FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 26, 2019

KNIGHT HAWK COAL, LLC, Contestant v. SECRETARY OF LABOR, MINE SAFETY & HEALTH ADMINISTRATION (MSHA) Respondent	CONTEST PROCEEDING Docket No. LAKE 2019-0087-R Citation No. 9035600; 11/14/2018 Mine: Prairie Eagle Underground Mine ID: 11-03147

ORDER DENYING THE SECRETARY OF LABOR'S MOTION IN LIMINE

Before: Judge McCarthy

I. STATEMENT OF THE CASE

This proceeding is before the undersigned on a Notice of Contest and separate Motion to Expedite filed November 15, 2018, by Knight Hawk Coal, LLC, pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d) ("Mine Act") and Commission Procedural Rule 20(b). The contest challenges technical Citation No. 9035600-01, as modified, issued to Contestant on November 14, 2018 for operating without an approved ventilation plan under 30 C.F.R. § 75.370(a)(1).[1]

Contestant's existing ventilation plan for the Prairie Eagle Underground Mine ("Mine") was revoked by MSHA's District 8 manager on November 14, 2018, after months of negotiations resulted in alleged impasse over various previously-approved ventilation plan provisions. The Citation alleged that in numerous discussions, and by letters dated April 12, May 3, June 7, and October 22, 2018, MSHA advised Contestant of concerns and of certain issues required to be addressed in its ventilation plan." The Citation, in more specific detail set forth therein, identified the following five deficiencies: (1) The designs of the typical bleeder system does not control the air direction through all individual "blocks", including the air direction in the pillared area within each "block". [30 C.F.R. §§ 75.334(b)(1), 75.334(c)(4), 75.371(bb), and 75.372(b)(9)] . . . (2) The method to control air movement to ventilate the unbolted extended-depth perimeter cuts within the pillared area is not provided. The extended

[1] The contest alleges that the citation was invalidly issued under the Act and applicable regulations, the inspector's evaluation lacks foundation in fact or law, and the revocation of the previously-approved ventilation plan involving perimeter mining was arbitrary, capricious, and unreasonable.

cuts are part of the pillared area within the worked-out area, and the air must be controlled to ensure effective ventilation of the extended-depth cuts. [30 C.F.R. §§ 75.334(b)(l), 75.334(c)(4), 75.371(bb), and 75.372(b)(9)] . . . (3) The air direction through all individual "blocks", including the air direction in the pillared area within each "block", is not shown in the ventilation plan drawings or on the ventilation map. [30 C.F.R. §§ 75.364(a)(2)(iii) and 75.372(b)(9)] . . . (4) The air direction at EP locations is not shown in the ventilation plan drawings or on the ventilation map. [30 C.F.R. §§ 75.364(a)(2)(iii), 75.371(y), 75.371(z), and 75.372(b)(9)] . . . (5) The specified means of evaluation of the worked-out area does not provide sufficient information to determine the effectiveness of the bleeder system, including (a) whether air was moving in the proper direction through all "blocks," including the bleeder entries and pillared areas in each "block"; (b) the means to reasonably assure ventilation of the extended-depth portions of the pillared areas; or (c) the effectiveness of ventilation through the worked-out area. [30 C.F.R. §§ 75.334, 75.364(a)(2)(iii), 75.364(a)(2)(iv), 75.371(y), and 75.371(z)].

On November 20, 2018, Respondent filed its Answer to Notice of Contest and admitted that the citation was issued after Respondent determined that Contestant was mining without an approved ventilation plan under conditions alleged to be a violation of the cited mandatory standard. On November 26, 2018, this case was assigned to the undersigned. Thereafter, on November 27, 2018, Respondent filed an Opposition to Contestant's Motion to Expedite.

In its Motion to Expedite, Contestant alleges that revocation of the approved ventilation plan permitting perimeter mining was arbitrary, capricious, and unreasonable. Contestant argues that eleven years of mining history shows that perimeter mining is a safe and acceptable method of mining that results in lower exposure to respirable dust, noise, and red or danger zones; a lower citation and injury rate; elimination of all hazards associated with roof bolting; superior overall ventilation of the entire perimeter panel, as compared to longwall gob and pillared areas; and adequate ventilation to ensure that methane-air mixtures and other gases, dusts, and fumes from worked-out areas are continuously diluted and routed away from active workings into a return air course or to the surface. Further, Contestant alleges that the previously-approved ventilation plan is consistent with MSHA Program Policy Letter No. P13-V-12, which addresses evaluation of bleeder systems and states, "[i]t is anticipated that District Managers would not suggest changes to relevant portions of existing approved ventilations plans absent conditions affecting the safety or health of miners that arise following the issuance and effective date of this PPL." Finally, Contestant requested an expedited hearing by the end of January 2019 to promote judicial economy and to ameliorate claimed irreparable harm to Contestant's method of production and miners.

