

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 14, 2019

M-CLASS MINING, LLC,
Contestant,

v.

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

CONTEST PROCEEDING

Docket No. LAKE 2018-0188-R
Order No. 9104295; 2/24/2018

Mine: MC #1
Mine ID: 11-03189

DECISION

Appearances: Christopher D. Pence, Hardy Pence PLLC, Charleston, WV, for Contestant;

Travis W. Gosselin, U.S. Department of Labor, Office of the Solicitor, Chicago, IL, for Respondent.

Before: Judge Simonton

This case is before me upon M-Class Mining, LLC’s (“M-Class” or “Contestant”) Notice of Contest pursuant to section 104(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).¹ This proceeding involves § 103(k) Order No. 9104295 (“(k) Order”), issued to M-Class on February 24, 2018, and terminated on April 4, 2018. There is no corresponding section 104(a) citation or penalty assessment. Nonetheless, M-Class declined to withdraw its contest and maintained that the (k) Order should be vacated as invalidly issued and overbroad in scope.

Given the unique procedural posture of the contest, the parties were instructed to brief whether this court retained jurisdiction over a terminated (k) Order. Upon review, the court found that the Commission did in fact retain jurisdiction to review the terminated (k) Order. Order Denying Secretary’s Motion to Dismiss, dated July 18, 2018. The court also denied the Secretary’s subsequent Motion to Certify the Matter for Interlocutory Review, and set the docket

¹ In this decision, the parties’ Joint Stipulations, the transcript, the Secretary’s exhibits, and Contestant’s exhibits are abbreviated as “Jt. Stip. #,” “Tr.,” “Ex. S-#,” and “Ex. C-#,” respectively.

for hearing.² *See* Order Denying Secretary’s Motion for Interlocutory Review & Order Denying Secretary’s Motion to Stay, dated September 11, 2018.³

The hearing was held on October 3-4, 2018, in St. Louis, Missouri. Based upon the parties’ stipulations and my review of the witness testimony, the entire record, and the parties’ post-hearing briefs, I make the following findings.

I. FINDINGS OF FACT

A. Joint Stipulations

The parties entered into the following joint stipulations:

1. M-Class Mining, LLC, is an “operator” as defined in Section 3(d) of the Federal Mine Safety Act of 1977, as amended (Mine Act), 30 U.S.C. § 803(d), at the coal mine at which the order at issue in this proceeding was issued.
2. MC#1 mine is operated by the Contestant in this case, M-Class Mining, LLC.
3. Contestant’s MC#1 mine is located in Macedonia, Illinois.
4. MC#1 mine is subject to the jurisdiction of the Mine Act.
5. The individual whose name appears in Block 22 of the order at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the order was issued.
6. A duly authorized representative of the Secretary served the subject order and terminations of the order upon the agent of the Contestant at the dates and place stated therein as required by the Mine Act, and the order and terminations may be admitted into evidence to establish their issuance.

² The Secretary still maintains that the court lacks jurisdiction to review a terminated § 103(k) Order and that this matter is moot because there remains no justiciable controversy for the court to resolve. Secretary’s Post-Hearing Brief (“Sec’y Br.”) at 14, n. 7. Both parties have incorporated the arguments set forth in their previous briefs herein. *See id.*; Respondent’s Post-Hearing Response Brief (“Cont. Resp.”) at 3, n. 1. The court herein incorporates its reasoning set forth in its Order Denying the Secretary’s Motion to Dismiss, and will not readdress those matters in this decision.

³ The Commission did not deny the Secretary’s petition for Interlocutory Review, but was without the authority to take any substantive action on the matter due to a lack of quorum. Commission Letter, dated September 26, 2018.

7. The order contained in Exhibit A attached to Contestant's Notice of Contest is an authentic copy of the order at issue in this proceeding with all appropriate modifications and terminations, if any.

