

July and August 2019

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Review was granted in the following cases during the months of July and August 2019:

Secretary of Labor v. James C. Scott and Donnie B. Thomas, employed by Mill Branch Coal Corp., Docket Nos. VA 2018-103, et al. (Judge Feldman, July 23, 2019)

Secretary of Labor v. Hopedale Mining, LLC., Docket No. LAKE 2019-149 (Judge Miller, June 24, 2019)

No case review was denied during the months of July and August 2019.

COMMISSION DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

July 11, 2019

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

Docket No. SE 2016-81

v.

SIMS CRANE

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The single citation at issue alleges that the manner in which a Sims Crane employee exited the cab and descended from a crane on a lowboy trailer violated the fall protection standard at 30 C.F.R. § 56.15005.¹

Sims argued below that the employee’s method of egress was consistent with safe access standards issued by the International Organization for Standardization (“ISO”) and incorporated by the Mine Safety and Health Administration (MSHA). The Administrative Law Judge found that Sims failed to provide certification of ISO compliance which he believed was directed by MSHA guidance, rejected Sims’ argument, and found a violation. 39 FMSHRC 116, 124-25 (Jan. 2017) (ALJ).

On appeal, Sims claims that the Judge found a violation based solely on Sims’ failure to provide documentation of ISO compliance, and that this constitutes legal error. Sims argues that a lack of ISO documentation is not a proper basis for a violation of the standard, and that the Judge improperly shifted the burden of proof by requiring Sims to establish compliance rather than requiring the Secretary to establish a violation.

For the reasons below, we find that the Judge improperly shifted the burden of proof, reverse the Judge’s decision, and vacate the citation.

¹ The standard states: “Safety belts and lines shall be worn when persons work where there is a danger of falling.” 30 C.F.R. § 56.15005. This may be satisfied by compliance with the Occupational Safety and Health Administration’s fall protection standard, which requires employees working at a height of six feet or more to be protected from falling by the use of guardrails, safety nets, or personal fall arrest systems. Ex. R-3 (MSHA Program Policy Letter No. P14-IV-02 (Mar. 25, 2014)).

I.

Factual and Procedural Background

A. Factual Background

The events at issue took place at a phosphate rock mine and processing facility in Florida, operated by Mosaic Company (“Mosaic”). Sims Crane is a contractor that was providing crane rental and services to Mosaic at the time of these events.

In September 2015, MSHA Inspector Robert Peters was driving to Mosaic’s administrative offices when he saw a crane on a lowboy trailer on the side of the road.² The crane was being prepared for transport by William Nasrallah, a Sims employee. Peters saw Nasrallah move from the cab of the crane toward the left front fender. Peters turned away for a moment to park, and when he looked back, Nasrallah had descended to the ground. The entire process took less than a minute. After parking, Peters approached the crane and issued a citation alleging a violation of section 56.15005.³ He testified that he issued the citation because the fender was narrow and not designed for use as a walkway, creating a danger of falling, and that Nasrallah had not used fall protection such as handholds while crossing.⁴ Tr. 42, 52, 71-72.

At the time, the inspector assumed that Nasrallah had descended via the crane’s valve bank. Tr. 37-40. It was later determined that Nasrallah left the cab, took two or three steps on a walkway across the fender area, then descended by way of a ladder at the front of the crane as it was positioned on the lowboy trailer. The crane had three ladders: one at each front corner and one under the cab. The inspector was unaware of the front ladders when he issued the citation. Tr. 63-64, 78.

Nasrallah maintained three points of contact while exiting the cab and descending the ladder, but conceded that handholds were not available while crossing the fender. He stated that this was his normal procedure for exiting this type of crane when loaded on a lowboy trailer and that his procedure felt safer than using the ladder directly beneath the cab, which had a 34-inch drop from the last step to the ground. Tr. 116.

The area Nasrallah crossed while travelling from the cab to the ladder was approximately seven feet above the ground, six feet in length, three feet wide, and covered in anti-skid material. Tr. 43-44, 51, 98-99, 113, 124-28. The inspector initially estimated the width at 20 inches, but

² A lowboy trailer has two drops in deck height, which allows the deck to be extremely low compared to other trailers.

³ The inspector also issued an imminent danger order pursuant to section 107(a) of the Act, 30 U.S.C. § 817(a). The Judge found the operator did not timely contest the imminent danger order and it was therefore not before him. 39 FMSHRC at 119 n.4. The order was subsequently reopened and vacated. Unpublished Order, No. SE 2017-97-RM (Dec. 7, 2018) (ALJ) (finding that the miner’s descent from the crane could not reasonably be expected to result in imminent serious harm).

⁴ MSHA subsequently proposed a civil penalty of \$270 for the alleged violation.

conceded that he did not measure the width or look closely at the crane. Tr. 43-44, 71, 80. He was apparently unaware of the anti-skid coating when he issued the citation. Tr. 73.

Robert Berry, Sims' Safety Director, testified as to the feasibility of various forms of fall protection when accessing or egressing this model of crane. He explained that tying-off is not feasible because a standard seven foot lanyard offers no protection for someone seven feet above the ground. He agreed that it is impossible to maintain three points of contact when crossing the deck; however, he testified that the crane was manufactured in compliance with ISO standards regarding safe access and egress. Specifically, the crane has non-skid surfaces, handholds at key locations, and ladders at the front and at the cab. Tr. 93, 97-98, 103.

B. Summary of Relevant ISO Standards

The International Organization for Standardization develops and publishes international standards for a wide variety of products, services and systems. Certification of compliance with an ISO standard is conducted by external certification bodies. Two standards have been referenced in this matter.

The primary standard at issue is ISO 2867, titled "Earth-Moving Machinery Access Systems." The standard requires in part that all access system surfaces used for walking must be slip resistant. The standard also encourages the use of three-point support when ascending, descending, or moving while more than one meter above the ground, but states that two-point support is acceptable for stairways, ramps, walkways and platforms. Ex. R-5, §§ 4.1.5, 4.1.6.

ISO 2867 has been incorporated into MSHA's guidance through Public Information Bulletin ("PIB") No. P10-04, titled "Safe Access, Fall Prevention and Fall Protection involving Self-Propelled Mobile Equipment." Ex. R-2. The PIB lists methods for reducing the risk of falls from mobile equipment, such as: inspecting equipment for icy, wet or oily areas; ensuring that walkways are no narrower than their original manufactured widths and have slip-resistant surfaces; and ensuring that handrails are within easy reach at critical locations. The PIB then states that, "[i]n addition, equipment manufacturers may be providing safe access, fall prevention and fall protection by complying with ISO 2867." The PIB notes that "Operators are responsible for providing documentation to verify that their equipment is ISO 2867 certified," which inspectors may then consider in determining whether safe access has been provided. *Id.*

ISO 11660, titled "Cranes – Access, Guards and Restraints," addresses general safety requirements for crane access systems, dependent on whether the access relates to control stations or maintenance. For example, the standard outlines the appropriate dimensions and characteristics for ladders, handrails, walkways, and other access system elements. Ex. R-7. As discussed below, the Judge declined to consider ISO 11660 in his decision because it has not been incorporated by MSHA into the regulatory program. Sims has not contested that determination.

C. The Judge's Decision

The Judge found that Nasrallah crossed the walkway on the fender of the crane to get from the cab to the front ladder—a distance of six feet at a height of seven feet—without handholds or other forms of fall protection. 39 FMSHRC at 121-22.

The Judge then addressed Sims' argument that Nasrallah's method of egress did not violate section 56.15005 because it was consistent with ISO and MSHA guidance. The Judge was persuaded that the method of egress was consistent with ISO 2867, and found that this standard had been incorporated by MSHA. However, he held that PIB No. P10-04 requires operators to provide documentation certifying that equipment is ISO compliant and that Sims had failed to provide such documentation for the crane at issue. Accordingly, the Judge rejected Sims' compliance argument and found a violation. *Id.* at 122-25. He stated that if Sims had provided documentation that the crane was ISO certified, then pursuant to MSHA guidance, he would not have found a violation.⁵ *Id.* at 127.

The Judge also reduced the likelihood of injury to "unlikely." He found that the violation contributed to a falling hazard, but that the Secretary failed to establish that taking two or three steps across a three-foot wide, slip-resistance surface was reasonably likely to result in a fall. *Id.* at 126. Finally, the Judge reduced the negligence to none and imposed a \$100 penalty. *Id.* at 126-27.

II.

Disposition

The Mine Act imposes on the Secretary the burden of proving an alleged violation by a preponderance of the evidence. *See, e.g., Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989). In other words, the Secretary must convince the trier of fact that the allegation is more probable than not. *RAG Cumberland Res. Corp.*, 22 FMSHRC 1066, 1070 (Sept. 2000), *aff'd*, 272 F.3d 590 (D.C. Cir. 2001). To prove a violation of section 56.15005, the Secretary must show by a preponderance of the evidence that person(s) were working where there was a danger of falling without adequate fall protection. If the Secretary fails to meet this burden then there is no violation, irrespective of any counterarguments. We find that the Judge in this instance centered his analysis on the strengths and weaknesses of Sims' counterarguments without first determining whether a preponderance of the evidence supported the Secretary's claims. Accordingly, we find that the Judge improperly shifted the burden of proof.

The Judge did find as a factual matter that Nasrallah walked across the left fender—a distance of six feet at a height of seven feet—without handholds, and noted that the "Secretary thus argues that Nasrallah's travel across the fender wheel well without maintaining three points of contact constitutes a violation of section 56.15005." 39 FMSHRC at 122. However, he then moved directly into an analysis of Sims' claim that the method of egress complied with MSHA guidance.⁶ Despite finding persuasive evidence that the crane complied with ISO 2867, the Judge ultimately rejected Sims' argument, because Sims had not provided the documentation

⁵ The Judge was also persuaded that the method of egress was consistent with ISO 11660, but found that the standard had no bearing on the violation because it had not been incorporated by MSHA. 39 FMSHRC at 124.

⁶ The Judge's analysis described herein is embedded in the "significant and substantial" discussion within the decision. 39 FMSHRC at 122-25; *see Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984). There is no separate discussion solely addressing the fact of the violation.

required by MSHA's guidance incorporating this ISO standard.⁷ The Judge concluded: "In the absence of such certifying documentation, I reject Respondent's argument that Nasrallah's egress procedure complied with MSHA's recommendations in PIB No. 10-04. I therefore find that a technical violation occurred." 39 FMSHRC at 122-25.

Conspicuously absent from the Judge's decision is any analysis of the Secretary's underlying claim that travelling across this particular walkway without maintaining three points of contact violates section 56.15005. Rather than requiring the Secretary to prove by a preponderance of the evidence that the scenario at issue presented a danger of falling (particularly in light of the additional evidence presented by Sims), it appears that the Judge apparently inferred that the scenario was presumptively violative and then turned his attention to Sims' counterargument.

Upon rejecting the counterargument, the Judge then found a violation, without returning to the Secretary's underlying claim. By doing so, the Judge improperly placed on Sims the burden of proving that the method of egress was compliant (to establish a non-violation), rather than requiring the Secretary to meet his burden of proving that it was unsafe (to establish a violation).⁸

In addition to raising its burden-shifting argument, Sims claims that the Judge legally erred by finding a violation based solely on Sims' failure to provide documentation of ISO compliance. We agree that Sims' interpretation is a reasonable one, given the Judge's factual findings regarding the relative safety of the equipment and his statement that he would not have found a violation had Sims produced the required document.⁹ *Id.* at 127.

⁷ It is not clear that the PIB at issue actually *requires* such documentation, and the language of the PIB strongly suggests that any such requirement arises in the context of a demand for documentation *by an inspector*. It states that compliance "may" indicate adequate fall protection, inspectors "may" consider documentation of such compliance when deciding whether to issue a citation, and that operators are "responsible" for providing such documentation to inspectors. Ex. R-2. In effect, it simply states that *if* an operator wishes an inspector to consider ISO compliance, then the operator (presumably as the party with access) should provide the relevant documentary evidence.

⁸ The Secretary suggests that Sims' compliance argument is an affirmative defense, such that the burden of proving the defense falls on the party asserting it. *See Taylor v. Sturgell*, 553 U.S. 880, 907 (2008). This is not a circumstance where the burden-shifting framework applies, and regardless, under such a framework the Secretary must still prove his *prima facie* case.

⁹ An alternative reading of the Judge's opinion, as suggested by the Secretary, is that the Judge found a violation based on the height of the fender and lack of handholds, and only relied on the lack of documentation to reject the compliance defense. However, as discussed *supra*, whether the Judge relied on the lack of documentation to find a violation or to reject a defense is ultimately irrelevant. This decision turns on the Secretary's failure to meet his burden of proof.

However, the Judge's error is more fundamental. The Judge was not bound by the PIB to find a violation simply because of a lack of documentation of compliance with the PIB, just as he would not have been bound to find no violation if documentation had been provided. Rather, the Judge was required to consider the PIB for what it is: a public guidance document that informs the agency's judgment on the danger of falling from mobile equipment.

The PIB itself makes clear that the ISO and J185 practices are alternative, and not exclusive, means of demonstrating that miners are appropriately protected against accidental falls. The PIB expressly states that manufacturers may comply with these industry standards "in addition" to the measures set forth in the PIB. Inspectors may use certification documents to ascertain whether operators are "providing safe access, fall prevention and fall protection." Ex. R-2.

In this case, the Secretary failed to establish that fall protection beyond that provided by the design of the equipment and the practices followed by Mr. Nasrallah (features and practices that the PIB identifies as exemplary) was necessary. Moreover, the operator provided evidence that its actions were in fact consistent with the recommendations in the PIB.

While it would constitute legal error for a Judge to consider the PIB binding, compliance with ISO and/or MSHA guidance can and should be considered to the same degree as any other evidence. Partial or full compliance may have a bearing on the level of safety (similar to an expert opinion or industry standard), which is relevant in determining whether a danger of falling existed.

If the Judge relied on the lack of compliance documentation as Sims suggests, then his error was not that he considered compliance at all, but rather that in considering compliance, he treated the absence of documentation as dispositive. However, we need not determine whether the Judge improperly relied on the lack of documentation to find a violation because we find that he improperly shifted the burden to the operator. Rejection of a counterargument should result in a violation *only if* the Secretary has successfully met his burden of proof—that is, by at least providing substantial evidence to support his position. For the following reasons, we find the Secretary has not done so in this instance.

Under the particular facts of this case, the limited evidence put forward by the Secretary does not establish a danger of falling by a preponderance of the evidence. The inspector emphasized that he found a violation because the fender of the crane was narrow and not designed for use as a walkway (despite referring to it as such), so that a stumble or misstep could result in a fall. Tr. 42-44, 52, 71-72. However, he conceded that he did not actually examine the crane. Tr. 80. This may explain why the inspector incorrectly estimated the fender's width at 20 inches rather than 36-42 inches (Tr. 43-44, 98-99, 125) and was apparently unaware of either the anti-skid coating or the ladders at the front of the crane (Tr. 63-64, 73, 78).

Since the inspector was still under the impression during the hearing that Nasrallah must have climbed down the valve bank, he apparently also failed to confirm the method of egress with Nasrallah during their ten-minute conversation after he approached the crane. Tr. 78, *see also* Tr. 35-36. The only accurate information provided by the inspector, i.e., the only evidence

put forward in support of the violation, is the height and length of the fender, and the absence of handholds.

Conversely, Sims' witnesses provide a detailed description of both the method of egress and the crane, including a discussion of the manufacturer's safety specifications. Nasrallah testified that he had handholds while exiting the cab (wheel and door handle), took two to three steps from the cab to the front ladder without handholds, and then had handholds as he turned around and descended the ladder at the front. Tr. 114, 120, 135. He testified that the relevant portion of the crane deck was three to three and half feet wide, six feet long, covered in anti-skid coating, and free of ice, rain, or debris. Tr. 98-99, 113, 124-25, 128-29.

Sims' Safety Director testified that standard methods of fall protection such as safety harnesses are not feasible when only seven feet above the ground; therefore manufacturers provide alternative safety measures (present in the crane at issue) such as anti-skid walking surfaces and handholds at key locations. Tr. 93, 97-98, 103. And yet, the Secretary conducted no cross-examination regarding the accuracy or efficacy of these alternative safety measures, apparently relying on a simple statement from the inspector that even if anti-skid coating was present it "wouldn't have any bearing." Tr. 73.

In sum, the Secretary would have the trier of fact find a danger of falling based solely on the seven-foot height of the fender, the lack of handholds, and a general statement that there is always some danger of falling. This is so despite the bulk of the testimony indicating that Nasrallah took two steps across a flat, three-foot wide, skid-resistant surface which was designed for use as a walkway and which complies with safe access standards created by the ISO and implemented by manufacturers. Given the record, we find substantial evidence does not support the decision that a danger of falling was more probable than not.¹⁰

The Judge's factual findings below are consistent with this determination.¹¹ Crediting Nasrallah's and Berry's testimony regarding the crane, the Judge noted that the three-foot width

¹⁰ We do not suggest that working at a certain height without handholds would never be sufficient to establish a violation, or that working at a height of seven feet is inherently safe. This is particularly the case where a miner is performing work rather than merely taking two or three steps across a slip-resistant walkway, or where there is testimony as to a specific danger (for example wet conditions), where the facts could support a violation of the fall protection standard. We also do not go so far as to positively find that there was no danger of falling. Nothing in our decision may be taken as a diminution of the importance of fall protection for the safety of miners. We only find that in this specific case, the Secretary has failed to establish by a preponderance of the evidence that taking two or three steps across a flat, three-foot wide, skid-resistant surface which was designed for use as a walkway to reach a ladder with handholds at a height of seven feet created a danger of falling.

¹¹ Some of the factual findings discussed herein are found in the Judge's S&S analysis. We recognize that the relevant standards differ, and that a finding of no reasonable likelihood in the S&S context cannot be borrowed wholesale to find no danger of falling. We do not draw on the Judge's S&S analysis, only his factual findings.

and anti-skid coating suggest that the fender was intended for use as a walkway, and that such characteristics “can reduce mobile equipment slip and fall accidents.” 39 FMSHRC at 124, 126. He was also persuaded that the crane was compliant with the ISO safety standards as a factual matter, finding only that the crane failed to comply with his understanding of the documentation requirements of the incorporating PIB. *Id.* at 124-25. Essentially, the Judge’s factual analysis of the record suggests that the conditions on the crane *likely were not* dangerous. In contrast, all the Secretary offers is the height of the crane, the lack of handholds, and the inspector’s “opin[ion] that a person readying a crane for transport could stumble at any time.” *Id.* at 126.

The Judge ultimately found a violation, apparently due to Sims’ failure to demonstrate compliance with the PIB. Putting aside the Judge’s legal conclusions, however, his factual analysis clearly indicates that the Secretary failed to establish a danger of falling by a preponderance of the evidence. Accordingly, we reverse the Judge’s finding of a violation and vacate the citation.¹² *See Am. Mine Servs., Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993) (remand is not necessary when the record supports no other conclusion).

¹² Because we have vacated the citation, we need not address Sims’ argument that imposing a penalty in this instance would violate the Paperwork Reduction Act, 44 U.S.C. § 3501 et seq. However, we note that the Paperwork Reduction Act explicitly does not apply to the collection of information “during the conduct of . . . an administrative action or investigation involving an agency against specific individuals or entities.” 44 U.S.C. § 3518(c)(1)(B)(ii). This would presumably include the issuance and adjudication of citations issued to specific mine operators pursuant to the Mine Act.

III.

Conclusion

For the foregoing reasons, we conclude that the Judge erred by finding a violation where the Secretary had failed to meet his burden of proof. Accordingly, we reverse the Judge's decision and vacate Citation No. 8823573.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004-1710

August 13, 2019

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

Docket No. YORK 2018-31-M

v.

RICHMOND SAND & STONE, LLC

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). The only issue before the Commission is a question of regulatory interpretation: whether a fatal heart attack unrelated to work activities is an “accident” for purposes of the Secretary of Labor’s reporting requirements at 30 C.F.R. Part 50.

The single citation at issue alleges that Richmond Sand and Stone (“Richmond”) failed to timely notify the Mine Safety and Health Administration (“MSHA”) of a fatal heart attack. The relevant standard requires operators to “immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving: [a] death of an individual at the mine.” 30 C.F.R. § 50.10(a).

The Administrative Law Judge found that the plain language of both the Mine Act¹ and the Secretary’s regulations require any death at a mine to be reported immediately and within 15 minutes, regardless of cause. Because a death occurred on-site and the operator did not report it until the next day, the Judge found a violation of section 50.10(a). 41 FMSHRC 12, 16-19 (Jan. 2019) (ALJ). Richmond appeals, arguing that deaths due to natural causes do not fall within the ordinary meaning of “accident” and therefore are not immediately reportable accidents for purposes of section 50.10(a).

I.

Factual and Procedural Background

The material facts are undisputed. An excavator operator at the Richmond Sand and Stone Mine was found slumped over his controls at approximately 2:19 p.m. on October 2, 2017.

¹ See 30 U.S.C. §§ 802(k), 813(j); n.3, *infra*.

Nearby miners called 911 and attempted resuscitation. An ambulance squad arrived within five minutes and attempted further resuscitation. All attempts were unsuccessful. Richmond's Health and Safety Director, Peter Robbins, was informed of the occurrence at 2:34 p.m. The miner was transported to the hospital, where he was pronounced deceased at 3:35 p.m. Robbins called MSHA to report the death at 11:21 a.m. the following day. The parties stipulate that the miner died of a heart attack and not as the result of any activity in the course of his employment.

The parties filed cross-motions for Summary Decision, and the Judge granted the Secretary's motion. Relying on the definitions of "accident" in the Mine Act and Part 50, the Judge found that section 50.10(a) unambiguously requires the immediate reporting of any death at a mine. 41 FMSHRC at 16. Accordingly, the Judge found that Richmond failed to timely notify MSHA of an on-site death in violation of the standard, and assessed the minimum \$5,000 penalty under section 110(a)(2) of the Mine Act. *Id.* at 17-19. The Judge noted that the Commission ALJ cases cited by Richmond (discussed *infra*) were distinguishable because they involved non-fatal heart attacks cited as reportable injuries rather than deaths. *Id.* at 16. The Judge also rejected Richmond's reliance on ordinary meaning in light of the plain language of the Mine Act and Part 50. *Id.* at 17 n.5.

On appeal, Richmond argues that section 50.10(a) does not require the reporting of fatal heart attacks (or of any deaths due to natural causes) because such deaths do not fall within the ordinary meaning of "accident." According to Richmond, "accident" is not defined in Part 50; therefore, the ordinary meaning should apply. Richmond also suggests that defining a natural cause death as an accident is contrary to the purpose of the Act and that the Secretary's interpretation of the regulation causes confusion for operators.

The Secretary counters that the plain language of Part 50 defines "accident" to include any death at a mine regardless of cause, that ordinary meanings and dictionary definitions are not relevant where the term is expressly defined by the regulation, and that the cited ALJ cases are inapposite as they do not involve the death of a miner. The Secretary adds that if the language were ambiguous, his interpretation would be reasonable and consistent with the purpose of the Act, which delegates to the Secretary the authority to determine the cause of accidents.

II.

Disposition

Richmond was cited for failing to notify MSHA within 15 minutes once it knew or should have known "that an accident has occurred involving: [a] death of an individual at the mine." 30 C.F.R. § 50.10(a). It is undisputed that a death occurred on-site, and that Richmond did not notify MSHA until almost a day after becoming aware of the death. The case turns solely on whether the death was an "accident" for purposes of section 50.10(a). As discussed below, we find that the plain language of the Secretary's Part 50 reporting regulations defines *all* on-site deaths as immediately reportable accidents. Accordingly, Richmond violated section 50.10(a) by failing to timely notify MSHA of a fatal heart attack at the mine.

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See Dynamic Energy, Inc.*, 32 FMSHRC 1168, 1171 (Sept. 2010) (citations omitted). In the event that the language is

ambiguous, deference to the Secretary’s interpretation may be appropriate if the interpretation is reasonable, authoritative, within the Secretary’s expertise, and reflects fair and considered judgment. However, questions of deference do not arise unless the regulation is determined to be genuinely ambiguous after all the traditional tools of construction are exhausted. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-19 (2019). Here, the relevant regulatory language is clear and unambiguous.

The Secretary’s Part 50 reporting regulations address three types of events—accidents, occupational injuries, and occupational illnesses. 30 C.F.R. § 50.1. While operators must report all three types of events, “accidents” as defined in the regulation are subject to the more stringent requirements of immediate reporting, investigation, and scene preservation. 30 C.F.R. §§ 50.10-50.12. Contrary to Richmond’s argument, 30 C.F.R. § 50.2 clearly defines the three types of events, including “accidents.” Those definitions contain a clear and specific definition of an “accident:”

Definitions.

...

(h) Accident means:

- (1) A death of an individual at a mine;
- (2) An injury to an individual at a mine which has a reasonable potential to cause death;
- (3) An entrapment of an individual for more than 30 minutes or which has a reasonable potential to cause death;

....

30 C.F.R. § 50.2 (emphasis added).

In turn, Section 50.10 requires immediate notification of an “accident.” Indeed, it expressly requires notification of a death of an individual at a mine:

The operator shall immediately contact MSHA at once without delay and within 15 minutes . . . once the operator knows or should know that an accident has occurred involving:

- (a) A death of an individual at the mine;
- (b) An injury of an individual at the mine which has a reasonable potential to cause death;
- (c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or
- (d) Any other accident.

30 C.F.R. § 50.10 (emphasis added).

It is difficult to imagine a stronger case for plain meaning than where the regulation itself provides and then uses a definition.² Had the drafters wished, they could have excluded natural deaths or otherwise indicated an intent to limit the scope of the term “accident” to deaths resulting from mining activities. They did not qualify or limit the unmistakably clear word “death.” Instead, the *only* qualifier provided by the drafters is that the death must occur “at the mine.” All on-site deaths are thus reportable accidents pursuant to the plain language in Part 50.³

Richmond’s claim that the definition in section 50.2(h) does not actually define “accident” clearly fails. “Accident” is defined explicitly. 30 C.F.R. § 50.2(h). Even were that definition inconsistent with ordinary usage, the express definition in the regulation takes precedence. *Island Creek Coal Co.*, 20 FMSHRC 14, 19 (Jan. 1998) (“*In the absence of an express definition . . . the Commission has relied on the ordinary meaning of the word to be construed.*”) (emphasis added); *cf.* 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* §§ 47:7, 47:28 (7th ed. 2018) (Statutory definitions are usually binding “even if the definition varies from a term’s ordinary meaning.”)

Moreover, requiring the reporting of all deaths serves an important purpose that is consistent with the Secretary’s obligations under both Part 50 and the Mine Act. The purpose of Part 50 is to “implement MSHA’s authority to investigate, and to obtain and utilize information pertaining to, accidents, injuries, and illnesses occurring or originating in mines.” 30 C.F.R. § 50.1; *see also* 30 U.S.C. § 813(a) (grant of authority). This serves the “urgent need to provide more effective means and measures for improving the working conditions and practices in . . . mines in order to prevent death and serious physical harm.” 30 U.S.C. § 801(c). In other words, reporting requirements allow the Secretary to gather and analyze data that will improve miner safety. *See* Mine Accident, Injury and Illness Reports, 44 Fed. Reg. 52,827, 52,827 (Sept. 11, 1979) (Part 50 “was intended to achieve the statutory objective of acquisition and analysis of accident, injury and illness data for the purpose of reducing mine safety and health hazards”).

In order to determine whether steps can be taken to prevent future occurrences, the Secretary must be able to gather complete and accurate information regarding the causes of deaths at mining sites. *See* 30 U.S.C. § 813(a) (directing the Secretary to obtain information related to “the causes of accidents, and the causes of diseases and physical impairments”). The cause of a death is not always immediately obvious; it may not initially be clear whether the event resulted from a factor within the operator’s control.

² The interpretive significance of definition sections has been recognized in the statutory context. *Cf.* 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 47:7 (7th ed. 2018) (“When a legislature does define statutory language, its definition usually is binding A statute itself furnishes the best evidence of its own meaning.”). Logically, a regulation itself would also provide the most direct evidence of its own intended meaning.

³ The Judge also relied on text of the Mine Act that defines accident to include “injury to, or death of, any person.” 30 U.S.C. § 802(k).

Requiring immediate notification of *all* accidents as defined in section 50.2, including all deaths, preserves evidence, thereby ensuring that the Secretary will have an opportunity to determine the cause.⁴ This promotes the accuracy and efficacy of the reporting program.⁵ The Secretary can easily exclude data points ultimately found to be irrelevant. The Secretary cannot include relevant data points that are not reported. The plain text of the regulation is consistent with the purpose of Part 50.

Richmond cites two inapposite ALJ decisions for the proposition that heart attacks are not reportable accidents. *Hanson Aggregates Midwest*, 35 FMSHRC 2412, 2416 (Aug. 2013) (ALJ); *Vulcan Constr. Materials LP*, 35 FMSHRC 2868, 2874 (Aug. 2013) (ALJ). Both decisions found that *non-fatal* heart attacks are not accidents pursuant to section 50.10(b), because they are not *injuries* as defined in section 50.2(h)(2). The issue here is whether a *fatal* heart attack must be reported under section 50.10(a) because it is a *death at a mine* as clearly defined in section 50.2(h)(1).

Notably, both decisions cited by Richmond recognize this distinction and explicitly state that a fatal heart attack would be an immediately reportable accident. *Hanson*, 35 FMSHRC at 2416 n.10; *Vulcan*, 35 FMSHRC at 2885-86. Other Commission Judges have implicitly held that on-site fatalities due to natural causes are immediately reportable accidents under section 50.10(a). *E.S. Stone & Structure*, 33 FMSHRC 515, 520 (Jan. 2011) (ALJ); *Premier Chemicals LLC*, 29 FMSHRC 686, 691-92 (Aug. 2007) (ALJ).⁶

As a final matter, to the extent Richmond's claim of "confusion to mine operators" may be interpreted as a notice argument (Reply Br. at 2), section 50.10(a) provides adequate notice of

⁴ Requiring all deaths to be reported will inevitably result in the reporting of some deaths that are not related to mining activities. However, this should not impede the accuracy of the data, as the irrelevant reports can simply be excluded from the analysis. See MSHA, *Non-chargeable Mining Deaths*, <https://arlweb.msha.gov/Fatals/NonChargeables/NonChargeableFatalshome.asp> (last visited Aug. 7, 2019).

⁵ The Commission and the D.C. Circuit have recognized a similar interest in the context of reportable injuries under 30 C.F.R. § 50.20. The Commission held that all on-site injuries are reportable regardless of causal nexus, noting that the Secretary has an interest in compiling all on-site injury data in order to determine which injuries may be prevented. *Freeman United Coal Mining Co.*, 6 FMSHRC 1577, 1579, 1579 n.3 (July 1984). The D.C. Circuit similarly found it "not unreasonable" for the Secretary to require the reporting of all on-site non-trivial injuries "in order to gather information necessary to carry out his rulemaking function under the Act." *Energy West Mining Co. v. FMSHRC*, 40 F.3d 457, 461 (D.C. Cir. 1994).

⁶ Both decisions turn on whether the operator's notification was timely. *E.S. Stone*, 33 FMSHRC at 520 (finding a violation where the operator failed to timely report a fatal heart attack); *Premier Chemicals*, 29 FMSHRC at 691-92 (finding no violation where the operator took reasonable time to investigate before reporting a death due to natural causes). This requires an implicit assumption that the fatalities were subject to the immediate notification requirement.

its objectives and requirements. Where the meaning of a standard is clear from the regulation's plain language, it follows that the standard provides adequate notice to operators. *See, e.g., Dynamic Energy, Inc.*, 32 FMSHRC at 1172; *Jim Walter Resources, Inc.*, 28 FMSHRC 983, 988 n.6 (Dec. 2006). Here, Part 50 explicitly defines "a death of an individual at a mine" as an accident, and all accidents as immediately reportable. 30 C.F.R. §§ 50.2(h)(1), 50.10. Given the plain language of Part 50, the obvious purpose of the reporting requirement, and Commission case law, a reasonably prudent person in the mining industry clearly had fair notice that all on-site deaths are immediately reportable accidents for purposes of Part 50.

III.

Conclusion

For the foregoing reasons, we find that the plain language of MSHA's reporting regulations at 30 C.F.R. Part 50 unambiguously defines any on-site death as an "accident" subject to the immediate reporting requirement in section 50.10(a). Accordingly, Richmond's failure to timely notify MSHA of a fatal heart attack at the mine site violated the standard. The Judge's decision is affirmed.

/s/ Marco M. Rajkovich, Jr.
Marco M. Rajkovich, Jr., Chairman

/s/ Mary Lu Jordan
Mary Lu Jordan, Commissioner

/s/ Michael G. Young
Michael G. Young, Commissioner

/s/ William I. Althen
William I. Althen, Commissioner

/s/ Arthur R. Traynor, III
Arthur R. Traynor, III, Commissioner

ADMINISTRATIVE LAW JUDGE DECISIONS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9949

July 5, 2019

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

v.

PEABODY MIDWEST MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. LAKE 2017-0073
A.C. No. 11-03156-423356

Docket No. LAKE 2017-0074
A.C. No. 11-03156-423356

Mine: Wildcat Hills Mine - Underground

DECISION AND ORDER

Appearances: R. Jason Patterson, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, for Petitioner;

Arthur M. Wolfson, Esq., Fisher & Phillips LLP, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge L. Zane Gill

These cases originally comprised four section 104(a) citations issued at Peabody Midwest Mining, LLC's Wildcat Hills Mine-Underground. Citation No. 9038387 was resolved by settlement prior to hearing.¹ The remaining three citations, Nos. 9039355, 9039356, and 9039357, were tried at a hearing in Marion, Illinois.

Citation Nos. 9039355, 9039356, and 9039357 were issued on September 8, 2016, for an area then known as the "old 2B panel."² (Tr.39:8-14; 43:19-21) Each alleges a violation of an escapeway-related requirement: Citation No. 9039355 alleges that the area lacked post-accident communication and tracking; Citation No. 9039356 alleges that a lifeline was not provided; and Citation No. 9039357 alleges that a refuge alternative lacked communication. (Ex. S-2) It is Peabody's position that these measures were not required because, at the relevant times, escapeways were not required in the old 2B panel. The Secretary asserts that escapeways were required. Therefore, the three citations involve a common foundational issue: whether escapeways were required in the old 2B panel in September 2016.

¹ A Motion to Approve Settlement was filed for that citation on April 9, 2018. (Tr.10:17-11:6)

² The "old 2B panel" is the area where mining unit No. 2 was previously located. Unit 2 was moved to another location in the mine. (Tr.43:17-44:1)

The dispute hinges on the determination of what the terms “removed” and “area” mean in the context of 30 C.F.R. § 75.380. Section 75.380(b)(1) requires that escapeways be “provided from each working section, and each area where mechanized mining equipment is being installed or removed, continuous to the surface escape drift opening [. . .] .” 30 C.F.R. § 75.380(b)(1) (emphasis added). Section 75.380(b)(2) specifies that “[d]uring equipment removal, [escapeways] shall begin at the location of the last loading point.” 30 C.F.R. § 75.380(b)(2).

Production at the old 2B panel stopped on August 26, 2016. (Tr.172:8–173:14; Ex. R–7 at 2) An air change and other items related to moving the production unit, including moving needed mechanized mining equipment, commenced on August 27, 2016. (Tr.124:15–125:1) Three pieces of equipment that were planned to eventually be transported from the mine were moved outby the last loading point and stored in nearby crosscuts. (Tr.99:3–7; 147:6–10; 148:4–6) Production was started at a new production unit on September 1–2, 2016. (Tr.174:13–175:4; Ex. R–7 at 8–9) The Secretary does not claim that active mining was being done in the old 2B panel when Inspector Brittan Belford was conducting his E01 inspection on September 6–8, 2016. (Tr.43:22–44:4)

The Secretary argues that escapeways were still required because the mechanized mining equipment had not been “removed” from the old 2b panel, which he argues is the relevant area in the regulation. Peabody argues that their mechanized mining equipment was “removed” because it had been moved outby the last loading point, which it sees as the relevant area in the regulation. If it was “removed,” as they argue, there was no requirement to maintain escapeways, and the three citations must be vacated since they all derive from the assumption that escapeways were required.

I. DECISION SUMMARY

In summary, I find that the essential removal process, which changed the requirements for maintaining escapeways, had been completed by the time Inspector Belford arrived. The Secretary’s interpretation of section 75.380(b), that mechanized mining equipment needed to be moved off the old 2b panel before escapeways could be discontinued, is not supported by the regulatory language, history, or logic. Thus, the fact that surplus equipment was stored outby the last loading point after being removed from an active face did not require Peabody to maintain escapeways. Consistent with Respondent’s position, once a formerly active production area is shut down and the equipment is moved outby the last loading point, the need to maintain escapeways is obviated. I conclude Citation Nos. 9039355, 9039356, and 9039357 must be vacated.

II. STIPULATIONS

1. Peabody Midwest Mining, LLC is an “operator” as defined in 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (Mine Act), 30 U.S.C. 803(d) at the time the citations at issue in this proceeding were issued.
2. Peabody Midwest Mining, LLC operates Wildcat Hills Mine.
3. Wildcat Hills Mine is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judges pursuant to sections 105 and 113 of the Mine Act.

5. The individual whose signature appears in Block 22 of the Citations at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citations were issued.

6. A duly authorized representative of the Secretary served the citations and terminations of the citations upon the agent of the Respondent at the date and place stated therein as required by the Mine Act, and the citations and terminations may be admitted into evidence to establish their issuance.

7. The total proposed penalty for the citations at issue will not affect Respondent's ability to continue in business.

8. The citations contained in Exhibit A attached to the Petition for Assessment of Penalty are an authentic copy of the citations at issue in this proceeding with all appropriate modifications and terminations, if any.

9. The exhibits to be offered by the Secretary and Peabody are stipulated to be authentic, but no stipulation is made as to the relevance of the truth of the matters asserted therein.