In its Opposition, Respondent argues that Contestant has failed to show "extraordinary or unique circumstances resulting in continuing harm or hardship," and that this complex case will require extensive discovery and expert testimony about air sampling data and ventilation controls, thereby making an expedited hearing inappropriate.

After various conference calls and email exchanges with the undersigned, the parties eventually agreed to hearing dates on March 28-29 and April 1, 2019 in St. Louis, Missouri.[2]

On February 5, 2019, the Secretary of Labor filed a Motion in Limine ("Motion") to exclude three types of evidence at the hearing: (1) the introduction of any evidence concerning MSHA's approval, rejection, or revocation of ventilation plans other than the Prairie Eagle Underground Mine; (2) all evidence and testimony, including expert testimony, that was not part of the record available to MSHA District 8 Manager, Ronald Burns, when he decided to revoke the Mine's ventilation plan; and (3) and testimony from former MSHA ventilation supervisor, Mark Eslinger. The Secretary argues that under the arbitrary and capricious standard of review adopted by the Commission in *Prairie State Generating Co., LLC*, 35 FMSHRC 1985 (July 2013) (*Prairie State I*), *aff'd* 792 F.3d 82 (D.C. Cir. 2015) (*Prairie State II)* and *Mach Mining, LLC*, 32 FMSHRC 149 (Jan. 2010) (*Mach Mining I*), *aff'd* 728 F.3d 643 (7th Cir. 2013) (*Mach Mining II*), MSHA's approval or rejection of ventilation plans at other mines is irrelevant to whether MSHA's revocation of the Mine's ventilation plan was arbitrary and capricious. Rather, the Commission need only determine whether District Manager Burns "[made] a full appraisal of the relevant and available facts, and [was] reasonable in his conclusions." Motion at 4. The Secretary also argues that information that was not presented to District Manager Burns during the parties' negotiations is irrelevant to the threshold question of whether the parties engaged in good-faith negotiations for a reasonable period of time regarding the disputed ventilation plan. *See Twentymile Coal Company*, 30 FMSHRC 736, 748 (Aug. 2008); *Prairie State II*, 792 F.3d at 93. Finally, the Secretary argues that Eslinger should not be permitted to testify because his opinions regarding perimeter mining are irrelevant under the arbitrary and capricious standard, and were not presented to District Manager Burns during negotiations over the ventilation plan.

On February 13, 2019, Contestant filed a Response ("Response") in Opposition and argues that the Secretary's Motion should be denied. Alternatively, Contestant requests an opportunity to present excluded evidence by offer of proof to generate a full record for Commission review. Response at 14.[3] Contestant argues that the Secretary bears the burden of proving that the operator's proposed ventilation plan is "unsuitable" for the Mine under Commission precedent in *C.W. Mining Co.*, 18 FMSHRC 1740 (Oct. 1996), *Peabody Coal Co.*, 18 FMSHRC 686 (May 1996), *Peabody Coal Co.*, 15 FMSHRC 381 (Mar. 1993), and *Carbon Cty. Coal Co.*, 7 FMSHRC 1367 (Sept. 1985). Response at 2. The Contestant further argues that the Commission's *Prairie State I* decision contradicts such prior Commission precedent, without

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[2] The schedule for the hearing reflects an agreement resolving a misunderstanding between the parties about testimony to be taken from Contestant's expert. Specifically, on January 16, 2019, Contestant filed a motion to keep the record open after the hearing to take expert testimony due to a scheduling conflict. Contestant styled the motion as "unopposed," but the Secretary did oppose the motion, as written. During a subsequent conference call with the undersigned, the parties agreed to set aside an additional day – April 1, 2019 – to take testimony that could not be taken on March 28-29, 2019.