B. Factual and Procedural Background

M-Class operates the MC#1 Mine, an underground coal mine located in Macedonia, Illinois. The Mine consists of the MC and Viking portals. Tr. 207-08. At 8:00 AM on February 24, 2018, 14 miners arrived at the Headgate #6 section of the MC portal to clean up a roof fall. Tr. 221, 224. The group was building a steel archway to re-support an approximately 20-foot void in the roof to allow miners to begin cutting, loading, and removing the fallen rock. Tr. 221, 223. Eight to ten of the miners working in the section wore handheld gas detectors, or "spotters," to track oxygen, methane, and carbon monoxide levels. Tr. 226.

The team completed the steel sets by mid- to late morning. Tr. 225. They then started up a diesel air compressor to fill the void with expanding Jen-Mar foam. Tr. 223. Miner Mitchell Mullins manned and worked in close proximity to the diesel air compressor. Tr. 51-52, 63-64, 75. About 90 minutes into his shift, Mullins began to complain of dizziness and a light headache. Ex. S-2; Tr. 76-77. Mullins' symptoms grew to include stomach pain, shortness of breath, and a racing heartrate. Ex. S-2; Tr. 77. His condition prompted a fellow miner to inform attending Superintendent Demetrios Macropoulos that Mullins needed a ride out of the mine.⁴ Tr. 227. Mullins was administered oxygen, and evacuated from the mine. Ex. S-2; Tr. 227-28. Macropoulos personally drove Mullins to the section mouth to get a ride out of the mine. Tr. 228. He testified that Mullins did not indicate that he believed his symptoms to be due to carbon monoxide poisoning. Tr. 228. He also noted that no spotters went off in the Headgate #6 section during the shift. Tr. 228, 236. None of the mounted carbon monoxide monitors mounted underground revealed elevated levels of carbon monoxide during Mullins' shift. Ex. C-C.

Mullins was subsequently transported by ambulance to Herrin Hospital in Benton, Illinois. Exs. S-2, S-6. Doctor Dean Bosley treated Mullins in the emergency room and quickly diagnosed Mullins with carbon monoxide poisoning. *Id.* Mullins would spend approximately the next 72 hours in the hospital on 100% oxygen. Ex. S-6. His initial carboxyhemoglobin concentration measured 4.8%. Tr. 189. Over that 72-hour span, Mullins' carboxyhemoglobin concentration decreased to 3.4% the morning after his admission, only to increase to 3.8% that afternoon and up to 4.2% by the morning of February 26. Ex. S-6; Tr. 195-97. He was released on February 27 with a carboxyhemoglobin concentration measurement of 1.9%. Ex. S-6; Tr. 71, 195-97.

Concerned about Mullins' diagnosis, Dr. Bosley notified the Benton Police Department of Mullins' condition and recommended that the mine be shut down to prevent additional exposure to carbon monoxide in the mine. *Id.* The Police dispatcher relayed Dr. Bosley's

⁴ Demetrios Macropoulos is the Superintendent for the MC portal at the MC #1 Mine. Tr. 207-08. He has worked in the mining industry for 12 years and at M-Class for eight years. Tr. 208-09.

message to the MSHA hotline. Ex. 6. The hotline constructed an Escalation Report documenting the call and sent the report to the proper channels at MSHA.⁵ See Ex. S-7; Tr. 27-28. The Report states in pertinent part:

Someone at the mine called 911 at approximately 2:00 PM today because a miner was sick. The miner was transported around 3:00 PM to the Emergency Room at Herrin Hospital in Herrin, IL, which is about 30 minutes away from the mine. The Emergency Room doctor contacted dispatch at approximately 6:50 PM today. He stated that the miner has very high levels of Carbon Monoxide poisoning, and wants the mine to shut down immediately. The Doctor's name is Dr. Bosley...He stated if the mine is not shut down immediately that he is afraid that there will be more miners admitted with carbon monoxide poisoning. The caller does not have the authority to shut down the mine.

Ex. S-7. MSHA's management personnel took special notice of the report because of the apparent severity of Mullins' diagnosis and because the Police Department called the hotline directly. Tr. 157. MSHA District 8 Field Office Supervisor Bob Bretzman read the Escalation Report and quickly contacted Parker Phipps, Assistant General Manager for Foresight Energy's mines.⁶ Bretzman asked if M-Class had detected elevated carbon monoxide levels at the mine that day. Tr. 248-49. Phipps responded that they did not. Tr. 248-49. Bretzman informed Phipps of Mullins' condition and expressed his opinion that the mine should be evacuated. Tr. 249. When Phipps asked whether MSHA officially ordered evacuation, Bretzman hesitated and replied that he would call back shortly. Tr. 249.