III. FACT SUMMARY³

A. The Unit 2 Move and Air Change (July–August 2016)

Wildcat Hills Mine has three active production units.⁴ (Tr.99:8–10; 112:1–4; 200:20–23) In late August 2016, coal production on the “2B panel” reached the geographic limit of the mining claim and had to stop, necessitating a production unit move several miles away in the same mine. (Tr.112:5–113:1; 170:14–171:3)

When a production unit moves, either because mining has reached the permitted geographic limit or a section has run out of coal or it has become unprofitable, the shut-down process generally includes an “air change.” (Tr.168:3–6; 270:16–271:3) An air change is done to maximize fresh air flow to the new active production area. (Tr.110:23–111:12; 271:5–9)

³ The findings of fact are based on the record as a whole and my careful observation of the witnesses as they testified. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, all consistencies or inconsistencies in their testimony, and their demeanor. Any failure to analyze each witness' testimony is not a failure to have fully considered it. The fact that some evidence is not discussed does not mean that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence, and failure to cite specific evidence does not mean it was not considered).

⁴ Active workings are “[a]ny place in a coal mine where miners are normally required to work or travel.” 30 C.F.R. § 75.2.

More airflow is needed in active production areas to dilute gases and dust, etc., (Tr.111:13–17), while mined-out portions of a mine can be ventilated with return air.⁵ (Tr.271:5–7)

After an air change, the escapeways that were required when the unit was in production are no longer required. (Tr.168:22–169:3) Any time mining equipment is moved for any reason from one place to another, it is moved in entries ventilated by belt air, not in a primary escapeway.⁶ (Tr.268:18–269:12) MSHA has never indicated that it is out of compliance to do so (Tr.269:13–23), and this is the standard practice in District 8. (Tr.269:24–270:4) A plan to transport equipment from place-to-place in an entry ventilated by belt air has never been required. (Tr.270:5–9)

Prior to the air change, the intake air course and the 2B travelway were the primary and secondary escapeways, respectively. (Tr.94:7–20) They were required to be separate and could not have air in common. (Tr.94:21–95:3) The maps submitted with the air change plan showed that the entries that had been separate escapeways when unit 2 was operational would be made common on the 7 main north. (Tr.121:15–24; Ex. R–2)

1. Ventilation Plan

Peabody had to redirect ventilation air flow once production stopped on the 2B panel to send more and fresher air to other parts of the mine (Tr.111:5–17) and leave the current (but soon

⁵ Return air is defined in 30 C.F.R. § 75.301 as:

Air that has ventilated the last working place on any split of any working section or any worked-out area whether pillared or nonpillared. If air mixes with air that has ventilated the last working place on any split of any working section or any worked-out area, whether pillared or nonpillared, it is considered return air. For the purposes of § 75.507–1, air that has been used to ventilate any working place in a coal producing section or pillared area, or air that has been used to ventilate any working face if such air is directed away from the immediate return is return air.

Notwithstanding the definition of intake air, for the purpose of ventilation of structures, areas or installations that are required by this subpart D to be ventilated to return air courses, and for ventilation of seals, other air courses may be designated as return air courses by the operator only when the air in these air courses will not be used to ventilate working places or other locations, structures, installations or areas required to be ventilated with intake air.

⁶ A primary escapeway has to be ventilated with intake (fresh) air, and it has to go all the way to each section. 30 C.F.R. § 75.380(f). It cannot be used for any other purpose. (Tr.273:5–14) A secondary (alternate) escapeway is less restricted; it can be common with belt or travel road air. (Tr.274:5–15; 30 C.F.R. § 75.380(h))

to be “old”) 2B panel in a worked-out status.⁷ (Tr.275:10–276:7) In this case, the air change was substantial and complex enough to require a plan approved by MSHA. (Tr.109:17–110:3; 113:2–13) Matthew Kimbel⁸ and his team modeled the ventilation capacity of the mine and determined how the ventilation controls needed to be arranged. (Tr.110:10–22; 114:10–17) The air change plan was based on the decision to move the production unit (i.e., unit 2) to the “Second East Mains.” (Tr.115:3–5; Ex. R–1 at 1) The plan proposal was submitted to MSHA on July 12, 2016. (Tr.116:5–7; Ex. R–1 at 1) MSHA did not approve this submittal. (Tr.117:18–20)

After receiving feedback from the MSHA district office, Peabody realized it had unneeded equipment (a spare belt drive) and decided to change the location of unit 2’s future faces from the “Second East Mains” to the “Second East Main Parallel” (new unit 2). (Tr.117:22–118:2; Ex. R–1 at 3–4) On July 29, 2016, Peabody submitted a superseding air change plan to MSHA along with three new revised maps, which identified the then-current ventilation controls and what ventilation control changes would be made. (Tr.115:6–14; 117:22–25; 118:3–119:11) The amended air change was planned for a single work shift, during which the escapeways would be maintained. (Tr.120:19–121:10; 124:15–23) MSHA approved this plan on August 17, 2016. (Tr.119:24–120:1; 121:9–10; Ex. R–1 at 5)

2. Equipment Plan

Stephen Reynolds⁹ and Kimbel participated in making the decision as to where the equipment on the 2B panel would be moved. (Tr.129:1–3; 183:17–21) At Wildcat Hills, mechanized mining equipment is prepared for transport before an air change occurs. (Tr.271:10–272:7) First, all equipment is moved out by the loading point before the air change. (Tr.184:8–15) Next, subsequent decisions are made about what to do with each piece of equipment, with priority given to equipment needed for production at the new unit. (Tr.184:16–185:7) However, all of the mining equipment is not always moved to the new area when the production unit moves. (Tr.168:12–21) At Wildcat Hills, equipment is on a contractual tonnage-based maintenance schedule (Tr.278:4–10); thus, when a piece of equipment reaches its tonnage limit, it has to be transported out of the mine to be refurbished. (Tr.277:25–278:17) Continuous miners are taken out of the mine for these repairs once every two or three section changes, with rebuilt continuous miners taking their place at the new unit. (Tr.278:10–13) According to Kimbel, Peabody had never been required to specify in a ventilation or air change

⁷ A worked-out area is “[a]n area where mining has been completed, whether pillared or nonpillared, excluding developing entries, return air courses, and intake air courses.” 30 C.F.R. § 75.301.

⁸ Kimbel is the Manager of Engineering at the Wildcat Hills Mine in the Arclar Complex. (Tr.107:15–108:6) He is a professional engineer with a Master of Science degree and has 11 years of experience in the mining industry. (Tr.108:25–109:11)

⁹ Reynolds is a project manager for Peabody. (Tr.165:13–18) In August of 2016, he was the underground superintendent and general mine manager. (Tr.165:25–166:7) He has 43 years of mining experience at various underground mines in the region. (Tr.166:15–167:15) Any unit move would be under Reynolds’ supervision. (Tr.167:16–168:2)

proposal submitted to MSHA where excess mechanized mining equipment would be stored pending transport from the mine. (Tr.130:20–131:4; 132:16–24)

Chad Barras¹⁰ gave the order to have the equipment moved outby the loading point prior to making the air change so that the escapeway air flow would be preserved until the equipment was moved. (Tr.272:9–16; 303:24–304:13) Peabody believed this was consistent with industry practice and in line with section 75.380(b). (Tr.295:14–296:4) Peabody further believed that once all of the mechanized mining equipment that had been used to mine at the face of the 2B panel was moved outby the former loading point, “removal” would be complete, the area would no longer be active, and escapeways would no longer be required. (Tr.169:6–21) This has long been the practice and understanding of “removal” at Wildcat Hills. (Tr.169:6–170:3; 198:5–21; 264:19–265:2; 296:2–4) There is no requirement that all of the equipment be moved within a given time. (Tr.294:4–295:3)

3. Execution of the Unit 2 Move

Production at the 2B panel (hereafter “old 2B panel”) stopped on August 26, 2016. (Tr.171:19–173:14; Ex. R–7) Consistent with the plan, all mechanized mining equipment was first moved outby the former loading point. (Tr.173:4–11; 189:6–12) Reynolds testified that most¹¹ of the essential equipment was moved to the new mining location before the air change. (Tr.187:13–188:3) In preparation for the unit move, the area near the former working face was roof bolted, loose accumulations of coal were back scooped, and the area was rock dusted. (Tr.173:19–174:2; Ex. R–7 at 3–4)

Under Reynolds’ supervision, Peabody carried out the unit move and air change during the “owl” and day shifts on August 27, 2016. (Tr.124:24–125:4; 131:11–14; 171:4–18; 173:25–174:12; Ex. R–7 at 4–5) One effect of the air change was to change the designation of air courses in the old 2B panel so that they were no longer considered “escapeways,” as required when the unit was in active production. (Tr.162:2–7; 202:19–22) This was accomplished by removing some stops and constructing new stoppings to direct the air into its new course. (Tr.124:15–21) Production at new unit 2 commenced on September 1, 2016. (Tr.174:13–175:4; Ex. R–7 at 8–9)

Although most of the mechanized mining equipment was moved to new unit 2 to resume production, three pieces of equipment — Continuous Miner #234 (CM234), Continuous Miner #235 (CM235), and Feeder Breaker #605 (F605) — were not. New unit 2 did not need CM234 and CM235 because newly rebuilt miners — Continuous Miners Nos. 237 and 238 — had already been sent to new unit 2. (Tr.175:19–177:6; 201:4–11; Ex. R–7 at 8–9) It is not clear from the record why F605 was not needed at new unit 2.

¹⁰ Barras is (and was) the safety and compliance director for Peabody Energy. (Tr.258:24–259:9; 260:22–25) Barras was a ventilation engineer at MSHA prior to working for Peabody. (Tr.261:3–7) Mark Eslinger was his supervisor at MSHA. (Tr.261:10–12)

¹¹ Reynolds could not recall, however, if all of the essential equipment was moved before the air change. (Tr.187:13–189:4)

Although CM234, CM235, and F605 could have been moved completely off the 2B panel before the air change (Tr.189:17–21), they were left in the crosscuts just outby the former loading point.¹² (Tr.44:5–9; 50:8–19; 52:19–21; 302:23–303:15) The decision regarding what to do with these three pieces of excess mechanized mining equipment was instead deferred. (Tr.129:21–25; 183:17–187:10) Peabody’s management was certain, however, that the equipment would not be stored indefinitely in the crosscuts outby the former loading point on the old 2B panel. (Tr.129:16–20; 192:10–193:15)

B. Inspector Belford’s Inspection (September 6–8, 2016)

1. September 6, 2016

Enter now MSHA Inspector Brittan Belford¹³ of the Marion, Illinois field office. (Tr.28:15–24) Belford visited the mine site on three consecutive days to conduct an E01 Inspection. (Tr.38:10–15; 39:8–14) He was familiar with the mine, having previously conducted three or four E01 inspections at Wildcat Hills. (Tr.37:25–38:1)

On the first day, September 6, 2016, Belford arrived at the Wildcat Hills Mine at 7:30 a.m. and met with Douglas Combs¹⁴ in the mine’s safety office. (Tr.42:20–43:8) The two traveled underground together to the old 2B panel via the 2A Sub Main.¹⁵ (Tr.43:14–21; 137:8–138:3) Once there, Belford and Combs traveled inby the old 2B travelway on a stinger ride.¹⁶ (Tr.91:4–18; 95:10–12; 96:1–5; 138:10–17) Belford observed FB605, CM234, and CM235 parked outby the former loading point. (Tr.52:12–21) Belford also observed a lifeline hooked up in the old 2B travelway. (Tr.58:17–21; 95:13–19) Belford’s notes indicate that no violations were observed up to this point. (Tr.92:14–93:1; Ex. S–2) Once Belford and Combs traveled the

¹² The last former loading point was located at crosscut 130. (Ex. J–3) While there is no dispute that the three pieces of mechanized mining equipment were outby the former loading point (Tr.90:18–23; 99:3–7), there is a slight discrepancy in the record about precisely where they were parked. During the hearing, Inspector Belford illustrated on Joint Exhibit 3 that F605 was located in crosscut 129 and the continuous miners were located in crosscuts 128 and 127. (Tr.50:8–19; Ex. J–3) Douglas Combs’ map shows F605 located in crosscut 127 and the continuous miners located in crosscuts 125 and 126. (Tr.147:6–10; 148:4–6; Ex. R–6) This discrepancy does not alter my analysis. Thus, I will refer to Inspector Belford’s locations.

¹³ Belford received a bachelor’s degree in mining engineering in 2010. (Tr.29:2–16) After graduation, Belford spent one year in the private sector as a full-time production management trainee. (Tr.30:1–4) In 2011, Belford began working at MSHA as a coal mine inspector. (Tr.31:5–10)

¹⁴ Combs was the safety supervisor at Wildcat Hills. (Tr.135:24–136:3) Combs’ responsibilities included working on policies and procedures and escorting federal and state inspectors. (Tr.136:6–9)

¹⁵ The old 2B panel developed at a 90 degree angle off of the 2A Sub Main. (Tr.138:4–9)

¹⁶ A stinger ride is a battery powered vehicle. (Tr.138:13–17)

length of the travelway and reached the end of the panel, they took a left turn and entered into the left return. (Tr.91:4–23; 138:18–21)

While in the old 2B left return, their vehicle got stuck. (Tr.139:1–3) Belford and Combs exited the vehicle and used a man door to enter back into the old travelway at approximately the 5,700 foot mark.¹⁷ (Tr.138:24–139:17; 140:2–13; *See* Ex. J–3) Combs then attempted to use his mine site cell phone to call for a ride. (Tr.53:3–5; 139:21–22; 140:14–19; 149:17) There was no cell service. (Tr.53:5–7; 139:22–23; 140:20–22; 149:10–17) Combs and Belford discussed the lack of cell signal and communication coverage, which was a surprise to both. (Tr.140:20–142:1) At this time, Belford testified he told Combs that equipment — i.e., FB605, CM234, and CM235 — was still being removed from the area and, therefore, the travelway was a secondary escapeway, which required tracking or communication. (Tr.53:8–13) Combs testified, however, that Belford asked if tracking or communications were required in the area. (Tr.141:13–14) Combs was unsure but thought the fact the excess equipment was parked outby the former loading point was a relevant factor. (Tr.141:15–17) At this point, according to Combs, neither man was certain. (Tr.141:18–21)

The two discussed and referenced the federal regulations for an answer but, according to Combs, could not reach a conclusion. (Tr.53:17–20; 141:22–142:1; 143:5–10) Combs and Belford traveled outby where there was cell service, called to the surface, and requested a ride for Belford out of the mine. (Tr.142:4–15)

Once back at the surface, Belford went to the tracking office to speak with Nathan Sumner, the supervisor of tracking and communications.¹⁸ (Tr.53:21–54:2; 93:25–94:5) Sumner explained that because the power center for unit 2 had been moved from the old 2B panel on August 26, 2016, there was no power for a tracking system in the area. (Tr.54:9–16; *see also* Tr.181:10–18) Sumner told Belford that it would not be a problem to put the power center back in and re-establish communication and tracking. (Tr.55:3–8) Belford testified that he informed Sumner that the old 2B travelway was an escapeway that required communication and tracking; nevertheless, Belford did not issue a citation that day. (Tr.55:13–21) Belford claimed that he was affording the company the opportunity to come into compliance before enforcement action was needed. (Tr.55:22–24)

Later that day while on his way home from work, Barras learned that Inspector Belford had asked questions about communication and tracking on the old 2B travelway. (Tr.285:2–12) In Barras' mind, the equipment in the 2B panel was “removed” once it was moved outby the former loading point so there was no need for escapeways and thus no need for communication and tracking. (Tr.285:14–16) Barras called Marion field office supervisor Mike Rene and expressed his opinion. (Tr.285:17–22) Rene said he would talk to Belford the next morning.

¹⁷ The old 2B left return and old 2B travelway are adjacent to each other and connected by a man door. (Tr.139:12–17)

¹⁸ There is a discrepancy in the record whether Combs was also present at the tracking office for this discussion. (Tr.54:3–8; *contra* Tr.142:16–143:4)

(Tr.285:22–24) Barras believed that Rene would resolve the issue with Belford. (Tr.285:25–286:2)

2. September 7, 2016

Belford returned to the mine the next morning, September 7, 2016. (Tr.55:25–56:8) He again went to the safety office and spoke to Combs. (Tr.56:6–11; 144:12–18) Prior to going underground to resume the inspection, Belford asked Combs about the status of tracking and communication in the old 2B travelway. (Tr.56:17–22) Combs responded that they had not installed tracking or communication, did not plan to, and had additionally pulled the lifeline¹⁹ that was in the travelway the previous day. (Tr.56:22–25) Belford recalled telling Combs that the old 2B travelway was still an escapeway, but now it was an escapeway without a lifeline.²⁰ (Tr.57:1–4)

Belford reviewed the mine map and examination records before returning underground to the old 2B panel. (Tr.57:5–12) He was accompanied by Eric Blackford, a member of Wildcat Hills' safety team. (Tr.57:13–20) At the old 2B panel, Belford verified the lifeline had been removed. (Tr.57:21–25) Additionally, Belford noted where the last known loading point was, where the excess equipment was, and that the phone at a nearby refuge alternative did not work. (Tr.58:1–9) Belford and Blackford took the right return heading outby and spoke with mine examiner J. Jackson, the miner responsible for conducting pre-shift examinations. (Tr.58:22–59:8; 72:19–73:1) Belford asked Jackson if he knew there was no tracking or communication along the old 2B panel. (Tr.59:11–12) Jackson replied that he was aware and that manual tracking was being used in place of the wireless tracking system.²¹ (Tr.59:12–14) The phone system and wireless tracking were not operational because the power source had been taken out during the unit move.²² (Tr.308:9–15; 309:9–18) At this time, records in the area indicated the old 2B panel was still being pre-shifted three times a day, as if it was still in active production. (Tr.72:1–13)

¹⁹ Barras believed that the lifelines were pulled out of the old 2B panel on September 7 to avoid the appearance they were connected to functioning refuge alternatives. (Tr.307:21–308:8)

²⁰ Combs, on the other hand, recalled Belford saying that Wildcat Hills would either get two or three serious citations or none at all. (Tr.144:21–145:1)

²¹ Although manual tracking can vary from mine to mine, here, miners were instructed to call out and somebody would write in a record book the names of the miners going into the old 2B panel. (Tr.59:12–14; 101:24–102:2)

²² Barras explained that Wildcat Hills' Emergency Response Plan requires two forms of tracking in escapeways. (Tr.308:16–310:3) His belief was that the old 2B travelway was not an escapeway by that time.

After speaking with Jackson in the mine, Belford returned to the surface and met with Reynolds²³ and Barras in the staging area.²⁴ (Tr.60:6–19; 181:21–182:5) Belford asked Reynolds why the lifeline was taken down and communications were not re-established as he had instructed the previous day. (Tr.61:14–17) Reynolds responded that Barras had allowed him to remove the lifeline. (Tr.61:17–19) Reynolds had the lifeline removed because it is not required if there is no active escapeway. (Tr.178:8–179:2) Reynolds explained that it was potentially dangerous to have a lifeline in an airway other than an escapeway since it could give a false impression to miners and lead them in the wrong direction. (Tr.179:3–14) After speaking with Belford about the lifeline issue, Reynolds stood by his view that no escapeway was required because the excess equipment was outby the last former loading point. (Tr.180:16–181:6)

During his conversation with Barras, Belford reiterated that the old 2B travelway was still an escapeway that required a lifeline, communication, and tracking.²⁵ (Tr.62:24–63:3) Barras adamantly disagreed, stating that because equipment was moved outby the former loading point, they were no longer required to maintain an escapeway and the other requirements associated with it. (Tr.62:17–63:6; 295:14–296:4)

After leaving the mine that day, Belford returned to the MSHA district office and spoke to supervisor Bob Bretzman.²⁶ (Tr.63:10–14) Around that time, Rene called Barras and told him that he was passing the issue on to Bretzman because Rene was scheduled to go on vacation. (Tr.286:9–17; 287:16–288:11) During this call, Rene did not indicate whether he thought

²³ Combs also recalled participating in a conversation about tracking, communications, and the lifelines in the old 2B panel with Reynolds, Max Hainey (Safety Manager), and Inspector Belford. (Tr.148:14–149:7) At this point, Combs believed that nobody, including Inspector Belford, had a clear notion whether the old 2B travelway was still an escapeway. (Tr.150:3–13) It is not clear from the record whether the meeting Belford recalled is the same as the one Combs recalled.

²⁴ Belford testified that he was sure he met separately with Barras and Reynolds (Tr.60:18–19), but he was unsure if he also spoke with Barras and Reynolds together at the same time. (Tr.316:4–10) Barras recalled that Reynolds was present. (Tr.290:3–8) Barras could not remember the exact date but remembered the substance of this meeting vividly because Belford accused Barras of not caring about the safety of his men, which was upsetting to him. (Tr.290:3–18)

²⁵ Reynolds testified that he came up on Combs, Barras, and Belford talking. (Tr.182:6–9) Reynolds recalled Belford saying that it would be okay if the mine just hooked the lifelines back together. (Tr.182:10–11) Reynolds recalled Barras saying that would not fix the issue because the primary and secondary escapeways were now common. (Tr.182:12–16) Barras also recalled this exchange with Belford. (Tr.290:21–291:14) Inspector Belford, however, denied ever telling Barras that the mine could just put the lifelines together. (Tr.316:16–21)

²⁶ Belford had never received any training from MSHA about what constitutes removal of equipment for purposes of the escapeway requirement. (Tr.90:8–15) Belford had never encountered a situation like this (Tr.88:9–13), so it is not surprising that he had not been trained to this interpretation of the regulation. (Tr.88:2–89:18)

Peabody was in or out of compliance. (Tr.288:3–11) Barras never heard from or spoke to Bretzman before the citations were issued. (Tr.288:14–17)

3. September 8, 2016

Before returning to the mine on the morning of September 8, 2016, Belford reviewed the mine's Emergency Response Plan and wrote three citations: Nos. 9039355, 9039356, and 9039357. (Tr.63:18–64:5; 289:6–14) Belford then traveled back to the mine and went to the safety office where he met with Mike Cummins, a member of the mine's safety staff, to give him the paperwork for the citations. (Tr.64:12–65:4) Belford spoke again with Barras. (Tr.65:5–11) Barras reiterated his position that the area was no longer an escapeway and the tracking system, lifeline, and refuge alternative were no longer required. (Tr.65:18–66:3) Belford repeated his position that an escapeway was needed because Wildcat Hills was still removing mine equipment — CM234, CM235, and FB605 — from that area. (Tr.66:4–8) The two went to Barras' office and called Belford's field office supervisor, Bob Bretzman, for a conference call. (Tr.65:5–17; 66:18–22)

4. Abatement and Termination of Citations

On September 12, 2016, Belford terminated all three citations after Peabody re-established the escapeways in the old 2B panel. (Tr.312:12–313:10; Ex. S–2 at 3, 6, 10) Citation No. 9039355 was terminated after Peabody received approval from MSHA for a manual check-in/check-out system in the old 2B panel, which also included a requirement that miners report in every two hours. (Tr.102:3–11; 292:11–294:1; Ex. S–2 at 10) Citation No. 9039356 was terminated after Peabody installed a continuous durable lifeline in the old 2b secondary escapeway.²⁷ (Tr.79:10–15; Ex. S–2 at 3) Citation No. 9039357 was terminated after Peabody re-established communication at the old 2B refuge alternative by use of a mine phone. (Ex. S–2 at 6)

As part of the abatement of these citations, MSHA did not require that FB605, CM234, or CM235 be moved within a specified time period. (Tr.294:4–295:3) Nonetheless, they were eventually moved out of the mine between September 8, 2016, and January 2, 2017. (Tr.299:13–303:4)

²⁷ In order to terminate the citation, the lifeline had to be re-established but was moved from the travelway to the left return entry. (Tr.79:10–23) Belford testified that this was because the travelway (where the lifeline had originally been located) was now ventilated with the same air as the primary escapeway after a few brattices were knocked down during the air change on August 27, 2016. (Tr.79:24–80:10; 317:10–19)

IV. FURTHER FINDINGS OF FACT AND CREDIBILITY

A. Eslinger's Testimony

Respondent's witness Mark Eslinger²⁸ is a former MSHA civil engineer with extensive experience with ventilation work. (Tr.205:10–208:11) He served as the supervisory mining engineer for ventilation in MSHA's District 8 office in Vincennes, Indiana — the same district where the Wildcat Hills mine is located — for more than 25 years. (Tr.207:11–209:1) Eslinger supervised ventilation inspectors who enforced MSHA ventilation regulations. (Tr.209:14–210:8) After retiring from MSHA in 2009, Eslinger worked as general safety manager over three underground mines in District 8. (Tr.209:2–13; 211:18–212:2; 233:22–234:15) In this capacity, Eslinger was personally involved in the planning and execution of several unit moves, which included air changes. (Tr.233:22–235:9)

1. Subpart D–Ventilation Rewrite Committee 1985–1988

On January 28, 1985, MSHA established a task force to study commonly employed practices and equipment used in longwall mining. 53 Fed. Reg. 2,382-01, 2,382–83 (Jan. 27, 1988). Eslinger participated on this task force and assisted in rewriting Subpart D of the 300 series ventilation regulations, sections 75.300 through 75.398, which included the escapeway regulation in question here.²⁹ (Tr.212:3–19) In 1988, MSHA issued its proposal for Subpart D–Ventilation. (Tr.216:6–17; 53 Fed. Reg. at 2,382)

2. Pyro Mining Company Disaster

In September 1989, an explosion at Pyro Mining Company's William Station No. 9 mine in Kentucky claimed the lives of 10 miners.³⁰ (Tr.217:11–14) Eslinger was one of the chief investigators in the post-event investigation into the causes of the tragedy.³¹ (Tr.217:7–18) The

²⁸ The Secretary moved *in limine* to exclude Eslinger's testimony. The motion was denied, and Eslinger was allowed to testify. (Tr.11:7–12:22)

²⁹ Eslinger also participated in the subsequent 1996 rewrite, which did not involve a change to the escapeway regulation's paragraphs (b)(1) and (b)(2) that are at issue here. (Tr.210:19–23; 61 Fed. Reg. 9764-01, 9810 (Mar. 11, 1996). In 2004, he was also on the committee that drafted and issued a new belt air rule that permitted the use of belt air on working sections. (Tr.210:23–211:8)

³⁰ *Gas Explosion in Kentucky Leaves 10 Coal Miners Dead*, N.Y. TIMES (Sept. 14, 1989), <https://www.nytimes.com/1989/09/14/us/gas-explosion-in-kentucky-leaves-10-coal-miners-dead.html>

³¹ The Pyro mine disaster took place at a longwall panel, Longwall Panel O. (Tr.217:25–218:2) Unlike a continuous miner unit, longwall recovery and removal involves much more work, including disassembling and moving hundreds of shields, a double arm sheer, the stage loader, the chain conveyor, and the pan line. (Tr.218:16–219:5; 230:12–232:9) This process can take weeks. (Tr.219:4–6)

investigation committee found that a ventilation change, which directed air to the new longwall panel, Longwall Panel P, was made on shift. (Tr.221:5–8) As a result, methane gas had accumulated at the longwall face while miners were still disassembling the equipment at Longwall Panel O. (Tr.217:25–218:13; 220:23–221:5) The investigation committee concluded that the likely source of ignition was a flame from a cutting torch.³² (Tr.221:12–15) The investigative team subsequently wrote a report, which became widely known in the mining industry. (Tr.221:16–25)

3. The 1992 Final Rule for Subpart D–Ventilation

The specific events at the William Station mine prompted the ventilation committee to rewrite portions of the ventilation regulations before the 1992 final rule was issued. After significant discussion, the rewrite committee concluded that if sufficient ventilation had been maintained until after all the mechanical equipment had been dismantled and moved away from the face, lethal conditions could have been avoided at the William Station mine. (Tr.222:21–223:9) Thus, one of the revisions the rewrite committee worked on was a clarification that escapeways must be maintained during both the installation and removal of equipment at the working face. (Tr.222:19–223:15; 57 Fed. Reg. 20,868-01, 20,894 (May 15, 1992)) Prior to this, there was no express requirement that escapeways be maintained with the attendant requirement for separate and supplemental escapeway ventilation during installation or removal. (Tr.222:7–18; 226:11–16; *see* 53 Fed. Reg. at 2,382)

The final rule was issued in 1992. 57 Fed. Reg. at 20,868. The new requirement that two escapeways be maintained as equipment was being installed or removed from an area was added. (Tr.223:10–15; 232:12–14; 233:3–9; 57 Fed. Reg. at 20,904; 30 C.F.R. § 75.380(b)(1)) Eslinger testified the rule became widely known through a series of well-attended informational meetings held around the country. (Tr.224:19–225:1) The escapeway standard was one of the topics covered in these meetings. (Tr.226:8–19) The specific point of when “removal” was complete was also covered. (Tr.226:20–22) According to Eslinger, removal was considered complete when all of the face equipment had been moved outby the last loading point and the loading point was decommissioned. (Tr.226:23–227:20) Eslinger explained the logic behind this: once equipment is moved outby the loading point, the risk level drops considerably. (Tr.248:18–22) Methane is most often liberated at the working section during mining (or shortly thereafter) and not as likely liberated outby the loading point. (Tr.249:2–4; 250:12–19) Additionally, the chance for explosions decreases because there would be no cutting and welding by the time all of the equipment is moved outby the loading point.³³ (Tr.248:22–249:10)

This interpretation was disseminated throughout District 8 during Eslinger’s tenure, until his retirement in 2009. (Tr.227:24–228:19; 265:19–21) Eslinger testified this interpretation was

³² The pan line is in sections and connected by “dog bone connectors,” which are connected by screws. (Tr.219:12–17) During the mining process, the screws rust. (Tr.219:17–19; 232:3–7) The easiest way to remove the rusted screws is to cut them out with an acetylene torch. (Tr.219:19–220:10; 232:7–9)

³³ The disassembly of equipment precedes the moving of equipment. (Tr.249:19–250:7) Nonetheless, dissembling of equipment is part of “removal.” (Tr.258:1–5)

a matter of agency culture; it was never reduced to a formal written policy statement. (Tr.228:24–229:16) Similarly, Eslinger’s interpretation of “removal” is not covered in any of MSHA’s Program Policy Manuals (PPM). (Tr.244:9–16) Until September 8, 2016, to Eslinger’s knowledge, MSHA never contradicted this practice. (Tr.235:10–22)

B. Eslinger’s Credibility

The Secretary uses a generous portion of his briefs challenging Eslinger’s testimony. The Secretary argues Eslinger’s testimony is (1) irrelevant (Sec’y Br. 21–23, 25–26; Sec’y Reply Br. 3–4); (2) inconsistent with the plain language and intent of the regulation (Sec’y Br. 21–22, 24–26; Sec’y Reply Br. 3–4) ; and, (3) factually implausible (Sec’y Br. 21–23, 26; Sec’y Reply Br. 3–4)

The Secretary argues Eslinger’s testimony is irrelevant because he has not been employed by MSHA in nearly a decade and admittedly has no authority to speak on MSHA’s behalf. (Sec’y Br. 23) Additionally, even if he were still working for MSHA, Eslinger’s view would not be binding on the Secretary as it does not “represent an official position” of the agency. (*Id.*; Sec’y Reply Br. 3) While this is true, it does not preclude me from crediting the factual portions of Eslinger’s testimony without reference to his ultimate legal conclusion.

The Secretary next argues Eslinger’s interpretation is at odds with the safety objective of the escapeway regulation. (Sec’y Br. 21–22; Sec’y Reply Br. 3–4) Notably, the Secretary states that “[t]he fact equipment is moved past the former loading point does not eliminate the hazards associated with equipment removal.” (Sec’y Br. 25) As discussed in detail below, Eslinger’s interpretation is closely compatible with the specific escapeway-related safety concerns enumerated in the preambles. *See* discussion *infra* Section VI. B.

Finally, the Secretary argues Eslinger’s testimony was factually implausible because Eslinger’s interpretation is not found in the extensive regulatory history of the escapeway standard. (Sec’y Br. 24) While it is true the various Subpart D-related sections in the Federal Register do not explicitly clarify when “removal” is complete, as outlined below, there is ample evidence to support Eslinger’s position. *See* discussion *infra* Section VI. B. The Secretary additionally claims to have serious doubts about Eslinger’s factual recounting, stating that the six public meetings Eslinger mentioned at the hearing took place before the William Station mine disaster — a temporal impossibility given that the “removal” language of the escapeway regulation was added in response to the disaster. (Sec’y Br. 24–25) It appears, however, the Secretary either misunderstood or misconstrued Eslinger’s statement. Eslinger’s statement about the six informational meetings starts on page 223 of the transcript. (Tr.223:20) Indeed, while speaking about the six public meetings in 1988, Eslinger specifically mentioned Grand Junction, Colorado (Tr.223:25–224:1), one of the locations listed in the Federal Register and cited by the Secretary. (Sec’y Br. 24; 57 Fed. Reg. at 20,868) However, on page 224, Eslinger began talking about the 1992 final rule and the subsequent informational meetings. (Tr.224:4–225:15) Thus, Eslinger described two sets of meetings: (1) the six public meetings in 1988 and (2) the three informational sessions after 1992. The Secretary’s failure to understand this detail is not a negative reflection of Eslinger’s credibility.

I have no reason to doubt the relevance and applicability of Eslinger's testimony about how the escapeway requirement came into existence, his role in investigating the William Station mine disaster, or his role in updating the ventilation regulations. Nevertheless, even if I were to discredit Eslinger under any of the Secretary's various theories (which I am not), I need not rely on Eslinger's testimony to reach my conclusion. A thorough review of the Federal Register confirms many of his factual statements, insofar as I am able to make various inferences, which leads me to an interpretation regarding section 75.380(b).

C. Respondent's Employee-Witnesses' Credibility

The Secretary also criticizes Respondent for relying on the "self-serving" testimony of its witness managers. (Sec'y Reply Br. 5) The Secretary uses this blanket proposition as an attempt to discredit Respondent's witnesses, but such a broad argument is not very convincing. It ought to go without saying that a party's own witnesses tend to support said party's contentions. I will not reject the testimony of Respondent's witnesses strictly on the basis of a current or former employment relationship. See *Cannelton Indus., Inc.*, 20 FMSHRC 726, 731–32 (July 1998) (citing *Breeden v. Weinberger*, 493 F.2d 1002, 1010 (4th Cir. 1974)). Similarly, the fact that Respondent's witnesses' testimonies do not conform to the Secretary's theory is an insufficient reason to discredit or disqualify them.

Of Respondent's four employee-witnesses, only Reynolds and Barras spoke in detail about the historical application of the escapeway provision in District 8. Reynolds and Barras both testified that they learned about removal of equipment, as it pertains to section 75.380(b), in the same manner Eslinger described, and they have taught and applied it that way since 1992. (Tr.169:6–170:3; 264:21–24) Barras' interpretation of what "removed" means was informed by his participation in a public information meeting, a possible phone call with Eslinger to get clarification, and years of doing it that way, including while working as an MSHA inspector in District 8. (Tr.265:19–266:1; 297:5–20) Reynolds' interpretation was based on his four decades of mining experience, the way air changes have been done since 1992, what he was trained and told to do, and his understanding of how it is done everywhere in the region. (Tr.197:8–200:12) Barras had never heard of any change in this view of when "removal" is complete. (Tr.267:4–10) Both witnesses were internally consistent in their testimony, have decades of combined mining experience in District 8, and their actions between September 6–8 were consistent with their statements at the hearing. I see no reason to discredit their testimony about their personal work history and understanding of the escapeway provision.³⁴

V. PRINCIPLES OF LAW

Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results. *Jim Walter Res., Inc.*, 28 FMSHRC 579, 587 (Aug. 2006) (citing *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir.

³⁴ By contrast, the Secretary's sole witness, Inspector Belford, had only six years of professional mining experience, had not been specifically trained on what constituted "removal," and had never seen this application of facts to the regulation.

1987); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989)). In determining the meaning of regulations, the Commission “utilizes ‘traditional tools of [. . .] construction,’ including examination of the text and the intent of the drafters.” *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44–45 (D.C. Cir. 1990)). The meaning of a regulation is “ascertain[ed] [. . .] not in isolation, but rather in the context in which those regulations appear.” *Wolf Run Mining Co.*, 32 FMSHRC 1669, 1681 (Dec. 2010) (citing *RAG Shoshone Coal Corp.*, 26 FMSHRC 75, 80 n.7) (Feb. 2004)). As recently articulated by the Supreme Court in *Kisor v. Wilkie*, a court should not afford *Auer* deference (established in *Auer v. Robbins*, 519 U.S. 452 (1997)) unless the regulation is genuinely ambiguous. 588 U.S. ___ (2019) (slip op. at 13) (citing *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). Before concluding that a rule is genuinely ambiguous, a court must first exhaust all the “traditional tools” — the text, structure, history, and purpose — of construction. *Id.* at ___–___ (slip op. at 13–14).