[3] During a February 28, 2019 conference call, Contestant indicated that should the undersigned grant the Secretary's Motion, Contestant would seek to make its offer of proof in question and answer format.

explicitly overruling it. Response at 2-3. Although the Commission applied the arbitrary and capricious standard of review to the district manager's revocation of a ventilation plan in *Prairie State I*, Contestant observes that the Commission cited to *C.W. Mining*, 18 FMSHRC at 1746, which requires the Secretary to show that the plan is unsuitable for the conditions of the mine. Response at 3, citing *Prairie State I*, 35 FMSHRC at 1989-90. *See also*, *Prairie State I*, 35 FMSHRC at 2002 (Young, C., dissenting). Finally, Contestant emphasizes that the operator is charged with developing the ventilation plan, not the Secretary. *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C. Cir. 1976). Contestant concludes that the arbitrary and capricious standard of review grants the district manager too much latitude to approve or reject a ventilation plan, and de facto transfers the responsibility for formulating the plan to the district manager. Response at 9-10.

II. LEGAL PRINCIPLES AND ANALYSIS

Section 303(o) of the Mine Act provides:

> (o) A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and approved by the Secretary shall be adopted by the operator and set out in printed form within ninety days after the operative date of this title. The plan shall show the type and location of mechanical ventilation equipment installed and operated in the mine, such additional or improved equipment as the Secretary may require, the quantity and velocity of air reaching each working face, and such other information as the Secretary may require. Such plan shall be reviewed by the operator and the Secretary at least every six months.

The cited regulation at issue in this case is 30 C.F.R. § 75.370(a)(1), which provides:

> The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in § 75.371 and the ventilation map with information as prescribed in § 75.372. Only that portion of the map which contains information required under § 75.371 will be subject to approval by the district manager.

30 C.F.R. § 75.370(a)(1).

The prehearing issues raised by the Secretary's motion in limine concern what evidence should be excluded at the hearing. Commission Procedural Rule 63(a) states that relevant evidence, including hearsay, which is not unduly repetitious or cumulative, is admissible. Determinations as to admissibility of evidence at hearing are left to the sound discretion of the trial judge. *Marfork Coal Co.*, 29 FMSHRC 626, 634 (Aug. 2007) (noting that an abuse of discretion standard is consistent with the discretion accorded the trial judge managing the hearing).

The Secretary contends that the undersigned should evaluate District Manager Burns' decision to revoke Contestant's previously-approved ventilation plan under an arbitrary and capricious standard of review and only consider evidence actually presented during plan negotiations. Contestant argues that the statutory and regulatory phrase "suitable to the conditions and mining system at the mine" supports consideration of all evidence related to the suitability of the disputed ventilation plan when deciding whether the district manager's revocation of the ventilation plan was erroneous, even under the arbitrary and capricious standard. In my view, it is premature and imprudent in this case to decide disputed evidentiary issues in a vacuum decoupled from the crucible of trial.

Commission case law regarding the standard of review applicable to determining whether a district manager's rejection of a ventilation plan is erroneous appears to be in a state of flux. In *Signal Peak Energy*, 40 FMSHRC 1059 (Aug. 2018), *appeal docketed*, No. 18-72837 (9th Cir. Oct. 19, 2018), the Commission recently split 2-2 on what standard of review applies when considering an MSHA district manager's revocation of a ventilation plan.[4] Then Chairman Jordan and Commissioner Cohen affirmed the judge's application of the "arbitrary and capricious" standard of review of the district manager's decision to reject a ventilation plan submitted by the operator. *Signal Peak Energy*, 40 FMSHRC at 1064.[5] They relied on *Mach Mining II*, 728 F.3d at 657-58, where the Seventh Circuit found that that a Commission majority correctly determined that a district manager's refusal to approve a ventilation plan should be reviewed deferentially under an arbitrary and capricious standard, and on *Prairie State II*, 792 F.3d at 91-92, where the D.C. Circuit held that the arbitrary and capricious standard of review applied by the Commission majority to the Secretary's plan-suitability determination "was at least a permissible one." *Id.* at 93.

By contrast, Commissioners Young and Althen found that the judge applied the wrong legal standard and that substantial evidence did not support a finding that the operator's plan was unsuitable to provide safe and healthful ventilation at the specific mine. *Signal Peak Energy*, 40 FMSHRC at 1074. They opined that *Mach Mining I* and *Prairie State I* were wrongly decided, but found that those Commission decisions were upheld by the circuit courts as permissible interpretations, making it unnecessary to reject such circuit court precedent because substantial evidence did not support rejection of the operator's proposed ventilation plan when analyzed

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[4] Accordingly, the judge's decision to apply the arbitrary and capricious standard of review was affirmed under *Pennsylvania Elec. Co.*, 12 FMSHRC 1652 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