Bretzman called back 15 minutes later to inform Phipps that he would not order an evacuation, but that he would be sending an accident investigator to the mine. Tr. 249. Phipps testified that he told Bretzman during that call that he was with Mullins at the Headgate #6 section during the shift and that his personal spotter did not go off. Tr. 250. After the second call, Phipps instructed Macropoulos to test all of the entries at which Mullins worked during the shift. Tr. 250-51. None of the entries presented elevated levels of carbon monoxide. Tr. 251.

Inspector Brandon Naas arrived at the mine shortly thereafter to begin MSHA's E04 investigation.⁷ He immediately issued a verbal § 103(k) Order at Headgate #6. Tr. 32-33. Naas

⁵ An Escalation Report is a document prepared by the third party contractor operating MSHA's 1-800 hotline. Tr. 28, 154-55. Operators ask the callers questions regarding their complaint and take notes and record the responses. Tr. 155, 157. The operator then prepares a report summarizing the call and submits it to MSHA. Tr. 150. Escalation Reports are sent to management personnel at the corresponding District and at the Agency's Headquarters in Virginia. Tr. 150-51.

⁶ Foresight Energy is the parent company to M-Class Mining, LLC. Tr. 241.

⁷ Brandon Naas has worked as an underground coal mine inspector for MSHA for 7 years. Tr. 24. He has served as an accident investigator since 2015. Tr. 24. Prior to that, he worked as a miner at White County Coal over the summers of 2003 to 2005, and was hired full time from

relied upon the description of Mullins' condition in the Escalation Report in doing so. Tr. 129, 134. He had not yet spoken with Dr. Bosley or Mr. Mullins, had not yet viewed any medical records or data at the mine, and had not yet gone underground. Tr. 93-94. He testified that in the event of an accident MSHA inspectors are trained to issue a (k) Order upon arrival to secure the scene and protect miners before conducting an investigation. Tr. 131, 137. Naas spent the first hour above ground reviewing the records for the generator, one of the spotters used by another miner on the shift, and the mine's carbon monoxide monitoring system. Tr. 41. He also requested to review Mullins' spotter, but M-Class was unable to locate it. Tr. 58-59. Unable to pinpoint exactly where the exposure occurred, Naas proceeded underground to conduct an imminent danger run across the faces and take carbon monoxide measurements in the Headgate #6 section. Tr. 49. He did not find any dangerous conditions and modified the (k) Order to allow M-Class to resume normal mining operations in the early hours of February 25. Tr. 50, 53.

On the morning of February 26, Inspector Naas returned to the mine to speak with six other miners on the crew that worked on Mullins' shift. Tr. 54. Pursuant to instructions from his supervisors, Naas also modified the (k) Order to remove the diesel air compressor from service pending the completion of the investigation. Tr. 54. Naas testified that since the compressor was running while Mullins was ill and was the only piece of equipment to which Mullins was not exposed on a normal basis, MSHA suspected it was defective and producing dangerous levels of carbon monoxide. Tr. 56.

Naas returned yet again on February 27 to meet with mine management. M-Class was still conducting its own investigation into the matter, but asked that the air compressor be released back into service. Tr. 67-69. Naas declined to do so when management could not identify any other possible source of carbon monoxide that may have led to Mullins' illness. Tr. 67-68. Naas interviewed Mullins on February 28. Tr. 72. Mullins told him that he was working in by the compressor tightening up roof bolts when he began to experience symptoms. Tr. 76. Mullins acknowledged that his spotter did not go off while he was working in the Headgate #6 section. Tr. 75. Mullins then described the progression of his symptoms and subsequent treatment. Tr. 75-77.