If a regulatory provision is found to be ambiguous, the agency’s interpretation of that provision is entitled to deference if it is found to be reasonable. See *Drilling & Blasting Syst., Inc.*, 38 FMSHRC 190, 194 (Feb. 2016) (citing *Auer*, 519 U.S. at 452). However, “an agency’s [. . .] interpretive authority is not unfettered.” *Hobet Mining Co.*, 26 FMSHRC 890, 899 (Nov. 2004) (ALJ). Deference to the agency’s interpretation is inappropriate if its interpretation is not reasonable, when it is plainly erroneous or inconsistent with the regulation, or if it does not reflect the agency’s fair and considered judgment. *Drilling & Blasting Syst.*, 38 FMSHRC at 194 (citing *Auer*, 519 U.S. at 461; *Christopher v. Smith-Kline Beecham Corp.*, 567 U.S. 142, 154 (2012)); see also *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001) (finding that the amount of deference to which an agency is entitled depends on, among other things, the agency’s consistency and persuasiveness of its position). Additionally, the regulatory interpretation must be one “actually made by the agency.” *Kisor*, 588 U.S. at ___ (slip op., at 15). In other words, it must be the agency’s “authoritative” or “official position,” rather than an ad hoc statement not reflective of the agency’s views. *Id.*

As the Supreme Court has explained, an agency’s interpretation may not reflect its fair and considered judgment when it conflicts with a prior interpretation. *Christopher*, 567 U.S. at 155; cf. *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991) (court considered longstanding and consistent interpretation as a factor on whether to defer); see also *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 515 (1994) (stating that a regulatory interpretation that conflicts with a prior interpretation is “entitled to considerably less deference than a consistently held agency view”). Courts should not give deference to an agency’s reading except to the extent it has the “power to persuade.” *Christopher*, 567 U.S. at 159. The Secretary bears the burden of establishing the factors necessary to afford his position deference. See *Peabody Twentymile Mining LLC*, 39 FMSHRC 1323, 1332 (July 2017) (declining to grant the Secretary’s position *Auer* deference when he failed to establish such a factor), *argued*, No. 17-9540 (10th Cir. Mar. 22, 2018).

VI. DISCUSSION AND ANALYSIS

The central issue before me is whether the old 2B panel required escapeways at the time of Inspector Belford's inspection. The Wildcat Hills mine had three active units. Each of the units ran continuous mining machines and feeders. The parties agree that an escapeway starts at the former loading point and continues out of the mine. (Tr.36:8-11; 37:4-5; 305:3-11) The parties also agree the old 2B panel was still being pre-shifted by examiners after the air change, which occurred on August 27, 2016. (Tr.72:4-6; 307:16-20) Belford considered the old 2B panel a working area because it was being pre-shifted three times a day, and, in his mind, equipment was still being removed from the area.³⁵ (Tr.36:14-17; 66:6-8; 71:17-18; 72:4-6; 81:8-18; 103:1-2)

As a preliminary matter, I conclude the fact that the old 2b panel was being pre-shifted three times a day by examiners does not mean that the old 2b panel was an active working area or that mechanized mining equipment was still being removed.

Active workings are "any place in a coal mine where miners are normally required to work or travel." 30 C.F.R. § 75.2. By contrast, a worked out-area is "an area where mining has been completed [. . .] excluding developing entries, return air courses, and intake air courses." 30 C.F.R. § 75.301. If a portion of a mine is not in active production, and no one is scheduled to work there, the examination frequency is reduced to once a week. (Tr.161:23-162:10; 30 C.F.R. § 75.364) In the event that work is planned to be done in worked-out panels, e.g., pre-planning or job testing, a pre-shift examination must be conducted even though there is no production. (Tr.154:19-155:4; 193:19-22; 194:7-12; 30 C.F.R. § 75.360(b)(10)) Importantly, escapeways are not required in worked-out areas of the mine even though miners go there to perform weekly examinations or to conduct repairs. (Tr.282:10-12)

Here, the record is clear that mining on the old 2b panel ceased on August 26, 2016. (Tr.173:4-14; Ex. R-7 at 2-3) The new unit 2 was operational and coal was being mined as early as September 1, 2016, five days before Inspector Belford's inspection. (Tr.174:24-175:4; Ex. R-7 at 8) Belford relied on the fact that the old 2B panel was being pre-shifted three times a day to conclude that the area was active and an escapeway was necessary. (See Tr.72:4-6) But without further information, his conclusion does not follow from the frequency of examinations. It is clear that no coal was being mined at the old 2b panel in September 2016. But, it is not clear what type of work was being done to necessitate pre-shift examinations. (See Ex. S-2 at 19) It is the Secretary's burden to show by a preponderance of the evidence that the work being done in the old 2b panel during Belford's inspection was the type of work that not only required pre-shift examinations but also required escapeways. The fact that parts of the old 2b panel were being pre-shifted three times a day does not in and of itself make the old 2b panel active, requiring an escapeway. As was explained in testimony, various types of work can be required in worked-out

³⁵ Upon seeing CM234, CM235, and FB605 stored in the crosscuts outby the loading point, Belford could have concluded the stored equipment was not needed to operate any of the three working units because the three units were all currently in operation at the time. (Tr.100:13-101:8) Thus, he could have further concluded that the old 2B panel was no longer active and should be considered a worked-out part of the mine.

mine areas, such as clean-up and maintenance. Any time that type of work is done, a pre-shift examination is required, even though the area is in a worked-out area. But, this type of maintenance work does not require the establishment of an escapeway. Once the work is done, the examination frequency reverts to weekly, and as before, no escapeway is required.

If I were so inclined, I could end the discussion here. Nevertheless, I will continue on with a full analysis of the escapeway regulation. The inquiry turns to whether the escapeway regulation, particularly the language regarding the removal process, is clear or ambiguous. If the regulation is ambiguous, the question is whether the Secretary is entitled deference. For the reasons that follow below, I conclude the Secretary is not.

A. The Escapeway Regulation is Ambiguous

The escapeway regulation states:

(b)(1) Escapeways shall be provided from each working section, and each area where mechanized mining equipment is being installed or removed, continuous to the surface escape drift opening or continuous to the escape shaft or slope facilities to the surface.

(2) During equipment installation, these escapeways shall begin at the projected location for the section loading point. During equipment removal, they shall begin at the location of the last loading point.

30 C.F.R. §§ 75.380(b)(1),(2) (emphasis added).

Thus, escapeways are required in two instances: (1) at each “working section” and (2) at each “area where mechanized mining equipment is being installed or removed.” Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such meaning would lead to absurd results. *Jim Walter Res.*, 28 FMSHRC at 587. Working sections are defined as “all areas of the coal mine from the loading point of the section to and including the working faces.” 30 C.F.R. § 75.2. This much is clear.

It is not immediately evident, however, what constitutes “removal” or what the parameters of the “area where mechanized mining equipment is being [. . .] removed” are. Despite this, both parties assert in their briefs that the plain language of the regulation is clear. (Sec’y Br. 14; Resp’t Br. 18) When both parties advance competing claims that the regulation is “plain,” such as is the case here, it may indicate ambiguity. *Canyon Fuel Co. v. Sec’y of Labor*, 894 F.3d 1279, 1290 (10th Cir. 2018) (stating that both parties advanced plausible interpretations of the regulation’s plain language and that the regulation is ambiguous); *Walker Stone Co. v. Sec’y of Labor*, 156 F.3d 1076, 1081 (10th Cir. 1998); *Alcoa Alumina & Chems., L.L.C.*, 23 FMSHRC 911, 914–15 (Sept. 2001). In determining the meaning of regulations, the Commission “utilizes ‘traditional tools of [. . .] construction,’ including examination of the text and the intent of the drafters.” *Amax Coal*, 19 FMSHRC at 474. The meaning of a regulation is

“ascertain[ed] [. . .] not in isolation, but rather in the context in which those regulations appear.” *Wolf Run Mining*, 32 FMSHRC at 1681. As recently stated by the Supreme Court, a court must exhaust the “traditional tools” of construction and “cannot wave the ambiguity flag” prematurely because the regulation is merely difficult to understand. *Kisor*, 588 U.S. at ___ (slip op. at 14). I will analyze both “removal” of equipment and the “area” where equipment is being removed below.

1. “Removal”

The parties do not agree on what constitutes “equipment removal.” The Secretary envisions “removal” as a process of physically moving the equipment out of the “area.” The Secretary does not commit to a concrete definition of “removal” but states “the equipment removal process involves transporting dangerous equipment through the mine, often requiring the use of additional dangerous machinery to provide transport.” (Sec’y Br. 16) (emphasis added). It is not clear from his briefs, however, whether he thinks “removal” also involves disassembly of mechanized mining equipment or lacing of cables.

In contrast, the Respondent draws a line between disassembly and transportation. During the hearing, whenever the Secretary’s counsel used the word “removal” to indicate the physical moving of mining equipment (Tr.298:22; 301:15–16; 304:20; 305:14), Respondent’s counsel objected (Tr.299:1–4; 301:18–19; 305:16–19), arguing the term “removed” in the context of section 75.380(b) is a “very weighted term” and “a term of art.” (Tr.298:25–299:7)

Respondent’s post-hearing brief, however, gives the impression Respondent does not disagree that removal of mechanized mining equipment involves at least some degree of physical movement or transportation. For example, Respondent’s post-hearing brief states its position that removal is completed once all section equipment is “moved outby the location of the former loading point.” (Resp’t Br. 18, 20) (emphasis added).

However, in its reply brief, Respondent readopts and rearticulates its position from the hearing that “removal” of mechanized mining equipment is “distinct from transportation.” (Resp’t Reply Br. 9) Notably, Respondent cites that the William Station mine disaster, on which the escapeway equipment removal language was predicated, “did not involve transportation.” (*Id.* at 10) Thus, Respondent argues section 75.380(b)(1) does “not contemplate transportation of equipment from place to place.” (*Id.*) Respondent then argues that removal activity — for example, cutting, disconnecting, or lacing cables — is “distinguishable from mere transportation.” (*Id.*) According to Respondent, removal activities are steps taken to “aid in transportation” but are distinct from it. (*Id.*)

This is peculiar. Although Respondent cites heavily to Eslinger’s testimony to support its contentions here, Eslinger himself stated unambiguously that disassembling of machinery is part of removal. (Tr.257:23-258:5) Respondent’s own language in its post-hearing brief that removal is completed “once all section equipment is moved outby the location of the former loading point” (Resp’t Br. 18) (emphasis added) also contradicts its apparent position that “removal” does not involve any transportation. These two seemingly contradictory positions can

be reconciled, however, if “transportation” and “move[ment]” are discrete concepts. If such a distinction exists, neither the Respondent (nor the Secretary) has yet to expound on it.

I am similarly unpersuaded by Respondent’s position that “removal” is a term of art. There is nothing in the plain language of the regulation or even the regulatory history to support the position that “removal” is a technical term that limits the process to only the disassembly or cable lacing steps. Words that are not technical in nature are to be given their usual, natural, plain, ordinary, and commonly understood meaning. *W. Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989) (citing *Old Colony R.R. Co. v. Comm’r of Internal Revenue*, 284 U.S. 552, 560 (1932)). To my knowledge, to date, neither the Commission nor its ALJs have had to define the word “remove” or “removal.” Remove means “[t]o move from a place or position occupied; to transfer or convey from one place to another; to take off; to take away; to withdraw.” *Remove*, The Am. Heritage Dictionary of the English Language 1476 (4th ed. 2009); *see also* Webster’s Third New Int’l Dictionary 1921 (3d ed. 1993) (“to change or shift the location, position, station, or residence of; to move by lifting, pushing aside, or taking away or off”). Removal means “[t]he act of removing; the fact of being removed; relocation, as of a residence or business.” *Removal*, The Am. Heritage Dictionary of the English Language 1476 (4th ed. 2009); *see also* Webster’s Third New Int’l Dictionary 1921 (3d ed. 1993) (“[t]he act of removing or fact of being removed; shift of location”).

Thus, I conclude that “removal” in section 75.380(b) involves at least some degree of physical transportation or movement of mechanized mining equipment.

2. “Area”

The more important question before me is the extent of such physical transportation or movement. The language of the regulation reads: “Escapeways shall be provided from each working section, and each area where mechanized mining equipment is being [. . .] removed [. . .].” 30 C.F.R. § 75.380(b)(1). With respect to this second condition, once the mechanized mining equipment is removed from the “area” — whatever that is determined to mean — removal is complete and escapeways are no longer required. Unfortunately, the definition section in the regulation is of no assistance here. Similarly, a standard American English dictionary does not give any meaningful guidance.³⁶

³⁶ Area is defined as “[a] roughly bounded part of the space on a surface; a region.” *Area*, The Am. Heritage Dictionary of the English Language 94 (4th ed. 2009); *see also* Webster’s Third New Int’l Dictionary 115 (3d ed. 1993) (“a level or relatively level piece of unoccupied or unused ground; the superficial contents of any figure; any particular extent of space or surface”).

The parties interpret the relevant “area” in vastly different ways.³⁷ According to the Secretary, the relevant “area” is the entirety of the old 2b panel (Sec’y Br. 14, 17, 19–20, 29, 31),³⁸ which spans a distance of 8,920 feet. (Tr.52:7; Ex. J–3) By contrast, Respondent argues that the relevant “area” is based on the former working section, that is to say the area from the former loading point inby to the former working face (Resp’t Br. 18, 20–21), a distance of approximately 360 feet. (Tr.52:5–8; Ex. J–3) Despite the fact that the Secretary’s interpretation yields a result 25 times larger than Respondent’s, both interpretations of “area” are facially plausible.

According to the Secretary, had Respondent fully removed the equipment from the old 2B panel prior to making the air change, escapeways would not have been required because the old 2B panel “would no longer constitute an area from which equipment was being removed.” (Sec’y Br. 20) In support of his interpretation that “area” in section 75.380(b) means the old 2B panel, the Secretary cites repeatedly to the plain language of the regulation. (Sec’y Br. 2, 10, 12, 14–15, 17–18, 21, 36; Sec’y Reply Br. 1, 2, 4) However, the word “panel” does not appear anywhere in section 75.380. *See* 30 C.F.R. § 75.380. In all of Subpart D as currently written, the word “panel” only appears nine times. *See* 30 C.F.R. §§ 73.333; 75.335; 75.351. Two of the “panels” relate to strength tests for building construction. *See* 30 C.F.R. § 75.333. Four of the “panels” relate to seals constructed to separate the active longwall panel from the longwall panel previously mined. *See* 30 C.F.R. § 75.335. The final three “panels” relate to carbon monoxide and smoke monitors. *See* 30 C.F.R. § 75.351. Similarly, the word “unit” does not appear in section 75.380. *See* 30 C.F.R. § 75.380. Thus, the plain language does not clearly support the Secretary’s contention that “area” in section 75.380(b) is referencing the entirety of the panel.³⁹

Respondent argues the meaning of “area” is clear once one understands the purpose and context of section 75.380(b). (Resp’t Br. 18) However, even after an exhaustive review of the Subpart D regulations as well as the various Federal Register preambles pertaining to Subpart D, *see* discussion *infra* Section VI. B., although strongly supported, I cannot conclude that Respondent’s interpretation is plainly evident either.

³⁷ The centrality of the concept of “area” in this case is evident by the frequency it appears in the record and briefs. The word “area” was used by the Secretary 32 times in his briefs. The Respondent used it 35 times. It appeared in the transcript 176 times.

³⁸ While the Secretary was very careful to state that equipment was still being removed from the “old 2B panel” in his briefs, Belford repeatedly characterized the removal from an undefined “area” at the hearing. (Tr.36:14–17; 53:10–13; 66:6–8; 71:17–18; 72:4–6; 81:8–9, 17–18; 103:1–2)

³⁹ Curiously, the 1988 Federal Register discusses disallowing “permanent electrical equipment or diesel equipment outby working panels” in at least one intake escapeway from each working section in the draft escapeway regulation preamble and draft 75.380 language. 53 Fed. Reg. at 2,408, 2,423 (emphasis added). However, this language was dropped in the 1992 final rule. *See* 57 Fed. Reg. at 20,904–06, 20,926–27.

Upon review of the plain language of section 75.380(b) as well as the definition section in section 75.2, and as evident by the clearly diverging interpretations proffered by the parties, I conclude the term “area” as used in section 75.380(b) is ambiguous.

B. The Secretary is not Entitled to Deference Because His Interpretation does not show the Agency’s Fair and Considered Judgment

Having found above that section 75.380(b) is ambiguous, I am to give deference to the Secretary’s interpretation if it is found to be reasonable. *See Drilling & Blasting Syst.*, 38 FMSHRC at 194 (citing *Auer*, 519 U.S. at 452). However, as recently articulated by the Supreme Court, *Auer* deference does not always apply; in fact, “it often doesn’t.” *Kisor*, 588 U.S. at ___ (slip op. at 18). Deference to the agency’s interpretation is inappropriate if its interpretation is not reasonable, when it is plainly erroneous or inconsistent with the regulation, or if it does not reflect the agency’s fair and considered judgment. *Drilling & Blasting Syst.*, 38 FMSHRC at 194 (citing *Auer*, 519 U.S. at 461; *Christopher*, 567 U.S. at 155); *see also Mead Corp.*, 533 U.S. at 228 (finding that the amount of deference to which an agency is entitled depends on, among other things, the agency’s consistency and persuasiveness of its position). Additionally, courts should not give deference to an agency’s reading except to the extent it has the “power to persuade.” *Christopher*, 567 U.S. at 159.

As the Supreme Court has explained, an agency’s interpretation may not reflect its fair and considered judgment when it conflicts with a prior interpretation. *Christopher*, 567 U.S. at 155; *cf. BethEnergy Mines*, 501 U.S. at 698 (court considered longstanding and consistent interpretation as a factor on whether to defer); *see also Thomas Jefferson Univ.*, 512 U.S. at 515 (stating that a regulatory interpretation that conflicts with a prior interpretation is “entitled to considerably less deference than a consistently held agency view”). The Secretary bears the burden of establishing the factors necessary to afford his position deference. *See Peabody Twentymile Mining LLC*, 39 FMSHRC at 1332 (declining to grant the Secretary’s position *Auer* deference when he failed to establish such a factor), *argued*, No. 17-9540 (10th Cir. Mar. 22, 2018).

I am convinced the position taken by the Secretary is unreasonable and deserves no deference for three reasons. First, the Secretary has failed to provide sufficient evidence to support that his interpretation is reasonable or the result of the agency’s fair and considered judgment. Second, when applied to section 75.380(b), the Secretary’s interpretation of “area where mechanized mining equipment is being installed or removed” is logically inconsistent. Finally, when applied to other similar sections in Subpart D, the Secretary’s interpretation of “area where mechanized mining equipment is being installed or removed” leads to absurd results. I will address each in turn.

1. The Secretary has Failed to Provide Sufficient Evidence to Support his Interpretation that the “Area” in Section 75.380(b) is the Old 2B Panel

The Secretary’s briefs state at least two dozen times that the relevant “area” the mining equipment must be removed from is the old 2B panel. (Sec’y Br. 3, 6–8, 10–11, 14–15, 17–20, 29, 31; Sec’y Reply Br. 1–2, 4–5) As justification for this, the Secretary cites repeatedly to the

plain language (Sec’y Br. 2, 10, 12, 14–15, 17–18, 21, 36; Sec’y Reply Br. 1–2, 4), the regulatory intent, (Sec’y Br. 12, 17, 21, 25– 27; Sec’y Reply Br. 2, 4–5), the regulatory history, (Sec’y Br. 16, 21, 23–24, 27; Sec’y Reply Br. 3–4), and various preambles. (Sec’y Br. 16–17, 21, 26; Sec’y Reply Br. 2, 4)

Beyond this level of generality, however, there is little if any exposition of how he arrives at his conclusion. An example of this can be seen on page 15 of the Secretary’s post-hearing brief. The first line correctly cites the language in the regulation: “areas where mechanized mining equipment is being removed.” (Sec’y Br. 15) (emphasis added) But, after citing case law on determining whether a standard is plain or ambiguous, the Secretary states, “[i]n this case, because equipment was being removed from the Old 2B panel [. . .] .” (*Id.*) (emphasis added) The Secretary seemingly pulls the “old 2B panel” language out of nowhere and merely substitutes it for the “area” he cited a moment earlier. This logical legerdemain permits the Secretary to avoid addressing the fundamental question before me: Why it is reasonable to think the old 2B panel is the “area” where mechanized mining equipment is being removed from. The Secretary cannot assume away his burden. Likewise, I cannot assume the Secretary has a good reason for his policy choice: The Secretary is obliged to supply a rationale and articulate a reasoned judgement as to why his interpretation must be adopted. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

The Secretary’s persistent citing to the regulatory intent, regulatory history, and preambles, while authoritative at first glance, lacks persuasive strength when placed under scrutiny. This is not to say the Secretary did not at times point to specific language in the Federal Register. Between both of his briefs, the Secretary cited or referenced specific language in the Federal Register several times. (Sec’y Br. 16, 23–24, 26, 26 n.10, 29; Sec’y Reply Br. 4) However, none of his citations helped support the major contention that “area” in section 75.380(b) means the old 2b panel.

“Area(s) Where Equipment is Being Installed or Removed” Mirrors the Term “Working Section”

As discussed above, *see* discussion *supra* Section IV. A. 3, the phrase “area(s) where equipment is being installed or removed,” which is at the heart of this litigation, did not appear in the 1988 preamble or draft language.⁴⁰ *See* 53 Fed. Reg. 2,382 et seq.

⁴⁰ As a direct example, the escapeway regulation found in the 1988 draft proposal read as follows:

§ 75.380 Escapeways.

(a) Except in situations addressed by §§ 75.384 and 75.385, at least two separate and distinct travelable passageways shall be designated as escapeways and shall be:

(1) Provided from each working section continuous to the surface or to escape shaft or slope facilities to the surface;

(2) Maintained in a safe condition to ensure passage at all times of any person, including disabled persons [. . .] .

(continued...)

Consistent with Eslinger’s testimony about the Pyro Mining Company’s William Station No. 9 Mine disaster and how his investigative committee’s findings prompted the ventilation committee to rewrite portions, *see* discussion *supra* Section IV. A. 3, the 1992 Federal Register states:

The specific reference in the final rule requiring preshift examination of areas where equipment is being installed or removed has been added to clarify the existing rule. The Agency has always considered these areas to be subject to the requirements of the preshift examination; however, an investigation following an explosion at the William Station Mine indicated that some confusion existed on this issue.

57 Fed. Reg. at 20,894 (emphasis added). MSHA subsequently added the phrase or close variant of the phrase “area(s) where equipment is being installed or removed”⁴¹ 17 times in the 1992 preamble and 12 times in the then-newly promulgated regulations. 57 Fed. Reg. 20,868 et seq.

The first explanation in the Federal Register⁴² about mechanized mining equipment being “installed or removed” provides useful context:

Areas where coal is being extracted or mechanized mining equipment is being installed or removed are typically the places in any underground mine where methane accumulation and other hazards to health or safety can develop quickly when ventilation is interrupted. To avoid exposure of miners to these hazards, timely withdrawal of persons is an important safety practice. Requiring withdrawal from the working section means that miners must be withdrawn out by [sic] the section loading point. In areas where equipment is being installed or removed and the loading point has

⁴⁰ (...continued)

53 Fed. Reg. at 2,422. The phrase “area where mechanized mining equipment is being installed or removed” is nowhere to be found.

⁴¹ Although this phrase is used in different regulations throughout Subpart D, an important canon of statutory and regulatory interpretation is that a word or phrase is presumed to be used consistently and bear the same meaning throughout a text. *See U.S. v. Castleman*, 572 U.S. 157, 174 (2014) (Scalia, J., concurring); *see also* Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Texts* 167 (2012).

⁴² Admittedly, “[a]gency regulations can sometimes make the eyes glaze over.” *Kisor*, 588 U.S. at ___ (slip op. at 14). Combing through regulatory history, while not always exciting, is sometimes necessary to solve these “hard interpretive conundrums [. . .] .” *Id.*

not been established or has been removed, withdrawal is to be to the anticipated location of the loading point or to the last location of the loading point.

57 Fed. Reg. at 20,875 (emphasis added). This language highlights two critically important points: (1) methane accumulations develop quickly when ventilation is interrupted, especially at the working face (i.e., “[a]reas where coal is being extracted”) and (2) MSHA’s intention that “areas where equipment is being installed or removed” be made in reference to the (anticipated or former) loading point and mirrors the working section.

MSHA reemphasizes the danger of methane accumulations throughout the preambles. The general discussion section of the preamble in 1992 states that the Subpart D regulations are aimed at protecting against “mine fires and explosions due in part to the presence of explosive gases in underground coal mines; oxygen-deficient atmospheres; and accumulations of other harmful gases.” 57 Fed. Reg. at 20,868. Additionally, the general discussion states that ventilation is a primary method of controlling and mitigating miners’ exposures to respirable dust to prevent the development of pneumoconiosis. *Id.* The preamble discussion about escapeways states, “[e]scapeways are the primary means of escape for miners during a mine fire or similar life-threatening emergency.” *Id.* at 20,904; *see also* 61 Fed. Reg. at 9,810 (“[w]hen a fire, explosion or other emergency necessitates an immediate evacuation of a mine, the designated route for miners to leave the mine is the escapeway”); 53 Fed. Reg. at 2,408 (“[e]scapeways are the primary means of egress during a mine fire or similar life-threatening situation”).

Given the above, the “area” during installation and removal of mechanized mining equipment that MSHA was most concerned with logically appears to have been where “accumulation and other hazards to health or safety can develop quickly when ventilation is interrupted.” 57 Fed. Reg. at 20,875. In other words, in the case of mechanized mining equipment removal, the place (former active face) where coal was formerly being extracted, i.e., the former working section.

MSHA reemphasizes the relationship between the “working section” and “area(s)” where mechanized mining equipment is/are being installed or removed in the discussion section for escapeways in bituminous and lignite mines:

Paragraph (b)(2) recognizes that during the installation or removal of mechanized mining equipment, the term working section, as defined, may not be appropriate because in one case the loading point may not yet be located by the installation of a belt tailpiece or feeder and in the other, it may have already been removed. In these cases, the required escapeways must begin at the projected location of the loading point in areas where equipment is being installed and at the location of the last loading point for the section when equipment is being removed. This aspect of the final rule

clarifies the existing provision and is necessary to provide safe escape for miners from hazards that may develop during this phase of the mining operation.

57 Fed. Reg. at 20,904 (emphasis added).

The meaning of words, especially those deemed to be ambiguous, is derived from context. *See Deal v. United States*, 508 U.S. 129, 132 (1993) (fundamental principle that the meaning of a word cannot be determined in isolation, but must be drawn from context in which it is used); *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 n.6 (1988) (“Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used.”) (citations omitted). Indeed, like peas in a pod, the phrase “area(s) where mechanized mining equipment is being installed or removed” nearly always finds itself positioned immediately next to “working section” (*see* 30 C.F.R. §§ 75.313(a)(3); 75.325(g); 75.332(a)(1); 75.350(a), (b), (b)(2), (b)(6), (d); 75.351(b)(1), (c)(4), (c)(7), (f), (n)(3)(iv); 75.352(c)(1); 75.360(b)(3), (c)(1); 75.371(ii); 75.380(b)(1)) or “working place” (*see* 30 C.F.R. §§ 75.323(b)(1),(2)).⁴³ Thus, applying the constructional canon of *noscitur a sociis*, that a word is known by its associates, it is sensible and reasonable to conclude “area(s) where mechanized mining equipment is being installed or removed” is closely related to and mirrors the active “working section.”

“Area” is to be Interpreted Narrowly

Even if the applicable “area” where mechanized mining equipment is being installed or removed was not meant to mirror the working section, there is ample evidence throughout the Federal Register that “area” should nonetheless be read narrowly.

The discussion of preshift examinations, section 75.360(b), notes “[i]ncluded in this examination of working sections and areas where equipment is being installed or removed are working places and ventilation controls and approaches to worked-out areas on those working sections or in these areas.” 57 Fed. Reg. at 20,893–94 (emphasis added). Had MSHA intended

⁴³ The few exceptions can be found in section 75.362, On-Shift Examination. 30 C.F.R. § 75.362. Subsection (a)(1) requires an on-shift examination of “each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift.” 30 C.F.R. § 75.362(a)(1) (emphasis added). Subsection (c)(1) requires an on-shift examination to include a determination of the volume of air “in the last open crosscut of each set of entries or rooms on each section and areas where mechanized mining equipment is being installed or removed, in the intake entry or entries at the intake end of the longwall or shortwall.” 30 C.F.R. § 75.362(c)(1) (emphasis added). Subsection (c)(2) requires a determination of the volume of air “on a longwall or shortwall, including areas where longwall or shortwall equipment is being installed or removed, in the intake entry or entries at the intake end of the longwall or shortwall.” 30 C.F.R. § 75.362(c)(2) (emphasis added). None of these exceptions, however, fortify the Secretary’s argument that “area” where mechanized mining equipment is being installed or removed means an entire panel.

the “area” where equipment is being installed or removed to encompass the entirety of the panel, there would be no need to enumerate these last three places. The discussion continues on to state, “[o]ther areas that require a preshift examination are approaches to worked-out areas in active workings and seals along intake entries where intake air passes through or along these entries on its way to a working section.” *Id.* at 20,894 (emphasis added). Again, if “area” were to encompass the entire panel, there would be no need to describe these “other areas.”

The same pattern of using the word “area” to delineate a discrete location is observed throughout the regulations. *See, e.g.*, 30 C.F.R. §§ 75.313(b) (mentioning “other areas” where methane is likely to accumulate); 75.313(c)(2) (mentioning “areas or haulageways where methane is not likely to migrate or accumulate”); 75.313(c)(3) (describing “areas where methane is not likely to migrate to or accumulate”); 75.351(b)(1), (n)(3)(iv) (noting “other areas designated in the approved emergency evacuation and firefighting program of instruction” in addition to working sections and areas where mechanized mining equipment is being installed or removed); 75.351(e)(1)(iii) (mentioning “areas along each belt entry”); 75.352(c)(1) (describing “affected areas” during sensor alerts and alarms); 75.361(b) (describing areas “required to be examined outby a working section”); 75.384(c)(2) (explaining that miners shall be withdrawn from “face areas” to “a safe area outby the section loading point”); 75.388(d) (discussing borehole penetration in an “area that cannot be examined”); 75.388(f) (mentioning an “inaccessible area of another mine”); 75.389 (describing areas penetrated by boreholes).

I note one clear exception: The phrase “underground area,” which describes a portion of the mine even larger than the old 2B panel, is used throughout Subpart D. 30 C.F.R. §§ 75.311(b)(3); 75.312(c), (d); 75.313(d)(1)(i); 75.360(a)(1), (g); 75.364(f)(1), (2); 75.372(b)(9); 75.389(c)(3). However, the word “area” is modified by the word “underground.” Section 75.380(b)’s “area where mechanized mining is installed or removed” does not have this expansive modifier. Thus, the most sensible conclusion is that an “area” where mechanized mining equipment is being installed or removed is also interpreted as a discrete location.

The Secretary has Failed to Provide Evidence to Bolster his Argument

As discussed above, the language of the Subpart D regulations and preambles does not support a reading of “area(s) where mechanized mining equipment is being installed or removed” in the way the Secretary interprets. The Secretary’s remaining arguments shift the focus to the Respondent: (1) Respondent’s interpretation is contrary to the safety purposes of the Mine Act and (2) Respondent’s witnesses are not credible.

The Secretary twice cites to the Federal Register’s “hazards that may develop during [the installation or removal] phase of the mining operation” language for the proposition that equipment removal is a “distinct phase of mining” that requires an escapeway to protect against all hazards, including pinch-point hazards, crush-by hazards, and electrical hazards. (Sec’y Br. 16, 26) This interpretation distracts from the clear and intentional directive of the ventilation regulations and, more specifically, the escapeway provision. The danger the escapeway regulation addresses is not any conceivable hazard in a mine, but the potential of a methane ignition and explosion such as what happened in the William Station mine disaster, which was the impetus for adding the subject escapeway requirement during both equipment installation and

removal. (Tr.217:7–221:25; *see* 57 Fed. Reg. at 20,894) The relevant danger is the one that arises from changing airflow too soon when a production unit is being decommissioned. If the face airflow is decreased too soon, methane that would otherwise have been evacuated, as during normal production, is allowed to build up. Thus, while the Secretary’s general, catch-all justification of “in the interest of miner safety” (Sec’y Br. 25) is ever-present and ever-important in Mine Act cases, the Secretary fails to properly acknowledge the specific safety-purposes of escapeways.

With this purpose in mind, the Secretary’s contention that Respondent’s interpretation “imposes an arbitrary line as the difference between safety and danger” (Sec’y Br. 17) is less convincing. Eslinger, Reynolds, and Barras all testified about the extremely hazardous conditions — especially during the loading of coal — that exist inby the loading point, including unsupported roof and higher levels of methane. (Tr.196:4–11; 248:21–10; 250:12–251:1; 276:9–15) Indeed, the 1992 preamble discussion of methane supports Respondent’s witnesses’ statements and logic. *See, e.g.*, 57 Fed. Reg. at 20,875 (“Areas where coal is being extracted or mechanized mining equipment is being installed or removed are typically the places in any underground mine where methane accumulation and other hazards to health or safety can develop quickly when ventilation is interrupted.”). There is also direct support in the regulations that the loading point is not an “arbitrary” line of safety. In section 75.384(c), Longwall and Shortwall Travelways, the regulation states: “[w]hen a roof fall or other blockage occurs that prevents travel in the travelway — [. . .] (2) Miners shall be withdrawn from face areas to a safe area outby the section loading point.” 30 C.F.R. § 75.384(c)(2) (emphasis added); *see also* 57 Fed. Reg. at 20,908. The preamble in the 1992 Federal Register additionally supports that the loading point is an important place marker: “[t]o avoid exposure of miners to [methane accumulation and other hazards that develop quickly when ventilation is interrupted], timely withdrawal of persons is an important safety practice. Requiring withdrawal from the working section means that miners must be withdrawn out by [sic] the section loading point.” 57 Fed. Reg. at 20,875 (emphasis added). Moving equipment outby the loading point, while not totally free from all potential hazards, moves it into an area substantially less hazardous for methane ignition. (Tr.248:18–249:10) This is not an immaterial consideration.

The Secretary’s argument that the run-of-the-mill danger associated with moving any equipment from one place to another in a mine, not the specific danger of methane accumulation and explosions addressed in this regulation, urges the unconvincing ad hoc interpretation advocated here, that any moving of any equipment in a mine requires the establishment of an escapeway. As will be discussed below, *see* discussion *infra* Section VI. B. 2, the absurdity of the Secretary’s interpretation is evidenced by specific examples of moving mechanized mining equipment on worked-out panels.

The Secretary spends the remainder of his argument attempting to discredit Eslinger and Respondent’s other witnesses. I have already determined above, *see* discussion *supra* Sections IV. B & C, that I could find no legitimate reason to discredit Respondent’s witnesses. In any event, the Secretary’s preferred arguments are two-sided blades. For example, the Secretary attempts to discredit Eslinger by stating that “[d]eference is owed to the decision maker authorized to speak on behalf of the agency, not to each individual agency employee.” (Sec’y Br. 23, *citing Serono Labs., Inc. v. Shalala*, 158 F.3d 1313, 1321 (D.C. Cir. 1998)) It is true that

despite having worked directly on the drafting of the Subpart D regulations over many years, Eslinger does not speak on behalf of the agency. But, by the same token, no single agency employee may speak for the agency, including Belford. In the absence of any additional evidence, it appears the Secretary is basing his interpretative position on the testimony of a single MSHA inspector with six years of mining experience who had never seen this type of situation before. As recently clarified by the Supreme Court, *Auer* deference can only be given if the regulatory interpretation is the agency's "authoritative" or "official" position and must "at the least emanate from [agency heads], using those vehicles, understood to make authoritative policy in the relevant context." *Kisor*, 588 U.S. at ___ (slip op. at 16). Belford and his direct superiors do not qualify.

The Secretary also argues that Respondent can point to no PPM or Question and Answer (Q&A) documents to support its interpretation. (Sec'y Br. 24) Again, this cuts both ways. The Secretary is the party uniquely responsible for issuing PPMs and Q&A documents, but he is similarly unable to point to any interpretative documentation to support his position. It is the Secretary, not the Respondent, who bears the burden of establishing the factors necessary to afford his position deference. *See Peabody Twentymile*, 39 FMSHRC at 1332, *argued*, No. 17-9540 (10th Cir. Mar. 22, 2018).

The Secretary's History of Interpretation and Enforcement is Unclear

Although not explicit in the Secretary's post-hearing brief, the Secretary implies in his reply brief that his interpretation of the escapeway regulation has been consistently held and enforced. (*See, e.g.*, Sec'y Reply Br. 5 ("Respondent's argument missed the mark because it mistakenly presumes the Secretary has changed [his] position [. . .] the Secretary is not taking a new position but instead merely opposing Respondent's misconstruing of a clear regulation.")) (emphasis added) However, there is no evidence in the record that the Secretary's current view has been long-held. The Secretary's sole witness, Inspector Belford, said nothing about this point. Belford said nothing about this being a long-held belief in the District 8 office, let alone across all MSHA offices. Belford did state on cross examination, however, that he was never trained on what "removal," and by logical extension, the applicable "area," meant. (Tr.90:13-15)

The Secretary explicitly states that MSHA had never officially adopted Respondent's and Eslinger's interpretation of the escapeway provision. (Sec'y Reply Br. 3, 5-6) Nevertheless, he allows that even if Eslinger's interpretation was advanced when Subpart D was first promulgated, an inconsistent enforcement pattern does not estop MSHA from proceeding under the interpretation it concludes is correct. (Sec'y Br. 23, *citing U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1547 (Aug. 1993)) That he did not provide evidence of enforcement against Respondent's practices is, in the Secretary's words, "of no consequence." (Sec'y Reply Br. 6) It is certainly possible that Respondent's witnesses, with decades of combined mining experience in District 8, (and, by extension, their various operator employers) misunderstood and were in violation of the escapeway provision for 24 years. It is also possible they managed to evade reprimand or citation despite practicing mechanized mining equipment removal based on this purported misunderstanding. That these operators seem to have done so openly in plain sight does not make this a statistical impossibility either. However, as stated by the Supreme Court,

“where, as here, an agency’s announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.” *Christopher*, 567 U.S. at 158. Quoting the sagacious Judge Posner of the Seventh Circuit, the Supreme Court further noted that “while it may be ‘possible for an entire industry to be in violation of the [FLSA] for a long time without the Labor Department noticing,’ the ‘more plausible hypothesis’ is that the Department did not think the industry’s practice was unlawful.” *Id.* (quoting *Dong Yi v. Sterling Collision Ctrs., Inc.*, 480 F.3d 505, 510–11 (7th Cir. 2007)). Such appears to be the case here.⁴⁴

Alternative arguments are acceptable in most cases. But when the Secretary — after having provided virtually no evidence — claims the agency has been consistent in its interpretation for years, and then argues that the agency may change his views without notice, without consistent enforcement, and without evidence to support the argument, the Secretary’s interpretation cannot be deemed to be fair, considered, or even reliable.

