FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 21, 2010

PRAIRIE STATE GENERATING CO.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. LAKE 2009-711-R
	:	Citation No. 6680548;09/17/2009
	:	
	:	Docket No. LAKE 2009-712-R
v.	:	Citation No. 6680549;09/17/2009
	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Lively Grove Mine
ADMINISTRATION, (MSHA),	:	Mine ID 11-03193
Respondent	:	

DECISION

Appearances: R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for Contestant;
Peter Nessen, Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Respondent.

Before: Judge Miller

These cases are before me upon Contestant's request for a hearing to challenge citation numbers 6680548 and 6680549 issued pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act" or "Mine Act"). The citations allege that Prairie State Generating Company, LLC ("PSGC") was operating its mine with an unapproved ventilation plan in violation of 30 C.F.R § 75.370(d) and an unapproved roof control plan in violation of 30 C.F.R. § 75.220(a)(1). The cited standards require, in essence, that the mine operator develop and follow a ventilation and roof control plan approved by the Secretary.

On August 28, 2009, PSGC re-submitted a ventilation and roof control plan dated July 31, 2009, to the Mine Safety and Health Administration ("MSHA"). The parties entered into negotiations and discussed various plan provisions. In September 2009, PSGC communicated its intent to implement the unapproved plan in order to bring this contest. By agreement between MSHA and the Contestant the mine began operation without an approved ventilation plan or approved roof control plan in place. Subsequently, on September 17, 2009, MSHA issued two citations signed by Inspector Keith Roberts. In addition, MSHA sent deficiency letters to PSGC that addressed the points at issue in each plan. Ex. M-3 (letter on ventilation plan); Ex. M-4 (letter on roof control plan). The letters and the citations list the specific items that are in dispute in both the roof control and ventilation plans. The parties stipulated at hearing to certain items listed in the citations. Specifically, the parties agreed that a number of items listed on the

operator's "contested issues" list are no longer in contention. Further, any item listed as "not in contention" has been withdrawn from the contest in this matter and will not be addressed in this decision.

MSHA argues that the items set forth in the deficiency letters that were not eliminated prior to hearing should be included in the specific plans in a manner that meets MSHA's goals of providing safe and effective ventilation and roof control plans for the mine. PSGC argues that the plans it proposes are safe and mine specific. One of the primary issues is the use of extended cuts; that is, instead of using the normal 20-foot cut by the continuous mining machine, the mine seeks to use an extended cut of 40 feet. MSHA seeks to impose a performance method at the mine which would first use 20-foot cuts, be evaluated for effectiveness, and then move to a 30-foot cut and eventually to a 40-foot cut. A secondary and related issue in both plans is the use of wider than normal entries.

PSGC's Lively Grove mine is newly opened and the plans at issue are the first plans to be put in place. Therefore, any issue regarding the suitability of a plan that is already in place is not raised here. Instead the Secretary must prove that the district manager did not abuse his discretion in determining that the plans proposed by MSHA are suitable to the Lively Grove mine. The Secretary argues that the district manager, with the assistance of others at MSHA, reviewed all factors and reached a reasonable conclusion regarding the plans. In this case, the assistance of others includes direction from the national office regarding the use of extended cut mining and wide entries. Lively Grove on the other hand argues that the district manager did abuse his discretion, did not consider all of the data available to him, and used an "across-the-board" policy regarding the use of extended cuts.

The first contested citation, Citation No. 6680548, alleges a violation of 30 C.F.R. § 75.370(d), which states that "[n]o proposed ventilation plan shall be implemented before it is approved by the district manager." In deciding whether to approve a proposed ventilation plan MSHA looks to § 75.370(a), which provides in pertinent part that "[t]he operator shall develop and follow a ventilation plan approved by the district manager [and] [t]he plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine." 30 C.F.R. § 75.370(a).