[5] Generally, under the arbitrary and capricious standard of review, a district manager's decision would be set aside only where MSHA "relied on factors which Congress [had] not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Signal Peak Energy*, 40 FMSHRC at 1065, citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

under the safety standard at issue. *Id.* at n.10.[6] They observed that the Commission has taken conflicting positions on the Secretary's burden of proof, comparing the *Peabody Coal* and *C.W. Mining* cases cited by Contestant in his Response, with both the *Mach Mining I* and *Prairie State I* cases cited by the Secretary in his Motion. *Signal Peak Energy*, 40 FMSHRC at 1075-76.[7]

Commissioners Young and Althen relied on *Canyon Fuel Co., LLC*, 39 FMSHRC 1578 (Aug. 2017), *aff'd in part and vacated in part*, 894 F.3d 1279, 1296-1300 (10th Cir. 2018), where the Tenth Circuit reversed another 2-2 split Commission decision and found that that the Secretary failed to establish a violation of 30 C.F.R. § 75.380(d)(5), which provides that "[e]ach escapeway shall be ... [l]ocated to follow the most direct, safe and practical route to the nearest mine opening suitable for the safe evacuation of miners."[8] Relying on Commission precedent, the Tenth Circuit stated:

> To establish a violation of § 75.380(d)(5), however, "[i]t is insufficient for the Secretary to merely cite the designated route as being out of compliance with the regulation." *S. Ohio Coal*, 14 FMSHRC at 1785. Rather, "it is the Secretary's burden to prove that, as compared to the designated route, there is at least one other escapeway route that [he] has determined more closely complies with the standard's requirement."

894 F.3d at 1295-96.

Acting Chairman Althen and Commissioner Young concluded that the phrase "suitable to the conditions and mining system at the mine" set forth in 30 C.F.R. § 75.370(a)(1) is sufficiently analogous to the "suitable for the safe evacuation of miners" in 30 C.F.R. § 75.380(d)(5) such that the Tenth Circuit's analysis was persuasive.[9] They stated:

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[6] Commissioners Young and Althen declined to characterize their view on the Secretary's burden of proof as a "standard of review," stating that "the outcome of a suitability determination in this case does not depend upon a didactic characterization of the standard of review as beyond a preponderance of the evidence or abuse of discretion." *Id.* at 1079.

[7] *But see Mach Mining II*, 728 F.3d at 658 n.21, noting that further explanation regarding departure from precedent by the Commission was unnecessary given the court's conclusion that the statute's regulatory scheme requires a more deferential standard of review.

[8] The deadlocked Commission left standing the judge's finding that the escapeway used by the operator was not the most direct, safe and practical route to the nearest mine opening "suitable" for the safe evacuation of miners.

[9] Commissioners Young and Althen recognized the unusual suitability provision in section 75.380(d)(5), which may require comparison of alternative "suitable" escapeways to determine whether the one designated by the operator is "the most direct, safe and practical route," unlike section 303(o), which mandates only that the ventilation plan be suitable. 40 FMSHRC at 1077 n.7. They emphasized, however, that the Tenth Circuit required an initial determination of whether the escapeway developed by the operator was suitable, and only then was the

> Thus, section 303(o) [of the Mine Act] does not call for MSHA to develop a plan of its own and impose such plan upon the operator. Suitability is the standard. If the operator's plan is suitable – this is, is appropriate for maintaining adequate ventilation and respirable dust control, then it meets the requirements of section 303(o).

Signal Peak Energy, 40 FMSHRC at 1079.[10]

Given apparent evolving Commission precedent concerning the appropriate standard of review for evaluating a district manager's revocation of a mine's ventilation control plan, the recent change in Commission composition,[11] and the prerogative of the new Commission to rationally explain reversal of existing precedent,[12] even in light of appellate court or Supreme Court affirmation of existing precedent,[13] the undersigned concludes that Contestant's proffered evidence may be sufficiently relevant under either a de novo review of proof of suitability based on a preponderance of substantial evidence or an arbitrary and capricious standard of review, such that denial of Respondent's motion in limine is warranted.

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comparison aspect of the specific regulation triggered. *Id.* at 1078. Commissioners Young and Althen fundamentally concluded that "the test of suitability is not which plan MSHA might prefer, but instead whether the plan (i.e., route in *Canyon Fuel*) proffered by the operator is suitable. In other words, the suitability determination is not an opportunity for MSHA to design a route or develop a plan for the operator. In their view, MSHA's duty is to review the plan submitted by the operator and determine whether it achieves the requisite safety and health requirements at the specific mine." 40 FMSHRC at 1077. They faulted MSHA in both *Signal Peak* and *Canyon Fuel*, for failing to analyze the operator's plan in terms of its suitability for achieving the safety and health requirements at the specific mine. 40 FMSHRC at 1077 n.7.