The Secretary has adduced insufficient evidence to show that his interpretation is reasonable or reflects the agency’s fair and considered judgment; to the contrary, the evidence demonstrates that the Secretary’s position is unreasonable and merely the ad hoc interpretation of a single inspector and his supervisors. This logical lacuna in the Secretary’s interpretation is evident when I apply the Secretary’s interpretation to section 75.380(b) and even more so when I apply it to the other regulations in Subpart D.

2. The Secretary’s Interpretation of Section 75.380(b) Yields Inconsistent Outcomes and Leaves Logical Gaps

The Secretary cites repeatedly to the fact that moving mechanized mining equipment can create hazards, for example pinch-point hazards, crush-by hazards, electrical hazards, and fire hazards. (Sec’y Br. 16, 26) The Secretary correctly points to the fact that not all hazards are eliminated once equipment is moved past the former loading point. (*Id.* at 16, 18, 25) For these reasons, the Secretary argues mechanized mining equipment had to be moved off the old 2b panel in order to be properly “removed.” However, there are serious inconsistencies and logical gaps if the Secretary’s interpretation is adopted.

Let’s suppose Respondent moved CM234, CM235, and FB605 off the old 2B panel — an additional 8,600 feet from the former loading point. According to the Secretary’s interpretation, this would have constituted proper “removal” of the mechanized mining equipment. Let’s suppose Respondent then dismantled the lifeline, powered off the two-way communication at the refuge alternative, shut down tracking, and completed the air change. The old 2B panel would

⁴⁴ I note that Belford did not issue any citations on September 6 or 7. This is consistent with the notion that neither he nor his supervisors at District 8 were certain about enforcement of the escapeway provision, as the Secretary’s briefs would have me believe. It appears more likely that Belford was not sure whether the old 2B travelway was still an escapeway, which is consistent with the testimony that neither Belford nor Combs was sure on September 6 when they looked at the regulatory language for 75.380(b). It is also consistent with Belford’s testimony that he had never been trained specifically on the meaning of “removal” nor had he ever seen this type of situation before.

no longer be in active working status. Now let's suppose Respondent then immediately moved the three pieces of equipment back onto the old 2B panel and parked them in crosscuts 125, 126, and 127 — the precise locations Inspector Belford found them in on September 6, 2016. It appears this would not be a violation. It is not readily apparent to me how this (non-violative) situation is any safer than what Respondent actually did. In both cases, the three pieces of mining equipment ultimately ended up in crosscuts 125, 126, and 127. Yet, the Secretary claims one fact pattern is dangerous insofar as it requires the protections of an escapeway; the other — where mining equipment was moved an additional 17,000 feet — would not. To accept this outcome would exalt form over substance. This inconsistent outcome cannot be what MSHA envisioned.

Similarly, the Secretary largely avoided addressing the Respondent's legitimate counterargument that escapeways are not required every time mechanized mining equipment is being moved or transported in a mine. Respondent's witnesses and Inspector Belford testified that escapeways are not required when mechanized mining equipment is moved back into a worked-out, inactive portion to make repairs. (Tr.97:5–98:19; 162:2–19; 202:14–203:21; 280:24–283:12) For example, mechanized mining equipment might be moved into a return air course to do cleaning or roof bolting. (Tr.204:7–17; 281:6–25; 282:1–9; 283:3–12) No escapeway would be required in this situation. (Tr.204:18–20; 282:10–12) Additionally, although unusual, it is not unheard of to use a continuous miner for cleanup work. (Tr.203:22–204:3; 282:13–283:2; *contra* Tr.103:12–20) No escapeway would be required in this situation either. (Tr.204:4–6; 282:21–23) All of the hazards that would exist in moving CM234, CM235, and FB605 from crosscuts 125, 126, and 127 off the panel would exist in these cleaning/maintenance scenarios.

The Secretary's response to this compelling counterargument can be found hidden in a single footnote.⁴⁵ The Secretary states that the regulations contemplate protection during equipment removal associated with the end of a production section as a distinct phase of mining; thus, Respondent's counterexamples are not related to the phase of mining contemplated by the regulations. (Sec'y Br. 26 n.10) The Secretary's argument conflates the "distinct phase of mining" the preambles warn about, i.e., the decommissioning of equipment that is occurring at the former working section in by the loading point, with the transportation of mechanized mining equipment out by the loading point. This side-step by the Secretary leads to a distinction without a difference. To accept the Secretary's argument here would once again place form over substance.

It makes logical, practical sense that escapeways and their related requirements are not required in every scenario when mechanized mining equipment is being moved. As Kimbel and Barras both testified, mines have a limited amount of air. (Tr.111:5–8; 276:6–7) Working

⁴⁵ The Secretary's decision to address one of Respondent's most compelling arguments in a footnote was ill advised. *See CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014) ("A footnote is no place to make a substantive legal argument on appeal; hiding an argument there and then articulating it in only a conclusory fashion results in forfeiture."); *see also Hutchins v. District of Columbia*, 188 F.3d 531, 539 n.3 (D.C. Cir. 1999) (a court "need not consider cursory arguments made only in a footnote").

sections are prioritized since dangerous levels of methane and dust exist at the working faces and need to be diluted. (Tr.111:7–17; 276:12–15) Worked-out locations, by contrast, do not require as much air to maintain safe conditions. (Tr.111:7–17; 276:1–7) If every maintenance situation in old, worked-out panels that involved mechanized mining equipment required escapeways to be installed — along with air changes — it could compromise the mine’s ability to maximize its ventilation resources for the safety of miners in active areas. Consistent with this logic and history, Peabody planned for the unit 2 move by doing an engineering review to determine what changes were needed to redirect the ventilation airflow away from what had been an active mining unit in the old 2B panel so that the available airflow could be sent to higher priority areas of the mine. (Tr.168:3–11; 274:5–276:7)

The Secretary’s argument — conceived for purposes of this litigation — is so narrow that it leads to an absurd result. The absurdity arises from an awareness of the need during normal mining operations to move mining equipment from one place to another in inactive, worked-out panels without having to attend to the escapeway requirement. The Secretary has provided no rational explanation to account for the inconsistent outcomes that emerge from his interpretation of the escapeway regulation.

3. The Secretary’s Interpretation Leads to Absurd Results when it is Applied to Other Regulations in Subpart D

As discussed numerous times above, the Secretary argues that the applicable “area” that mechanized mining equipment must be removed from was the old 2B panel. As shown below, applying the Secretary’s interpretation to related regulations in Subpart D leads to absurd results.⁴⁶

Section 75.313(a), which involves procedures when there is a main mine fan stoppage while persons are underground, states:

If a main mine fan stops while anyone is underground and the ventilating quantity provided by the fan is not maintained by a back-up fan system — [. . .] (3) Everyone shall be withdrawn from the working sections and areas where mechanized mining equipment is being installed or removed.

30 C.F.R. § 75.313(a) (emphasis added). Substituting in the Secretary’s interpretation for the subject area during removal, we can understand the regulation to read, “if a main mine fan stops while anyone is underground and the ventilating quantity provided by the fan is not maintained by a back-up fan system — [. . .] Everyone shall be withdrawn from the working sections and

⁴⁶ I anticipate the Secretary might protest that “area where mechanized mining equipment is being installed or removed” means the old 2B panel in the escapeway provision but, in other ventilation provisions, it means something else entirely. Justice William O. Douglas cautioned of such fickle judgment in *Zschernig v. Miller* when he cited to Humpty Dumpty’s pronouncement to Alice in *Through the Looking-Glass*: “When I use a word [. . .], it means just what I choose it to mean — neither more nor less.” 389 U.S. 429, 435 n.6 (1968).

old 2B panel [during removal].” Thus, miners at the working section must be withdrawn from the working section — in other words outby the loading point; miners during the equipment removal phase, which is no more dangerous than the active mining phase, would instead have to be withdrawn from the panel. In the case of Wildcat Hills’ old 2B panel, this would account for a difference of 8,600 feet.

Section 75.351(f), which specifies the required locations for atmospheric monitoring sensors, instructs that in order to monitor the primary escapeway, “carbon monoxide or smoke sensors must be located in the primary escapeway within 500 feet of the working section and areas where mechanized mining equipment is being installed or removed. In addition, another sensor must be located within 500 feet inby the beginning of the panel.” 30 C.F.R. § 75.351(f) (emphasis added). Rewritten with the Secretary’s interpretation substituted in, the regulation would mandate that, during removal, sensors be located in the primary escapeway within 500 feet of the old 2B panel. This would result in a sensor being placed somewhere in the 2A Sub Main, which is absurd as it would not properly detect problems near the former working section, where the risk is greatest. I also note that the regulation mandates an additional sensor 500 feet inby at the beginning on the panel. Had MSHA intended for the “area” during equipment installation or removal to also mean “the panel,” they could/would have said so.

The escapeway maps provision would also be nonsensical if the Secretary’s current interpretation of “area” were adopted.⁴⁷ The escapeway map provision states:

- (a) Content and accessibility. An escapeway map shall show the designated escapeways from the working sections or the miners’ work stations to the surface or the exits at the bottom of the shaft or slope, refuge alternatives, and SCSR storage locations. The escapeway map shall be posted or readily accessible for all miners—
- (1) In each working section;
 - (2) In each area where mechanized mining equipment is being installed or removed;
 - (3) At the refuge alternative; and
 - (4) At a surface location of the mine where miners congregate, such as at the mine bulletin board, bathhouse, or waiting room.

30 C.F.R. § 75.1505(a) (emphasis added). Reworded with the Secretary’s interpretation in mind, the escapeway map provision would read: “The escapeway map shall be posted or readily

⁴⁷ For the 1992 final rule, the escapeway maps regulation was moved to section 75.383. 57 Fed. Reg. at 20,907. On December 8, 2006, section 75.383 was split up and removed: the old subsection (a) was transferred to create a new section, section 75.1505. 71 Fed. Reg. 71,430-01, 71,437 (Dec. 8, 2006). The section was amended in 2008. 73 Fed. Reg. 80,656-01, 80,698 (Dec. 31, 2008). The new section 75.1505(a) shares the same general meaning as the old section 75.383, but it is worded slightly differently and adds a few additional requirements. *Compare* 30 C.F.R. § 75.383 (1992) *with* 30 C.F.R. § 75.1505(a) (2008).

accessible for all miners [. . .] (2) in the old 2B panel [during removal] [. . .].” If this were the case, an operator could comply with the regulation by placing an escapeway map at the former working face, at the beginning of the old 2B panel, or anywhere in the 8,900 feet between the two. Such a result would be contrary to common sense and the safety-focused purpose of the regulation as miners might not be able to reliably check the escapeway map in the event of an emergency. It is absurd and cannot be what MSHA and its drafters intended.

Section 75.323, which involves procedures when methane levels are excessive, instructs that various tests for methane concentrations be made at least 12 inches from the roof, face, ribs, and floor. 30 C.F.R. § 75.323(a). Subsections (b) and (c) describe the procedures when methane reaches 1.0% and 1.5%, respectively, in “a working place or an intake air course [. . .] or in an area where mechanized mining equipment is being installed or removed [. . .]” 30 C.F.R. §§ 75.323(b)(1), (2). Substituting in the Secretary’s interpretation for the subject area during removal would mean that methane measurements could be taken practically anywhere in the old 2b panel rather than discrete areas notorious for methane accumulations. The results of this could be catastrophic.

Section 75.332(a)(1), which involves working sections and working places, requires that “[e]ach working section and each area where mechanized mining equipment is being installed or removed” be ventilated by a separate split of intake air directed by overcasts, undercasts, or other permanent ventilation controls.” 30 C.F.R. § 75.332(a)(1). Substituting in the Secretary’s interpretation, the regulation would require that, during removal, the entire old 2B panel would need to be ventilated by a separate split of intake air directed by overcasts, undercasts, or other permanent ventilation controls. The infeasibility of this undertaking exposes the absurdity of the Secretary’s position.

I cannot credit the Secretary’s rationale for his interpretation. In contrast, Respondent’s view is more defensible, coherent, and supplemented with credible testimony regarding the historical application of enforcement. As the Secretary’s interpretation of the escapeway standard is unreasonable, not fairly considered, and results in absurd outcomes, deference to the Secretary is not appropriate.

VII. PARTIAL SETTLEMENT FOR CITATION NO. 9038387

On April 9, 2018, and prior to the hearing, the Secretary filed a motion to approve partial settlement. A reduction in the penalty for Citation No. 9038387 from \$918.00 to \$213.00 was proposed.

The Secretary also requested that Citation No. 9038387 be modified to reduce the gravity from “Reasonably Likely” to “Unlikely” and to remove the “S&S” designation. In support of this, Respondent would have presented evidence at hearing to show the cable at issue was a shielded cable and power conductors are individually shielded. If cable damage were serious enough to cut internal conductors, Respondent argued the most likely scenario would be a ground fault. Ground fault currents are limited by the grounding resistor. If a phase-to-phase short circuit occurred, the system was designed such that the minimum short circuit current available was well in excess of the setting cited. Respondent stated an analysis was conducted

using the MSHA short circuit calculation program, and it was determined that the maximum available current was 6,005 amps; the minimum short circuit current available was 4,541 amps. Accordingly, Respondent argued that it was unlikely the breaker would not trip in the event of a short circuit. In consideration of the Respondent's arguments, the Secretary agreed to reduce the gravity from "Reasonably Likely" to "Unlikely," to remove the "S&S" designation, and to accept a reduced penalty.

I have considered the representations and documentation submitted in this case for Citation No. 9038387, and I conclude that the proffered partial settlement is appropriate under the criteria set forth in section 110(i) of the Act.

VIII. SUMMARY AND ORDER

The Secretary has failed to prove by a preponderance of the evidence that an escapeway was required in the old travelway on the old 2B panel during Inspector Belford's E01 inspection on September 6-8, 2016. As the three citations issued on September 8, 2016, were predicated on the existence of an escapeway, they must be vacated.

Accordingly, it is **ORDERED** that Citation Nos. **9039355**, **9039356**, and **9039357** are hereby **VACATED**.

It is further **ORDERED** that Citation No. **9038387** be **MODIFIED** to reduce the likelihood from "Reasonably Likely" to "Unlikely" and to remove the "S&S" designation.

It is further **ORDERED** that the operator pay a penalty of **\$213.00** within 40 days of this decision and order.⁴⁸

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

⁴⁸ Payment should be sent to: MINE SAFETY AND HEALTH ADMINISTRATION, U.S. DEPARTMENT OF LABOR, PAYMENT OFFICE, P. O. BOX 790390, ST. LOUIS, MO 63179-0390.

Distribution:

R. Jason Patterson, Esq.
Office of the Solicitor
U.S. Department of Labor
230 S Dearborn St, Ste 844
Chicago, IL 60604-1779

Arthur M. Wolfson, Esq.
Fisher & Phillips LLP
One Oxford Center
301 Grant St, Ste 4300
Pittsburgh, PA 15219-6405

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

July 11, 2019

SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR on
behalf of TYLER HERRERA,
Complainant,

v.

FIELD LINING SYSTEMS, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2019-0364-DM
MSHA Case No.: RM-MD-2019-11

Mine: Freeport-McMoRan Safford Inc
Mine ID: 02-03131

DECISION AND ORDER

Before: Judge Rae

The captioned matter is before me based on an Application for Temporary Reinstatement (the “Application”) filed by the Secretary of Labor (the “Secretary”) on behalf of Tyler Herrera against Field Lining Systems, Inc. (“Respondent”), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the “Act”), 30 U.S.C. § 815(c)(2). Under section 105(c)(2), “upon the application of the Secretary” the Commission “shall order the immediate reinstatement of the miner pending final order on the complaint” if the complaint “was not frivolously brought.” 30 U.S.C. § 815(c)(2). The Secretary determined that Herrera’s complaint was not frivolously brought and accordingly filed the Application with the Commission on June 14, 2019. Following a conference call held on June 17, 2019, Respondent indicated that they were not requesting a hearing and asked the parties be allowed to submit briefs in support of or against the Application. The parties’ briefs were submitted on July 8, 2019.

For the reasons discussed below, I grant the Application and order Complainant’s temporary reinstatement.

I. LEGAL PRINCIPLES

Section 105(c) of the Act prohibits mine operators from discriminating against miners for engaging in any right protected under the Act. 30 U.S.C. § 815(c). “[I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint.” 30 U.S.C. § 815(c)(2). A temporary reinstatement proceeding differs from a hearing on the merits of a discrimination claim in that addressing an application for temporary reinstatement is limited narrowly to the question of whether the miner’s

discrimination complaint “was not frivolously brought” by Rule 45(d).¹ 29 C.F.R. § 2700.45(d); *Sec’y of Labor on behalf of Deck v. FTS Int’l Proppants, LLC*, 34 FMSHRC 2388, 2390 (Sept. 2012) (“*FTS Int’l Proppants*”); *Sec’y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff’d sub nom. Jim Walter Res., Inc. v. FMSHRC*, 920 F.2d 738 (11th Cir. 1990) (“*Jim Walter Res.*”). A discrimination complaint satisfies the “not frivolously brought” standard of section 105(c)(2) of the Act when there is “reasonable cause to believe” that the “complaint appears to have merit.” *Jim Walter Res.*, 920 F.2d at 747 (citing S. Rep. No. 95-181 at 36).

In view of the narrow scope of temporary reinstatement proceedings, “the Commission has recognized, ‘[i]t [is] not the judge’s duty, nor is it the Commission’s, to resolve the conflict in testimony at this preliminary state of the proceedings.’” *FTS Int’l Proppants*, 34 FMSHRC at 2390 (quoting *Sec’y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999)). Although the Secretary need not present a prima facie case of discrimination to prevail at this stage of the proceeding, reviewing the elements of a discrimination claim aides in determining whether the submitted evidence satisfies the “not frivolously brought” standard. To demonstrate a prima facie case of discrimination under section 105(c) of the Mine Act, the Secretary must establish that the complainant engaged in an activity protected by the Mine Act, that the complainant was subjected to an adverse action, and that the adverse action was motivated, at least in part, by the complainant’s protected activity. *See Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981) (citations omitted).

II. BACKGROUND AND APPLICATION

Since March 20, 2019, Herrera worked for Respondent as a laborer. Application at 2; Sec’y’s Memo at 2; Herrera Decl. at 1. During the night shift on or about April 19, 2019, Herrera allegedly observed a fork lift operator moving a light plant with a forklift. Application, Ex. A at 2; Sec’y’s Memo at 2; Herrera Decl. at 1. Herrera allegedly heard a crash and saw that the light

¹ Specifically, Rule 45(d) provides:

The scope of a hearing on an application for temporary reinstatement is limited to a determination as to whether the miner’s complaint was frivolously brought. The burden of proof shall be upon the Secretary to establish that the complaint was not frivolously brought. In support of his application for temporary reinstatement, the Secretary may limit his presentation to the testimony of the complainant. The respondent shall have an opportunity to cross-examine any witnesses called by the Secretary and may present testimony and documentary evidence in support of its position that the complaint was frivolously brought.

plant had fallen off the forklift, damaging the light plant's outriggers and bending one of the wheels. Application, Ex. A at 1-2; Sec'y's Memo at 2; Herrera Decl. at 1. Herrera then allegedly saw a supervisor place the light plant against a berm. Application, Ex. A, 1-2; Sec'y Memo at 2. Herrera believed this was done to give the appearance the light plant was still functioning properly. Application, Ex. A, 1-2; Sec'y Memo at 2. Herrera alleges the supervisor placed the damaged light plant close to portable restrooms. Application, Ex. A, 1-2. Herrera allegedly felt the damaged light was unsafe due to its instability and potential for collapse. *Id.*

Herrera allegedly shared his concerns with his coworkers and urged them to reach out to MSHA. Sec'y Memo at 2. On April 20, 2019, Herrera called the MSHA hotline and reported the damaged light plant. Sec'y Memo at 2; Herrera Decl. at 5. Two days later, on April 22, 2019, Josh Johnson, the Safety Manager for Respondent, had allegedly called Herrera and asked if he had made a complaint to MSHA. Sec'y Memo at 2. Herrera conceded that he did call MSHA with a safety concern. Sec'y Memo at 2. Two days after the conversation with Josh Johnson, Herrera was terminated on April 24, 2019. Application, Ex. A at 1-2; Sec'y Memo at 2; Herrera Decl. at 8.

Following his termination, Herrera filed his 105(c) discrimination complaint on May 13, 2019. Application at 2; Sec'y Memo at 2. MSHA Special Investigator Merle Nash then investigated the complaint and determined that Herrera had engaged in two episodes of protected activity. Application, Ex. B at 2. Nash determined that the first protected activity was Herrera's alerting the mine operator of his safety concern regarding the damaged light plant on April 20, 2019. *Id.* Nash determined that the second protected activity was Herrera's calling MSHA to report a hazard complaint that same day. *Id.* Based on the information available to Nash as a result of the investigation, he concluded that Herrera's April 24, 2019, termination (the adverse action) was motivated, at least in part, because of the protected activity discussed above. Application at 2. Accordingly, Nash determined that Herrera's discrimination complaint was not frivolously brought. *Id.*

In opposition to the Application, Respondent asserts that Herrera's termination was not unique, and Herrera was terminated solely for violating the company's attendance policy. While Respondent's assertion regarding Herrera's non-compliance with the company attendance policy may constitute an affirmative defense to the underlying discrimination complaint, such a defense is not properly before me during a temporary reinstatement proceeding.

Therefore, given Herrera's alleged engagement in protected activities and the close nexus in time to his termination, I agree at this preliminary stage of the proceeding that his complaint is not frivolously brought.

III. ORDER

For the reasons set forth above, Field Lining Systems, Inc., is **ORDERED** to immediately reinstate Tyler Herrera to the position he held on April 20, 2019, with restoration of pay, allowances, and benefits retroactive to the date of discharge.²

Mr. Herrera's reinstatement is not open-ended. It will end upon a final order on the underlying discrimination complaint. 30 U.S.C. § 815(c)(2). Therefore, the Secretary must promptly determine whether or not he will file a complaint with the Commission under section 105(c)(2) of the Act and so advise the Respondent. Otherwise, I shall entertain a motion to terminate this Order.³

/s/ Priscilla M. Rae
Priscilla Rae
Administrative Law Judge

Distribution:

Veronica Melendez, Esq., U.S. Department of Labor, Office of the Solicitor, 90 Seventh Street, Suite 3-700, San Francisco, CA 94103

Kristy Lagumas, Field Lining Systems, Inc., 439 S. 3rd Ave., Avondale, AZ 85323

Tyler Herrera, 900 East Hollywood Lot #213, Safford, AZ 85546

² Herrera's regular pay is \$910.00 per week as calculated at a rate of \$14.00 per hour for 50 hours and overtime pay rate of \$21.00 for 10 hours each week. Application, Ex. A at 1.

³ The Court does not have the authority to, sua sponte, grant economic reinstatement. *See e.g., Sec'y of Labor on behalf of Terry v. Prospect Mining & Development Co., LLC*, 41 FMSHRC 142 (Feb. 2019) (ALJ). However, should the parties agree to such, a motion should be submitted forthwith.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

July 19, 2019

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

v.

VULCAN CONSTRUCTION
MATERIALS, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. SE 2018-0239
A.C. No. 01-00028-471366

Mine: Fort Payne Quarry

DECISION AND ORDER

Appearances: Thomas J. O’Donnell, CLR, U.S. Department of Labor, MSHA, Birmingham, Alabama, for Petitioner

Leslie P. Brody, Office of the Solicitor, U.S. Department of Labor, Atlanta, Georgia, for Petitioner

Misty Hillis, Vulcan Construction Materials LLC, Birmingham, Alabama, for Respondent

Before: Judge Moran

This matter, brought under the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d), is before the Court upon a petition for assessment of a civil penalty. It involves whether the safety and health standard at 30 C.F.R. § 56.12025, titled, “**Grounding circuit enclosures,**” which states in relevant part that “**All metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection...**”¹ applies to a portable space heater located in an enclosed, elevated, surface mine operation’s control room where that heater was equipped only with a two-prong plug. The Secretary of Labor (“Secretary”) contends that the heater was neither grounded nor provided with equivalent protection. A hearing was held on March 21, 2019 in Birmingham, Alabama. For the reasons which follow, albeit with some misgivings, the Court concludes that the standard does apply in this instance.

¹ The standard also provides that “[t]his requirement does not apply to battery-operated equipment.” Battery-operated equipment is not involved in this matter.

Findings of Fact

Vulcan Construction Materials (“Respondent”) is a large mining operation, with about 300 quarries nationwide. Tr. 7. The single citation involved was assessed a proposed civil penalty of \$118.00 but the dispute is decidedly not about the proposed penalty. Rather, it is about the standard’s applicability in this situation.

Secretary’s Testimony

Testimony began with Inspector Robert Lance White, the inspector who issued the citation. He has been an MSHA inspector for about 11 years. Over his years of employment he has had safety responsibilities but regarding electrical, his experience has been limited. Tr. 19. With MSHA, he had limited training involving electricity, and that was 11 years ago. White is not an electrician, nor does he possess any degrees involving electrical work. Tr. 21. Apart from his MSHA training, his knowledge about electricity has been acquired through self-training. Tr. 22. The citation issued by White, Ex. C-1, was issued on July 16, 2018, and his notes related to that are reflected in Ex. C-2. Tr. 24, 29. The citation, under condition or practice states, “[m]etal encasing electrical circuit was not grounded on a personal heater in the secondary control room.” Tr. 31. The inspector added that he “observed that the heater had a metallic casing, and there was no ground wire or ground prong, which is required by the standard [at least] as [he has] been trained and experienced it.” Tr. 31.

The Court sought clarification of the condition observed by the inspector. The inspector agreed that he came upon a personal heater which was plugged into a wall socket. Tr. 31. The inspector found that the plug had two prongs, and no ground prong. Tr. 32. Photographs of the heater were introduced. Gov. Ex. C-3 and C-4. Tr. 33. White described the secondary control room where he observed the heater as a metallic structure that’s raised up for viewing reasons so that one can view the operation of the plant. A set of stairs provides access to the elevated structure. There are multiple windows in the structure so that they can observe their process and control and most things can be turned on and off from that structure. Therefore, the Court concludes that it is in effect a control room tower. It is a relatively small structure, being somewhere around eight foot by eight foot or perhaps only eight foot by six feet. The structure is enclosed. Tr. 34. Inside the control room are chairs, a small refrigerator, control panels, switches and the heater, which is the subject of this matter. *Id.*

In his citation, the inspector wrote, “miners work in the control room daily when the plant is in operation. Contacting the metal surface when the metal is energized would likely result in strains, sprains, or broken bones when falling due to recoiling from the shock.” Tr. 35. Electrical shock is the hazard White identified, and he expressed that multiple injuries could result from receiving a shock, including most probably “[b]urns probably from electrical shock and tissue damage, depending on the route taken of the electrical current through the body.” Tr. 36.

The Court asked the inspector to explain what he meant by “metal encasing electrical circuits.” The inspector responded that “[i]n this case it was the metallic outside of the heater. So all the parts you would touch normally if you were moving the heater or

just incidental contact would be metallic, which is an electrical conductor.” Tr. 37. Seeking clarification, the inspector agreed that the heater itself is the metal encasing electrical circuit. Tr. 37. The inspector stated that the heater had not been modified in any way. Thus, except for a little dirt, it was in its original condition. Tr. 38. Although it was plugged in when he observed it, it was not running. *Id.* The heater has an on/off switch but the inspector did not test it to see if it was operational. Tr. 39. He had no basis to conclude that there was anything wrong, anything malfunctioning, anything defective with that heater at all. Tr. 40. His only issue was the device not being grounded. Tr. 40-41.

Explaining his concern further, the inspector opined that his belief was that if one were to touch the metal casing he would receive a shock. The hazard would arise “[i]f there is damage on the inside where that metal casing can become energized because of damage wear and tear, anything like that, then the metal casing would be energized and you would receive a shock from touching it.” Tr. 39. When a device is grounded, “if there's some damage internally in the heater to where maybe the electrical circuits or even the heating element has broken and is touching the metallic part or the internal electrical connections.” Tr. 41. In such a situation, the metallic part would still be energized but if there is grounding, the current would be drawn through the ground wire and kick a breaker so that it would not remain energized. *Id.* Without a ground wire, if the metal casing became electrified, the “only path to ground would be through the body of the miner when they contacted it.”² Tr. 42.

² An attendant risk is called “hand-to-hand pathway,” which the inspector described as where the current

passes through the chest cavity, the heart, lungs. It can result in heart stoppage or thoracic [...] lung function stoppage. [...] hand-to-hand is [...] dangerous [as] [...] it's doing tissue damage as it goes, including electrical tissue damage to the heart. The heart has its own electrical system, and this current messes that up.

Tr. 42-43. However, more than one action would apparently have to occur, as the inspector offered the example of “[t]ouching this heater and having the other hand on this metallic refrigerator which is sitting on the metal floor and all that could be a path for hand-to-hand.

It depends on circumstances, how the miner would touch it.” Tr. 43. Another risk was described as “let-go current.” The inspector advised that

[l]et-go current is a common term for a particular amount of current that keeps a person from turning loose if they grab the heater. It's a muscle contraction, and they could not turn loose. So this increases the total amount of current because current is dependent upon time. So you're exposed to more current if you can't let go.

Tr. 43-44. For this 120 volt heater, let-go current would not be a certain event as it would depend “upon the conductivity of the person's skin, which can be affected differently by different

(continued...)

The inspector marked the injury or illness for this alleged violation as “unlikely;” he stated this was based on the warm temperatures that day – 87 degrees – and therefore a room heater would be unnecessary. Tr. 46-47. Typically, there would be just one person in the control room. Tr. 47. Photo Ex. C-3 depicts the heater as the inspector observed it. It was located in front of a small refrigerator but the inspector did not determine if it was operating. Tr. 48. The inspector believed that the heater would need to be moved to open the refrigerator door. Tr. 49. Responding to his marking “lost workdays or restricted duty” for the alleged violation, the inspector described the hazard as electrical shock. A number of injuries can result from a shock.³ The citation was terminated the same day as its issuance by removing the heater from the premises. Tr. 51.

Ex. C-5 is a picture of the side of the heater, which reflects the model number, the voltage, amperage, watts, 60 hertz, which is typical AC, alternating current, electricity provided in the U.S., and the heater’s serial number, L209017547. Tr. 53-54. UL 1278 also appears in the photo exhibit. White stated that he believed the UL number refers to heaters and its presence means that the heater was tested against the Underwriters Laboratories safety standards. Tr. 54-55. “Intertek ETL Listed” also appears in the photo, but White was not familiar with that reference. Tr. 55. White was then asked about the National Electrical Code or “NEC.” He informed that NEC is a “code for manufacturing and constructing and building different electrical devices and meeting the code.” Tr. 55-56. White did not consider either the NEC or the UL standard in deciding that there was a violation, since his training and experience was that equivalent protection, would be a ground fault circuit interrupter, better known as a “GFCI,” or with double insulation. White saw no indication of either. He did ask Vulcan foreman Jeff Dean, who was the employee who accompanied him during the inspection, to see the breakers, but they saw no indication of any GFCI, nor any “square inside a square” symbol indicating there was double insulation. Tr. 56. Dean agreed with White that the heater casing was metallic. Tr. 57-58. White reiterated that GFCI is considered equivalent protection in lieu of a ground system or a ground wire. Tr. 58. As he indicated earlier in his testimony, he went down from the control room to the MCC, or motor control center, below that room but, while they found a breaker, they did not see a GFCI. Tr. 59. During his inspection, White found a second heater in the primary

² (...continued)

individuals. The amount of perspiration, anything wet in the area, water spilled on the refrigerator or the outside of the heater itself, a variety of factors.” Tr. 44-45. Thus, the inspector could not say for certain if the “let-go” phenomena would apply in this instance. Tr. 45-46. In fact, he conceded that while it could occur for a 120 volt device, it’s more common with higher voltage devices. Tr. 46. 120 volts is considered lesser voltage. *Id.*

³ The inspector elaborated that the “response to the shock in the human body depends upon, [...] a variety of circumstances. Moisture in the skin. It can be electrical burns. It can be tissue damage throughout the body along the path. It can be muscle contractions to where people do fall down or whatever [and in this situation there was] [...] limited space.” Tr. 49. Inspectors are trained to focus on the more likely results.

control room with the same issue.⁴ While he noted it, he did not write a separate citation for that heater. Tr. 60. Both heaters were removed from the mine property. Tr. 61.

The Secretary introduced documents which had been provided by the Respondent during discovery. The government's purpose behind their introduction was to show the conditions in the control room in order to demonstrate the hazards and gravity associated with the condition. Tr. 64-65. Respondent pointed out that the photos were taken after the citation was issued and involve a different heater. Tr.65-66. *See also* Gov. Exs. C-6, C-7, and C-8. White, referring to the photos, identified them as from the same control room as the one where he found the allegedly defective heater. Tr. 67. White believed they were useful for the Court to consider, as the photos show the general layout of the control room and consequently may show the likelihood of incidental contact. Tr. 68. White also commented that the photo shows "the metallic floor plate, which is a conductor, and a metallic desk [...] and the controls themselves being metallic." Tr. 69.

The inspector explained that the term "double insulation" means "an extra layer of nonconductive material, frequently plastic, around the electrical contacts of the circuit so that if something becomes loose or damaged, it is more likely to hit a nonconductive surface rather than a conductive metallic surface." Tr. 70. If present, he stated that such double insulation can be considered to be equivalent protection. Tr. 70-71. Its presence is indicated on the device itself, either by simply stating that it is double insulated or with the square within a square symbol, which looks like a "D" within a square.⁵

Apart from MSHA's requirements under the standard, the inspector agreed that the manufacturer indicated that the heater was in compliance with the standards listed on the heater's label, such as UL Standard 1278. This included the inspector's admission that the heater was originally made as a two-prong outlet device. Tr. 78-79. He also agreed that there was nothing inherently unsafe about the heater. Tr. 79. The inspector offered that the MSHA requirements were more strenuous because

the mining environment's tougher [than] [...] the heater in your grandma's house on a nice wooden floor. The heater in a control room where people with wet, muddy boots may knock it around, where you have a metallic floor, and just even the atmosphere, the mining environment, that floor plate that you see there, I believe that's that particular color because of dirt. What I'm saying is you drag stuff in. You expose the heater to more stringent situations. And I believe that's why the mine standard is a requirement above and beyond any UL standard or anything like that.

Tr. 79-80.

⁴ The next day, he found a third heater, in the bathroom of the maintenance shop, but that heater did have a ground wire or ground system.

⁵ Gov. Ex. C-9, Respondent's violation history was admitted. Tr. 73.

On cross-examination, the inspector again agreed that he did not see any obvious visual damage. However, he raised the possibility of internal damage, though he admitted that, as he did not open it, that was pure speculation by him. Tr. 81. He also agreed that he had no basis to believe that the heater case would be energized if it were switched on. Tr. 84. The inspector did not know if the inner workings of the heater were constructed so that there would be no way for the case to become energized. Tr. 84-85. He could not state that the entire case was metallic, but maintained that some parts of it were metal. Tr. 86. Similarly, he could not recall if the heater's handles were plastic, but added that, even if that were so, incidental contact with the metal parts of the heater could occur.⁶ *Id.* The inspector did not know if the operating controls were metal or plastic. Tr. 87. Shown Ex. C-6, the inspector stated that there appeared to be a mat, possibly a rubber mat, beneath the control room chair. Tr. 91. However, he added that he did not see that the mat extended to the heater area. Tr. 92.

Shown Ex. C-4, the inspector identified the plug as a two-prong type. He agreed that one of the two prongs was wider than the other. Tr. 96. The inspector stated that the difference in the prong sizes involved polarity but he was unable to elaborate about that, other than remarking that polarity is positive and negative, but he did not believe that came into play for alternating current. He admitted that he did not know what polarity meant. Tr. 97. His view was that such two prong plugs were a hazard only where a device is metal-encased. *Id.* He reiterated his view that the only "equivalent protection" acceptable under the standard would be the GFCI, or double insulation." Tr. 97. The inspector was also unaware of any MSHA policy manual guidance on the subject but he would not use Underwriter Laboratories for guidance on this issue, as it was his understanding that such "UL" standards do not go above or beyond MSHA standards. Tr. 101.

Respondent's Testimony

The Respondent's defense began with the testimony of Misty Hillis, Vulcan's Safety and Health Manager for their Southern and Gulf Coast division. Tr.111-112. She has been in Vulcan's employ for 19 years, all of it in connection with safety and health matters. Tr. 113. Vulcan provides training regarding electrical hazards and hazard awareness for its miners and its electricians have in-depth training. Tr. 114. Their miners are trained to be alert to things such as damaged electrical cords, missing junction boxes, and missing knockouts. Tr. 115.

With regard to the control room where the cited heater was located, Hillis described it as "an office kind of room" as it has an office-type desk and chair, from which location they monitor the plant, having a bird's eye view to watch the conveyors and screens. Tr. 116.

⁶ The inspector could not state how many amps represent the threshold for release current. Asked if it is a current at any voltage, or whether it is a combination of voltage and current, or whether it is only that voltage and resistance work together to create a certain current, the inspector responded that his understanding was that it's only about current, which would be affected by the amount of voltage, analogizing the voltage as the push or pressure involved, such as in a water system and the current being the amount of flow, such as gallons per minute, to continue the water analogy. Tr. 87. The particular conductivity can be affected by perspiration or if one were in contact with water, such as with a wet floor, or with wet, muddy boots, for example. Tr. 88.