The second contested citation, Citation No. 6680549, alleges a violation of 30 C.F.R. § 75.220(c), which states that "[e]ach mine operator shall develop and follow a roof control plan, approved by the District Manager, that is suitable to the prevailing geological conditions, and the mining system to be used at the mine."

As a general matter, the Commission has held that plan formulation under the Mine Act requires MSHA and the operator to negotiate in good faith for a reasonable period of time concerning disputed plan provisions. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.,* 18 FMSHRC 1740, 1747 (Oct. 1996). In this proceeding the parties have stipulated that they have negotiated in good faith.

For reasons that follow below, I affirm Citation No. 6680548 and Citation No. 6680549 and dismiss PSGC's contest proceedings.

I. FINDINGS OF FACT

Lively Grove is an underground coal mine that will exclusively serve a new 1,600 megawatt generating facility that is under construction adjacent to the mine. Stip. ¶¶ 2, 3. PSGC is an operator within the meaning of the Act, and is subject to the jurisdiction of the Mine Act. Stip. ¶¶ 6, 7.

The dispute in this case centers on whether 40-foot cuts and extra wide entries, without previous testing or evaluation, are a suitable part of the ventilation and roof control plans, given the conditions at the mine.

Inspector Keith Roberts, who has more than 30 years of mining experience, testified that he reviewed the ventilation plan at issue and drafted the deficiency letter. (Tr. 40, 43); Ex. M-3. Roberts explained the review process and the use of a checklist to ascertain whether each issue had been covered in the proposed plan. (Tr. 44-45); Ex. M-5. Roberts reviewed the ventilation plan dated August 28, 2009, Ex. M-1, and, after consultation with the district manager and armed with information from MSHA and the mine, drafted the list of deficiencies contained in the letter. (Tr. 47); Ex. M-3.

The mine plan called for the use of extended cuts, i.e., 40-foot cuts. The agency's position is that the mine must start with a standard 20-foot cut plan and use a performance-based approach to verify that the methane and respirable dust control standards could be met before a 30-foot cut could then be tested. If 30-foot cuts were then tested and found to meet the standards, then 40-foot cuts could be evaluated. (Tr. 49). Roberts, and subsequently district manager Robert Phillips, relied upon a procedural instruction letter ("PIL") that outlines the procedures for evaluating a request for extended cuts. (Tr. 50); Exs. M-13, M-14. Roberts is aware that mines in this area of Illinois can experience significant amounts of methane liberation and a significant number of roof falls. In order to avoid these at the outset, Phillips determined that cuts beyond the standard 20-foot cut should be evaluated prior to moving to longer cuts.

Shorter cuts allow for better methane and roof control according to Roberts. (Tr. 53-55). Section 75.330 sets the standard cut at 10 feet, however, over the years it has become an accepted practice to begin with cuts of 20 feet. (Tr. 55-56). It is the opinion of Roberts that "taking a deeper cut is never safer than taking a shorter cut." (Tr. 60). Many of the other issues addressed in the ventilation plan are based upon the 40-foot cut requested and, therefore, hinge on the approval of the depth of the cut. (Tr. 68-69).

Mark Odum, the roof control specialist for District 8, has more than 25 years of mining experience. He has a bachelor's degree in mining engineering, has worked in coal mines, and began work as a mine inspector with MSHA in 1991. Odum was responsible for reviewing the PSGC roof control plan, evaluating the plan, and drafting the deficiency letter. (Tr. 144-146); Exs. M-4, M-2. Odum described exhibit M-6 as the checklist used for a roof control plan

review, and acknowledged that the list was used as a guideline when he reviewed the plan at issue. Odum also agreed that a shorter cut, in terms of roof control, is always the safer option.

Robert Phillips, the MSHA district manager in Vincennes, Indiana at the time of this dispute, has been in the mining industry in various positions since 1960 and was employed by MSHA for 27 years. (Tr. 207-208). Phillips arrived in District 8 in the fall of 2007, and upon his arrival learned that the district had the largest number of unintentional roof falls and the largest number of respirable dust over-exposures of all the MSHA districts. He was instructed that part of his mission was to reduce these figures. (Tr. 217). Phillips, as a part of his efforts to reduce the overall roof falls in the district, asked the administrator for coal and the chief of health from MSHA to make presentations to the mine operators in District 8 regarding extended cuts.