[10] The Commission's split decision in *Signal Peak Energy* is pending with briefs filed in the United States Court of Appeals for the Ninth Circuit.

[11] Chairman Marco M. Rajkovich, Jr. and Commissioners William I. Althen and Arthur R. Traynor, III were sworn into office on Monday, March 25, 2019. They join Commissioners Mary Lu Jordan and Michael G. Young to form a new five-member Commission.

[12] *See e.g., Mach Mining II*, 728 F.3d at 658 n.21, citing *Lone Mountain Processing, Inc. v. Sec'y of Labor*, 709 F.3d 1161, 1164 (D.C. Cir. 2013) ("[a]s we have long held, an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored.") (internal citations omitted).

[13] *See, e.g., John Deklewa & Sons*, 282 N.L.R.B. 1375 (1987), *enforced sub nom. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers Local 3 v. NLRB*, 843 F.2d 770, 780-81 (3d Cir. 1988), *cert. denied*, 488 U.S. 889 (1988) (overruling previous Board interpretation of section 8(f) of the National Labor Relations Act despite the Supreme Court's affirmance of the Board's previous interpretation in *NLRB v. Iron Workers*, 434 U.S. 35 (1978)).

Contestant seeks to offer evidence concerning the rejection of ventilation plans involving perimeter mining at other mines to support its contention that District Manager Burns' course of conduct resulted in an arbitrary and capricious decision in this case. Response at 10-11. Contestant argues that starting in 2017, District Manager Burns "engaged in a systematic program of seeking to eliminate perimeter mining in District 8 despite its long use and approval. It involved revocation of plans at Arch Coal's Viper Mine, denial of a perimeter mining plan at Peabody Midwest's Gateway North Mine, the evaluation of perimeter mining at Peabody Midwest's Gateway Mine and the revocation of Knight Hawk's plan." *Id.* at 10. Contestant argues that "[t]he District Manager was fully aware of this history during discussions with Knight Hawk of this history. Further, it was clear throughout the process of discussions with MSHA that the safety aspects of perimeter mining [were] presented to the District Manager." *Id.* at 11. If, as the Secretary states in his Motion at 5 that "[t]he initial question in ventilation plan cases is whether MSHA and the operator engaged in good-faith negotiations for a reasonable period of time regarding the proposed plan," evidence that the District Manager has embarked on a pattern of rejecting or revoking perimeter mining ventilation plans, arguably without demonstrating adverse risks to miner safety and health under the previously-approved plan, is relevant to whether MSHA engaged in good-faith negotiations or arbitrary and capricious decision-making.

The undersigned finds little risk of prejudice to the Secretary should Contestant's evidence be considered at hearing. There are no jury trials at the Commission. Therefore, the risk of confusing or misleading the trier of fact as to the appropriate burden of proof or standard of review is greatly diminished. Moreover, a Commission judge is capable of distinguishing information that was actually presented to the district manager during discussions over the Mine's ventilation plan from information that was not presented, but arguably may have influenced the district manager's decision making, and such judge can parse through a complete and thorough record when issuing findings of fact.

By contrast, excluding the Contestant's evidence at this stage would prevent the Contestant from developing a complete and thorough record should either party seek further review of the trial decision, which could significantly delay the resolution of this case should the undersigned be required on remand to further develop the record or consider evidence that could have been fully developed or considered in the first instance. Furthermore, Contestant's counsel represented during the parties' February 28, 2019 conference call that the form of the offer of proof that he would seek should the undersigned grant Respondent's motion in limine would be by question and answer format of excluded testimony. While the undersigned has discretion to deny the requested form of such proffer based on my statutory and regulatory authority to control and manage the hearing,[14] granting the Secretary's Motion and allowing the Contestant to submit its offer of proof to fully develop the record for Commission review is unlikely to save much additional time or resources at hearing. Therefore, in the undersigned's view, a balancing of interests weighs in favor of giving Contestant a full and fair opportunity to present all "[r]elevant

[14] See Administrative Procedure Act, 5 U.S.C. § 556(c)(3) and (5) and Commission Procedural Rules 55(c)(3) and (5).

evidence, including hearsay evidence, that is not unduly repetitious or cumulative" or privileged, at hearing. *See* Commission Procedural Rule 63(a).