Those in the control room wear safety boots with rubber soles. The control room, which is indoors, has no sink, toilet or other water source sufficient to even partially immerse the heater. Tr. 117. Generally, there is only one person in the room. *Id.* In terms of the items in Vulcan's control rooms Hillis stated that generally one would find heaters, fans, small dorm-style refrigerators, a radio and a clock, "things that you would find in a normal office." Tr. 118. These typical arrangements motivated Vulcan to challenge this citation because it has "all those different type of two-prong appliance, office-type things in those rooms, in most of our control rooms throughout the division." Tr. 118. In her years with Vulcan, there has never been a control room accident involving those devices. Tr. 119. Regarding the heater, she informed that the handles are plastic as are the control knobs including the on/off switch. *Id.* As for the mini-fridge, with the exception of a metallic hinge, the mini-fridge is not metal either. Tr. 119-120. Although Vulcan has received citations for this standard, those were quite different in nature, such as for a broken ground pin. Vulcan believes that, in this instance, the standard was misapplied. In that regard, it believes that an ALJ decision involving the same issue, a heater in a shop, but for a coal case, is applicable to this situation. There, a mine was cited for the two-prong plug issue. Tr. 120-121. Ex. V-2,⁷ *San Juan Coal Co.*, 13 FMSHRC 1688 (Oct. 1991)(ALJ)(*"San Juan"*).

Both sides agreed that there is no program policy manual or other instruction from MSHA offering guidance or further explanation for this standard. Tr. 128. Vulcan has never interpreted the standard and its reference to "metal encasing circuits" to apply to an appliance in a control room. Tr. 129. At least for Ms. Hillis, she associated breaker boxes and junction boxes and equipment out in the plant with the grounding requirement, not appliances in an office kind of room. Tr. 129.

Respondent then called Mr. Andy Hill, Vulcan's electrical maintenance manager for its Southern Gulf Coast division. He has been employed with Vulcan for 39 years and he has 42 years of experience as an electrician. Tr. 133. Hill described the control room as an office-type environment area with usually a desk with a set of controls, noting that Vulcan calls it the operator house. It is from that location that the plant is operated as the control room operator watches and controls the plant to produce the plant's product, limestone. Except for incidental track-in wetness from outside, the control room is not wet. Tr. 136.

Referring to Ex. C-5, Hill identified it as the tag which was affixed to the heater. The UL listing on the tag reflects that it conforms to UL 1278. Tr. 138. The UL listing informs that the product is deemed as to "mechanical strength or electrical strength, to be a safe product to be used in the area where it was designed for." Tr. 138. Hill informed that UL 1278 recommends "not using it in a wet location, bathroom area, laundry rooms, stuff of that nature." Tr. 139. There is a risk in those situations of electrical shock but from "[b]eing knocked over into water or something of that type of incident ... [a] tub or something." *Id.* Hill made the point that the control room presents no such risks. Tr. 140. Respondent's Ex. V-3, representing portions from UL 1278, dated March 21, 2014 was admitted.

⁷ There is no Exhibit V-1 in the record, because it is duplicative of an exhibit already entered by the Secretary.

Hill's interpretation of UL 1278 is that no three prong plug is required in the control room, because the control room is not located in a wet area. Tr. 142. Hill noted that another heater owned by Respondent does have a three prong plug, because it is located in a bathroom where the floor can become wet. Tr. 141-42. Hill read into the record that Section 36.3 of Ex. V-3 provides "[i]f a heater intended for operation on a circuit involving a potential of 150 volts or less to ground has provision, although not required, for grounding noncurrent-carrying metal parts by means of a conductor of the cord, a directly attached flexible cord or cord set provided with the heater shall comply with the requirement in 36.2." Tr. 142-143.

The Court asked Hill to explain the significance of the provision he just read and he responded

Section 36 of UL standard 1278, is grounding. And under that section [if] you have ... [a] heater intended for operation on a circuit involving potential of more than 150 volts to ground ... [then one] shall have provision for grounding in accordance with 36.2, of all exposed noncurrent-carrying parts, and all noncurrent-carrying metal parts exposed during any servicing operation, including maintenance and repair, that are likely to be energized.

Tr. 144. Hill added that the provision would not apply to "the heater in question because it's working at a voltage of 120 volts to ground." *Id.*

After providing a more lengthy explanation of his interpretation,⁸ Hill summed up that the provision in his view provides that if one is dealing with a heater of 150 volts or less, "then

⁸ In attempting to clarify his view, Hill then added,

[s]o it's saying in that you have to have provision for grounding. 36.2 says, on a heater where grounding is required ... or provided, the power supply cord or cord set shall include a grounding conductor which shall be -- and it's telling you green coated, which is a recognized identification of a ground conductor or with a yellow stripe -- green with a yellow stripe and connected to the grounding pla[t]e of an attachment plug of a grounding type, which would be a three-pronged plug, and connected to the enclosure of the appliance.

Tr. 145. Hill interpreted that to mean that,

right there under definition, enclosure, they're implying that an appliance is an enclosure. So by connected to the enclosure of the appliance, that means it was not likely to be removed during the ordinary servicing or equivalent means. Solder alone is not acceptable for making this connection. [...] [t]hen Section 3 comes up [...] [and informs] [i]f a heater intended for operations on a circuit involving a potential of 150 volts or less to ground [] 36.1 says a potential of 150, more than 150 to ground, so now they're at 150 volts to ground, which is what the circuit -- [the] voltage the heater was operating on -- in question was operating. [...] Involving potential 150 volts or less to ground has provisions although not

(continued...)

whatever cord comes with it is acceptable under UL 1278.” Therefore, the cited heater falls under 36.3 as it had a directly attached flexible cord or a cord set. Tr. 146-147. The voltage in the control room is 120 volts, applying to appliance items and therefore less than 150 volts. Tr. 147.

Respondent’s Ex. V-4, pertaining to certain pages from the 2017 National Electric Code, was admitted. Hill, referring to that exhibit, and within that, to Section 110 in the National Electric Code which sets forth the chapter definitions. He explained that section 110.3 states that UL is used in listings of product certifications of equipment. NEC he stated is akin to his Bible. NEC, he noted, recognizes UL listing. And “NEC requires equipment that's installed safely to operate safely in people's protection to be a listed product.” Tr. 150. Further, regarding the plug for the heater, section 420.4⁹ allows that:

[i]f the appliance is provided with a manually operated inline single pole switch for appliance on/off operation, an Edison-base lampholder, or a 15- or 20-amp receptacle, the attachment plug shall be of polarized or grounding type. Two-wire nonpolarized attachment plug shall be permitted to be used on a listed double-insulated shaver.

Tr. 151. Hill admitted the provision was vague and therefore required interpretation. However, in his view, the heater in issue was “a recognized ,” that is to say, “a listed device” and as such it is factory installed with a two polar plug. Tr. 151-152. The heater in issue was equipped with such a polarized plug. Tr. 152.

Therein is the critical distinction applicable to this heater’s polarized plug, in Hill’s view. He explained that:

[t]he purpose of the polarized plug[] is to identify the grounded conductor. In this case, [involving] a 120-volt circuitry, [there is] [...] a current-carrying leg. And in a grounded circuit, even though [it’s] grounded at the power source, it's still considered a current-carrying conductor, *but it is a grounded conductor*.

Tr. 152 (emphasis added). The Court inquired further about this assertion asking, whether, because the heater had a polarized plug, it was a grounded conductor. Hill responded, “[i]t’s not *equipment* ground conductor. It is a grounded conductor by NEC.” *Id.* (emphasis added). He added, “[g]rounded and grounding are two different things. Grounded means at the system

⁸ (...continued)

required for grounding noncurrent-carrying metal parts by means of a conductor of the cord. A directly attached flexible cord or cord set provided with the heater shall comply with the requirements in 36.2, which said you had to have -- if you had a carrying conductor, it had to be green with a yellow stripe.

Tr. 145-146.

⁹ Ex. V-4, at the first page of that exhibit, page 468, NEC recognizes polarity in cord and plug-connected appliances.

potential voltage, that there's an intentional ground to that system to the earth. [...] [and as such] that is a safety factor. Among other things, it actually stabilizes the voltage.” Tr. 153.

The system in this case is a “grounded system.” *Id.* The polarized plug does not make it a “grounded system.” Rather, it is the 120 voltage rating that makes it a grounded system. *Id.*

That being the case, the Court then asked what, if anything, was the value of having a polarized plug. Hill responded that with the polarized plug, with one prong being larger than the other, one “cannot reverse the internal wiring of that. You've got it always plugged into the grounding conductor.” Tr. 154. The Court, perplexed by some of Hill’s responses, pressed him on whether a polarized plug has any effect on shock hazards. Hill responded that, under his interpretation of UL 1278, and the testing required for that, it would take something catastrophic before a hazard would occur. Tr. 156. Pressing him further, Hill expressed that there is an increased chance of a shock hazard for a non-polarized plug. Tr. 156-157. He added that, without being polarized, it would fall out of the UL design and testing. Tr. 157.

The Court then inquired about the inspector’s concern that if there were an internal defect in the heater, there could be a hazard where the plug is only two-pronged. From that, the Court inquired whether there was less of a chance that you could get hurt because the plug is polarized, if there was something internally wrong with it. Hill responded that the hazard would be reduced but only in comparison to a non-polarized two-pronged plug. He explained further,

[b]ecause of the design of the heater itself and the amount of testing and how they test it, it's designed that if there was a fault to the case or enclosure, that with it being a grounded conductor, basically it's going to do the same thing. That's the reason why if you go back in the UL standards, that's why they say 150 volts or less.

Tr. 158. Thus, Hill’s major reasoning stemmed from the 120 volts involved with the heater.

Hill reaffirmed that “the heater in question [was] compliant for use in the environment it was [being used] in ... consistent with its UL listing and with the National Electric Code requirements.” Tr. 162. Turning back to Exhibit V-3, Respondent revisited the inspector’s concern for the “potential for an energized conductor inside the box to somehow contact the metal case thereby energizing the metal case but not having a direct path to ground and thereby tripping the breaker and isolating hazard.” Tr. 162-163. Hill’s answer was that the testing standards are rigorous and this includes that such devices have to withstand 50,000 ohm, potential test to the housing, meaning that there has to be a minimum of 50,000 ohms of resistance between the intended conductors and the housing. Tr. 163. The testing associated with meeting the standard to be so listed includes “drop tests, crush tests, dielectric testing. ... they even do abuse testing. They spray it with water. They do multiple testing. ... They first operate the heater, and while it's still at operating temperature, they test it at the 50,000 ohm value.” Tr. 164. After all that abuse testing, based on UL 1278, the device must still measure a minimum of 50,000 ohms of resistance. Tr. 164.

Referencing the abnormal operation tests, which are part of UL 1278, Hill referred to the overvoltage, tip-over, and drop tests that a device must satisfy to achieve the UL 1278 listing.

Tr. 166-167. Ex. V-3. Hill expressed his view that the UL listing should be considered “equivalent protection” because the standard is basically almost word for word out of the NEC.” Tr. 170.

Upon cross-examination, Hill agreed that the heater has metal parts on the outer casing and that the two-pronged plug for the heater had no ground wire. Tr. 172. Asked what would happen if the metal part of that heater were to become electrified with 120 volts, Hill responded that “[i]t would probably trip the overcurrent device.” Tr. 173. He acknowledged that if the circuit had a ground wire connected to the case it would definitely trip. Tr. 174. Thus, he agreed that “when [the heater] has a ground attached to the metal cabinet, it is really an insurance that no one will be shocked with an energized cabinet.” Tr. 174.

The Court then asked additional questions of Hill. Asked if considered the heater to be a metal *enclosing* electrical circuit and a metal *encasing* electrical circuit, he affirmed that it was. Tr. 180. He was then asked if he considered the heater’s polarized plug arrangement to constitute grounding, Hill answered, “it’s not grounded with an equipment ground, no. But by UL standard, it was safe enough to use on a grounded system of 120 volts that wouldn’t pose electrical shock... [based on] the UL standards.” *Id.* Hill reiterated that the heater was not grounded “with a[n] equipment-grounding conductor.” Tr. 181. However, he did reaffirm his view that the heater had equivalent protection. *Id.* The Court then asked him to identify the equivalent protection to which he answered, “[t]he equivalent protection, in my professional opinion, based on standards or the listing, that there has been vigorous steps in the design of this piece of equipment that UL standard put -- they went through these tests they put their stamp on, and NEC, which is a safety electrical code that protects people, approves, said it’s okay to use as it’s designed. So yes, I do think it’s equivalent.” Tr. 182.

The Court inquired further, as to whether Hill was addressing “equivalent protection” to grounding, not just equivalent protection. Hill answered, “in my professional opinion, based on my training of the code, they recognize it as being equivalent.” Tr. 182-183. Pressed further, the Court asked, if that meant “being equivalent protection to grounding,” Hill responded, “Yes.”

After Hill testified, the Respondent rested its case. As the Secretary did not elect to recall any witnesses, the hearing was concluded.

The Parties’ Post-hearing Briefs

The Secretary of Labor’s Initial Brief

The Secretary contends that by the “plain and unambiguous language, section 56.12025 applies to the personnel heater at issue,” adding that “when the language of a regulation is clear, the Commission has recognized that the terms of that regulation “must be enforced as they are written’ ...” Secretary’s Post Hearing Brief (“Sec. Br.”) at 12-13.

The Court does not believe that the words and application of the standard are so clear. As the Secretary acknowledges, “the plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that

language is used, and the broader context of the statute as a whole.” *Id.* This is the approach the Court has taken, analyzing the specific context in which that language was applied here.

As the Secretary concedes, “[n]either the Mine Act nor the regulation define the phrase ‘metal used to enclose or encase electrical circuits’ ; however, the NEC defines the term ‘enclosed’ as ‘surrounded by a case, housing, fence or wall(s) that prevents persons from accidentally contacting energized parts.’” *Id.* at 13, citing NFPA 70-2017, Article 100 Definitions, p. 70-36.

The Secretary asserts that the heater was neither grounded nor provided with equivalent protection. The focus is upon whether the heater was provided with equivalent protection. He notes that the Inspector stated that equivalent protection would only be through a Ground Fault Circuit Interrupter (“GFCI”) or through double insulation. *Id.* at 16. The Secretary takes issue with Respondent’s contention that reliance upon UL 1278, which the Secretary concedes “appears to exempt electric heaters of 150 volts or less from being grounded.” *Id.* The Secretary counters that the standard requires all metal enclosing or encasing electrical circuits to be either grounded or provided with equivalent protection; and consequently it does not provide for exemptions. *Id.*

The Secretary then asserts that, even if the meaning of the regulation is ambiguous, the Secretary’s interpretation of the regulation is entitled to deference. *Id.* at 17. Among other cases cited in support of such deference, the Secretary cites to *American Coal Co. v. Fed. Mine Safety & Health Rev. Com’n*, 796 F.3d 18, 24 (D.C. Cir. 2015) and *Hecla Limited*, 38 FMSHRC 2117, 2122 (Aug. 2016). The Secretary asserts that his “interpretation of section 56.12025 is entitled to deference because it is consistent with the plain words and purpose of the regulation, as well as the broader purpose of the Mine Act to protect the safety and health of miners.” *Id.* at 18, citing *Emery Mining Co., v. Sec’y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984).¹⁰

The Secretary’s Reply Brief

In its Reply Brief (“Sec Reply”), the Secretary urges that the Court should not adopt Vulcan’s interpretation of what constitutes “equivalent protection” because it does not comport with the plain meaning of the standard, does not promote safety, and would lead to the absurd result of defeating the purpose of the standard. Sec. Reply at 2. The Secretary distinguishes the

¹⁰ The Secretary also cites to *Contractors Sand and Gravel, Inc.*, 20 FMSHRC 960, 970 (Sept. 1998) for the proposition that the Commission recognized that “[t]he protective purpose of [56.12025] is to prevent injury from electrocution caused by a malfunctioning or improper grounding system.” However, the Secretary neglects to mention that the Court of Appeals for the District of Columbia Circuit *reversed* the Commission’s decision in *Contractors Sand and Gravel*, specifically because it determined that, as a matter of law under the Equal Access to Justice Act, the Secretary’s litigating position “lacked substantial justification.” *Sec’y of Labor v. Contractors Sand and Gravel, Inc.*, 199 F.3d 1335, 1340-41 (D.C. Cir. 2000). To be sure, the D.C. Circuit specifically rejected a contention that the standard proscribes a specific method for grounding electrical equipment, which is not at issue in this matter. But the principle that the commitment to protecting the health and safety of miners entitles the Secretary to deference is not borne out by *Contractors Sand and Gravel* in light of the D.C. Circuit’s reversal.

cited standard from 30 C.F.R. § 56.12045 and 30 C.F.R. § 56.12048, as both those standards specifically reference the NEC, whereas 30 C.F.R. § 56.12025 does not. He reasserts that the plain language of the standard requires the heater to be grounded or provided with protection that is equivalent to grounding. He maintains that the intent of the standard is to protect miners against electric shock and electrocution but that the UL tests identified by Vulcan do not protect miners against those hazards. *Id.*

As for Vulcan's claim that the standard does not apply to the control room, the Secretary responds that "no matter the dimensions of the control room, or terms Vulcan uses to describe the control room, it is part of the mine and consequently, under MSHA's jurisdiction; therefore, the standard applies." *Id.* at 3.

Addressing Vulcan's vagueness claim, that the meaning of the terms "equivalent protection" and "metal enclosing or encasing electrical circuits" are not specified, the Secretary responds that a standard's use of general terms does not mean that it suffers from vagueness. Standards may be drafted in general terms "in order to be adaptable to the myriad of circumstances in a mine" as long as "a reasonably prudent person, familiar with the mining industry and the protective purpose of the standard, would recognize the hazardous condition that the standard seeks to prevent." *Id.* The hazard addressed by the standard is electric shock. Further, both Inspector White and Mr. Hill stated that the cited heater had metal enclosing or encasing electrical circuits. The inspector stated that for equivalent protection, there would need to be either a Ground Fault Circuit Interrupter ("GFCI") or double insulation. *Id.* at 4.

Last, the Secretary contends that the administrative law judge's decision in *San Juan* is distinguishable from this matter. After correctly noting that administrative law judge decisions have no precedential effect, the Secretary distinguishes 30 C.F.R. § 77.701 from the standard in this matter. It notes that section 77.701 requires metallic frames, casings, and other enclosures of electric equipment that can become alive through failure of insulation or by contact with energized parts are to be grounded by methods approved by an authorized representative of the Secretary. *Id.* at 4-5. Although the judge in *San Juan* concluded that the two toasters and a portable heater were not "electric equipment", and therefore section 77.701 did not apply, and that the UL listing amounted to a certificate that the heater had an equivalent means of shock protection, the Secretary contends that the standard in this litigation, 56.12025, is broader, as it is not limited to electric equipment. *Id.* at 5. Instead, it applies to all metal enclosing or encasing electrical circuits. A further distinction, the cited standard "requires shock protection equivalent to being grounded, not to double insulation." *Id.* An additional distinction, Further, § 77.701 requires electric equipment enclosures be grounded by methods approved by an MSHA inspector. ¹¹ *Id.*

¹¹ Alternatively, the Secretary urges that if this Court were to conclude that the coal standard is useful in construing the cited standard, it should look to the rationale in *Pittsburg & Midway Coal Mining Co.*, 9 FMSHRC 1908 (November 1987) (ALJ) ("*Pittsburg*"). In *Pittsburg*, the ALJ concluded that section 77.701 applied to a 110-volt space heater located in the electrical supervisor's office. That heater was metal-cased, lacked a three-prong plug or any other type of grounding, and had a "UL" stamp of approval on it. *Id.* at 1911-1912. The judge recognized, "[f]ailure to ground this type of heater could cause shock, serious burns or a fatality. If this

(continued...)

Vulcan's Initial Brief

Vulcan summarizes its factual position in its initial post-hearing brief ("R's Br.") as follows:

The heater at Fort Payne was used only in the control room. The control room is a low-traffic area that is dry and orderly. The heater has been used for years in this room and has never been cited by MSHA for not having a ground prong. The heater was not damaged and was not in use at the time of the inspection. In order for the heater to cause a shock, it would have to develop an electrical fault. This is extremely unlikely due to the extensive tests that are required for the heater to be UL listed. In addition, the heater was used in a clean, low-traffic, dry room and was very unlikely to suffer any damage that would result in an electrical fault.

R's Br. at 5.

Though elaborated below, Vulcan's legal argument is that,

[t]he standard cited allows for grounding or 'equivalent protection'. The only guidance for 'equivalent protection' provided by MSHA is double insulation. The actual definition of 'equivalent protection' is not available to the general public.

¹¹ (...continued)

condition [of the heater not being grounded] continued and a fault occurred you could reasonably expect a shock or serious burn." *Id.* The judge also noted that the inspector did not know whether MSHA had a policy concerning the grounding of appliances. The inspector opined about the different ways the heater in *Pittsburg* could have been grounded. Respondent, *Pittsburg* argued that as MSHA had not issued a policy or interpretation requiring the replacement of two-prong plugs, the inspector's requirement that the operator abate the hazard with a three-prong plug was just the inspector's personal preference. However, the judge disagreed and affirmed the citation against P&M holding that "several methods of grounding were available but . . . a three way plug was required." *Id.* at 1914. The judge also found that *Pittsburg* "was negligent as to the ungrounded space heater inasmuch as this condition was open and obvious" and that the gravity of the violation was high because "[a] miner could have been burned or electrocuted by the electrical space heater." *Id.* at 1919-1920. The judge then assessed a penalty of \$150 for P&M's violation of section 77.701. The facts of the *Pittsburgh* case are very similar to those of the instant case; therefore, *Pittsburg*, and not *San Juan*, should have persuasive weight with this Court.

The Court did review *Pittsburg*. However, it does not find the decision to be helpful in that the judge there simply upheld the Secretary's authority to enact general regulations relating to equipment and to impose stricter limitations than the NEC. No one disputes that the Secretary may do that, but the question is whether the language employed in the standard is unenforceably vague such that a *reasonably prudent person* familiar with the mining industry and the protective purposes of the standard *would have recognized the specific requirement of the standard* and that, applying the reasonably prudent person test to the subject standard, such a person would have considered the heater to be *a metal enclosing or encasing electrical circuit*.

Based on the evidence provided, the UL listing on the heater should be considered 'equivalent protection' and appliances used in office-type environments should not be considered 'electrical circuits' thus rendering this citation invalid.

Id.

Vulcan notes that:

[t]he heater is UL1278 listed. UL1278 details standards for moveable and wall or ceiling-hung electrical room heaters. In order for an appliance to have the UL listing, it must comply with the National Electric Code. Section 68.2 of the UL1278 standards states that 'This heater is not intended for use in bathrooms, laundry areas and similar indoor locations. Never locate the heater where it may fall into a bathtub or other water container.' In order to achieve an U1278 listing the heater must be subjected to many abusive tests and still maintain at least 50,000 ohms of resistance.

Id. at 1.

Vulcan also remarks that "[t]he control room where the heater was located is an indoor location where the plant can be controlled and observed." *Id.* at 2. It observes that while "MSHA emphasized that the heater was used in a mining environment" and suggested "that the control room was more likely to cause a condition that would damage the heater and lead to an electrical fault," *Id.* Vulcan submits that is unsupported, as "the control room is less likely than a home environment to cause damage since the control room generally has one qualified, trained miner inside." *Id.* In fact, Vulcan submits that "the control room is much less likely to cause damage to the heater than a residence." Beyond those contentions, Vulcan adds that since "the circuit breaker the heater was plugged into had a 20 amp overcurrent protection [...] the breaker would most likely have tripped if the heater had encountered a fault." *Id.*

Beyond the particular facts attendant to the citation, Vulcan contends that the standard 30 C.F.R § 56.12025, does not define "metal enclosing or encasing electrical circuits," nor does MSHA's metal/non-metal program policy manual offer guidance on that phrase. The National Electric Code does not define it either. Vulcan submits that "[i]n the absence of a definition, a reasonable assumption of the term could be that the term refers to electrical installations such as: breaker boxes, junction boxes, starters or electrical disconnects." *Id.* at 3.

Vulcan believes that the parallel MSHA coal standard, 30 C.F.R. § 77.701¹² supports its view. Vulcan contends that the MSHA program policy manual¹³ associated with that standard, also offers support for its view.

¹² § 77.701, titled, "Grounding metallic frames, casings, and other enclosures of electric equipment," states "[m]etallic frames, casings, and other enclosures of electric equipment that can become "alive" through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary."

The significance of the absence of any definition comes to the fore, because Vulcan asserts that the standard itself is fatally vague. It points to the need for a standard to “give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and it cannot be so incomplete, vague, indefinite, or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application” R’s Br. at 3, citing *San Juan*.

Vulcan contends that “[s]ince MSHA does not define either “metal enclosing or encasing electrical circuits” or “equivalent protection”, the industry is left to guess at its meaning. *Id.* at 4. It asserts that:

[a] reasonable person would likely not guess that a portable heater would be considered a ‘metal enclosing or encasing electrical circuit.’ Also, a reasonable person could infer that a UL listed heater used in a UL approved location would be considered ‘equivalent protection.’ In fact, because the heater has been in the control room for many years, it is reasonable to assume that past MSHA inspectors have also not considered the heater an electrical circuit and considered that it had equivalent protection.

Id.

¹³ MSHA’s coal program policy manual addressing standard 77.701, Grounding Metallic Frames, Casings, and Other Enclosures of Electric Equipment, provides:

Certain moveable electric equipment, e.g., rail-mounted and pivoting coal stackers, traveling shop cranes on track rails, small traveling hoists on I beams, etc., cannot be strictly classified as portable, mobile or stationary equipment. For the purposes of frame grounding, such equipment shall be considered stationary. Consequently, the grounding requirements of Subpart H apply to such equipment.

This Section requires that metallic frames of electric equipment be grounded by methods approved by an authorized representative of the Secretary. Therefore, rail-mounted and pivoting coal stackers, traveling shop cranes on track rails, small traveling hoists on I beams, and similar equipment shall be grounded in accordance with the following: All tracks shall be bonded or welded at each joint, and each individual track rail or I beam shall be solidly grounded through a grounding conductor which meets the requirements of Section 77.701-3 to an acceptable grounding medium. In instances where the conveyor, hoisting and/or tramming motors receive power through a trailing cable, the moving frame shall be grounded to an acceptable grounding medium through a proper size grounding conductor inside the cable. In instances where the conveyor, hoisting and/or tramming motors receive power through a trolley system, the moving frame shall be grounded to an acceptable grounding medium through an additional grounding trolley contact.

Program Policy Manual, Volume V – Coal Mines, U.S. DEP’T OF LABOR, MINE SAFETY & HEALTH ADMIN., <https://arlweb.msha.gov/REGS/COMPLIAN/PPM/PMVOL5R.HTM> (last visited July 16, 2019).

Vulcan also takes note that,

MSHA relies on the NEC and UL to determine if a device is double-insulated and thereby meeting the test for 'equivalent protection' per Inspector White's testimony. The heater in question is also UL listed and certified as safe for the application in which it was being used. In this citation, MSHA chose to rely on one UL listing but not the other. The list of MSHA-accepted UL listed devices is not available to the industry or general public. In addition, this heater would be acceptable in an equivalent OSHA location due to its UL listing. Without a written interpretation from MSHA, the mine operator is left to guess at what is acceptable.

Id.

Vulcan's Reply Brief

Vulcan points in its reply brief ("R's Reply Br.") to the National Electric Code, Underwriters Laboratories, and OSHA regulations that support its position. It notes that Inspector White acknowledged that UL standards provide assurance that such approved products, if correctly used, would be safe. R's Reply Br. at 1. It points to Inspector White's acknowledgement that the NEC is a code for manufacturing and constructing and building different electrical devices and meeting the code. Vulcan adds that OSHA drew heavily from the NEC in revising its electrical hazards standards and it asserts that "OSHA incorporates the National Electric Code and recognizes that the UL listing complies with the product safety test standards. Therefore, the UL and NEC codes are much more than simply 'codes to limit a company's liability.'" *Id.* at 2.

Challenging the inspector's claim that the cited heater was subject to more stringent conditions, Vulcan notes that the applicable UL standard, 1278, makes plain that the heater is not intended for use in bathrooms, laundry areas and similar indoor locations nor where it may fall into a bathtub or other water container. The cited heater is not used in, nor subject to, such conditions and the UL standard does not limit it to residential use. *Id.* Vulcan adds that the control room at Ft. Payne has much less traffic and more stringent conditions than a normal household and that a typical household is subject to children, pets and more visitors than the control room. *Id.*

Vulcan response to Inspector White's concern that electrical shock could result if there was some internal damage to the heater and its electrical circuits or if the heating element were to touch the metallic parts of the heater, is that such an event would be extremely unlikely. In fact, Vulcan contends that for that to happen the heater would have to be crushed. *Id.* at 3. In that regard, Vulcan points out that the Inspector acknowledged that the heater was not damaged in any way. *Id.* Vulcan adds that for the heater to qualify for UL 1278 approval, rigorous testing is required. This includes tests on the heater involving overvoltage, tip-over, stalled fan, dropping the heater three times from a height of three feet and a strain relief test on the cord. *Id.* at 3-4.

As for the Secretary's reference to past citations, Vulcan remarks that none of them involved "heaters located in a dry, office-type control room."¹⁴ *Id.* at 4. Vulcan notes that Citation 6127272 was written for a two-prong heater in use inside a water pump building, with the inspector's notes remarking that the room was very wet. *Id.* at 5.

Vulcan sums up that it is extremely unlikely that the cited control room heater would develop an electrical fault to cause a shock. It characterizes such an event as extremely unlikely due to the extensive tests that are required for the heater to be UL listed. Further, it notes that OSHA incorporates the National Electric Code and recognizes that the UL listing complies with the product safety test standards. From that it contends that since the heater has the UL listing and was in compliance with the NEC, it should be considered as having "equivalent protection" under the cited standard. This is especially true, it argues, since the definition of "equivalent protection" is not available to the general public. Vulcan maintains that appliances used in office-type environments should not be considered "electrical circuits." *Id.* at 6.

Discussion

For the reasons explained below, the Court must affirm this citation. As noted, the standard cited, 30 C.F.R. § 56.12025, titled, "Grounding circuit enclosures," provides: "[a]ll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection." Although the terms "metal enclosing or encasing" electrical circuits and "equivalent protection" are not defined, Mr. Hill affirmed that the heater was a metal enclosing electrical circuit and a metal encasing electrical circuit. Hill's concession fits with the common understanding of an electrical circuit, that is defined as "an electrical device that provides a path for electrical current to flow."¹⁵ Certainly the heater in question fits the definition. As noted, Hill also conceded that the heater is a metal encasing/enclosing *appliance*. There is no serious dispute about these two issues.

There is next the issue whether the heater was grounded or provided with equivalent protection. Respondent's Hill, who must be complimented for his frank and credible testimony, stated that the heater was not grounded. He did, however, express his honest view that equivalent protection was provided. As described above, his view relied upon the rather strenuous requirements provided through the UL approval process.

¹⁴ Vulcan adds that for one of the citations mentioned by the Secretary in his post hearing brief as written for an ungrounded heater, and identified by the Secretary as Citation No. 6523834, there is no information on the citation to indicate if the heater was manufactured as a two-prong or three-prong heater, nor information about where the heater was located. Vulcan remarks that it is possible that the heater was located in a wet area. The Court notes that the citation number was actually No. 8631815. The number given by the Secretary as the citation, 6523834, is actually the "Event No."

¹⁵ ELECTRICAL CIRCUIT, <https://www.vocabulary.com/dictionary/electrical%20circuit> (last visited July 18, 2019).

It is at that juncture that matters become more complicated, because the Secretary has some deference afforded to its interpretation of safety standards. As described above, the Secretary has set forth the basis for this claim of deference in his post-hearing briefs.

Challenging the Secretary's claim that the standard applies to the cited portable heater, Vulcan has pointed to an administrative law judge's decision in *San Juan*. Exhibit V-2. In *San Juan* the judge was dealing with 30 C.F.R. § 77.701, a coal mining standard pertaining to grounding. Titled "Grounding metallic frames, casings, and other enclosures of electric equipment," it provides that "[m]etallic frames, casings, and other enclosures of electric equipment that can become 'alive' through failure of insulation or by contact with energized parts shall be grounded by methods approved by an authorized representative of the Secretary." Two toasters, that is, simply appliances to toast bread, and a portable heater were involved in that case.¹⁶ The inspector noted that the appliance "was located on a formica-topped metal table sitting in an eating area in a warehouse with a concrete floor. ... it had no external ground, had a metal housing, and was equipped with a size 16 cord (four feet long) with two conductors." *Id.* at 1693.

As in this matter, the inspector in *San Juan* was concerned that "people could become the 'ground' themselves, if 'something happened to the internal wiring' and the insulation failed and a person walked up and touched it. *Id.* (emphasis added). The judge referred to the toaster's UL approval and a National Electric Code (NEC) provision stating that such a toaster can be used in areas which are not damp or wet. The evidence included information from Underwriters Laboratories, Inc., ("UL") which informed that "Underwriters Laboratories Listed electrical equipment for ordinary locations has been evaluated for use in accordance with the National Electrical Code and to determine that the design of such equipment provides for the reduction of the risk of injury to life and property." *Id.* at 1695. UL also stated that:

[e]lectric toasters are not among the appliances in residential occupancies required to be grounded by Section 250-45(c). Additionally, in other than residential occupancies, cord-and-plug connected appliances not used in damp or wet locations or by persons standing on the ground or on metal floors or working inside metal tanks are not required to be grounded. ... UL considers Listed electric toasters, although not grounded, to comply with the NEC whether used in residential occupancy or the type of premises you described which I understand is a dry location.

Id. Interestingly, UL advised that "[m]odifications to toasters to replace the power cord with a grounding type cord, which you indicate is required by the inspector, can introduce risks of electric shock or fire." *Id.*

Judge Lasher observed that "[a] safety standard must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited and it 'cannot be so incomplete, vague, indefinite, or uncertain that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Id.* at 1699 (emphasis in original). That being the case,

¹⁶ The parties stipulated that the judge's determination for one of the toasters would control the outcome for the other toaster and the portable heater. *Id.* at 1692.

the judge concluded that the standard, 30 C.F.R. § 77.701, was “sufficiently indefinite and unclear in its application here as to cause disagreement among Petitioner’s own hierarchy [...] as well as failing to communicate that it could be intended to apply to small toaster-ovens and a small portable heater manufactured for use without a grounding conductor in the cord and plug.” *Id.*

Judge Lasher also noted that “MSHA’s own Program Policy Manual, (hereafter, “Manual”) [...] appears to exempt U.L. approved cord-and-plug appliances such as the toaster ovens and heater involved here [as it provides that] [p]ortable tools and appliances that are protected by approved systems of double insulation, or its equivalent, need not be grounded.” *Id.* (emphasis in original). The judge concluded that “the U.L. listing is in effect a certificate that the three listed appliances have means of shock protection equivalent to double insulation.” *Id.* at 1700.

The judge looked to the Manual for additional guidance, as it:

appears to give some idea of the type of ‘electric equipment’ 30 C.F.R. § 77.701 is intended to encompass, i.e., ‘Certain movable electrical equipment, e.g., rail-mounted and pivoting coal stackers, traveling shop cranes on track rails, small traveling hoists on I beams, etc.’ The types of clear-cut mining equipment mentioned as examples by MSHA as a minimum delivers considerable weight to Respondent’s contention that the subject standard is unenforceably vague when applied to the three appliances in question.

Id. Thus the judge concluded that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized the specific prohibition or requirement of the standard [and that] [a]pplying the ‘reasonably prudent person’ test to the subject standard, such a person would not consider the term ‘electric equipment’ used in 30 C.F.R. § 77.701 to apply to the three UL approved appliances in question and have recognized a requirement to modify each appliance by grounding it externally [and thus that] [t]he three appliances involved--the two toasters and the portable heater-- are not “electric equipment” as that term is used in 30 C.F.R. § 77.701.”¹⁷ *Id.*

Although the Court agrees that there are some similarities between this matter and the *San Juan* decision, the Court finds that they are distinguishable for several reasons. First, it is

¹⁷ The Court did review *Pittsburg & Midway Coal Mining Co.*, 9 FMSHRC 1908 (November 1987) (ALJ), cited by the Secretary as offering a rationale worthy of adopting. Sec. Reply at 5. The decision affirmed the Secretary’s authority to enact general regulations relating to equipment and may impose stricter limitations than the NEC. No one disputes that the Secretary may do that, but the question at hand is whether the language employed in the cited standard, 30 C.F.R. § 56.12025, is unenforceably vague such that a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would not have recognized the specific requirement of the standard and that, applying the reasonably prudent person test to the subject standard, such a person would have considered the heater to be a metal enclosing or encasing electrical circuit. As explained, the Court finds that the standard is not unenforceably vague and that equivalent *grounding* protection was not provided.

true that the decision of another administrative law judge has no precedential effect. Further, the language of the two standards is not identical. In addition, at least for the coal standard, MSHA issued a program policy statement, which the judge in *San Juan* construed to support his position. Beyond those observations, the Court does not agree that the term “equivalent protection” is unenforceably vague. The phrase must be measured against the object of the standard – to achieve grounding. Therefore the equivalent protection must afford equivalent *grounding* protection.

When the Court asked Mr. Hill if he considered the heater’s polarized plug arrangement to constitute grounding, he admitted it wasn’t grounded with an equipment ground, but he believed that, due to the UL standard, it was safe enough to use on a grounded system of 120 volts. It can’t be that each mine operator gets to opine about what constitutes equivalency. If reasonable, it is within the Secretary’s purview to make those calls and deference is due in these circumstances. *Kisor v. Willkie*, 588 U.S. ___, ___ (2019)(slip. op. at 14)(“[i]f genuine ambiguity remains, moreover, the agency’s reading must still be reasonable.”)(internal quotations omitted).