Although Naas completed his investigation on February 28, MSHA did not allow the compressor to be put back into service. Tr. 88. On March 1, 2018, M-Class submitted a proposal to terminate the (k) Order. Ex. C-I. MSHA denied that proposal and provided a list of requirements to be fulfilled for termination. Ex. C-J. M-Class later responded that it did not agree to implement MSHA's requirements. Ex. C-K. It filed a notice of contest on March 15. Finding no conclusive evidence that linked the compressor to Mullins' sickness, MSHA terminated the (k) Order on April 4, 2018. The Secretary did not issue an accompanying citation or penalty assessment.

II. PRINCIPLES OF LAW

Section 103(k) of the Mine Act provides in pertinent part:

2005 to 2011. Tr. 25. He has completed all basic training at the Mine Academy, including retraining and two weeks of accident investigation every other year. Tr. 26.

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).

The occurrence of an “accident” as defined by section 3(k) of the Act is a necessary precondition of the issuance of a section 103(k) Order. *Aluminum Co. of America (Alcoa)*, 15 FMSHRC 1821, 1824 (Sept. 1993); *see also Pinnacle Mining Co.*, 33 FMSHRC 2207, 2221-2225 (Sept. 2011) (ALJ); *Pattison Sand Co., LLC*, 33 FMSHRC 3096, 3142, 2011 WL 6880702 (Dec. 2011) (ALJ). Section 3(k) of the Act defines an “accident” as a “mine explosion, mine ignition, mine fire, or mine inundation, or injury to, or death of, any person.” 30 U.S.C. § 802(k). In this context, section 3(k) should be broadly construed; an event not listed in the definition may nonetheless constitute an “accident” depending on whether its effects are “similar in nature or present[] a similar potential for injury or death as a mine explosion, ignition, fire, or inundation.” *Alcoa*, 15 FMSHRC at 1825-26; *see also Pattison Sand Co. v. FMSHRC*, 688 F.3d 507, 513-14 (8th Cir. 2012). Though an accident need not be a sudden occurrence under section 3(k), the Commission has recognized that all of the listed events require quick action. *Alcoa*, at 1826. The Secretary need not be aware of what exactly the accident entailed or have completed an investigation into the accident prior to issuing a (k) Order. *Jim Walter Res.*, 37 FMSHRC at 1871. The determination should be made on a case-by-case basis. *Alcoa*, at 1826.

The Commission has not explicitly determined the appropriate standard of review of a (k) Order. *See Eastern Assoc. Coal Corp.*, 2 FMSHRC 2467, 2472 n. 7 (1980) (declining to determine whether a 103(k) Order was reviewable under an “‘arbitrary or capricious,’ ‘reasonableness,’ or *de novo* basis”). However, the Commission has recognized that section 103(k) grants the Secretary plenary authority to issue orders the Secretary deems appropriate to ensure the safety of any one in the mine when an accident occurs. *Jim Walter Res.*, 37 FMSHRC 1868, 1870-71 (Sept. 2015). Once an accident has been proved, Commission Judges have thus consistently analyzed (k) Orders under an arbitrary and capricious or an abuse of discretion standard. *See Pattison Sand Co., LLC*, 33 FMSHRC 3096, 3142, 2011 WL 6880702 (Dec. 2011) (ALJ) (“[The arbitrary and capricious] standard appropriately respects the Secretary’s judgment while allowing review for abuse of discretion, errors of law, and review of the record under the substantial evidence test.”), *aff’d*, 688 F.3d 507 (8th Cir. 2012); *see also Pinnacle Mining*, 33 FMSHRC 2207, 2231-33 (Sept. 2011) (ALJ). “The abuse of discretion standard requires the agency to examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” *Clintwood Elkhorn Mining Co.*, 32 FMSHRC 1880, 1893-94 (Dec. 2010) (quoting *Motor Vehicle Mfr’s Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983)); *Pinnacle Mining*, 33 FMSHRC at 2226.

III. DISPOSITION

M-Class argues that the Secretary has not proven by a preponderance of the evidence that an “accident” occurred at the MC #1 Mine. It contends that the Secretary did not produce any

evidence that carbon monoxide was present in the mine that injured or sickened a miner. Contestant's Post-hearing Brief ("Cont. Br.") at 11. Hence the Secretary failed to prove the occurrence of a "sudden event" constituting an accident and the (k) Order should be vacated as invalidly issued. *Id.* M-Class also contends that the scope of the (k) Order was overly broad because MSHA refused to vacate the order and return the compressor back into service until well after Inspector Naas' investigation was completed. *Id.* at 16.