In addition, Phillips changed the parameters in the roof and ventilation plans of the mines in District 8. (Tr. 229) The respirable dust levels had increased from 2006 to 2007 and into 2008. The same was true for the number of roof falls. In 2009, both numbers began to decline.

When Phillips arrived in District 8, the PSGC Lively Grove mine was just being developed and neither ventilation nor roof control plans had yet been approved for the mine. As is true of all plans, the assistants to the district manager began the process of meeting with the mine and reviewing conditions and information submitted by the mine. (Tr. 212).

Phillips explained that each district has its own procedure for processing and approving ventilation plans. Lively Grove's proposed ventilation plan, Ex. M-1, and the proposed roof control plan dated July, 31, 2009, Ex. M-2, went through the same process as any other plans for newly opened mines in the district. (Tr. 105). After much discussion and review, the district manager rejected both plans on September 17, 2009. (Tr. 212). Phillips relied on his roof control specialist, his ventilation specialist and guidance from the MSHA national office. In addition, he paid particular attention to the PIL addressing extended cut mining at new mines. He understood that the PIL directed him to evaluate extended cuts to "ensure compliance with [the Secretary's] 30 CFR standards." (Tr. 213).

a. Use of extended cuts, i.e., 40-foot cuts as opposed to 20-foot cuts, in Citation Nos. 6680548 and 6680549

The issue of the depth of cuts is found throughout both the ventilation plan and the roof control plan. There was obviously much discussion and disagreement about the safety of the extended cuts and the expert witness for PSGC made it clear that the use of extended cuts is an issue not only in District 8, but across the country. There is a dispute as to whether extended cuts are more or less safe in terms of dust control and in terms of roof support. The use of extended cuts makes production more efficient.

MSHA authored a PIL dated June 3, 2008 regarding extended cuts. Ex. M-14. This letter was circulated to mine operators and used by MSHA as guidance in evaluating PSGC's request to use 40-foot cuts. The operator asserts that Phillips uses the PIL for all mines and that

this "across the board" policy takes away from the mine-specific character of the plan negotiating process. Inspector Roberts explained that he uses the policy with all new mine operators and that his office would look at 20-foot cuts and, pending evaluation and compliance with applicable standards, would allow an operator to apply for approval to take 30-foot cuts, and, again, pending evaluation and compliance with the applicable standards, then allow application for 40-foot cuts. (Tr. 100). Phillips described this as a performance-based approach. (Tr. 100, 222).

MSHA's arguments with regard to extended cuts focus on the possibility of a greater number of roof falls with longer cuts and the presence of respirable dust. The MSHA roof control specialist, Odum, believes that the mine can better control the roof with 20-foot cuts as opposed to 40-foot cuts. (Tr. 162). PSGC argues that there are no issues regarding roof control that need to be addressed because its data, although not provided to the district manager, supports its position that the roof is good. Gary Hartsog, one of the experts who testified on behalf of PSGC, opined that it is "unlikely that roof conditions will be adverse." (Tr. 445-6). However, no one could testify that 20 foot-cuts are an imprudent way to proceed. The mine did point out that an extended cut generates less respirable dust, since a majority of the dust is generated at start-up and fewer start-ups are required for a longer cut.

b. Use of 20- foot wide entries as opposed to 18- foot wide entries in roof control and ventilation plans

Roberts believes that both entries are suitable for moving equipment, and, like the extended cuts, the wide entries may be approved based upon performance. (Tr. 113). The Secretary also believes that the wider the entry, the more difficult it is to control the roof. (Tr.152) William Jankousky, the mine's safety manager, explained his view that it is easier to maneuver in a wider entry, i.e., that the two additional feet make a difference in the ability of the equipment to maneuver a turn. (Tr. 374).