This does not mean that deference to the Secretary’s position is unbounded. Deference is not automatically, nor blindly, given. A regulation must actually be ambiguous before the Secretary’s interpretation is entitled to deference. *Kisor*, 588 U.S. at ___ (slip. op. at 13-14)(“[b]efore concluding that a rule is genuinely ambiguous, a court must first exhaust all the traditional tools – the text, structure, history, and purpose – of construction.”)¹⁸ In *Drilling and Blasting Systems, Inc.* 38 FMSHRC 190, (Feb. 2016), the Commission addressed an Administrative Law Judge’s determination that deference was not due, as it was “plainly erroneous.” *Id.* at 193. The Commission, noting that the term “attended” as it appears in section 56.7012 and section 56.2 is ambiguous vis-à-vis the issue presented, acknowledged that “[o]rdinarily, [it] must defer to the agency’s interpretation of its own ambiguous regulation. . . . However, deference is inappropriate if the agency’s interpretation is not reasonable or when it is ‘plainly erroneous or inconsistent with the regulation’ . . . or ‘when there is reason to suspect that the interpretation does not reflect the agency’s fair and considered judgment on the matter.’” *Id.* at 194. As in this case, the decision rested upon the particular facts involved.

¹⁸ In *Brown Bros. Sand Co.*, 17 FMSHRC 578, 584 (Apr. 1995), cited by the Secretary, the administrative law judge was dealing with the same standard involved in this matter but there were significant factual differences involved as it pertained to metal frames on disconnect boxes for a conveyor and two shaker screens and light switch boxes, none of which were grounded. These items were outdoors and the inspector stated that the absence of grounding exposed miners to potential electrocution. The judge simply stated that the cited standard requires the grounding of all metal enclosures encasing electrical circuits. The case is of negligible value, as the applicability of the standard was not challenged; issues of negligence and whether the violation was significant and substantial were the focus of the decision. Similarly, *Contractors Sand & Gravel Supply, Inc.*, 18 FMSHRC 384 (Mar. 1996) (ALJ), cited by the Secretary is of minimal value. While the judge did hold that the cited standard, 30 C.F.R. § 56.12025, is specific and not broadly worded and is a performance standard, the citation was vacated as an attempt to expand the standard beyond its plain meaning, by trying to proscribe the method of grounding employed by the operator, constituting an impermissible expansion of the plain meaning of the standard.

Examining those particular facts, the Commission concluded that the Secretary's interpretation was not the most natural reading of the safety standard, and accordingly concluded that there plainly was no basis for deference. *Id.* at 197.

The text of the standard at issue in this case does not define "metal enclosing or encasing electrical circuits," nor does it define protection equivalent to grounding, nor are those terms otherwise defined Part 56. In such instances however, as long as the Secretary's interpretation is not plainly erroneous or inconsistent with the standard, it is the Secretary's call to set forth the basis for determining that the appliance in issue is captured by those terms and whether protection equivalent to grounding was present. In this instance, the Court cannot conclude that the Secretary's interpretation of "metal enclosing or encasing electrical circuits" is unreasonable, separate and apart from the Respondent's noteworthy concession that the heater fits those terms. Nor can the Court conclude that it is plainly erroneous or inconsistent with the standard at issue for the Secretary to set out what constitutes "equivalent protection" for purposes of meeting the regulation's requirement that the protection be equivalent to grounding, which the Secretary's authorized representative determined the electric heater lacked. In this instance, the Secretary established that such equivalent protection was not provided.¹⁹

In light of the above considerations, the Court concludes that the Secretary established by a preponderance of the evidence all of the elements necessary to sustain a violation of 30 C.F.R. § 56.12025.

Penalty Determination

In assessing civil monetary penalties, Section 110(i) of the Act requires that the Commission consider the six statutory penalty criteria:

[1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

As the Commission has noted, "Administrative Law Judges are accorded broad discretion in assessing civil penalties under the Mine Act." *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). A Commission Judge's penalty assessment is reviewed under an abuse of discretion

¹⁹ Even when considering Vulcan's view that the control room is akin to a residence, the room's metallic floor makes it unlike any office or residence. While the Court agrees that the UL approval makes it *extremely* unlikely that a miner would be shocked by the portable heater, that consideration is taken into account in assessing an appropriate penalty, not in determining whether the standard was violated.

standard. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601(May 2000); *see also Knight Hawk Coal, LLC*, 38 FMSHRC 2361, 2373 (Sept. 2016).

That said, the Court recognizes that there are two important considerations that must be evaluated; the Secretary's burden to provide sufficient evidence to support the proposed assessment; and the Court's obligation to explain the basis for any substantial divergence from the proposed amount. The Commission has noted that:

[The] Secretary [] does bear the 'burden' before the Commission of providing evidence sufficient in the Judge's discretionary opinion to support the proposed assessment under the penalty criteria [and that] [w]hen a violation is specially assessed that obligation may be considerable. [On the other hand] the Secretary's proposed penalty cannot be glided over, as the Commission also stated, 'Judges must explain any substantial divergence between the penalty proposed by MSHA and the penalty assessed by the Judge. ... If a sufficient explanation for the divergence is not provided, the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness.

The American Coal Co., 38 FMSHRC 1987, 1993-1994 (Aug. 2016), citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984).

Section 110(i) Penalty Factors As Applied to This Case

History of Previous Violations

Respondent's Violation History was admitted without objection. Tr.72, Gov. Ex. C-9. It reflects that Vulcan had been cited for this standard, but not at its Fort Payne Quarry. *Id.* *See also* Tr. 106. The Secretary acknowledged that Vulcan's "violations of the standard at issue were on the low end." Sec. Br. at 20. The Court concludes that the history of previous violations of this sort at this mine is minimal.

Good Faith Abatement

The parties stipulated that Vulcan demonstrated good faith in attempting to achieve rapid compliance after notification of a violation. Sec. Br. at 20.

Operator's Ability to Remain in Business

There has not been any assertion by Vulcan that the Secretary's proposed assessment of a civil penalty of \$118.00 will affect its ability to remain in business. The Respondent did not raise this assertion in its post-hearing briefs and the Court concludes that a penalty of the amount proposed would not affect the Respondent's ability to remain in business.

Size of the Business

Vulcan is a large mine operator, with approximately 300 quarries nationwide. Tr. 6-7.

Negligence

Without endorsing his view, the Secretary declares that “[l]ow negligence is appropriate when ‘[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances.’” [...] Inspector White testified that he evaluated the negligence as low because “no one had reported a safety hazard and [told the managers], [w]e’ve got a heater that’s not in compliance [and] the management [Jeff Dean, Vulcan’s foreman and George Grguric, Vulcan’s plant manager] was not aware of either [...] the requirement [that the heater be grounded or provided with equivalent protection] or the violation [of the cited standard].” Sec. Br. at 21, citing Tr. 30, 63; Ex. C-2.

Gravity of the Violation

As the Secretary has noted, “[u]nder section 110(i) of the Mine Act, 30 U.S.C. §820(i), the gravity penalty criterion ‘is often viewed in terms of the seriousness of the violation.’ [citing] *Consolidation Coal Co.*, 18 FMSHRC 1541, 1549 (Sept. 1996) [...] The gravity analysis focuses on factors such as the likelihood of injury, the severity of an injury if it occurs, and the number of miners potentially affected. Here, Inspector White evaluated the likelihood of injury as “unlikely” because at the time of the inspection, no one was in the control room; the heater was not turned on; and it was 87 degrees outside. Tr. 46-47; Ex. C-2. He assessed the injury expected as lost workdays or restricted duty due to a miner receiving electrical burns or falling while recoiling from shock. Tr. 49; Ex. C-2. He noted that the exact injury would depend on a variety of factors and circumstances. Tr. 49. He assessed the number of persons affected as one because “[i]t’s a likely thing that only person would be hurt. Even if it’s crowded in [the control room].” Tr. 50, Sec. Br. at 20-21.

Conclusion

Of the six penalty factors set forth in Section 110(i), the negligence and gravity are the most significant considerations, and they point to a reduced penalty from that proposed by the Secretary. Taking into account all of the preceding findings and observations, the Court concludes that while the violation occurred, it presented a very “unlikely” risk of an expected injury of lost workdays or restricted duty. The Court also finds that one person would be affected by the violation, the violation was not significant and substantial, and that the negligence of the operator was less than moderate, approaching low negligence. In light of the inherent power of Commission Judges to independently assess penalties based on their reasoned judgment of all the facts, the Court finds that given the Secretary’s admission that this was a non S&S violation, unlikely to occur, of low negligence, and the Court’s independent determination that the negligence was less than low, approaching no negligence, in this particular near-office

environment, and that it was unlikely in the extreme to occur in that environment, particularly considering the rigorous UL requirements for the heater, independently support the Court's imposition of a civil penalty of \$59.00 for this violation.

ORDER

It is hereby **ORDERED** that Respondent is **ORDERED** to pay a civil penalty in the total amount of **\$59.00** ("fifty-nine" dollars) within 30 days of this decision.²⁰

/s/ William B. Moran
William B. Moran
Administrative Law Judge

Distribution:

Thomas J. O'Donnell Jr., Conference & Litigation Representative, MSHA, 1030 London Drive, Suite 400, Birmingham, AL 35211

Leslie Paul Brody, Esq., Office of Solicitor, U.S. Department of Labor, 61 Forsyth Street, SW, Room 7T10, Atlanta, GA 30303

Misty Hillis, Vulcan Construction Materials, LLC, 1200 Urban Center Drive, Birmingham, AL 35242

²⁰ Payment is to be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9900 / FAX: 202-434-9954

August 2, 2019

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

v.

NORTHSHORE MINING COMPANY,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2018-277-M
A.C. No. 21-00831-465235

Mine: Northshore Mining Company

DECISION

Appearances: Barbara Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, Chicago, Illinois, for Petitioner;

Arthur Wolfson, Esq., Fisher & Phillips, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Bulluck

This case is before me upon a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) on behalf of the Mine Safety and Health Administration (“MSHA”) against Northshore Mining Company (“Northshore”), pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). The Secretary seeks a civil penalty in the amount of \$132.00 for an alleged violation of section 103(a) of the Mine Act, 30 U.S.C. § 813(a).

A hearing was held in Duluth, Minnesota. The following issues are before me: (1) whether Northshore violated section 103(a) of the Mine Act; and, if so (2) the degree of negligence to which the violation was attributable; and (3) the appropriate penalty. The parties’ Post-hearing Briefs are of record.

For the reasons set forth below, I **AFFIRM** the citation, as issued, and assess a penalty against Respondent.

I. Joint Stipulations

The parties have stipulated as follows:

1. Northshore Mining Company was an “operator” as defined in section 3(d) of the Federal Mine Safety and Health Act of 1977, as amended (hereinafter “the Mine Act”), 30 U.S.C. § 803(d), at the time the citation at issue in this proceeding was issued.
2. Northshore Mining Company operated the Northshore Mining Company which was located in Silver Bay, Lake County, Minnesota at the time the subject citation was issued.
3. Northshore Mining Company is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.
4. This proceeding is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission and its designated Administrative Law Judge, pursuant to sections 105 and 113 of the Mine Act.
5. The individual whose signature appears in Block 22 of the citation at issue in this proceeding was acting in his official capacity and as an authorized representative of the Secretary of Labor when the citation was issued.
6. A duly authorized representative of the Secretary served the citation and termination of the citation upon the agent of Respondent at the date and place stated, therein, as required by the Mine Act, and the citation and termination may be admitted into evidence to establish their issuance.
7. The total proposed penalty for the citation at issue (\$132.00) will not affect Respondent’s ability to continue in business.
8. The citation contained in Exhibit A attached to the Petition for Assessment of Penalty is an authentic copy of the citation at issue in this proceeding, with all appropriate modifications and terminations, if any.

Tr. 5-7.

II. Factual Background

Northshore operates an iron ore processing plant in Silver Bay, Minnesota. Jt. Stips. 2-3; Tr. 74. The plant’s large concentrator building separates iron ore from waste materials. Tr. 73-76. The concentrator department includes the concentrator, fourteen other buildings, and a pipeline located along a seven-to-eight mile stretch leading to a tailings basin, where waste material is collected. Tr. 76, 89-90.

Work at Northshore is divided into day and night shifts. Tr. 72. During both shifts, seven employees are on duty in the concentrator department: six operations technicians and one control

room operator. Tr. 74-75, 89. Concentrator employees communicate with one another on personal radios set to a channel ordinarily used only by department employees. Tr. 83. Concentrator control room operator Philip Goutermont and operations technician Jamie Gnerer were working on the concentrator crew at the time of the inspection at issue. Tr. 71, 81-82, 88, 90-91.

On March 6, 2018, during the night shift, MSHA Inspector Terrance Norman arrived at the Silver Bay plant to continue an ongoing E01 inspection. Tr. 21, 23, 81-82; Ex. P-2. The regular practice at Northshore is to provide designated personnel who are available at the safety office to escort MSHA inspectors. Tr. 109-10. However, when Norman arrived at approximately 4:00 a.m., the designated safety representative was off-duty. Tr. 23, 82, 114-15. Finding no one at the safety office, Norman proceeded to the concentrator control room, introduced himself as an MSHA inspector, and asked Goutermont to find him an escort. Tr. 23, 82. Goutermont made an announcement over the department radio channel that someone was needed to go with MSHA during an inspection. Tr. 83, 86. After completing the day's inspection, Norman issued a citation to Northshore for providing advance notice of an MSHA inspection to the plant. Tr. 29-30; Ex. P-2.

III. Findings of Fact and Conclusions of Law

Inspector Norman issued 104(a) Citation No. 9380677 on March 6, 2018, alleging a violation of section 103(a) of the Mine Act that had “no likelihood” to result in an injury or illness, could not reasonably be expected to result in “lost workdays or restricted duty,” and was caused by Northshore’s “moderate” negligence.¹ Ex. P-2. The “Condition or Practice” is described as follows:

On arrival to the Concentrators [sic] Control Room, the control room operator announced over the plant wide radio system that MSHA was in the control room and he needed someone to go with the inspector, which gave everyone in the plant prior notice of a [sic] inspection.

Ex. P-2. The citation was terminated on March 7, 2018, after Northshore issued a written policy prohibiting radio announcements and instructing its miners to contact specific personnel to secure mine escorts for MSHA inspectors. Ex. P-2.

A. Fact of Violation

In order to establish a violation of the Mine Act, the Secretary must prove that the violation occurred “by a preponderance of the credible evidence.” *Keystone Coal Mining Corp.*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)).

¹ Section 103(a) of the Mine Act provides, in relevant part, that “[i]n carrying out the requirements of this subsection, no advance notice of an inspection shall be provided to any person” 30 U.S.C. § 813(a).

The Secretary maintains that the prohibition on advance notice of MSHA inspections is central to enforcement of the Mine Act, and that section 103(a) proscribes giving advance notice to anyone for any reason, although “contacting a specific individual directly is an acceptable means of obtaining an escort.” Sec’y Br. at 4, 7, 9, 10 (citing *Topper Coal Co. Inc.*, 20 FMSHRC 344, 348 (Apr. 1998)). After advance notice has been provided, the Secretary contends, neither operator correction of hazardous conditions nor MSHA’s issuance of citations is relevant to whether a violation of section 103(a) has occurred. Sec’y Br. at 10. Finally, the Secretary argues that Northshore had fair notice of the requirements of section 103(a). Sec’y Br. at 14 (citing *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991)).²

Northshore contends that the Secretary must show that allegedly violative conduct was intended to provide advance notice of an MSHA inspection, and that it had “the effect of actually providing such advance notice.” Resp’t Br. at 6, 10. Northshore argues that *Topper Coal* and *KenAmerican Res., Inc.* support its position that only effective and intentional advance notice of an MSHA inspection is prohibited. Resp’t Br. at 10-13 (citing *Topper Coal*, 20 FMSHRC at 348-49; *KenAmerican Res., Inc.*, 38 FMSHRC 1943, 1943-49 (Aug. 2016) [hereinafter, *KenAmerican II*]). It primarily rests its argument on two ALJ decisions that vacated section 103(a) citations. See Resp’t Br. at 6-10 (citing *KenAmerican Res., Inc.*, 40 FMSHRC 1544 (Dec. 2018) (ALJ)³ [hereinafter, *KenAmerican III*], and *Portable, Inc.*, 36 FMSHRC 3249 (Dec. 2014) (ALJ)); Resp’t Reply Br. at 6. Additionally, Northshore rejects any legal distinction between explicit and ambiguous conduct with regard to section 103(a) violations. See Resp’t Br. at 6, 10, 12-13.

Inspector Terrance Norman came to MSHA in 2014, with thirteen years experience in the mining industry. Tr. 20-22. Norman had previously inspected Northshore in 2015 and 2017. Tr. 59-60, 61-62. He testified that Goutermont “announced on the radio that MSHA was here and [Goutermont] needed somebody to accompany [Norman] on an inspection.” Tr. 23. Norman explained that he issued the citation because “[Goutermont] was giving pre-notification to the miners inside the plant that MSHA was there and doing an inspection,” which provided “the opportunity to correct a hazard out on the floor.” Tr. 25, 36. Norman also testified that a similar incident had occurred on December 17, 2017 at a different location, the pelletizer control room, where a miner announced MSHA’s presence on-site over the radio. Tr. 34, 62-63, 65-67; Ex. P-3. He stated that, on the same day, he had informed hot side operations supervisor Jared Conboy that the announcement was prohibited and that, on December 18, he had discussed procedures for securing mine escorts with Scott Blood, area manager of safety and loss control. Tr. 34-35, 51, 65-67; Ex. P-3. Finally, Norman testified that MSHA inspections are timed so as to visit Northshore during both shifts. Tr. 29.

Philip Goutermont has held the position of concentrator control room operator at Northshore for almost 30 years. Tr. 70-71. He testified that he announced over the department radio channel, “[W]e need someone to go with MSHA and inspect,” and that his radio

² Northshore makes clear that it is not raising fair notice as a defense. Resp’t Reply Br. at 8. However, whether Northshore had a heightened awareness of its duty to comply with section 103(a) is addressed in the discussion of negligence.

³ *KenAmerican III*, decided on remand by the Commission of *KenAmerican II*, is currently on appeal before the Commission.

announcement did not indicate where MSHA was planning to inspect. Tr. 83, 86. Goutermont also stated that over the course of his career, MSHA inspectors had come unescorted to the control room “about a half dozen times,” and that he had previously made radio announcements explicitly requesting MSHA escorts, without being cited. Tr. 80-81.

Operations technician Jamie Gnerer testified that she heard Goutermont’s radio announcement, responded to it, and proceeded to the concentrator control room to escort Norman. Tr. 92. Gnerer also testified that she did not know what areas of the plant would be inspected when the team left the control room. Tr. 92-93.

Jared Conboy and safety representative Luke Thun both testified that, in order to abate citations during prior MSHA inspections, they had routinely made radio announcements that mentioned MSHA, and that such conduct was not cited. Tr. 100-102, 120-121. Conboy confirmed that, in December of 2017, he and Norman had discussed the language used in radio announcements requesting MSHA escorts. Tr. 103-06. Conboy also testified that, once over the course of each inspection cycle, MSHA makes a night shift inspection. Tr. 110.

Scott Blood testified that he became aware of the December 2017 incident only after Norman issued the March 2018 citation. Tr. 134. He denied having had a conversation with Norman in December of 2017 about the pelletizer control room incident. Tr. 134.

The Commission has found that explicit “warning of the inspection clearly is sufficient to establish a violation.” *Topper Coal*, 20 FMSHRC at 348. Additionally, intent can be relevant to the fact of violation where conduct is ambiguous. See *KenAmerican II*, 38 FMSHRC at 1948-49. The plain language of section 103(a) “focuses on whether advance notice of an inspection was in fact provided,” and its purpose is “to ensure the efficacy of inspections by preventing operators from concealing hazards before an inspector can observe them.” *Id.* at 1949 (citing S. Rep. No. 95-181, at 27 (1977)).

In the instant case, the evidence establishes that, at Norman’s behest upon entering the concentrator control room, Goutermont announced to the entire concentrator crew over the department radio channel that an escort was needed for an MSHA inspection.

Northshore’s argument that “intent” and “effect” are elements required to prove section 103(a) violations finds no support in *Topper Coal* and *KenAmerican II*. In *Topper Coal*, the Commission affirmed a violation of section 103(a) where the president of the mine, above ground at the time, had telephoned a miner underground and said that “two federal inspectors” were in the mine and he wanted the miners to “watch out and be careful.” 20 FMSHRC at 346 (quoting *Topper Coal Co., Inc.*, 17 FMSHRC 945, 946 (June 1995) (ALJ)). According to Northshore, the Commission’s finding that the conduct in question constituted a “warning of the inspection” is evidence that only advance notice that effectively impedes an inspection is prohibited. Resp’t Br. at n.13 (citing *Topper Coal*, 20 FMSHRC at 348). However, the Commission’s use of the word “warning” relates to the effectiveness of the communication in conveying information, rather than the effectiveness of the communication in impeding the inspection. See *Topper Coal*, 20 FMSHRC at 348. Northshore also contends that *Topper Coal* supports an intent requirement for establishing section 103(a) violations. Resp’t Br. at 10-11;

Resp't Reply Br. at 4. While it is true, as Northshore points out, that *Topper Coal* "does not establish a point of law that violative advance notice may occur regardless of intent," that case establishes neither an intent nor an effect requirement. See Resp't Reply Br. at 4.

The facts in *KenAmerican II* involve a contested exchange wherein miners underground asked if there was "company outside," and a dispatcher may have responded "yeah. I think there is." 38 FMSHRC at 1944. The Commission found that the judge erred by granting summary decision for *KenAmerican* because there remained a "genuine issue of material fact" as to "the meaning of the communication." *Id.* at 1948. Northshore argues that "nothing in the decision limits consideration of intent only to statements that are ambiguous." Resp't Br. at 12. However, while the Commission stated that intent can be considered in a summary decision where it is an "essential element" of the claim, its discussion of the Secretary's burden in proving section 103(a) violations merely indicates that intent can be relevant where the conduct at issue is ambiguous. *KenAmerican II*, 38 FMSHRC at 1947. The Commission did not establish intent as an element of all section 103(a) violations.

Likewise, the ALJ decisions that Northshore cites do not establish that intent and effect are requirements for establishing section 103(a) violations. In *KenAmerican III*, the judge decided the case on credibility grounds that were directly tied to its unique facts, finding that the miner who was asked whether there was "company outside" had responded "I don't know," a statement that did not constitute advance notice. 40 FMSHRC at 1552. The facts in this case, involving a department-wide announcement, are entirely distinguishable.

In *Portable*, the judge found that communications with a single miner regarding an MSHA inspection were intended to secure an escort, and that there was no evidence that the operator had taken corrective actions after notice had been provided. 36 FMSHRC at 3257-58. Again, at issue here, by contrast, is the effect of communication to the entire concentrator crew. Ex. P-2.

The Commission, establishing in *Topper Coal* that "warning of the inspection clearly is sufficient to establish a violation," indicated that explicit advance notice of an MSHA inspection, once conveyed, is sufficient to constitute a violation, regardless of intended meaning or whether advance notice actually impeded the inspection. 20 FMSHRC at 348; see also *KenAmerican II*, 38 FMSHRC at 1949 ("[The] plain language [of section 103(a)] . . . focuses on whether advance notice of an inspection was in fact provided"). Read together, *Topper Coal* and *KenAmerican II* establish that intent is relevant where ambiguous conduct is involved, but where the meaning of the conveyance is clear, no intent inquiry is necessary to determine whether advance notice occurred. See *Topper Coal*, 20 FMSHRC at 348; *KenAmerican II*, 38 FMSHRC at 1948-1951.

This reading of section 103(a) is consistent with the enforcement goals of the Mine Act. Congress viewed the prohibition on advance notice as a crucial part of MSHA's "broad right-of-entry" to make unannounced inspections, noting "the notorious ease with which many safety or health hazards may be concealed if advance warning of inspection is obtained." S. Rep. No. 95-181, at 27 (1977). The unequivocal language of section 103(a) and its related criminal provision demonstrate how seriously Congress viewed the consequences of advance notice. See § 110(e), 30 U.S.C. § 820(e).

In this case, the communication at issue was explicit, “[W]e need someone to go with MSHA and inspect,” and the meaning of the message to the entire concentrator department was clear, i.e., that MSHA was on-site for an inspection. Based on these facts, I find that advance notice of the MSHA inspection was provided to the plant on March 6, 2018 and, accordingly, the Secretary has established a violation of section 103(a).

C. Negligence

The Secretary argues that moderate negligence is appropriate because Northshore had been cautioned previously about violating section 103(a) in December of 2017. Sec’y Br. at 11-12. Norman and supervisor Conboy establish that they had discussed advance notice following the pelletizer control room incident in December of 2017. Putting their conversation in context, i.e., following a radio call announcing MSHA’s presence during the inspection, it is clear that Northshore’s awareness of prohibited advance notice was, or should have been, heightened a mere three months prior to the instant violation, and is an aggravating factor. However, Goutermont, Conboy, and Thun’s collective, uncontroverted testimony of inconsistent MSHA enforcement of section 103(a) constitutes a mitigating factor. *See Mach Mining, LLC*, 809 F.3d 1259, 1265-66 (D.C. Cir. 2016); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 2305, 2310 (Oct. 1984). Given these considerations, I find that Northshore was moderately negligent in violating the advance notice prohibition of section 103(a).

IV. Penalty

While the Secretary has proposed a civil penalty of \$132.00, the judge must independently determine the appropriate assessment by proper consideration of the six penalty criteria set forth in section 110(i) of the Mine Act, 30 U.S.C. § 820(i). *See Sellersburg Co.*, 5 FMSHRC 287, 291-92 (Mar. 1983), *aff’d* 736 F.2d 1147 (7th Cir. 1984).

Applying the penalty criteria, and based on a review of MSHA’s online records, I find that Northshore is a medium-sized operator, with an overall history of violations that is neither a mitigating nor aggravating factor in assessing the appropriate penalty.⁴ The record indicates that Northshore demonstrated good faith in achieving rapid compliance after notice of the violation. Ex. P-2. Northshore has stipulated that imposition of the proposed penalty will not adversely affect its ability to remain in business. Jt. Stip. 7.

The remaining criteria involve consideration of the gravity of the violation and Northshore’s negligence in its commission. Because providing advance notice compromises the integrity of an inspection and endangers the health and safety of miners, this is a serious violation, and I have found that it was caused by Northshore’s moderate negligence. Therefore, considering my findings as to the six penalty criteria, I find that a penalty of \$132.00, as proposed by the Secretary, is appropriate.

⁴ In the fifteen months preceding the inspection, the operator had been cited for 240 violations, unrelated to the standard at issue in this proceeding.

ORDER

WHEREFORE, it is **ORDERED** that Citation No. 9380677 is **AFFIRMED**, and that Northshore Mining Company **PAY** a civil penalty of \$132.00 within thirty days of this Decision.⁵ **ACCORDINGLY**, this case is **DISMISSED**.

/s/ Jacqueline R. Bulluck
Jacqueline R. Bulluck
Administrative Law Judge

Distribution:

Barbara Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, 230 S. Dearborn St.,
8th Fl., Chicago, IL, 60604

Arthur Wolfson, Esq., Fisher & Phillips, 301 Grant St., One Oxford Center, Ste. 4300,
Pittsburgh, PA, 15219

⁵ Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390. Please include Docket number and A.C. number.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004
Telephone No.: (202) 434-9900 / Fax No.: (202) 434-9949

August 16, 2019

KNIGHT HAWK COAL, LLC,
Contestant

v.

SECRETARY OF LABOR
MINE SAFETY AND 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

DECISION AND ORDER

Appearances: R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, PA for the Contestant¹

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

Before: Judge McCarthy

This proceeding is before the undersigned on a Notice of Contest and Motion to Expedite filed November 15, 2018, by Knight Hawk Coal, LLC, pursuant to § 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), which states that “[t]he 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 systems at the mine.”

A hearing was held in St. Louis, Missouri, on March 28-29 and April 1, 2019. During the hearing, the parties offered lay and expert witness testimony and documentary evidence.² Witnesses were sequestered. The parties submitted post-hearing and reply briefs, the latest of which was filed on June 7, 2019.

¹ Although Mr. Moore was with Jackson Kelly, PLLC, when the contest was filed, he is currently at Fisher Phillips LLP, Pittsburgh, PA.

² In this decision, “Tr.” refers to the hearing transcript, “P. Ex. #” refers to the Contestant’s exhibits, and “G. Ex. #” refers to the Respondent’s exhibits. P. Exs. 13-28, 30, and 34-40, and G. Exs. 1-12 and 14-18, were received into evidence. Tr. 281-82.

Based on a careful review of the record, including the parties' post-hearing and reply briefs, and observation of the demeanor of witnesses,³ the undersigned makes the following findings of fact and conclusions of the law and orders that the technical citation be vacated and the previously approved ventilation plan be reinstated.

I. STIPULATIONS

The parties submitted the following stipulations, which have been accepted into the record:

1. The Prairie Eagle Underground Mine (PEUG) is a "mine" as that term is defined in Section 3(h) of the Mine Act.
2. Knight Hawk is engaged in mine operations in the United States, and its mining operations affect[ed] interstate commerce.
3. Knight Hawk is the operator of the PEUG, MSHA ID No. 11-03147.
4. Knight Hawk is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq.
5. The Administrative Law Judge has jurisdiction in this matter.
6. Citation No. 8429603 was issued to the mine operator on November 14, 2018, and subsequently modified to correct the citation number – Citation No. 9035600.
7. The subject Citation was properly served by a duly authorized representative of the Secretary upon an agent of Knight Hawk on the date and place stated therein, and may be admitted into evidence for the purposes of establishing its issuance.
8. The Prairie Eagle Underground Mine mines coal utilizing continuous miners.
9. The PEUG began production in August 2006 with a single MMU. Since that time, it has implemented four (4) additional MMU's; each of them going through the extended cut evaluation process where they began at 20-foot cuts and worked their way to 40-foot cuts. These evaluations, as outlined in [Procedure Instruction Letter] I12-V-11 (Reissue of I10-V-09, I08-V-03, I06-V-6), consisted of a mine history evaluation, plan provisions, training requirements, on-site evaluation, ventilation plan approval, and supplemental information pertaining to cut depth, ventilation, respirable dust, methane, and roof support. All five MMU's operate with extended

³ In evaluating testimony, the undersigned has taken into consideration the nature of the questioning and testimony given in response, the demeanor of the witnesses, their evasiveness or forthrightness, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for their testimony, their experience and credentials, and their consistency or lack of consistency vis-à-vis their own testimony and the testimony of other witnesses.

cut plans and each of them conducted perimeter mining. Specifically, each extended cut plan, including perimeter mining, was approved by a District Manager, including the current one. The Ventilation Plan for each MMU is identical.

10. [Procedure Instruction Letter] 112-V-11 is marked as [G. Ex. 14] and may be admitted into evidence.

11. Program Policy Letter P13-V-12 is marked as [G. Ex. 13] and may be admitted into evidence.

12. Knight Hawk has conducted perimeter mining since January 2007.

13. During the initial startup of the mine, the Roof Control Plan and the Ventilation Plan [were] subject to an initial evaluation of both plans, including perimeter mining. That continued for 22 months for the Roof Control Plan and 41 months for the Ventilation Plan.

14. Roof bolting is generally eliminated during perimeter mining because after the entry is mined and the continuous miner withdrawn, it is barricaded off. Some limited roof bolting is still performed during perimeter mining in approaches to evaluation points. Per the approved roof control and ventilation plans, installation of four props/jacks [were] required prior to beginning each perimeter cut and the props/jacks must be left in place or removed remotely after a cut is completed.

15. Specifically, each MMU began at the following date and the extended cut plan, including perimeter mining, was approved by the following District Manager on the following dates:

* MMU 002 – June 2008, Acting DM Mary Jo Bishop (March 1, 2010)

* MMU 003 – December 2011, DM Robert Simms (August 17, 2012)

* MMU 004 – July 2013, DM Robert Simms (December 9, 2013)

* MMU 005 – August 2017, DM Ronald Burns (September 27, 2017)

16. The Roof Control Plan timeline is as follows:

* 01/26/06 – Conditional approval with no perimeter mining. MSHA stated, “an in-mine evaluation, to evaluate the mine’s specific mining conditions and the effectiveness of the plan in addressing those conditions will be required before any such approval can be considered.” The plan expired 07/26/06.

* 07/31/06 – Extension of the conditional approval until 01/26/07.

* 01/18/07 – Received a conditional approval for perimeter mining and an extension of the base plan; both until 07/18/07.

* January 2007 – Perimeter Mining begins at PEUG.

* 07/02/07 – Knight Hawk requested, “Due to the extent of mining completed to date, the multiple visitations/evaluation from Mr. Jeff Williams, and the

successful implementation of the plan, we are hereby requesting removal of the ‘conditional’ approval of the Roof Control Plan and that the plan be placed into effect.”

- * 07/10/07 – Conditional approval extended another 6 months for further evaluation until 01/18/08.
- * 01/11/08 – Knight Hawk requested removal of the ‘conditional’ approval.
- * 03/11/08 – Conditional approval extended until 05/12/08.
- * 04/11/08 – Consolidated plan submitted as per MSHA request.
- * 05/30/08 – Plan approved without the ‘conditional’ constraint; including perimeter mining.

17. The Ventilation Plan timeline is as follows:

- * 08/02/06 – Conditional approval with perimeter mining. The plan expired 11/03/06.
- * 10/31/06 – Request to either remove the ‘conditional’ approval or extend the date.
- * 11/08/06 – Extension of the conditional approval until 02/03/07.
- * January 2007 – Perimeter Mining begins at PEUG.
- * 01/29/07 – Request to either remove the ‘conditional’ approval or extend the date.
- * 02/01/07 – Extension of the conditional approval until 05/03/07.
- * 05/02/07 – Request to either remove the ‘conditional’ approval or extend the date.
- * 05/02/07 – Extension of the conditional approval until 08/02/07.
- * 07/23/07 – Request to either remove the ‘conditional’ approval or extend the date.
- * 08/04/07 – Extension of the conditional approval approved until 10/09/07.
- * 10/02/07 – Request to either remove the ‘conditional’ approval or extend the date.
- * 12/28/07 – Extension of the conditional approval until 03/28/08.
- * 03/17/08 – Request to either remove the ‘conditional’ approval or extend the date.
- * 04/11/08 – Consolidated plan submitted as per MSHA request. The same date [Contestant] submitted a consolidated Roof Control Plan per MSHA’s request as well. No approval received.
- * 12/08/08 – Consolidated plan submitted as per MSHA request. No approval received.

- * 11/12/09 – Consolidated plan submitted as per MSHA request.
- * 03/01/10 – Plan approved without the ‘conditional’ constraint; including perimeter mining.

18. A typical Perimeter Mining Panel is 1 mile in length and 1,240 feet in width; approximately 150 acres. It takes approximately 11 months to complete a Perimeter Mining Panel and PEUG typically seals each panel within 30 days from completion of mining.

19. At the request of District Manager Ronald Burns, on December 19, 2017, the MSHA Pittsburgh Safety and Health Technology Center (“Tech Support”) performed an evaluation of the bleeder system which includes areas where perimeter mining was conducted at Prairie Eagle Underground on January 9-10, 2018. A report was prepared and submitted to the District Manger on or about February 8, 2018 and is marked as [G. Ex. 1] and may be admitted into evidence.

20. Similar evaluations were requested by District Manager Burns at the Viper Mine operated by ICG Illinois LLC and of the Gateway North Mine operated by Peabody Gateway North Mining LLC and are marked as [P. Exs. 35 and 34] respectively and may be offered into evidence at the hearing in this matter, subject to the objections outlined in the Secretary’s Motion in Limine.^[4]

21. On January 29, 2018, Knight Hawk met with MSHA to discuss the preliminary findings of Tech Support’s evaluation of the mine’s bleeder system. During that meeting[,] District Manager Ronald W. Burns requested that Knight Hawk address the issues raised by those preliminary findings.

22. On March 7, 2018, Knight Hawk received a copy of Tech Support’s report. A copy of the report is marked as [G. Ex. 1]. A copy of the analytical gas sampling results from the Tech Support evaluation is marked as [G. Ex. 16] and may be admitted into evidence.

23. Knight Hawk’s ventilation plan including perimeter mining was last approved on February 15, 2015. A copy is marked as [G. Ex. 12] and may be admitted into evidence.

24. On March 13, 2018, Thomas Hasenstab[, a mining engineer and the current superintendent for Knight Hawk,] sent a letter to Mr. Burns outlining Knight Hawk’s response concerning perimeter mining. Such letter is marked as [G. Ex. 2] and may be admitted into evidence.

25. On April 12, 2018, Mr. Burns wrote Mr. Hasenstab directing Knight Hawk to revise its ventilation plan. Such letter is marked as [G. Ex. 3] and may be admitted into evidence.

⁴ The undersigned denied the Secretary’s Motion in Limine. Order Denying the Secretary’s Motion in Limine, 41 FMSHRC 217 (Mar. 2019) (ALJ).

26. On April 22, 2018, Mr. Hasenstab sent a letter to Mr. Burns submitting a response to his letter of April 12, 2018 with an attached copy of Knight Hawk's March 13, 2018 letter. Such letter is marked as [G. Ex. 4] and may be admitted into evidence.

27. On May 3, 2018, Mr. Burns wrote Mr. Hasenstab as a follow-up to a conference call on April 30, 2018. Such letter is marked as [G. Ex. 5] and may be admitted into evidence.

28. On May 15, 2018, Mr. Hasenstab wrote Mr. Burns responding to his May 3, 2018 letter. Such letter is marked as [G. Ex. 6] and may be admitted into evidence.

29. On June 7, 2018, Mr. Burns wrote Mr. Hasenstab responding to his letter dated May 15, 2018. Such letter is marked as [G. Ex. 7] and may be admitted into evidence.

30. On July 5, 2018, Mr. Hasenstab wrote Mr. Burns in response to his letter of June 7, 2018. Such letter is marked as [G. Ex. 8] and may be admitted into evidence.

31. On October 22, 2018, Mr. Burns wrote Mr. Hasenstab in response to his July 5, 2018 letter. Such letter is marked as [G. Ex. 9] and may be admitted into evidence.