The Secretary argues that Order No. 9104295 was properly issued because Mullins' hospitalization for carbon monoxide poisoning constituted an "accident" as defined by section 3(k) of the Mine Act. Sec'y Br. at 15. The Secretary notes that the responses of Dr. Bosley, MSHA, and M-Class to Mullins' hospitalization demonstrate that Mullins' was injured and that his diagnosis required the "quick action" that the events listed in section 3(k) require. *Id.* at 16; *see also Alcoa*, at 1826. Finally, the Secretary maintains that the scope of the Order and its subsequent modifications were reasonably tailored to the information known to MSHA at the time. *Id.* at 17.

A. Whether the 103(k) Order was Validly Issued

I find that the (k) Order was validly issued. The Secretary has proven by a preponderance of the evidence that an "accident" occurred. Mullins presented symptoms that concerned his fellow miners. He was evacuated from the mine and transported to the local hospital, where he was diagnosed with carbon monoxide poisoning by an emergency room doctor. Mullins spent the next 72 hours on oxygen and under observation at the hospital. Dr. Bosley quickly contacted the local police department to express his concern about Mullins' condition and alerted the local police department that other miners may be exposed to elevated carbon monoxide. Once notified, MSHA immediately contacted the operator and sent an inspector to investigate. Similarly, once M-Class was informed of Mullins' condition, it immediately opened its own investigation and tested every entry through which Mullins traveled for elevated carbon monoxide levels. Tr. 231-32.

Mullins' diagnosis and the rapid response of all involved parties demonstrate that his injury was a sudden event similar in nature to those requiring quick action under § 3(k). *See Alcoa*, 15 FMSRHC at 1826. Carbon monoxide poisoning can be life-threatening and can be indicative of a gas inundation that requires emergency action as contemplated by section 103(k). *Cf. Pinnacle Mining Co.*, 33 FMSHRC 2207, 2222 (Sept. 2011) (ALJ) (holding that elevated carbon monoxide buildup is an event similar to, but not as extensive as, an inundation of gas). Based on the information available to MSHA at the time, Inspector Naas' decision to issue a (k) Order upon his arrival at the MC #1 Mine was based on his belief that Mullins had been injured and that other miners were at risk of unsafe exposure to carbon monoxide. He issued the (k) Order to prevent any additional injuries while he investigated the Headgate #6 section. This was a valid exercise of MSHA's authority under the Act.

M-Class points to the Commission's decision in *Alcoa* to argue that the Secretary failed to prove that a "sudden event" occurred justifying the issuance of the (k) Order. Cont. Rep. at 9. Contestant argues that the Secretary failed to show evidence of elevated carbon monoxide levels

anywhere in the mine or that any other miners on Mullins' shift were adversely affected by similar symptoms. *Id.*

In *Alcoa*, the Commission held that a gradual unplanned release of mercury in an area of the mine did not constitute an "accident" that justified the issuance of a (k) Order. *Alcoa*, 15 FMSHRC at 1827. The Commission found that to determine whether an accident occurred, the Secretary must look to whether the event was similar in nature to the type of sudden events that pose an immediate hazard to miners that require emergency action. *Id.* at 1826. While the Commission noted that accidents need not necessarily be a sudden occurrence and that a gradual release of a toxic chemical may qualify, the mercury buildup did not constitute an accident because the Secretary did not issue a (k) Order for nearly a month following the initial complaint and the Secretary's witnesses in this matter failed to relate the hazards associated with the conditions to the events outlined in Section 3(k)'s definition of "accident." *Id.*

Crucial factual differences distinguish the instant case from *Alcoa* and indicate that Mullins' injury qualified as an "accident" under section 3(k). First, unlike the (k) Order issued 3 months later in *Alcoa*, MSHA received the Escalation Report detailing Mullins' condition and quickly dispatched Inspector Naas to the site to issue the (k) Order and investigate what it believed could be a carbon monoxide release at the mine. MSHA and M-Class' rapid response to Mullins' diagnosis indicates that both considered the injury to be a sudden event justifying quick action as defined by *Alcoa*. 15 FMSHRC at 1826.