c. Use of 64 total diagonal feet at intersection, as opposed to the 68 feet sought by the mine operator in the roof control plan

This issue is related to the wider entries sought by the mine and, again, the district manager seeks to implement a performance based evaluation before wider intersections are used. (Tr. 153-154). Odum testified that, based upon information he reviewed in exhibit M-16, wider intersections presented more roof control issues than narrower ones. He testified that intersections are one of the main areas that roof falls occur and, therefore, it is best to keep them as narrow as possible. (Tr. 154-156). Phillips relied on information from Casey Sears, an MSHA roof control authority, regarding large diagonals at the intersection and testified in support of Odum's position. (Tr. 216). PSGC points out that the information relied upon by the district manager may not be thorough or reliable and there is other information regarding roof control that the district manager should have reviewed and relied upon.

d. Air velocities in last open crosscut

The issue involves how much air is needed to assure compliance with air velocities as the air reaches the continuous miner and additional working places. PSGC argues that the lower ventilation quantities it seeks are appropriate for the "fishtail" ventilation system designed at the mine. PSGC asserts that MSHA imposes higher quantities of air no matter what kind of ventilation system is utilized by the mine. Victor Daiber, the engineering manager at the mine, testified on behalf of PSGC that he used information from other mines to determine that 9,000 and 12,000 cfm would be adequate for the fishtail ventilation and would work at this mine. (Tr. 301). Roberts, however, stated that there are plans in the district that include lower velocities but, in reality, they use greater air quantities because they don't sufficiently address the levels of respirable dust. (Tr. 84-85). Roberts points out that since the mine has three open crosscuts and a line curtain in the fourth, it is typical to require more air in the last open crosscut as a means to ensure adequate ventilation. (Tr. 87). If the mine uses the lower velocities they seek, they will not meet the respirable dust standards according to Roberts. (Tr. 125). Phillips agrees that unless the mine uses 25,000 cfm, it will not have the necessary air throughout the system.

e. Red zone issues in the roof control plan

The red zone issues relate to the persons working and moving cable in the area around the miner. (Tr. 74). PSGC, through Jankousky, indicates it would prefer to not address red zone issues in the roof control plan. Instead, the mine argues that it can handle safety policies for the red zone through internal programs and policies and, hence, did not include it in the roof control plan. (Tr. 361, 383). The mine also raises the red zone issues in terms of the 20-foot cuts and explains that less moving of the machine means fewer accidents. However, according to Roberts, it is the method chosen to move the equipment, not the number of times you do it, which is of critical importance.

f. Limit to turn no more than two turns in the crosscuts

If the mine wishes to turn the cross-cuts from both sides, then, according to MSHA, it needs to depict such on a sketch submitted with the plan. (Tr. 82). Odum relied upon an MSHA document showing the best practices for turning crosscuts with remote control continuous mining machines. (Tr. 163-164); M-15. Taking a limited number of turns helps limit the number of overly large intersections and, consequently, is a factor in roof control. The mine argues that it is a ventilation issue. Daiber, the engineering manager for PSGC, believes that more than two turns are necessary for ventilation control. (Tr. 289).

g. Curtain setback

The mine suggests a setback of five feet greater than the depth of the approved cut, i.e., a 25-foot setback. Jankousky testified that the miner operator can see the cut better at 25 feet than at 20 feet because the curtain does not get in the way. (Tr. 379) MSHA counters that see-through curtains may be used to improve visibility; however, the mine rejects that solution. (Tr. 381).

h. Using mesh in-cycle in roof control plan

The Secretary requests that the mine install mesh in certain areas of the roof to avoid roof falls. PSGC argues that loose materials accumulate in the mesh and, when it comes time to remove the mesh, it is difficult to do it safely. (Tr. 278). MSHA argues that the mesh prevents unplanned falls of roof and rock that may injure miners working or traveling in the area. (Tr. 168). Odum suggests that the safety benefits are "tremendous." Phillips agrees that placing the mesh during the roof bolting cycle provides additional safety from roof falls.