32. On November 14, 2018, Mr. Burns wrote Mr. Hasenstab revoking Knight Hawk's approved ventilation plan. Such letter is marked as [G. Ex. 10] and may be admitted into evidence.

33. In order to abate the Citation and to continue to operate[,] Knight Hawk submitted a ventilation plan which MSHA approved. A copy of such Interim Plan is marked as [G. Ex. 15] and may be admitted into evidence.

34. Citation No. 9035600 was issued on November 14, 2018, pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a) alleging a violation of Section 75.370(a)(1).

35. Under the heading and caption "Condition or Practice" the Citation alleges as follows:

The mine operator is mining without a ventilation plan approved by the District Manager. The operator's plan is revoked on this date because it fails to address existing, identified deficiencies. The parties' negotiations have reached impasse. In numerous discussions, and by letters dated April 12, May 3, June 7, and October 22, MSHA advised Knight Hawk Coal of concerns and of certain issues required to be addressed in its ventilation plan. Specifically:

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 CFR Sections 75.334(b)(1), 75.334(c)(4), 75.371(bb), and 75.372(b)(9).]

Section 75.334 requires a bleeder system to be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases....Both conditions must be addressed in the bleeder system design.

The bleeder system in this case is not controlling the air in an effective manner as determined by the ventilation survey conducted in January 2018.

Effective ventilation requires sufficient air movement in appropriate directions. The ventilating device intended to control air movement through the area did not effectively control the air movement.

Air movement was not perceptible in portions of the pillared areas, including many extended-depth perimeter cuts. The air direction through the rooms from which the perimeter cuts were mined w[as] not always consistent throughout the length of the room, nor with the net direction of airflow through the block. No perceptible air movement was observed in approximately 57 of the 138 perimeter cuts examined. A few of the bolted perimeter cuts were examined in greater detail.⁵ Movement of air was observed in approximately 57 of the 138 perimeter cuts examined. A few of the bolted perimeter cuts were examined in greater detail. Movement of air was detected in parts of some of these cuts near the adjacent rooms, but not near the faces. Air movement was not perceptible in some perimeter cuts in which air flowed past the front of the cut. Where air movement was detected in perimeter cuts, it appeared to be intermittent and/or the result of eddy currents created by air flowing past the front of the cut, rather than the result of ventilation control devices directing airflow into the perimeter cuts. Observations indicated the stronger the air flowing past the front of the cut, the more pronounced the movement of air at the test location within the perimeter cut. Movement of air caused by eddy currents for which no tests could practically be conducted in all the perimeter cuts (some were not accessible due to their location with respect to accessible areas) is not considered [an] appropriate or reliable means to control air movement.

Air movement was not adequately controlled through all sets of bleeder entries. Direction of air movement was not uniformly consistent in adjacent bleeder entries within a block or throughout the entire length of individual bleeder entries. Air moved in opposing direction across an individual bleeder entry at several locations. No perceptible air movement was observed in portions of bleeder entries in several locations. The direction of the net airflow through many blocks was difficult to discern; in some blocks it could not be determined due to inconsistent airflow direction. Tests for airflow directions using chemical smoke in the rooms across the front and back of each completed block did not consistently determine the direction of airflow through the block. Comparisons of air quantity measurements between blocks (in the cut-through connections and in the former section entries) were not always conclusive in determining air

⁵ In each block, a single perimeter cut was bolted. Tr. 77.

direction within a block due to the net flow of air through the block being less than reasonable inaccuracies in air quantity measurements.

2. The method to control air movement to ventilate the unbolted extended-depth perimeter cuts within the pillared area is not provided. The extended 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 CFR Sections 75.334(b)(1), 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 CFR Sections 75.364(a)(2)(iii) and 75.372(b)(9)]

The direction of airflow through bleeder entries and pillared areas, as well as at evaluation point (EP) locations, must be defined to determine whether a proposed means of evaluation will result in proper evaluation of the effectiveness of the bleeder system, including the pillared areas. Definition of the proper direction of airflow through bleeder entries and pillared areas, as well as at EP locations, also is necessary for the mine examiner to determine if air is moving in the proper direction while conducting tests during the weekly examination to evaluate the effectiveness of the bleeder system.

4. The air direction at EP locations is not shown in the ventilation plan drawings or on the ventilation map. [30 CFR Sections 75.364(a)(2)(iii), 75.371(y), 75.371(z), and 75.372(b)(9)]

The direction of airflow through bleeder entries and pillared areas, as well as at EP locations, is necessary to determine whether a proposed means of evaluation results in proper evaluation of the effectiveness of the bleeder system. Definition of the proper direction of airflow through bleeder entries and pillared areas, as well as at EP locations, is necessary for the mine examiner to determine if air is moving the proper direction while conducting tests during the weekly examination to evaluate the effectiveness of the bleeder system.

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 CFR Sections 75.334, 75.364(a)(2)(iii), 75.364(a)(2)(iv), 75.371(y), and 75.371(z)]

In letters dated April 22, May 15, and July 5, 2018, Knight Hawk Coal failed to provide adequate responses to MSHA’s concerns. In MSHA’s October 22, 2018 letter, Knight Hawk Coal was informed of the district manager’s intent to revoke the ventilation plan if the stated deficiencies were not addressed.

Standard 75.370(a)(1) was cited 22 times in two years at mine 1103147 (22 to the operator, 0 to a contractor).

36. The Citation was terminated on November 13, 2018. A copy of such Citation is marked as [G. Ex. 11] and may be admitted into evidence.

37. The parties have identified [G. Exs. 1-20] for the Secretary and [P. Exs. 1-39] for Knight Hawk and such exhibits may be offered into evidence without objection except [P. Exs. 34-35 and G. Exs. 19-20].

Jt. Ex. 1.

II. FINDINGS OF FACT

At Prairie Eagle Underground Mine (“PEUG” or “mine”), Knight Hawk conducted perimeter mining—a form of second coal mining⁶ where a series of extended-depth cuts⁷ are made around the perimeter of a block, including the area between blocks. Perimeter mining involves the reduction in pillars.⁸

Perimeter mining developed in Illinois where a high percentage of the land on the surface of underground mines is prime farmland. P. Ex. 37 at 1. As a result, Illinois has strict limitations on subsidence in mining. *Id.*⁹ Perimeter mining has been used since at least the 1990s. *Id.* at 2.

At the mine, each block consists of several rooms.¹⁰ Once the rooms are mined out through continuous, advance mining, cuts are made into the solid coal around the perimeter of the block. These perimeter cuts are unsupported and contain no permanent roof supports, except

⁶ Hasenstab testified that second mining is also known as retreat mining. Tr. 339; *see also*, tr. at 337 (“I agree that perimeter mining is second mining.”).

⁷ If perimeter cuts measure more than 20 feet from the nearest row of permanent roof supports, they are considered extended-depth cuts. Tr. 75.

⁸ The *Dictionary of Mining, Minerals, and Related Terms* (2d ed. 1997) defines “pillar” as “a column of coal . . . left to support the overlying strata or hanging wall in a mine.” Hasenstab credibly testified that the areas between the blocks were a pillar. Tr. 334-35 (“[W]e all have agreed [it] is a pillar, albeit a very large pillar, and we are partially recovering from that pillar.”).

⁹ The *Dictionary of Mining, Minerals, and Related Terms* (2d ed. 1997) defines “subsidence” as “[t]he sudden sinking or gradual downward settling of the Earth’s surface with little or no horizontal motion. . . . Subsidence may be caused . . . by human activity such as subsurface mining or the pumping of oil or groundwater.”

¹⁰ The parties presented differing and contradictory evidence as to the precise definition of a room. *Compare* G. Ex. 1 at 5 (describing multiple rooms within a single block) *with* Tr. 357 (“A block is a room.”). However, the precise definition of a room is not material to this Decision.

for two cuts per block that are bolted in order to maintain access for examination of the cut-through connection that will join a subsequent block. G. Ex. 1 at 5-7.

On March 1, 2010, MSHA approved a ventilation plan for the mine, without conditions. Jt. Ex. 1, ¶17. The ventilation plan included 40-foot, extended-cut perimeter mining. G. Ex. 12 at 38. The ventilation plan required a bleeder system to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from a worked-out area away from active workings and into a return air course or to the surface of the mine. Tr. 83, 325; *see* 30 C.F.R. § 75.334(b)(1). The approved ventilation plan stated that it “contains the minimum ventilation system designed to control methane and respirable dust . . . in accordance with 30 C.F.R. § 75.370. The methods and practices are considered to be suitable for the mining systems employed at this mine, and upon [approval], shall be followed until such time that a revised method or methods are submitted for review and approved for use by the MSHA District Manager.” G. Ex. 12 at 1.

Under the ventilation plan, the bleeder system consisted of a single bleeder entry into each room and a bleeder connector—connecting the bleeder entry to the mined out area—as well as stoppings and curtains to control the airflow through the area. Tr. 500; *see generally* G. Ex. 12.¹¹ In order to evaluate the effectiveness of the bleeder system, the ventilation plan included evaluation points (“EPs”). Tr. 320; P. Ex. 30 at 9. Examination of the bleeder system involved traveling in each block to EPs to test the concentrations of methane and oxygen as well as the direction and quality of airflow at the EPs. Tr. 319-21; P. Ex. 30 at 8, 9; *see* 30 C.F.R. § 75.364(a)(2)(iii).

Although MSHA approved the ventilation plan in 2010, former District 8 supervising mining engineer and ventilation supervisor, Mark Eslinger,¹² credibly testified that “District 8 want[ed] to get rid of perimeter mining.” Tr. 416. Eslinger testified about multiple occasions since 2010 where MSHA employees of District 8 expressed the view that District 8 was attempting to “get rid” of perimeter mining, including conversations that Eslinger had with Stan Reider, an engineer in District 8, and Doug Herndon, the District 8 Roof Control Supervisor, who told Eslinger that District 8 was “going to say [perimeter mining]’s illegal.” Tr. 417. Eslinger also credibly testified that he served a 90-day detail in 2001 in Arlington, Virginia,

¹¹ Although Dennis Beiter, Respondent’s expert (*infra* note 16), testified that there were up to five bleeder entries into a room, the undersigned does not credit this testimony. Tr. 61-63. Beiter equivocated and was evasive on this point, stating that some of what he identified as bleeder entries “are not necessarily called bleeder entries, but they function as bleeder entries.” Tr. at 61. Beiter’s testimony also relies on the definition of bleeder entry from Policy P13-V-12, discussed further below in Section III.C. As explained below, Policy P13-V-12 improperly made a substantive change to regulations. Beiter’s reliance on Policy P13-V-12 further indicates the unreliability of Beiter’s testimony on this point.

¹² Eslinger worked at MSHA or its predecessor agency for 38 years. Based on his experience as an MSHA ventilation supervisor, registered professional engineer, committee member that rewrote subpart D (the §75.300 series) of the MSHA ventilation regulations from 1983 through the final rule in 1996, Eslinger was qualified, absent objection, as an expert witness in mine ventilation and regulation for the Contestant. Tr. 399-410.

where he had discussions that led him to believe “that people in MSHA headquarters want to get rid of perimeter mining.” Tr. 444. When pressed for names on extended cross-examination by the Secretary, Eslinger credibly testified that “I have had discussions with Kevin Stricklin[, the Administrator for Coal Mine Health and Safety (Tr. 470)] and he did not seem to be in favor of perimeter mining.” Tr. 445. On the other hand, Thomas Hasenstab, a mining engineer and the current superintendent for Knight Hawk, testified that he did not think that District Manager Ronald Burns was trying to eliminate perimeter mining (Tr. 354), and Burns testified that he “ha[d] not told anybody that [he’s] trying to keep them from doing perimeter mining” (Tr. 212). The undersigned discounts this testimony from Hasenstab and Burns in light of the motivations of the witnesses and the totality of the evidence in the record. In his role as the superintendent for Knight Hawk, Hasenstab regularly interacts with District 8 and must maintain an ongoing relationship with its District Manager. Furthermore, it is irrelevant what Hasenstab thinks or Burns may have said; the important consideration is the actions, not the words, of MSHA and District Manager Burns.

On December 30, 2013, after the approval of the mine’s ventilation plan, Stricklin issued Program Policy Letter No. P13-V-12 (“PPL P13-V-12”) “to clarify and improve the examination and evaluation of bleeder systems by mine operators.” G. Ex. 13 at 1. PPL P13-V-12 states that “[i]t is anticipated that District Managers would not suggest changes to the relevant portions of existing approved ventilation plans absent conditions affecting the safety or health of miners that arise following the issuance and effective date of” PPL P13-V-12. *Id.* PPL P13-V-12 defines a bleeder system to “include[] the area from which pillars are wholly or partially recovered, bleeder entries, bleeder connectors, and all associated ventilation control devices that control the air movement through the area.” *Id.* at 2. PPL P13-V-12 also states that

some entries and/or rooms surrounding the pillared area may not have been routinely identified as traveled bleeder entries. These entries and/or rooms have been commonly referred to as primary internal airflow paths, open areas within the worked-out area, inner bleeders, mine foreman entries, part of the gob, or by other names. However, these entries and/or rooms around the pillared area are an inherent part of many bleeder systems and function as entries.

Id. at 3-4.

Contestant’s expert, Gary Hartsog,¹³ credibly testified that PPL P13-V-12 changed the definition of a bleeder system. Specifically, Hartsog testified that PPL P13-V-12 included as part of the bleeder system “any pillar that’s left untouched Commonly, we don’t refer to certain pillars next to the gob or around the gob as being part of the bleeder system. It’s part of the gob.”

¹³ Hartsog was qualified, absent objection, as an expert witness in mine ventilation for the Contestant based on his experience and education, including a Master of Science in mine engineering with a thesis in mine ventilation, his status as a registered professional engineer in West Virginia, and his experience teaching classes in mine ventilation, including bleeder systems, for groups such as state mine inspectors and engineers. Tr. 458-471; *see also* P. Ex. 36 (resume for Hartsog).

Tr. 513. Hartsog testified that perimeter cuts “are in the abandoned area. Once those are mined, I would not expect them to be re-examined once left.” Tr. 480. Hartsog also credibly testified that PPL P13-V-12 redefined what constituted a bleeder entry. Tr. 493-94. He stated that PPL P13-V-12 “defines bleeder entries as being any entries that . . . are between or around blocks that have not been second mined. Before this [policy] document came out, that was not the case.” Tr. 523.

In 2017, Gateway North, operated by Peabody Gateway North Mining, LLC (“Peabody”), was also conducting perimeter mining under an approved ventilation plan that included 20-foot perimeter cuts. Tr. 159-160. When Gateway North submitted a plan for 40-foot perimeter cuts, Burns talked with MSHA Arlington headquarters and Pittsburgh Tech Support about performing a ventilation survey at Gateway North because “we had concerns that those 40-foot cuts could be ventilated properly.” Tr. 160.¹⁴ From February 8 through March 1, 2017, MSHA conducted a ventilation survey of the Gateway North Mine bleeder system and “determined that there [were] deficiencies in the design of perimeter mining.” Tr. 159; P. Ex. 34. As a result of the Gateway North investigation, MSHA found that

[a]ll methane concentrations detected were less than 0.1%; [a]ll oxygen concentrations detected were greater than 20.6%; [t]he outby room of the first pod was not ventilated; [t]he direction of airflow through most pods was difficult to discern; [i]n ten of the eighteen pods, the general direction of airflow was opposite the direction indicated in the mine ventilation plan; [t]here was no perceptible air movement found in almost all perimeter cuts probed; [t]he total ventilating pressure differential between the belt air course and the left side return entries at the front of the 2nd North Panel was less than 0.2 inches of water gauge; [and t]he pressure differential across MPL regulator was less than 0.1 inches of water gauge.”

P. Ex. 32 at 2.

Although MSHA did not revoke Gateway North’s extant ventilation plan, MSHA never approved a ventilation plan that included 40-foot perimeter cuts. Tr. 164-65. Shortly after the ventilation survey, Gateway North ceased conducting perimeter mining entirely. Tr. 223, 235-36, 246-47.

After conducting the ventilation survey at Gateway North, MSHA decided to conduct a ventilation survey at Viper Mine, another mine conducting perimeter mining, and at PEUG. Tr. 160. MSHA chose to inspect PEUG first because MSHA “felt the hazards may be more for

¹⁴ Prior to working for District 8, Burns had never worked in or inspected any mines that had perimeter mining. Tr. 219.

Prairie Eagle than Viper.” Tr. 165. In particular, the Viper mine was only engaged in doing perimeter cuts around, not between blocks. Tr. 166, 239.¹⁵

On January 9 and 10, 2018, Respondent’s expert, Dennis Beiter,¹⁶ headed a team from MSHA Tech Support¹⁷—Bradley R. Wurl, Diane M. Doyle-Coombs, Gaetano J. Iannacchione, A. Zharif MdAzmi, and George N. Aul—as well as John Hohn, District 8 ventilation specialist supervisor, and Michael Pritchard and Bernard Reynolds, District 8 ventilation specialists. G. Ex. 1. Hasenstab and Bill Jankousky, the corporate safety director for Knight Hawk, assisted the MSHA team on January 9, 2018. Tr. 297.

As part of the survey, the MSHA team measured air quality for methane and oxygen levels through handheld devices and bottle samples and used chemical smoke to determine airflow direction at various locations in the mine. G. Ex. 1 at 2. This included testing air quality and airflow in the perimeter cuts themselves. Beiter testified that perimeter mining offered a “unique opportunity” to conduct a survey in a pillared area because a survey team would not ordinarily be able to access a mined-out area in second mining, such as longwall mining or full pillar extraction. Tr. 563. Burns also testified that, when conducting a ventilation survey, “as a general rule,” one does not go into or analyze the ventilation in pillared areas. Tr. 222.

When conducting tests in unbolted perimeter cuts, the MSHA team would not themselves go into the unbolted perimeter cuts, which are areas where miners do not normally work or travel. Tr. 298-99. The team would send a probe into the cut with one tube that would collect an air sample and a second tube that would release smoke. This smoke was created using a chemical reaction that resulted in heat, making the smoke rise. Tr. 536-37. The MSHA team then attempted to observe the movement of the smoke from approximately 44 feet away in order to determine whether, and in what direction, there was air movement in the perimeter cut. Tr. 52-53, 257. To aid these attempts in the dimly lit perimeter cut, an MSHA representative would point a light from outside the perimeter cut into the cut, while a pair of lights on the probe itself also provided some level of illumination. Tr. 122, 520. The results of the chemical smoke tests were not always repeatable. Tr. 561-62.

While conducting the PEUG ventilation survey, the members of the MSHA team were not always in agreement as to the results of the chemical smoke tests. Tr. 543. Hasenstab

¹⁵ After the ventilation survey at PEUG, MSHA conducted a ventilation survey at Viper Mine. Tr. 168, 212, 215. Burns testified that he was diligently working with Viper in order to approve 40-foot cuts based on good-faith negotiations. Tr. 216. However, the Secretary never provided evidence that Viper presented a situation different than Gateway North or PEUG to the point that it could satisfy District 8’s ventilation requirements for extended-cut perimeter mining.

¹⁶ Through his experience, including earning a Bachelor of Science in mining engineering, working as a mining engineer for MSHA, and overseeing underground ventilation in a mine, Beiter qualified as an expert in underground mine ventilation for the Respondent. Tr. 32.

¹⁷ The technical support group provides consultative support for MSHA’s coal mine safety and health branch and metal and nonmetal safety and health branch.

testified about disagreements within the survey team regarding perceptible movement and a “general uncertainty in regards to movement or no movement” among MSHA personnel. Tr. 299. Hasenstab also testified that “there were several times [Doyle-Coombs from the MSHA survey team] said that there was perceptible movement and Mr. Beiter would come up and say no, that’s not movement.” Tr. 378. Hasenstab also credibly testified that during the ventilation survey:

There w[ere] definitely some varying interpretations of movement of the smoke. . . . I do recall Mr. Beiter arriving and very quickly making a determination that the current perimeter cut we were in when smoke was released was no perceptible movement. I disagreed with that interpretation of that particular cut. From that point forward, MSHA personnel—I’ll just say they seemed to be very quick as to a determination if there was movement or not.

Tr. 349-50.

Similarly, Jankousky credibly testified that at least one member of the survey team, Doyle-Coombs, observed perceptible movement, but became visibly upset when Beiter overruled her observations and then directed that some of her notes be rewritten and some of her observations, or those of Knight Hawk’s representatives, be changed in accordance with Beiter’s interpretations. Tr. 378-79, 389-90, 567-68. Beiter also acknowledged that MSHA personnel were not able to come to a consensus as to the results of these smoke tests until he intervened and imposed his explanation of the “expected phenomenon.” Tr. 104-105.

MSHA’s survey team did not use tracer gas, a technique for determining air movement by releasing a certain gas in one area and then sampling for that gas in another area to assess how long it takes the tracer gas to move and to assess its concentration level. Tr. 533, 560. MSHA did not use tracer gas despite the fact that Beiter admitted that “[u]sually you would use tracer gas when we can’t confirm that there is airflow.” Tr. 573. Hartsog testified that he believed that the chemical smoke tests were not valid tests but “an attempt by District 8 to get rid of perimeter mining.” Tr. 415. Based on the record evidence, further stated below, bolstering this opinion, including the unique and sui generis use of the smoke tests, the actions of Beiter during the ventilation survey that resulted in overruling other members of the survey team, and the fact that the smoke tests were at times unrepeatable, the undersigned finds Hartsog’s expert opinion to be persuasive.

District Manager Burns testified about three particular concerns that he had with regard to perimeter mining as a result of the PEUG ventilation survey and Beiter’s subsequent report. First, Burns was concerned about the possibility of a spontaneous combustion¹⁸ event occurring due to a general lack of ventilation. Tr. 239. Although at the time of the November 14, 2018 plan revocation there had been no spontaneous combustion events at PEUG (G. Ex. 2 at 6), Burns

¹⁸ The *Dictionary of Mining, Minerals, and Related Terms* (2d ed. 1997) defines “spontaneous combustion” as “[t]he heating and slow combustion of coal and coaly materials initiated by the absorption of oxygen.”

relied on heating events that he identified as spontaneous combustion events, and he was focused on preventing a first spontaneous combustion event from occurring. Tr. 174-75.

Burns' second concern involved the possibility of the release of methane from a roof fall due to the fact that the perimeter cuts themselves were unbolted. Tr. 182. Hartsog testified that, if there were a roof fall, any methane liberated in the roof fall would be effectively "diluted and rendered harmless by the ventilation system." Tr. 488; *see also* Tr. 149. The ventilation survey, which found roof falls in some perimeter cuts but no elevated levels of methane, bolsters this testimony. G. Ex. 18-1.

Burns' third concern dealt with methane and oxygen levels within the general area of the perimeter cuts. Tr. 177. Burns based this concern on a single bottle sample showing a concentration of methane of 4.7% where a roof support drill hole penetrated a "bleeder" in the roof of an active area not subject to perimeter mining. Beiter relied on this event as "evidence that methane may be encountered at any time." Tr. 177; *see also* Tr. 149. Under the approved ventilation plan, the methane from the bleeder was effectively diluted to less dangerous levels. Tr. 149. Additionally, Hartsog testified that there were no ignition sources in the mine that might contribute to the dangers of methane buildup. Tr. 492. The Secretary failed to rebut this testimony.

On January 29, 2018, Beiter and Burns met with, and gave the preliminary results of the survey to, Hasenstab, Jankousky, Dale Winter, Kyle Griggs, Bernie Kern, Brian Wallace, and other staff from Knight Hawk. Tr. 93, 290-91. At this meeting, MSHA showed Knight Hawk maps of the mine indicating the findings of the ventilation survey, including levels of methane and oxygen as well as the presence and direction of airflow at specific locations. Tr. 167. These maps were introduced into evidence as G. Ex. 18. After reviewing Beiter's report, Burns determined that there were deficiencies in Knight Hawk's ventilation plan and the bleeder system was not adequate and effective to ventilate the mine. Tr. 171-72. Burns requested that Knight Hawk submit a revised ventilation plan to address the deficiencies. Tr. 168.

On February 8, 2018, Beiter and the MSHA team drafted an internal report summarizing the results of the survey. G. Ex. 1. Concerning air quality, the report stated that the highest concentration of methane was 0.12% and that the lowest concentration of oxygen was 20.2%. *Id.* at 1-2. These results were well within the allowable limit of methane below 1% under 30 C.F.R. § 75.323(c)(1), and the allowable minimum level of oxygen above 19.5% under 30 C.F.R. § 75.321(b). *See also* G. Ex. 16 at 2. Both Beiter and Hasenstab testified that the mine had a low oxidation rate. Tr. 98, 326. The oxidation of coal results in a reduction in the level of oxygen. Tr. 510.

Concerning air movement, the report set forth several alleged deficiencies, including:

- 1) "The direction of net airflow direction through many blocks was difficult to discern; in some blocks it could not be determined";
- 2) "No perceptible air movement was observed in approximately 57 of the perimeter cuts examined";
- 3) "The air directions through the rooms . . . were not always consistent throughout the length of the room, nor with the net direction of airflow through the block";
- 4) the "[d]irection of air movement was not always consistent in adjacent bleeder entries within a block, or the entire length of individual bleeder entries"; and

5) “[n]o perceptible air movement was observed in portions of bleeder entries in a few locations.” G. Ex. 1 at 2-3.¹⁹ The report and Beiter’s testimony discounted air movement observed in perimeter cuts as a result of “eddy currents created by air flowing past the front of the cut.” G. Ex. 1 at 2; Tr. 81. Beiter opined that he did not “think eddy current[s] would be an appropriate means of actually providing ventilation for that extended cut because the eddy currents are depend[ent] upon the amount of airflow moving by [the cut] and there is nothing in the ventilation plan that indicated there had to be a certain amount of airflow or certain velocity of airflow in the airflow moving in that room in front of there.” Tr. 81. The previously approved ventilation plan required 7,000 cubic feet per minute of airflow over the continuous miner during perimeter mining. G. Ex. 12 at 7; G. Ex. 1 at 6. The previously approved ventilation plan did not require any specific amount of airflow across perimeter cuts. G. Ex. 12. Nor is there any evidence that MSHA suggested any minimum amount of airflow across perimeter cuts during negotiations with Knight Hawk or listed this as a deficiency in the approved ventilation plan.

On March 13, 2018, Knight Hawk sent a letter in response to the concerns raised by MSHA in the January 29, 2018 meeting and those raised in Beiter’s February 8 report, which Knight Hawk did not receive until March 7, 2018. G. Ex. 2. According to Knight Hawk, the short period of time since the receipt of the report limited its ability to comment, or to retain an expert, if further evaluation became necessary. G. Ex. 2 at 6. Knight Hawk alleged that Beiter’s February 8 report contained opinion and speculation and used “assumed definitions and designation” of the terms “pillared areas, bleeder entries, partial recovery second mining, and return air split” as well as differing interpretations among MSHA investigators as to the definition of “no perceptible movement.” *Id.* at 7. The March 13 letter also stated that the February 8 report contained conflicting information and inaccuracies between the report and the sketches of the ventilation plan. *Id.* at 7.

Knight Hawk’s March 13 letter also documented, with extensive detail, the safety record of perimeter mining and established that “[p]erimeter mining results in a lower miner exposure to respirable dust, lower citations, a lower injury rate, a lower exposure to noise, and a lower exposure to red zone/danger zone” and did not involve roof bolting in most perimeter cuts, eliminating all hazards associated with that process. *Id.* at 2. The letter further noted that the mine had never experienced any spontaneous combustion events. *Id.* at 6.

Testimony bolstered the safety benefits of perimeter mining. Burns conceded that perimeter mining “is a safe form of mining” and provides less exposure to certain hazards released into the air than other forms of mining. Tr. 173. Hasenstab agreed that the previously approved ventilation plan has “significant” safety benefits. Tr. 337. Jankousky echoed this sentiment. Tr. at 370-71. Contestant’s expert Hartsog testified that perimeter mining was not only a safe form of mining, but that it was safer than continuous mining. P. Ex. 37 at 2; *see also* Tr. 371 (Jankousky) (“Definitely perimeter mining is safer.”). Burns admitted that perimeter mining was a safer form of second mining. Tr. 224.

¹⁹ The bleeder entries referenced were those redefined in Policy P13-V-12. G. Ex. 13 at 3-4.

On April 12, 2018, MSHA sent a letter to Knight Hawk that listed the alleged deficiencies in the mine's ventilation plan for the first time. G. Ex. 3. Although this letter does not reference Knight Hawk's March 13 letter, Burns testified that he considered that letter before sending the April 12 letter. Tr. 136-37. The undersigned discredits this testimony. Burns' April 12 response belies actual consideration of and fails to specifically address the safety and health benefits of perimeter mining or whether revocation of the previously approved ventilation plan would result in less protection under the interim plan. *See generally* G. Ex. 3. As Mine Superintendent Hasenstab noted in his April 22 correspondence with Burns, "[w]e have attached [our March 13] letter as we are currently unsure if you have received and/or read the letter because your letter did not refer to it. We believe that it sets out the many safety and health benefits of our current mining system that you should consider as well as supporting the mine specific nature of the plan." G. Ex. 4 at 1.

Apart from self-serving trial testimony elicited in an attempt to show that MSHA considered the important safety and health advantages of perimeter mining and did not summarily discounted them and leave them unanswered, there is no evidence during negotiations that Burns actually addressed or expressly considered such arguments that he acknowledged at trial were irrelevant. Rather, Burns testified that such purportedly considered arguments were not relevant considerations during his ventilation plan review because they dealt with mining conditions while the perimeter cuts were made (Tr. 173-74), and did not address MSHA's specified deficiencies that the bleeder system was being adequately ventilated, examined and evaluated. Tr. 171-72. According to Burns, his concern was "after the bleeder system was established, after they left there." Tr. 174.

Burns failed to explain how or why he would actually consider safety and health concerns that he deemed irrelevant. Furthermore, the Citation relied on § 75.334(b)(1), which concerns the bleeder system during pillar recovery, not "after they left there." Tr. 174. The undersigned remains unconvinced by Burns' post hoc rationalization at trial, which was never explained to Contestant during negotiations. In these circumstances, the undersigned finds Burns' testimony that he actually considered the significant safety and health protections afforded by perimeter mining under the revoked plan to be disingenuous and not credible.

The April 12 letter lists six alleged deficiencies in the mine's previously approved ventilation plan:

- The design 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."
- The method to control air movement to ventilate the unbolted extended-depth perimeter cuts within the pillared area is not provided.

- 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.
- The air direction at EP locations is not shown in the ventilation plan drawings or on the ventilation map.
- The use of permanent ventilation control devices, such as regulators and stoppings, to control air movement through the worked-out area would be prudent. Temporary control devices such as curtains are more susceptible to damage and/or inadvertent change than permanent control devices.^[20]
- The specified means of evaluation of the worked-out area does not provide sufficient information to determine the effectiveness of the bleeder system.

G. Ex. 3 at 1. This letter also indicated that a bottle sample, taken on March 1, 2018, found a concentration of methane of 4.7% where a roof support drill hole penetrated a “bleeder” in the roof of an active area not subject to perimeter mining, “which is evidence that methane may be encountered at any time.” *Id.*; see also Tr. 149. Under the approved ventilation plan, that methane was effectively diluted to less dangerous levels by the air used to ventilate the section. Tr. 149.

On April 22, 2018, Knight Hawk sent another letter to MSHA. G. Ex. 4. Knight Hawk contended that the ventilation system in the worked out area “does not fit readily into the term ‘bleeder’ in 30 CFR § 75.334(b) because the area at issue does not involve ‘pillar recovery.’” *Id.* at 2 n.2. Knight Hawk did not advance this position at the hearing or in its post-hearing brief, and the undersigned rejects it.

Addressing the alleged deficiencies listed in MSHA’s April 12 letter, Knight Hawk explained how the approved ventilation plan does indicate airflow direction and ventilation controls such as stoppings, regulators, and curtains. *Id.* at 2. Furthermore, Knight Hawk explained that the ventilation plan was working effectively and preventing the accumulation of gases, dusts, or fumes, as shown by the low levels of methane. *Id.* Knight Hawk also addressed the concentration of methane found on March 1, 2018, stating that the bleeder was penetrated in an active unit—not during perimeter mining—and reiterated that no roof penetration occurs during perimeter mining. *Id.* at 1.

In its April 22 letter, Knight Hawk also stated that “[t]he ability to continue to use the current plan is consistent with MSHA Program Policy Letter No. P13-V-12, which addresses the

²⁰ MSHA later removed this alleged deficiency as a violation of a mandatory regulation and acknowledged it as prudent, but not mandatory. G. Ex. 9.

evaluation of bleeder systems and states, “[i]t is anticipated that District Managers would not suggest changes to the relevant portions of existing approved ventilation plans absent conditions affecting the safety or health of miners.” *Id.* at 2. Knight Hawk’s April 22 letter also reiterated the contention that the definition of “perceptible movement” “varied among the MSHA personnel” and different interpretations of “no perceptible movement” “was evident and apparent” among the MSHA investigation team. *Id.* at 3. This letter closed by stating that “[i]t appears we may be at an impasse in discussions about the plan.” *Id.* at 4.

On May 3, 2018, MSHA responded to Knight Hawk’s April 22 letter. G. Ex. 5. MSHA reiterated the six alleged deficiencies identified in its April 12 letter, but, for the first time, included citations to regulations for each alleged deficiency. Specifically, the letter alleged that:

- the bleeder system does not control the airflow direction through all blocks, including in the “pillared area,” citing 30 C.F.R. §§ 75.334(b)(1), 75.334(c)(4), 75.371(bb), and 75.372(b)(9);
- the method to control air movement to ventilate the perimeter cuts is not provided, citing 30 C.F.R. §§ 75.334(b)(1), 75.334(c)(4), 75.371(bb), and 75.372(b)(9);
- the airflow direction is not shown through the blocks, citing 30 C.F.R. §§ 75.364(a)(2)(iii) and 75.372(b)(9);
- the airflow direction at EPs is not shown on the ventilation plan, citing 30 C.F.R. §§ 75.364(a)(2)(iii), 75.371(y), 75.371(z), and 75.372(b)(9);
- the plan should use permanent ventilation control devices rather than temporary ones, citing 30 C.F.R. §§ 75.333(b)(5) and 75.334(c)(4); and
- the specified means of evaluation do not provide sufficient information to determine the effectiveness of the bleeder system, citing 30 C.F.R. §§ 75.334, 75.364(a)(2)(iii) and (iv), and 75.371(y) and (z).

The letter ended by granting Knight Hawk two weeks to submit a ventilation plan in response to the alleged deficiencies.²¹

On May 15, 2018, Knight Hawk responded and addressed each of the alleged deficiencies and cited regulations in detail. G. Ex. 6. Knight Hawk’s May 15 letter goes into great depth referencing each cited regulation, and even addresses those regulations that are not applicable. This letter further elucidated Knight Hawk’s earlier contentions, stating that: 1) the current ventilation plan dilutes and moves methane, other gases, dust, and fumes out of the worked-out area; 2) controls such as stoppings, regulators, curtains, and connectors are illustrated on the ventilation plan; and 3) the ventilation map indicates the airflow direction

²¹ MSHA originally granted Knight Hawk a two-week grace period for abatement, beginning on May 3, 2018. Although the record does not indicate that MSHA explicitly granted Knight Hawk extensions, MSHA did not issue the technical citation until November 14, 2018.

within the entirety of the mine. Knight Hawk offered that it would also add more statements to the plan to help make the exact airflow patterns more clear, such as, “[t]he direction of airflow for the worked[-]out area in the 5W/3N/2ME is from EP4 to EP3 to EP2 to EP1.” *Id.* Knight Hawk also argued that the mine’s ventilation system does not fit within the definition of “bleeder” under 30 C.F.R. § 75.334(b) because the area does not involve “pillar recovery.” *Id.* at 5.²² Finally, Knight Hawk emphasized that when MSHA “Tech Support performed their evaluation of airflow in the mined out entries,” they entered “barricaded/dangered off” areas “where miners do not normally travel.” *Id.* at 7.

On June 7, 2018, MSHA responded to Knight Hawk’s May 15 rejoinder and alleged that Knight Hawk “**did not** address the noted deficiencies” and “did not provide any other revisions to the currently approved ventilation plan to address the 30 CFR standards.” G. Ex. 7 at 1. MSHA then offered its explanation of why Knight Hawk’s responses were inadequate and relied on the January 2018 ventilation survey and § 75.334(b)(1) to allege for the first time that the bleeder system was not controlling the air passing through the area. *Id.* The letter specifically emphasized that “[t]he location of current ventilating devices does not control the air movement **throughout the entire** worked-out area” and “[t]he worked-out area is not ventilated **throughout** the entire pillared area, as determined by the ventilation survey conducted in January 2018.” *Id.* at 2. The word “throughout” is not found in the regulations cited in MSHA’s May 8 letter, but it does appear in 30 C.F.R. § 75.334(a)(1), a different regulation than what the Citation relies on. Despite Burns’ earlier May 3 letter citing specific regulations, Burns testified that the use and emphasis of the word “throughout” in his June 7 letter was not referring to any specific regulation, but it “was just my term there to make sure they understand that I’m not just talking about the mouth [of a panel]. I mean from the active working section to the mouth of the panel. Throughout the entire area has got to be done.” Tr. 205. The undersigned does not credit this testimony. Rather, Hasenstab credibly testified that the term “throughout” does not capture the intent of the plain meaning of the regulation, “I believed we complied in so far as the intent of the law is to ventilate through the worked out area, not throughout.” Tr. 335.

MSHA’s June 7 letter also rejected Knight Hawk’s offer to add statements describing the direction of airflow. G. Ex. 7. Specifically, the letter stated that “[s]tatements on maps are not a substitute for showing the actual direction of airflow.” *Id.* at 1. The letter provided no support for this assertion. At the hearing, Burns testified that written statements were not adequate because “the way we read the regulation in plain language it says you show the direction on the maps and you show the direction at EP[s].” Tr. 204. Hartsog testified that he had seen approved ventilation plans that described airflow direction with words rather than arrows. Tr. 501-02.

