effect of the explosion here was not planned to have such effects.

¹⁰ See, for example, *Walker Stone Co., Inc. v. Secretary of Labor*, 156 F.3d 1076 C.A.10,1998, September 22, 1998 upholding the Commission's interpretation of a standard as "consistent with the safety promoting purposes of the Mine Act," and that the Mine Act should be liberally construed to accomplish its remedial purposes and rejecting a construction that would create absurd results. (internal citations omitted). Congress intended the Mine Act to be liberally construed to accomplish its remedial purposes. *Cyprus Indus. Minerals Co. v. FMSHRC*, 664 F.2d 1116, 1118 (9th Cir.1981), *Joy Technologies, Inc. v. Secretary of Labor*, 99 F.3d 991 C.A.10,1996, (November 5, 1996) denying Contestant's Motion for Summary Decision, the Court DENIES Contestant's Renewed Motion and GRANTS the Secretary's Motion to Dismiss Revelations' Notice of Contest.

William B. Moran

Attachment:

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 21, 2011

REVELATION ENERGY, LLC,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. KENT 2011-71-R
	:	Order No. 8247763;10/08/2010
v.	:	
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	S-1 Hunts BR
ADMINISTRATION, MSHA,	:	Mine ID 15-18280
Respondent	:	

ORDER DENYING CONTESTANT’S MOTION FOR SUMMARY DECISION

Contestant, Revelation Energy, LLC, has filed a motion for summary decision (“Motion”) along with a memorandum in support thereof (“Memorandum”). The Secretary filed a Response (“Response”) to those filings. For the reasons which follow, the Court DENIES the Respondent’s Motion.

Contestant’s Motion is based upon the assertion that the MSHA Order at issue in this proceeding is invalid because the subject of that Order, an accident, does not fall within the definition of an “accident” under the Mine Act. The Section 103(k) Order in issue, Order No. 8247763, stated in relevant part that:

A non injury blasting accident occurred at this surface at approximately 6:30 pm resulting in a rock about 6 feet in diameter and weighing approximately 2 tons leaving the mine property. This rock rolled down the hill through a citizens yard and came to rest in the creek next to the roadway below the citizens residence. This 103 (k) order is issued to protect the safety of all persons on mine site and off mine site.

Reduced to its essence, the Contestant asserts that, whether one looks to the statute or the regulations, neither provides authority for the Order issued here. To arrive at that contention, the

Respondent notes that the issuance of a 103(k) Order is available “[i]n the event of any accident occurring in a coal or other mine.” Under those circumstances the 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. Contestant also observes that when one looks to the statutory definition of an “accident” that provision provides that an accident “*includes* a mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person.” Section 3 (k) (emphasis added). Further, the Contestant notes that the regulation further defines the term “accident” stating that the term means twelve (12) enumerated events. Contestant concludes that, whichever measure is used to define the term “accident,” none apply to the circumstances which occurred here and consequently MSHA had no legal authority to issue the 103 (k) Order. Accordingly, Respondent maintains that as the event did not involve “injury, death or **any** of the events included in the definition of “accident” set forth in the Mine Act,” no accident occurred and the Order should be vacated. Memorandum at 4.

In response, it is the Secretary’s position that, because there are genuine issues of material facts, the Motion should be denied. The Secretary contends that the proper authority for determining the meaning of an “accident” is set forth in 30 U.S.C. § 802(k). In this respect, it is noted that the parties agree, as the Respondent asserts, that the “key question in determining the validity of a §103(k) citation is whether ‘an accident within the meaning of Section 103(k)’ occurred.” Motion at 3. There is also agreement with the parties that the term “accident” is also defined at 30 C.F.R. § 50.2(h). However, as the Secretary points out, Section 103(k) applies to “this chapter,” and that the chapter it refers to is Chapter 22 , that is, the Federal Mine Safety and Health Act of 1977 (“Mine Act”). Citing *Newmont U.S.A. Ltd.*, 32 FMSHRC 391 (April 14, 2010), the Secretary asserts that Section 802(k) is broader in its application than § 50.2(h).

The Court concludes that summary judgment is clearly not appropriate. As the Secretary has noted, Section 802(k) provides that, for the purpose of the Chapter, the term “‘accident’ *includes* a mine explosion, mine ignition, mine fire or mine inundation, or injury to, or death of, any person.” It is a fundamental tenet of statutory construction that use of the term “includes” is a term of enlargement and not one of limitation. Congress could have easily omitted the word “includes” and simply listed certain mine events, such as “mine explosion” and the other events listed in that section but it expressly decided not to so limit the scope of the term “accident.” Accordingly, the listing of certain known historical bases for mine accidents when coupled with the term “includes,” cannot reasonably be construed to limit accidents to those named. In fact, to limit the definition to those named circumstances would eviscerate Congress’ use of the term “includes,” making it meaningless.

Although the Secretary also asserts that the incident which resulted in the issuance of the Order here “presented a potential for injury [which was] similar to that of a mine explosion, mine ignition, mine fire, mine inundation or injury to or death of any person,” that is to say, the listed events in Section 103(k), the Court does not conclude that “similarity” to those listed events is an

essential requirement.¹¹ This is because the Mine Act is remedial legislation with its primary concern directed to the preservation of human life and as such is to be construed broadly to effectuate its purpose. *See, for e.g., Cyprus Cumberland Resources*, 21 FMSHRC 722, 1999 WL 557063, July 1999, *quoting Cannelton Industries*, 867 F.2d 1432, 1437 (C.A. D.C. 1989), and *Freeman Coal Mining Co.*, 504 F.2d 741, 744 (7th Cir. 1974).

Accordingly, the Contestant's Motion is DENIED.¹²

William B. Moran

William B. Moran

¹¹However, while concluding that similarity to the listed events is not a *sine qua non* to establishing that an event is included within the term "accident," the Court agrees that the Secretary's characterization of a 2 ton piece of rock some 6 feet in diameter blasted from mine property and ending up off mine property in an individual's back yard, as claimed, is an exquisitely similar event, with the fly rock, *writ large*, which apparently occurred here.

¹² **The parties are directed to arrange a conference call with the Court on Wednesday January 26, 2011, so that this matter may be set for hearing**