

Mine Emergency Issues

*By Derek J. Baxter
EMLF Conference – March 2010*

I. 103(k) and (j)

A. Text of the statutory provisions:

(j) In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal or other mine, where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activities in such mine.

(k) 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, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in such mine or to recover the coal or other mine or return affected areas of such mine to normal.

30 U.S.C. §§ 813(j) and (k)

B. Legislative history:

The 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 in section [103(k)] to take appropriate actions and in section [103(k)] 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. 29 (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess. Legislative History of the Federal Mine Safety and Health Act of 1977, at 617 (1978).

C. Case law interpreting MSHA's authority under section 103(k):

1. "Section 103(k) gives MSHA plenary power to make *post-accident* orders for the protection and safety of all persons." Miller Mining Co. v. FMSHRC, 713 F.2d 487, 490 (9th Cir. 1983) (emphasis in original)

2. Determine whether the Secretary abused discretion in issuing order/acted reasonably:

Emerald Coal Resources, LP, 30 FMSHRC 122, 125 (Jan., 2008) (J. Zielinski); Buck Mountain

Coal Co. v. Secretary of Labor, 15 FMSHRC 539, 548 (March, 1993) (J. Barbour); West Ridge Resources, Inc. v. Secretary of Labor, 31 FMSHRC 287, 304 (Feb., 2007) (J. Manning).

D. MSHA's policy clarification on need for inspector to be present to issue 103(k) order:

1. Program Policy Letter: P09-V-09 (Aug. 12, 2009)
2. Procedure Instruction Letter: I09-V-8 (Sept. 10, 2009)

II. Preservation of the accident scene

A. Section 103(j) of the Mine Act:

In the event of any accident occurring in any coal or other mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof.

B. 30 CFR 50.12:

Unless granted permission by a MSHA District Manager, no operator may alter an accident site or an accident related area until completion of all investigations pertaining to the accident except to the extent necessary to rescue or recover an individual, prevent or eliminate an imminent danger, or prevent destruction of mining equipment.

III. Immediate reporting requirements

A. New language

1. Change to 30 CFR 50.10, which now reads:

The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred.

2. Miner Act:

SEC. 5. PROMPT INCIDENT NOTIFICATION.

(a) IN GENERAL.--Section 103(j) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 813(j)) is amended by inserting after the first sentence the following: "For purposes of the preceding sentence, the notification required shall be provided by the operator within 15 minutes of the time at which the operator realizes that the death of an individual at the mine, or an injury or entrapment of an individual at the mine which has a reasonable potential to cause death, has occurred."

(b) PENALTY.--Section 110(a) of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 820(a)) is amended—

(1) by striking "The operator" and inserting "(1) The operator"; and

(2) by adding at the end the following:

"(2) The operator of a coal or other mine who fails to provide timely notification to the Secretary as required under section 103(j) (relating to the 15 minute requirement)

B. Preamble to the final rule

1. From the preamble to the final rule, 71 FR 71430, 71435 (Dec. 8, 2006):

Timely reporting can be crucial in emergency, life-threatening situations to activate effective emergency response and rescue. Not only can this be vital to the saving of lives, but it can be instrumental to having expert Agency personnel at the scene with authority to assure that the accident site remains undisturbed and preserved for investigation into causes. For remote operations, it enables MSHA to quickly communicate with local rescue and emergency services. While many reported accidents do not involve an injury or are non-emergencies, they may be near misses or signify a trend or problem that left uncorrected can be extremely hazardous. Fires, explosions, and gas and water inundations are of special concern.

If a situation were to arise involving extenuating circumstances, such as an operator having to choose between saving someone's life and notifying MSHA, enforcement discretion would take those circumstances into account. MSHA does not expect that an operator who has to make a decision between rendering life-saving assistance and calling MSHA would be penalized for providing that assistance.

At 71435-71436:

Consistent with current case law and interpretation of the notification provision, the final rule alternatively uses the clarifying terms “once the mine operator knows or should know,” based on the judgment of a reasonable person.

2. The preamble references prior Commission cases reviewing other reporting requirements:

- Secretary of Labor v. Cougar Coal Co., Inc., 25 FMSHRC 513 (2003): judgment as to what constitutes a “reasonable potential to cause death” is based on what a reasonable person would discern under the circumstances.
- Secretary of Labor v. Consolidation Coal Co., 11 FMSHRC 1935 (1989)

3. MSHA promulgated the new immediate reporting requirement as a mandatory standard.