There are many competing safety issues at a mine, and those issues must be weighed against one another in making decisions about the best plan. There are a number of other related issues raised by PSGC that are set forth in the Contested Issues submitted by the mine and a number of the items will need to be clarified or revised as the mine moves to longer cuts. (Tr. 93-94). The district manager has replied, ably, to each of those issues in the deficiency letter. That reply has been supplemented by the testimony of Roberts and Odum. (*See e.g.,* Tr. 160-162). I rely on those factors in determining that the deficiencies cited by MSHA are reasonable, based on relevant information, and contain a rational connection between the facts found and the choice made by the district manager.

II. CONCLUSIONS OF LAW

While plan contests are based on consultations between the Secretary and the operator, the Commission has recognized that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market." *C.W. Mining Co.,* 18 FMSHRC 1740, 1746 (Oct. 1996). As one court has noted, "the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with final approval of the plan." *UMWA v. Dole,* 870 F.2d 662, 669 n. 10 (D.C. Cir. 1989), *quoting* S. Rep. No. 95-181, at 25 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 613 (1978).

The framework for resolution of a plan dispute has been established by the Commission in a number of cases. *See Twentymile Coal Co.,* 30 FMSHRC 736, 748 (Aug. 2008). The Commission has held that "absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining Co.,* 18 FMSHRC at 1746. At issue here is whether the Secretary properly exercised her discretion and judgment in the plan approval process. The standard of review incorporates an element of reasonableness. *See Monterey Coal,* 5 FMSHRC 1010, 1019 (June 1983). I must therefore, look at the issue of suitability in terms of the discretion of the district manager.

a. Unsuitability of the current PSGC plan

The Lively Grove mine is a new mine that has been in the development stage for a period of time, but has now reached the point of mining coal and, therefore, has submitted proposals for both the ventilation and roof control plans. The plans at issue in this case are the initial plans of the mine, with no former plan to review for unsuitability.

b. Suitability of the MSHA plan

The Secretary must show that the district manager did not abuse his discretion in determining that the MSHA-proposed ventilation and roof control plans are suitable to the conditions at the Lively Grove mine. More specifically, the Secretary must show that the actions of the district manager were not arbitrary and capricious in his review and decision-making regarding the plans and their suitability. The Commission has defined "suitable" as "'matching or correspondent,' 'adapted to a use or purpose: fit,' 'appropriate from the view point of . . . convenience, or fitness: proper, right,' 'having the necessary qualifications: meeting requirements.'" *See Peabody Coal Company* 18 FMSHRC 686, 690 (May 1996)(omission in original), *quoting Webster's Third New International Dictionary* 2286 (1986), *aff'd* 111 F.3d 963 (D.C. Cir. 1997). The plans proposed by the Secretary, including the performance-based evaluation of the extended cuts and wide entries, must be suitable to this mine.

In examining suitability in this matter the primary focus is on the use of extended-cut mining, which encompasses wider entries and wider diagonals at intersections. Since PSGC is a start up mine, the district manger proposed that the mine start with shorter cuts of 20 feet, test them, and then move into longer cuts if the conditions prove to be appropriate. The district manager did this using national policy and guidelines regarding the use of extended cuts. Use of a guideline does not *per se* make it suitable or unsuitable to a plan, nor does "across the board" use of a policy automatically make it unsuitable for this particular mine. It is the position of PSGC that instead of using the national policy the district manager should have relied on studies conducted by the mine and general studies regarding roof and ventilation. Either way, the district manager is expected to rely on documents and information generated by the Mine Safety and Health Administration as a part of his review.