M-Class contends that because MSHA failed to detect elevated carbon monoxide levels and because of Mullins' low carbon monoxide concentrations, there was no "sudden event." Here, however, Mullins' hospitalization with carbon monoxide exposure is itself an "accident" as contemplated by section 3(k). Section 3(k) defines an accident as a "mine explosion, mine ignition, mine fire, or mine inundation, *or injury to*, or death of, any person." 30 U.S.C. § 802(k) (emphasis added). Thus, Mullins' symptoms and extensive hospitalization constitute such an injury.

Furthermore, the information contained in the Escalation Report rationally connects Mullins' injury to a potential buildup or elevation of carbon monoxide at the mine similar in nature and presenting a similar potential for injury or death as a gas inundation. Unlike the gradual buildup of mercury in *Alcoa* that lacked a discrete, non-speculative injury related to the buildup, the evacuation and hospitalization of a miner positively diagnosed with carbon monoxide poisoning constitutes an injury that requires quick action to ensure the safety of other miners. Mullins was visibly ill and presented symptoms that prompted his mid-shift evacuation from the mine and subsequently convinced the emergency room physician that he had carbon monoxide poisoning. The Secretary's actions were thus valid under the Commission's framework set forth in *Alcoa*.

M-Class next contends that the (k) Order was invalidly issued because Inspector Naas based his decision to issue the (k) Order on the information contained in the Escalation Report, when in fact a more thorough investigation would have revealed that Mullins did not sustain an injury and was not exposed to carbon monoxide at the mine. Cont. Br. at 11. Contestant points out that no other miners on Mullins' shift fell ill, no spotters present in the mine detected

elevated carbon monoxide levels, the subsequent examination of the compressor did not discover defects or elevated carbon monoxide emissions, and that Mullins' carboxyhemoglobin levels never reached levels that qualify as carbon monoxide poisoning. *Id.* at 12-13. It thus did not amount to an "injury" as contemplated by section 3(k).

In support of its assertion, M-Class offered the expert testimony of Dr. Michael Mullens. Dr. Mullens testified that he would not expect symptoms of carbon monoxide to present at the levels detected in Mitchell Mullins' blood stream. Tr. 190. He also opined that Mullins' carboxyhemoglobin levels were not close to toxic, and that the subsequent drop and rise in those levels during Mullins' stay at the hospital indicate that the tested concentration were more likely to be caused by smoking than by carbon monoxide poisoning. Tr. 191-93.

Although I find Dr. Mullens to be a credible expert witness, his testimony does not fully explain the context of Mullins' sickness and evacuation. Dr. Mullens did not personally observe or treat Mullins' during his stay in the hospital, and thus did not observe his condition firsthand. Tr. 187, 204. His testimony is based only upon his review of Mullins' medical records, and he acknowledged at hearing that it was unlikely that symptoms of carbon monoxide poisoning would present at the concentration levels detected in Mullins' blood, but not impossible. Tr. 190. I thus do not find his testimony to be dispositive in showing that Mullins was not in a condition that could have been life threatening and merited further investigation in order to ensure the safety of other miners.

Without question, M-Class presented credible evidence demonstrating that no elevated carbon monoxide levels were detected at the MC #1 Mine and that Mullins' original diagnosis may not have risen to the level of carbon monoxide poisoning. The court acknowledges these arguments, but notes that MSHA received this information after Naas issued the initial (k) Order. M-Class' interpretation would require the Secretary to conduct a thorough preliminary investigation into the precise conditions surrounding a potential accident, including questioning the medical diagnosis of an emergency room doctor, prior to issuing a (k) Order. This is contrary to the plain language and the intended purpose of section 103(k). Section 103(k) does not require that "the Secretary must be aware of exactly what the accident entailed let alone have completed an investigation into the accident before issuing a section 103(k) order." *Cf. Jim Walter Res.*, 37 FMSHRC 1868, 1870-71 (Sept. 2015). As Congress noted:

[t]he unpredictability of accidents in mines and uncertainty 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...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. 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).