The Secretary relies on the Commission's decision in *Prairie State I* to argue that the undersigned should not consider any evidence that was not previously submitted to District Manager Burns in the course of discussions over the ventilation plan. While the Secretary does cite language in *Prairie State I* where the Commission affirmed the decision of the judge to exclude evidence that had not been presented to MSHA prior to the district manager's final decision on the proposed plan, the Commission affirmed that decision as one within the judge's discretion and not an absolute legal requirement. *Prairie State I*, 35 FMSHRC at 1996. ("Accordingly, we conclude that the Judge did not abuse her discretion in excluding specific evidence that had not been presented to MSHA for consideration prior to the district manager's final determination."). As explained above, Contestant's yet-proffered evidence regarding an alleged policy or practice to preclude or marginalize perimeter mining within District 8 appears to be relevant to whether the operator's previously-approved ventilation plan was no longer suitable to achieve the safety and health ventilation requirements at the Mine, or whether District Manager Burns acted in an arbitrary and capricious manner by revoking the plan now deemed deficient under certain mandatory standards. Furthermore, based on an alleged deposition admission, Contestant asserts that District Manager Burns relied on Program Policy Letter No. P13-V-12, applicable to Examination, Evaluation and Effectiveness of Bleeder Systems, and that Contestant was subjected to evaluation of extended cuts in the worked out area of perimeter mining under Procedure Instruction Letter I12-V-11, each time it added a mining unit. Accordingly, such documents appear to be relevant.

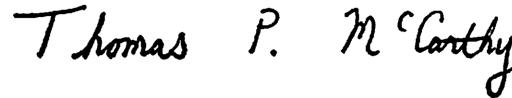
Finally, the undersigned concludes that the testimony of Mark Eslinger, former MSHA ventilation specialist for District 8, appears to be relevant to the issues presented for hearing. Contestant asserts that Eslinger would testify to the history of approval and safety of perimeter mining plans in District 8, including Knight Hawk's revoked ventilation plan. Response at 11. In his deposition, provided by the Secretary, Eslinger testified to an understanding that District Manager Burns wanted to eliminate perimeter mining in District 8. Eslinger Deposition, Tr. 27:19-29:23. Under the Young/Althen suitability approach, whether the district manager failed to consider whether perimeter mining under the previously-approved ventilation plan was suitable to achieve the safety and health ventilation requirements at the Mine is relevant to the undersigned's review of the District Manager's decision and whether the Secretary sustains his burden of proof. Under the arbitrary and capricious standard of review adopted by then Chairman Jordan and Commissioner Cohen in *Signal Peak Energy,* whether District Manager Burns revoked the Mine's ventilation plan due to pre-established conclusions or policy about perimeter mining, without regard to whether the evidence submitted by Knight Hawk showed that its plan remained suitable under section 303(o) of the Mine Act and 30 C.F.R. § 75.370(a)(1), is relevant to whether MSHA relied on inappropriate factors to guide its decision making, failed to consider an important aspect of the problem, or offered an explanation counter to the evidence, or that is implausible or inconsistent with agency expertise. Since Contestant avers that Eslinger was part of the MSHA committee that revised the ventilation standards in 1988, 1992 and 1996 (see Response at 12), his opinion testimony may be germane to compliance or non-compliance with cited mandatory standards in the technical citation. Therefore, under

either approach articulated by the Commissioners' separate opinions in *Signal Peak Energy*, the testimony of Eslinger appears sufficiently relevant to warrant consideration at hearing.

The Secretary argues that Eslinger's opinions should have been presented to the District Manager prior to issuance of the subject citation. But the Mine Act contemplates situations where a party may need to submit evidence to a reviewing body that was not heard by the initial decision maker. For example, as the Seventh Circuit recognized in *Mach Mining II*, while judicial review is usually based on the record created by the Commission, a party may obtain permission to supplement the record if the additional evidence is material and there are reasonable grounds for failure to adduce such evidence below. *Mach Mining II*, 728 F.3d at 653, citing section 106(a)(1) of the Mine Act. Here, Eslinger's deposition testimony states that he was told by industry and MSHA representatives that District Manager Burns wants to get rid of perimeter mining. Eslinger Deposition, Tr. 28-32. Such testimony, if credible, may be relevant and material to my disposition of this matter, and it arguably would have been futile to present such evidence during the negotiation process to the same district manager alleged to be hostile toward perimeter mining.

III. CONCLUSION

For the foregoing reasons, the Secretary's Motion in Limine is **DENIED**.



Thomas P. McCarthy
Administrative Law Judge

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