The mine argues first, that there are a number of studies to show that extended cuts are no more dangerous than 20-foot cuts. Daiber reviewed studies about extended cuts and reached the conclusion that there is no difference as to the ventilation of a 40-foot cut as opposed to a 20-foot cut. (Tr. 315). He testified that, based on the studies, there is "no significant difference" in respirable dust control between a 20-foot cut and a 40-foot cut. However, when pressed, both Daiber and another PSGC expert, Hartsog agreed that the roof conditions may be affected by extended cuts as the conditions are an unknown until mining actually begins. Although engineering and technical methods give the mine a good indication of what roof conditions it may encounter, it is by no means fool-proof, and the mine may encounter unexpected conditions. (Tr. 346, 445-446). Daiber essentially agreed that mining the area is the best way to determine the conditions at the mine and, therefore, taking smaller cuts in the beginning and evaluating them is a more prudent way to proceed. (Tr. 341, 346).

The evidence presented by the Secretary clearly demonstrates that the MSHA proposal is suitable as it relates to the Lively Grove Mine. First, I credit both Robert's and Odum's testimony far more than the generalization made by Hartsog, PSGC's expert. Hartsog is a self-employed mining engineer, who came into the case to support PSGC's stance after the citations were issued by the Secretary. (Tr. 418-423). Hartsog, like Daiber, testified that there is minimal, if any, difference between a 20-foot cut and a 40-foot cut as far as ventilation is concerned. (Tr. 431, 433-435). While the parties agree that the ventilation differences are

minimal, Hartsog insists that the potential for injury is higher with 20-foot cuts, than with longer, because the equipment is moved more frequently in a short cut than in a long. Hartsog however, does not address the safety of the roof in an extended cut in his initial support of the concept, but later admits that he can think of roof issues that would make a 40-foot cut less safe than a 20-foot cut. (Tr. 439, 441).

The district manager, in making his determinations about the suitability of ventilation and roof control plans, takes direction and guidance from MSHA experience and studies. The operator suggests that the directives used by the district manager somehow limit his discretion or take away from the suitability of the plan to this mine. I am not persuaded by the argument. The directives regarding the extended cuts, the wide entries, and the diagonals of the entries are directives used to determine what is suitable to the mine. The evidence presented by the Secretary regarding the use of extended cuts bears out the district manager's decision to evaluate their use prior to total approval. That can only be done by taking one step at a time, testing the effectiveness of the system, and then moving on. A conservative, careful approach, even if based on a PIL, on the part of the district manager does not undermine the prospect of what is suitable to this mine; in fact, the step-by-step approach enhances it.

c. Decision of the district manager

The Commission in *Twentymile Coal* applied the following guidance in determining if the actions of the district manager are arbitrary and capricious:

> The scope of review under the "arbitrary and capricious" standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." In reviewing the explanation, we must "consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has 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.

30 FMSHRC at 754-755, *quoting Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

I find that the district manager in this case met the requirements of examining relevant data by seeking out data, information, and opinions from a number of highly qualified people. He articulated a reasonable explanation for his finding that the provisions sought by MSHA are

suitable. I find that the district manager made reasonable decisions and did not abuse his discretion in making those decisions.

PSGC argues that the arbitrary and capricious standard applies only to ERP (emergency response plan) cases, yet the arbitrary and capricious standard was upheld by the Commission in addressing the roof control plan in the *C.W. Mining* case cited by PSGC. In determining the applicability of the arbitrary and capricious standard to this case, I agree with PSGC, that some element of reasonableness must be apparent in the decisions made by the district manager. While there are disagreements about what provisions are best for the mine, the district manager has balanced the conflicting ideas and articulated a rational connection between the facts shown and the choices he made. While not the plan the mine would like to see, it remains a reasonable one given all of the evidence.