MSHA received information from the local police department that a miner was undergoing medical treatment at a hospital for elevated levels of carbon dioxide in his bloodstream. MSHA quickly acted based on this information to ensure the safety of other miners. The court declines to invalidate MSHA's decision to issue a (k) Order based on the *post hoc* results of the investigation triggered by that Order. Simply because the pursuant investigation did not conclusively demonstrate elevated levels of carbon monoxide in the mine does not render MSHA's decision to issue the (k) Order in response to the information it possessed at the time improper or invalid.

I conclude that the Secretary has proven by a preponderance of the evidence that an accident occurred and that the (k) Order was appropriate to ensure the safety of other miners until the investigation of the Headgate was completed.

B. Whether the Scope of the 103(k) Order was an Abuse of Agency Discretion

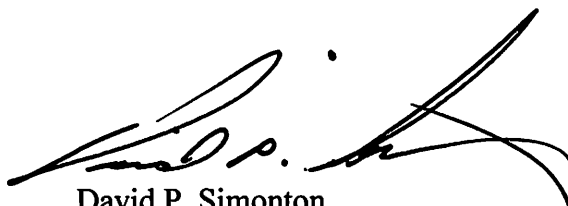
I find that Inspector Naas did not abuse his discretion when he issued the (k) Order to close off the Headgate #6 section based upon the available information and the prevailing belief that Mullins sustained elevated carbon monoxide exposure at the mine. Naas issued the Order upon arrival to quickly conduct an investigation of the Headgate #6 section and to ensure that no imminent danger existed and that other miners no longer faced the risk of serious injury. After examining the mine's gas detection data and personally inspecting the section and finding no risk, Naas expediently modified the (k) Order to allow work in the area. The (k) Order was thus promptly narrowed in scope when Naas determined that miners could safely work in the area.

MSHA's subsequent modification to remove the compressor from service was also rationally connected to the available facts based upon Naas' initial investigation and was reasonably tailored to investigating the suspected cause of Mullins' condition. Inspector Naas credibly testified that the compressor's presence in the area was abnormal and was the only piece of equipment that he could not definitely rule out as a potential source of carbon monoxide. Tr. 67-68. MSHA did not close the entire section nor unreasonably halt operations at the mine. It removed a single compressor from service in order to further investigate whether it posed a safety risk to miners. Thus, the initial decision to remove the compressor was reasonably tailored to the investigation.

The sole issue in this matter is whether the (k) Order was validly issued and reasonably tailored in scope given the information MSHA had at the time of the accident. Thus, I affirm the (k) Order. However, the court sympathizes with M-Class' position and has grave reservations regarding MSHA's subsequent refusal to allow the compressor back into service for over a month. Inspector Naas conducted a thorough investigation of the mine in response to the Escalation Report and modified the (k) Order to allow a resumption of services after discovering no indicia of danger in the Headgate #6 Section. Given the narrow scope of the hearing, neither party presented evidence focused on the compressor's extended removal from service. However, the court struggles to understand how testing of a compressor could take more than a month when Inspector Naas was able to inspect the entire Headgate #6 Section, presumably including the compressor itself, and modify the (k) Order to allow resumption of operations only a few hours after arriving.

Despite this concern, the unique procedural posture of this case does not present an appropriate remedy for MSHA's delay in returning the compressor to service. As explained above, the (k) Order's initial issuance was valid and reasonably tailored to conduct the investigation into Mullins' injury and possible carbon monoxide exposure at the MC #1 Mine. The (k) Order was terminated some ten months ago. The court will defer to the Secretary's determination and declines to vacate a validly issued (k) Order based upon subsequent modifications that are no longer in effect.

Accordingly, the contested Order is **AFFIRMED**.

A handwritten signature in black ink, appearing to read 'D. P. Simonton', with a large, sweeping flourish extending to the right.

David P. Simonton
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Travis W. Gosselin, U.S. Department of Labor, Office of the Solicitor, 230 South Dearborn Street, Room 844, Chicago, IL 60604

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