Lively Grove raises two primary issues with regard to the alleged arbitrary and capricious nature of Phillips decisions regarding the plans. First, PSGC argues that Phillips should not have used the PIL in making his decision regarding the mine. Specifically, PSGC argues that the use of the PIL is arbitrary because it is tantamount to using it as a binding rule, without the benefit of rulemaking. PSGC agrees that the PIL is not a rule, but argues it was used as such here. PSGC Br. 22. The fact that Phillips applied the PIL to the new mines in his district does not automatically render his decisions any less reasonable. The PIL guidance assists MSHA's district managers in determining how to best address a request for extended cuts, and, at a new mine such as was the case here, allows MSHA and the operator to evaluate the plan at each step. Phillips did not rule out the extended cuts, he simply wanted more information, based upon experience at *this* mine, in order to make a determination. I find Phillips' approach extremely reasonable. The Commission recognizes that while mine plans must be tailored to the specific conditions of a mine, they can include certain universal provisions. *Carbon County Coal Co.*, 7 FMSHRC 1367 (Sept. 1985). Much like a "universal provision", the PIL is based on MSHA experience and knowledge. It is a nationwide policy that a district manager has available for his consideration, and its purpose is to assist the district manager in reviewing plans.

The second argument that PSGC raises is that the district manager did not review all the relevant available data in making a decision about allowing the use of extended cuts at this mine. I disagree; the Secretary demonstrated that the district manager did consider all relevant facts, even if he did not review every document the mine suggests he should have reviewed. First, it is pure speculation on the part of the mine that the district manager did not review all relevant information or as the mine put it, all information that he "had readily available to him." I am aware that the parties rely on their knowledge and information from other sources when developing mine plans and that the information is often gathered from other mines and sources within MSHA. The parties don't start anew each time but, rather, start with time-tested practices and data gathered over time. I do not accept, however, that in determining whether the district manager abused his discretion, I must examine whether he found and reviewed every single piece of information that may be related, particularly when that information is not brought to his attention by the mine operator.

Next, it is not an abuse of discretion to rely on information he had available and in front of him, rather than on the information presented for the first time at the hearing. PSGC had a

number of experts testify regarding the two plans, including Hartsog concerning ventilation and Gadde about roof control. Neither of them was involved in the plan development or presentation of the plans to the district manager. The information put together by the experts was created after the plans were found deficient and solely for the purpose of hearing. Even so, the mine did not take the information back to the district manager for re-consideration. Respondent agrees that the evidence presented by Hartsog and Gadde was not presented to the district manager; however, PSGC wants to assume that the district manager had knowledge of the studies used by both and would have me agree that it is an abuse of his discretion not to have found it on his own and used it in his evaluation.

I agree with the Secretary that the "[d]istrict manager's decision is entitled deference under the arbitrary and capricious standard if he takes into account the statutory and regulatory elements of suitability, makes a full appraisal of the relevant and available facts, and is reasonable in his conclusions." Sec'y Br. 5. While MSHA agrees with PSGC that extended cuts and wider entries may be appropriate after study, MSHA seeks to take the safer route of testing before taking the larger step. I find that the district manager was not arbitrary and capricious in making the determination regarding the plans.

d. Other matters

During the course of the hearing, PSGC attempted to introduce evidence concerning the ventilation and roof control plans at other mines, specifically mines that are using extended cuts. I refused to allow that evidence primarily because it is not relevant to the decision regarding the circumstances and suitability of the plan to this mine. While I understand that many plans are based upon the experience at other mines, it is unlikely that two underground coal mines would present exactly the same factual situation and the same needs in their ventilation plan.

Since I must examine whether the actions of the district manager are arbitrary and capricious, I must look at how he made his decision, what he had before him at the time, and what information he used. Any document generated after that time is not relevant and will not assist me in making an informed decision in this matter. Therefore, a number of those documents were excluded from evidence as having no relevance.

I conclude that the Secretary has met her burden of proving that the district manager did not abuse his discretion. Accordingly, Citation No. 6680548 and Citation No. 6680549 are affirmed and Contest Proceedings, Docket Nos. LAKE 2009-711-R and LAKE 2009-712-R are hereby dismissed.

Margaret A. Miller
Administrative Law Judge

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