After the June 7 letter, Knight Hawk spoke with MSHA personnel by conference call on June 14, and in person on June 19, 2018. G. Ex. 8. Burns could not remember or testify about either discussion. Tr. 206. At these meetings, two alternative methods for ventilating perimeter cuts were discussed: 1) connecting two perimeter cuts from opposite sides by holing together

²² As noted, the undersigned rejects this pre-hearing position. As found above, perimeter mining involves second mining and pillar recovery. Consequently, perimeter mining at the mine squarely falls under § 75.334(b)(1) and its requirements that “[d]uring pillar recovery a bleeder system shall be used.”

angled cuts with straight cuts so air would flow through there, and 2) “sawtooth” cutting. Tr. 329-31. Knight Hawk rejected connecting angled and straight perimeter cuts because roof control and subsidence issues were unfavorable, the geometry would not work with regard to crosscut distances, and the combined cuts would exceed 40 feet. Tr. 332-33, 362. The term “sawtooth” cutting was never defined by MSHA, nor did Knight Hawk ask for clarification of the term at the time. Tr. 333, 344.²³

On July 5, 2018, Knight Hawk sent a letter in response to MSHA’s June 7 letter and the subsequent discussions with MSHA personnel. G. Ex. 8. Knight Hawk opined that its May 15 letter offered changes to the currently approved ventilation plan that addressed the alleged deficiencies and the parties were at apparent impasse. In anticipation of MSHA’s issuance of a technical citation, Knight Hawk requested that abatement be extended until an ALJ ruled on the validity of the existing plan because the mine “has operated safely and effectively under the current plan since 2007 and it provides significant safety benefits.” *Id.* Otherwise, Knight Hawk requested discussions about what was acceptable to abate the technical citation and operate under an interim ventilation plan during litigation. *Id.*

On October 22, 2018, MSHA sent another letter to Knight Hawk. G. Ex. 9. This letter again laid out the alleged deficiencies, but listed only five deficiencies. *Id.* MSHA revised one of the previously identified deficiencies—the alleged requirement that the ventilation plan use permanent rather than temporary ventilation controls—as “prudent” rather than mandatory. Burns’ letter stated that “[a]bsent modification of the ventilation plan to provide the miner protection outlined above, I will revoke your currently approved plan on November 12, 2018.” *Id.* at 3. The letter concluded that MSHA “will be more than happy to discuss a plan, which would be consistent with the provisions addressed above[, which] would permit mining to be conducted until a resolution is reached.” *Id.*

The record establishes that MSHA did not consider the experiential opinions and learning from District 8’s own ventilation specialists and inspectors intimately familiar with the mine during the plan revocation process. District Manager Burns, who was generally unfamiliar with and had limited experience with perimeter mining (Tr. 240-41), confirmed that he did not talk to or seek input from his own inspectors during the plan revocation process, despite the fact that his ventilation specialists would regularly perform six-month plan reviews on site and review mine maps to identify problems and ensure the plan was still “adequate.” Tr. 155-58, 233-34. During such reviews, “[a]n evaluation of the bleeder system was done in accordance with what the plan was as far as one of the evaluation points. We did not go to any area that the mine examiners would not go to during that time.” Tr. 158. District 8 ventilation specialist, Mike Pritchard, regularly performed such ventilation plan reviews. Tr. 383. Specifically, “he walks the air courses, walks intakes, returns, bleeders, and he . . . evaluates the bleeders.” Tr. 387. In January 2019, shortly after revocation of the plan, safety director Jankousky discussed perimeter mining and MSHA’s revocation of the ventilation plan with Pritchard during an underground, six-month

²³ Hasenstab testified that sawtooth cutting involved making perimeter cuts where two of them intersected at the back end, although the design and layout would be much different than holing perimeter cuts together. Tr. 359.

ventilation review. Tr. 381-82. Pritchard told Jankousky that he did not see anything wrong with the revoked system of ventilation for perimeter mining. Tr. 381, 383, 385-86.²⁴

By attachment to letter dated November 5 and attached revisions to letter dated November 6, 2018, Knight Hawk submitted an interim ventilation plan that did not include perimeter mining. G. Ex. 15; *compare* G. Ex. 12 with G. Ex. 15. By separate letters both dated November 14, 2018, MSHA approved the interim plan (G. Ex. 15), which does not permit perimeter mining (Tr. 354), and formally revoked the mine's ventilation plan, which included perimeter mining (G. Ex. 10). On November 14, 2018, MSHA also issued the technical citation at issue under 30 C.F.R. § 75.370(a)(1) for mining without a ventilation plan approved by the District Manager. G. Ex. 11.²⁵ Under questioning from the undersigned, Burns verified that nothing had changed at all since 2010, except for the ventilation survey. Tr. 240-41.²⁶

²⁴ Former District 8 ventilation supervisor Eslinger testified based on extensive experience with numerous district managers that a district manager would consult with his own ventilation specialists when contemplating revocation of a ventilation plan, and could not recall any instance in which MSHA "just yanked a plan on somebody, disapproved a plan." Tr. 424-26. When asked by the undersigned whether a district manager ever consulted with him about revoking a perimeter mining plan, Eslinger testified:

When Robert Phillips became the district manager in about 2007, he made some comments about perimeter mining. And he expressed his desire to get rid [of] and eliminate perimeter mining. He brought up some issues. I responded to some of the issues. The roof control supervisor responded to some of the issues. We had some discussions. The plans for perimeter mining were not revoked while I was the supervisor. We had some new mines going in, and they had a heck of the time trying to get perimeter mining approved, but we did not revoke any of the plans for the mines that had perimeter mining in them.

Tr. 425.

²⁵ When MSHA first issued the citation, the citation number used was already in use for another violation, and MSHA modified the original citation to change the citation number. G. Ex. 11; Tr. 267.

²⁶ Q. What changed, if anything, between approval of the plan and revocation?

A. We done our investigation and found out that areas of the mine was not being ventilated. And so the plan needed to address it at that time. Before we done the investigation in 2018 for them and 2017 for Prairie Eagle. I don't think we had ever done any kind of same type of ventilation survey on perimeter mining. When I got there in 2015, and this was like two months after I had been there, maybe less than two months, we approved the plan. Yeah, I knew—I had questions about it, about perimeter mining because I had never seen it before. I was used to from eastern Kentucky, full pillar extraction or something, but at that time, I did not know enough about this to know

(continued...)

Subsequent to the revocation of the mine's ventilation plan, two alleged spontaneous combustion events occurred at the mine, one underground and one on the surface. Tr. 175, 376, 492, 512. The evidence as to the cause of these events was inconclusive. Tr. 376. Having considered arguments and evidence as to the progeny of the events, the undersigned credits Jankousky's conclusion that it could not be determined whether the events were spontaneous combustion. Tr. 376. Furthermore, perimeter mining was not involved in either event, and both events occurred after the revocation of the ventilation plan. Tr. 225. Consequently, the undersigned finds that these events have little material bearing on resolution of the issues presented.

III. LEGAL PRINCIPLES AND ANALYSIS

The Secretary contends that the sole issue in this case is whether MSHA acted arbitrarily and capriciously when it revoked the mine's previously approved ventilation plan. Tr. 11. Knight Hawk contends, instead, that there are four issues: 1) whether the previously approved ventilation plan was suitable; 2) whether the revocation was improper and contrary to law; 3) what is the Secretary's burden of proof in this matter; and 4) how should the decisions 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 *Signal Peak Energy, LLC*, 40 FMSHRC 1059 (Aug. 2018), *appeal docketed*, No. 18-72837 (9th Cir. 2018), be considered with *Peabody Coal Co.*, 18 FMSHRC 686 (1996) (*Peabody*). Tr. 11.

As noted in the undersigned's Order Denying the Secretary of Labor's Motion in Limine, Commission case law regarding the standard of review applicable to determining whether a district manager's rejection of a ventilation plan appears to be in a state of flux. 41 FMSHRC 217 (Mar. 2019) (ALJ). MSHA alleges that Knight Hawk operated without a suitable ventilation

²⁶ (...continued)

exactly how I guess the ventilation system and everything would work or where it would not be working. So when we done the ventilation survey starting at Gateway North, we found out a lot. *I went through this and developing—not developing concerns, but looking at concerns we found that yes there is areas that's not ventilated.* That's what happened between when this was approved and when we revoked.

Tr. 240-41 (emphasis added). The undersigned finds Burns' verbal leak that they were "developing . . . concerns" to be telling. This verbal leak adds credence to the inference that Burns' concerns arose out of a preconception of what he expected to find at PEUG after Gateway North, rather than treating PEUG independently, and to the inference that MSHA wanted to get rid of perimeter mining.

plan as required by § 303(o) of the Mine Act. 30 U.S.C. § 863(o);²⁷ *see also Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406-07 (D.C. Cir. 1976). If I were working from a clean slate, I would find that the burden of proof that lies with the Secretary is the same as any violation the Secretary brings before this tribunal. It is a burden of proof the Secretary must satisfy before this fact-finding body and not a standard of review as if the undersigned merely functions as an appellate body for the Secretary's decision. As the Court of Appeals for the District of Columbia found in *Zeigler*,²⁸ ventilation plans are enforceable as mandatory standards. 536 F.2d at 409. Consequently, during the enforcement of such a plan, the Secretary would have to satisfy the same burden for a violation of § 303(o) as any other mandatory standard found in the Mine Act. *Id.* (“[W]e conclude that requirements of duly adopted ventilation plans are generally enforceable under § 104(b) and the statute's other enforcement provisions.”). The revocation of a ventilation plan in its entirety should not provide a means for the Secretary to avoid this burden. I would reject the position that the Commission must defer to the Secretary because to act otherwise would be to “displace entirely the expertise of the Secretary.” *Mach Mining, LLC v. MSHA*, 728 F.3d 643, 658 (7th Cir. 2013) (*Mach Mining II*), *aff'ing*, *Mach Mining*, 34 FMSHRC 1784 (Aug. 2012) (*Mach Mining I*). This position gives short shrift to the expertise inherent in the Commission itself. 30 U.S.C. § 823(a) (“The Commission shall consist of five members . . . who by reason of training, education, or experience are qualified to carry out the functions of the Commission.”).²⁹

Working from this clean slate, I would apply the standard as articulated in *Peabody*. Under this standard, the Secretary bears the burden of proof to establish by a preponderance of the evidence that “(1) the previously approved [ventilation] plan is no longer suitable to the conditions and the mining system of the coal mine, and (2) the new plan provision is suitable.” 18 FMSHRC at 690. To be blunt, the Secretary utterly fails to satisfy this burden. As more fully explained below, the Secretary relies on evidence—the smoke tests and the ventilation survey overall—that I find unreliable. Of note, the Secretary failed to establish the propriety or reliability of the smoke tests when used in second mining, and substantial evidence demonstrated that the smoke tests as conducted at the mine were unreliable. Tr. 52-53, 561-62. Credible

²⁷ “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.” 30 U.S.C. § 863(o).

²⁸ Although *Zeigler* did not explicitly adopt the arbitrary and capricious standard, *Zeigler* began the path that ultimately led to the application of the arbitrary and capricious standard of review seen in *Mach Mining, LLC v. MSHA*, 728 F.3d 643, 657-58 (7th Cir. 2013) (*Mach Mining II*), *aff'ing*, *Mach Mining*, 34 FMSHRC 1784 (Aug. 2012) (*Mach Mining I*).

²⁹ I see the same flaws inherent in *Martin v. Occupational Health & Review Commission*, 499 US 144, 152-53 (1991) (“[T]he Secretary is more likely to develop the expertise relevant to assessing the effect of particular regulatory interpretation.”).

evidence demonstrated that the ventilation at the mine effectively ventilates the mine according to 30 C.F.R. § 75.334(b)(1). This evidence includes levels of methane and oxygen that were described as “excellent.” Tr. 428. Furthermore, I found the Secretary’s expert to be, by and large, unreliable. He was evasive and frequently avoided answering questions directly.

Turning to the merits of Burns’ three concerns regarding perimeter mining, the concentrations of methane and oxygen established that the previously approved ventilation plan continuously diluted and moved methane-air mixtures and other gases, dusts, and fumes from the worked-out area. G. Ex. 1 at 1-2. The evidence also established that, prior to the revocation of the ventilation plan, PEUG did not experience any spontaneous combustion events. G. Ex. 2 at 6. Finally, the plan adequately mitigates any risk of a roof fall, and testimony established that a hypothetical roof fall would be effectively rendered harmless. Tr. 488. In other words, Burns’ concerns were utterly unwarranted. The record demonstrates that the previously approved plan continues to be suitable to the conditions and mining system of the mine. Consequently, the Secretary failed to satisfy by a preponderance of the evidence that Knight Hawk’s previously approved ventilation plan was unsuitable.

However, the undersigned is not working from a clean slate. In *Signal Peak*, the Commission split 2-2 on what standard of review applies when considering an MSHA district manager’s revocation of a ventilation plan, creating no precedential decision.³⁰ 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*, 40 FMSHRC at 1064.³¹ They relied on *Mach Mining*, 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 under an arbitrary and capricious standard, and on *Prairie State II*, 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*, 40 FMSHRC at 1074. They opined that *Mach Mining I* and *Prairie State I* were wrongly decided; however, they acknowledged that those Commission decisions were upheld by the

³⁰ Accordingly, the judge’s decision to apply the arbitrary and capricious standard of review was affirmed under *Pennsylvania Electric Co.*, 12 FMSHRC 1652 (Aug. 1990), *aff’d on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

³¹ Generally, under the arbitrary and capricious standard of review, a district manager’s decision will 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*, 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).

circuit courts as permissible interpretations. *Id.* at n.10.³² In the end, Commissioners Young and Althen stated that it was unnecessary to reject such circuit court precedent because substantial evidence did not support rejection of the operator’s proposed ventilation plan when analyzed under the safety standard at issue. They observed that the Commission has taken conflicting positions on the Secretary’s burden of proof, comparing the *Peabody* and *C.W. Mining*, 18 FMSHRC 1840 (Oct. 1996), cases cited by Contestant in his Response, with both the *Mach Mining* and *Prairie State I* cases cited by the Secretary in his Motion. *Signal Peak*, 40 FMSHRC at 1075-76.³³

Thus, given the apparent evolving Commission precedent concerning the appropriate standard of review for evaluating a district manager’s revocation of a mine’s ventilation plan, the recent change in Commission composition,³⁴ and the prerogative of the new Commission to rationally explain reversal of existing precedent,³⁵ even in light of appellate court or Supreme

³² 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.

³³ *But see Mach Mining II*, 728 F.3d at 658 n.21, cursorily 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. In doing so, however, the court in *Mach Mining II* failed to require the Commission to give any reasoned explanation as to its change in interpretation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*FCC*) (“An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy.”). I also reject the notion that the more deferential standard of review is required, rather than simply permissible, under the statute. As noted above, the court in *Mach Mining II*, based this on the assumption that “[t]o permit the Commission to substitute its view for that of the Secretary simply would displace the expertise of the Secretary,” an assumption that discounts the expertise of the Commission itself. *Mach Mining II*, 728 F.3d at 658.

³⁴ 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.

³⁵ *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) (“As 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.”).

Court affirmation of existing precedent,³⁶ the undersigned concludes that the most recent Commission precedent follows the permissible interpretation that applies an arbitrary and capricious standard in these circumstances. Although the Commission split 2-2 in *Signal Peak*, creating no precedential decision and leaving the judge's decision below in place, this is a permissible interpretation and one that the Commission may, upon a reasoned explanation, change. *FCC*, 556 U.S. at 514. As such, it is prerogative of the new Commission to rationally explain the affirmation or reversal of existing and conflicting precedent,³⁷ and to change course even in light of appellate court or Supreme Court affirmation of existing precedent.³⁸

Accordingly, applying the arbitrary and capricious standard as a permissible interpretation, the Secretary must establish that MSHA's revocation of the mine's previously approved and presumptively suitable ventilation plan was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law ("arbitrary and capricious"). 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Prairie State*, 792 F.3d at 82; *Mach Mining I*, 34 FMSHRC at 1790.

It is of critical note that the agency bears the burden of articulating a "rational connection between the facts found and the choice made." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). This inquiry involves "examining the reasons for agency decisions—or, as the case may be, the absence of such reasons." *Judulang v. Holder*, 565 U.S. 42, 52-53 (2011); see *FCC*, 556 U.S. at 515 (noting "the requirement that an agency provide reasoned explanation for its action").

As delineated in *Motor Vehicle Mfrs.*, an agency action is arbitrary and capricious when it: 1) relies on factors that were not intended to be considered; 2) entirely failed to consider an important aspect of the problem; 3) offered an explanation for its decision that runs counter to the evidence before the agency; or 4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 463 U.S. at 43. MSHA acted arbitrarily and capriciously under these factors.

³⁶ 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)).

³⁷ 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).

³⁸ 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)).

A. MSHA relied on inappropriate factors.

MSHA revoked the previously approved ventilation plan by technical citation citing five major deficiencies that Knight Hawk allegedly failed to address or include in a modified or revised plan submission. MSHA grounded the alleged deficiencies in mandatory ventilation standards set forth in 30 C.F.R. §§ 75.334(b)(1); 75.334(c)(4); 75.364 (a)(2)(iii) and (iv); 75.371(y), (z), and (bb); and 75.372(b)(9). Although the Secretary mentions seven other regulations, discussed further below in Section III.C, the citation largely rests on § 75.334(b)(1) to revoke the ventilation plan.³⁹ This regulation states that

During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

30 C.F.R. § 75.334(b)(1). This regulation has two requirements: 1) that the bleeder system “control the air passing through the area”; and 2) that the bleeder system “continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area.” There is no question that the mine has low levels of methane and adequate levels of oxygen. G. Ex. 1 at 1-2; Tr. 25, 70, 141-42, 296, 421, 485-86. However, MSHA alleges that the bleeder system fails to control the air passing through the mine. *See, e.g.*, G. Ex. 9 at 1. To support this allegation, MSHA relies on the ventilation survey. G. Ex. 3 at 1. This included the use of chemical smoke tests inside the extended-depth perimeter cuts. Tr. 120-21.

As noted above, an agency action is arbitrary and capricious if it relies on factors that were not intended to be relied upon. *Motor Vehicle Mfrs.*, 462 U.S. at 43. Here, MSHA improperly relied on two factors: unreliable smoke tests conducted inside the perimeter cuts, and a bias against perimeter mining that is supported by substantial record evidence.

In using the smoke tests inside the perimeter cuts, MSHA gathered data that would not have been considered in other forms of second mining or in the consideration of a bleeder system under § 75.334(b)(1). Tr. 559-60, 573. As Respondent’s expert Beiter repeatedly testified, the ability to go into a perimeter cut presented a “unique opportunity” because a survey team would not be able to access a mined-out area in second mining. Tr. 563; *see also* Tr. 50, 117, 559, 571. As Beiter further testified, because a survey team could not access a mined-out area in longwall or full pillar recovery mining, a ventilation survey would only include taking measurements from the crosscut leading up to and coming out of the mined-out area. Tr. 116. Beiter agreed that he had “never done a ventilation survey actually in a pillared area, either full extraction, partial

³⁹ While § 75.334(b)(1) applies “[d]uring pillar recovery,” § 75.334(b)(2) applies “[a]fter pillar recovery.” Although both arguably apply to the mine, the Citation and the Secretary’s theory of the case—as supported by testimony (Tr. 190, 194) and the Secretary’s briefs—rely exclusively on § 75.334(b)(1). *See* G. Ex. 11. Therefore, this Decision will only consider the alleged violation of § 75.334(b)(1) and not § 75.334(a)(1) or (b)(2).

extraction, or longwall.” Tr. 116-17. Burns echoed this sentiment and testified that, “as a general rule,” one does not go into or analyze the ventilation in pillared areas. Tr. 222.

In revoking the mine’s ventilation plan, MSHA improperly relied on a “unique” opportunity to apply a different standard—requiring perimeter mining to pass a test not required of any other form of second mining—without explanation; “where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.” *Burlington Northern & Santa Fe R. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005). Accordingly, MSHA’s revocation of the mine’s ventilation plan was arbitrary and capricious.⁴⁰

Despite the inability to obtain comparable measurements from inside a pillared area in other forms of second mining, MSHA relied heavily on the measurements taken from inside the perimeter cuts at the mine. In doing so, MSHA applied a different test to perimeter mining than it applied to any other types of second mining under § 75.334(b)(1). Other than describing the situation as “unique,” there was no explanation given as to why perimeter mining was subject to requirements that were not applied to any other type of second mining.

In addition, MSHA exhibited a bias against perimeter mining, and there is substantial evidence in the record to warrant the inference that MSHA was engaging, by incremental steps, in an attempt to eradicate perimeter mining. This bias led MSHA to conduct the ventilation survey seeking a predetermined result. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 711 (10th Cir. 2010) (using arbitrary and capricious standard in reviewing predetermination claim). The most probative evidence and credible testimony demonstrate that District 8’s true aim was to “get rid” of perimeter mining and declare it “illegal.” Tr. 417. Former MSHA District 8 supervising engineer, Mark Eslinger, credibly testified that he served a 90-day detail in 2001 in Arlington, Virginia, where he had discussions that led him to believe “that people in MSHA headquarters want to get rid of perimeter mining.” Tr. 444. When pressed for names on further cross-examination by the Secretary, Eslinger credibly testified that he “had discussions with Kevin Stricklin and he did not seem to be in favor of perimeter mining.” Tr. 445. Stricklin executed PPL P13-V-12, without notice-and-comment rulemaking. Eslinger also testified that Reider, an engineer in District 8, warned that District 8 was trying to “get rid” of perimeter mining. Tr. 417. Furthermore, MSHA roof control supervisor, Doug Herndon, told Eslinger during a December 2018 meeting presented by Tech Support that MSHA was going to declare perimeter mining was “an illegal system of mining. That’s how they are going to get rid of it.” Tr. 441-42.

This bias was evidenced not only from testimony, but also from the June 7, 2018 letter where MSHA specifically emphasized that the ventilation plan was inappropriate because “[t]he worked-out area is not ventilated throughout the entire pillared area.” G. Ex. 7 at 2. As noted above, the undersigned discredits Burn’s post hoc rationalization for the emphasis of a word that does not appear in § 75.334(b)(1). Far from simply being Burns’ “term to make sure they

⁴⁰ MSHA’s heavy reliance on the smoke tests in the perimeter cuts alone is sufficient to find that the revocation of the ventilation plan was arbitrary and capricious.

understand that I'm not just talking about the mouth" of the panel, the term implies a standard not found in the cited regulation, but the standard found in § 75.334(a)(1). Tr. 205. The use and emphasis of the word "throughout," which does not appear in the cited regulation, demonstrates an application of that regulation outside normal bounds and suggests some motive other than an unbiased application of the proper regulation.

The application of the smoke tests also indicates MSHA's bias and result-driven conclusions. As found above, Hartsog persuasively testified that the chemical smoke tests were not valid tests, but "an attempt by District 8 to get rid of perimeter mining." Tr. 415. MSHA's bias was also evident from Beiter's actions, discussed below, overruling Doyle-Coombs when she made notations documenting perceptible movement. Rather than consider the observations of a member of the survey team or even those from the operator's representatives, Beiter intervened and directed changes to those recorded observations that reflected less favorably on the previously approved ventilation plan.

The record establishes that MSHA also failed to consider the experiential opinions and expertise from District 8's own ventilation specialists and inspectors, who are intimately familiar with the mine, during the plan revocation process. Although Burns was generally unfamiliar with and had limited experience with perimeter mining (Tr. 240-41), he did not talk to or seek input from his own inspectors during the plan revocation process, despite the fact that his ventilation specialists would regularly perform six-month plan reviews on site and review mine maps to identify problems and ensure that the plan was still "adequate." Tr. 155-58, 233-34. These inspectors included Mike Pritchard, who told safety director Jankousky that he did not see anything wrong with the revoked system of ventilation for perimeter mining at PEUG. Tr. 381, 383, 385-86.

MSHA's unexplained failure to consider the expertise found in its own agency demonstrates that MSHA failed to consider an important aspect of the problem and supports the inference that MSHA was motivated by a desire to chip away at and to ultimately eradicate perimeter mining.

Although Hasenstab testified that he did not believe that Burns was trying to get rid of perimeter mining, the testimony and the actions of MSHA when confronted with requests for approval of ventilation plans that included perimeter mining demonstrate that District 8 was attempting to get rid of perimeter mining. Tr. 354. As noted above, the undersigned discounts Hasenstab's testimony on this point because he would not want to generate ill will with District 8, complicating a key relationship in operating a mine in that district. Other testimony from disinterested witnesses and the actions of MSHA establish that there was an active effort by District 8 against perimeter mining. While none of this evidence alone indicates a bias, taken together, the evidence—including the credited testimony, the use of inapplicable language, the use of the unreliable smoke tests, and the failure to consider the opinions of District 8's ventilation specialists intimately familiar with the ventilation plan at the mine—demonstrates a pattern of bias against perimeter mining that infected the decision-making process, leading to a predetermined, and thus arbitrary and capricious, decision. *Forest Guardians*, 611 F.3d at 711.

Either of these, the use of the unreliable smoke tests and the demonstrated bias against perimeter mining, would alone render MSHA's decision arbitrary and capricious. *Motor Vehicle Mfrs.*, 462 U.S. at 42 (An agency acts arbitrarily and capriciously when it relies on improper factors when making its decision.).

B. MSHA failed to consider important factors.

An agency action is arbitrary and capricious if the agency failed to consider an aspect of the problem. *Motor Vehicle Mfrs.*, 462 U.S. at 42. In revoking the mine's ventilation plan, MSHA failed to consider several important factors including the no-less-protection standard; using tracer gas; and the disagreements within the survey team and from Knight Hawk's representatives concerning the varied and inconsistent results of the smoke tests.

At the outset, MSHA overlooked and failed to consider that its regulatory authority to revoke the previously approved ventilation plan is subject to a unique statutory limitation: "[n]o mandatory health or safety standard . . . shall reduce the protection afforded miners by an existing mandatory health or safety standard." 30 U.S.C. § 811(a)(9); see *United Steel v. Mine Safety & Health Administration*, 925 F.3d 1279, 1288 (D.C. Cir. 2019). "This unusual limitation 'expressly mandates that no reductions in the level of safety below existing levels be permitted, regardless of the benefits accruing from improved efficiency.'" *Id.* at 1282 (quoting *United Mine Workers of Am., Int'l Union v. Dole*, 870 F.2d 662, 666 (D.C. Cir. 1989)). This is the no-less-protection standard. The Mine Act requires that MSHA "state the basis for its conclusion" that a new health or safety standard satisfies the no-less-protection standard. *Id.* at 1282-83. Ventilation plans are the equivalent of safety and health regulations promulgated through notice-and-comment rulemaking. *Prairie State Generating Co. LLC v. Sec'y of Labor*, 792 F.3d 82, 86 (D.C. Cir. 2015). Accordingly, when revoking the previously existing plan that provided for perimeter mining, MSHA could not approve an interim plan without perimeter mining that provided less protection, and MSHA needed to state the basis for its conclusion that revocation of the status quo would not result in less protection for miners under the interim plan.

Knight Hawk presented substantial evidence to MSHA establishing that perimeter mining was a safe and effective method of mining at the mine that resulted 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. G. Ex. 2 at 3-7; Tr. 301. Burns conceded that perimeter mining "is a safe form of mining" and provides less exposure to certain hazards released into the air than other forms of mining. Tr. 173. Additional testimony bolstered the fact that perimeter mining is a safe form of mining. Tr. 337 (Hasenstab) (agreeing that the previously-approved ventilation plan has "significant" safety benefits); Tr. 370-71 (Jankousky). Hartsog went further and stated that not only was perimeter mining a safe form of mining, but it was safer than continuous mining. P. Ex. 37 at 2. Jankousky agreed. Tr. 371 ("Definitely perimeter mining is safer."). Even Burns conceded that perimeter mining was a safer form of second mining. Tr. 224.

Despite substantial evidence that perimeter mining is a safe and likely safer form of mining with regard to recurring hazards, the credited, probative evidence in the record establishes that MSHA failed to even consider, much less address, the comparative safety advantages of perimeter mining under the previously approved ventilation plan. As noted above, the undersigned has discredited Burns' testimony at trial that he actually considered the safety and health benefits of perimeter mining first raised by Knight Hawk in its March 13 letter.

More importantly, the Mine Act requires that MSHA "state the basis for its conclusion" that safety and health standards prevailing under the interim plan satisfies the no-less-protection standard. *United Steel*, 925 F.3d at 1282 (quoting *Nat'l Min. Ass'n v. MSHA*, 116 F.3d 520, 536 (D.C. Cir. 1997)). Any such statement by MSHA "is subject to review under the Administrative Procedure Act and must manifest that MSHA engaged in reasoned decisionmaking." *Id.* (citing *Nat'l Min. Ass'n v. MSHA*, 116 F. 3d at 536).

Here, MSHA made no statement or analysis that the significant and uncontroverted safety and health protections afforded by perimeter mining under the revoked ventilation plan were actually considered or outweighed by safety and health standards that gave no less protection against respirable dust, noise, red zone, and roof bolting under the interim ventilation plan. MSHA failed to consider whether revoking the ventilation plan would result in Knight Hawk's performance of more advance continuous mining than it would have performed if the ventilation plan remained in place. Because there is substantial evidence in the record demonstrating that advance continuous mining is less safe than perimeter mining, MSHA failed to consider an important factor in making its decision. Specifically, MSHA failed to consider the unique statutory limitation, which cabined its revocation discretion.

Such unexplained agency action in excess of statutory limitations found in 30 U.S.C. § 811(a)(9) is arbitrary and capricious decision making. *Motor Vehicle Mfrs.*, 463 U.S. at 43 (finding that an agency action is arbitrary and capricious "if the agency has . . . entirely failed to consider an important aspect of the problem"); see also *International Union, United Mine Workers of America v. U.S. Department of Labor*, 358 F.3d 40, 44-45 (D.C. Cir. 2004) (finding that MSHA's failure to provide an adequate explanation for its decision to withdraw an air quality proposal was arbitrary and capricious action). Here, MSHA failed to offer any explanation, let alone an adequate one, as to why the revocation of the previously approved ventilation plan satisfied the limitations of the statutory no-less-protection standard. *United Steel*, 925 F.3d at 1282-83. This is a sufficient basis, standing alone, to vacate MSHA's revocation action and reinstate the previously approved ventilation plan.

In addition to failing to consider the no-less-protection standard, MSHA acted in an arbitrary and capricious manner when it failed to consider a tracer gas test, which is usually employed to confirm airflow. In fact, MSHA failed to even consider the use of tracer gas to confirm its unreliable smoke tests. As noted above, tracer gas is a method of determining air movement by releasing a certain gas in one area and then sampling for that gas in another area. Beiter acknowledged that "[u]sually you would use tracer gas when we can't confirm that there is airflow." Tr. 573. Hartsog confirmed that tracer gas would be the "proper tool for the task" of determining the effectiveness of a bleeder system. Tr. 532-33.

However, in deviation from acknowledged usual practice, MSHA's survey team did not use tracer gas, despite being unable to confirm airflow in the perimeter cuts. MSHA did not provide any reasoned explanation as to why it did not use tracer gas. Such an explanation is necessary, especially where testimony establishes that it was MSHA's usual practice to use tracer gas where airflow could not be confirmed. At the very least, MSHA should have used this acknowledged usual practice to back up or confirm the findings of the smoke tests. This deviation meant that MSHA did not consider an important factor, the use of tracer gas, when revoking the mine's ventilation plan. When such an aberration from usual practice in agency action goes unexplained, it is arbitrary and capricious. *Encino Motors, LLC v. Navarro*, 136 S.Ct. 2117, 2120 (2016) (citing *FCC*, 556 U.S. at 515). Consequently, MSHA's unexplained departure from a usual practice was arbitrary and capricious.⁴¹

Finally, as noted above in Section III.A, MSHA did not properly consider differences in the opinions and observations from the survey team and the contrary opinions and observations from Knight Hawk's representatives concerning the varied and inconsistent results of the smoke tests. The survey team made observations of smoke rising approximately 44-feet away in dimly lit perimeter cuts from areas that miners do not normally work or travel. Tr. 52-54. This unique and questionable practice resulted in disagreements among the survey team and from Knight Hawk's representatives, which Beiter actively suppressed, directing some notes to be rewritten. Tr. 104, 299, 349-350.

Additionally, MSHA failed to consider that the smoke tests provided varied and inconsistent results regarding the direction and movement of airflow. As noted, Hasenstab credibly testified that there was "[g]eneral uncertainty in regards to movement or no movement." Tr. 299-300. At times, the tests were not even capable of being repeated. Tr. 561-62.

Even if the undersigned were to overlook the aberrant use of unreliable smoke tests inside the perimeter cuts, MSHA failed to consider the limitations placed on the survey team in conducting the smoke tests, disagreements among the survey team and Knight Hawk representatives concerning perceptible air movement in such cuts, and the varied and inconsistent results of the survey. By not considering these important factors, MSHA acted in an arbitrary and capricious manner. *Motor Vehicle Mfrs.*, 463 U.S. at 43 (An agency action is arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem.").

In short, MSHA revoked a previously approved ventilation plan through results-oriented, unreliable, and suspect investigation techniques that failed to consider several important aspects of the problem to ensure the reliability of data and observations relied upon and to ensure compliance with an important statutory limitation. MSHA failed to consider the no-less-protection standard; the simple use of tracer gas to validate or confirm the smoke tests; and the disagreements within the survey team and from Knight Hawk's representatives concerning the varied and inconsistent results of the smoke tests. These failures demonstrate that MSHA acted

⁴¹ Due to MSHA's heavy reliance on a ventilation survey that did not use tracer gas, this deviation from an acknowledged usual practice alone is sufficient to find that the revocation of the ventilation plan was arbitrary and capricious.

in an arbitrary and capricious manner in a unique and unprecedented scenario to revoke a previously approved plan found suitable by four District 8 managers or acting district managers and by District 8 ventilation specialist Pritchard, who inexplicably was never consulted about the revocation decision or called as a rebuttal witness. Any one of these three failures is sufficient to find the revocation of the ventilation plan arbitrary and capricious.

C. MSHA offered explanations counter to the evidence before it.

MSHA cited regulations that had no support in the record to justify its revocation of the mine's ventilation plan. MSHA revoked the previously approved plan by technical citation citing five major deficiencies that Knight Hawk allegedly failed to address or include in a modified or revised plan submission. The Secretary grounded the alleged deficiencies in mandatory standards set forth in 30 C.F.R. §§ 75.334(b)(1); 75.334(c)(4); 75.364(a)(2)(iii) and (iv); 75.371(y), (z), and (bb); and 75.372(b)(9). Of these regulations, only § 75.334(b)(1), discussed above, deals with whether a ventilation plan is effective. The remainder of the regulations pertains to the technical requirements of what must be in a written ventilation plan and map prior to submission to MSHA for its consideration. Specifically, five of the remaining seven regulations—§§ 75.334(c)(4); 75.371(y), (z), and (bb); and 75.372(b)(9)—pertain to what the ventilation plan and map must “specify” and what “information” the ventilation plan and map must contain prior to submission for approval. It should be emphasized that these regulations only pertain to what technical details must be included in a submitted plan and map and *not* whether the submitted plan and map constitute a suitable ventilation plan. In other words, these regulations prescribe what information an operator must include in a ventilation plan and map when submitting them for MSHA's initial consideration, but they do not speak to whether it is a suitable ventilation plan.

When MSHA approved the ventilation plan in 2010, MSHA found that the plan and map were in compliance with 30 C.F.R. § 75.370. G. Ex. 12 at 1. Under § 75.370, a “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.” As such, when a plan and map are found in compliance with § 75.370, they are likewise found in compliance with § 75.371 and § 75.372. Five of the cited regulations that MSHA alleged that Knight Hawk had violated—§§ 75.334(c)(4); 75.371(y), (z), and (bb); and 75.372(b)(9)—are components of § 75.371 and § 75.372. In 2010, MSHA found that the ventilation plan and map were in compliance with these five regulations concerning the required technical details.⁴²

When MSHA revoked the ventilation plan, nothing had changed in the written ventilation plan or map from the 2010-approved version. Tr. 240-41. Other than the PEUG ventilation survey, the Secretary offers no explanation as to why a plan found to include the necessary

⁴² Although 30 C.F.R. § 75.370 does not explicitly reference 30 C.F.R. § 334(c)(4), the requirements of § 334(c)(4)—that a ventilation plan specify “[t]he location of ventilating devices”—are the same as those in 30 C.F.R. § 75.371(bb), which does incorporate § 334(c)(4) by reference.

information in 2010 was suddenly lacking in 2018.⁴³ Furthermore, the Secretary offers no explanation why, even if the 2018 PEUG ventilation survey were accepted at face value, it rendered the technical details in the 2010 plan and maps improper for submission to MSHA for consideration. In essence, MSHA has declared, without explanation, that the previously approved ventilation plan and map are suddenly unacceptable even for an initial submission for consideration by MSHA.

As noted above, an agency must “examine the relevant data and articulate a satisfactory explanation for its action.” *FCC*, 556 U.S. at 513 (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43). Here, the Secretary offers *no* explanation, satisfactory or otherwise, why the technical details of the 2010 written ventilation plan did not satisfy the requirements of §§ 75.371 and 75.372 in 2018 when the same technical details did so in 2010. Consequently, MSHA acted arbitrarily and capriciously and contrary to law when it determined that Knight Hawk had violated these regulations.

The remaining two regulations—§§ 75.364(a)(2)(iii) and 75.364(a)(2)(iv)—require that the operator conduct weekly examinations of the ventilation system. Specifically, § 75.364(a)(2)(iii) requires that, at least every seven days, “[a]t least one entry of each set of bleeder entries used as part of the bleeder system . . . shall be traveled in its entirety.” Additionally, measurements shall be performed during the weekly examination to determine methane and oxygen levels as well as whether air is moving in the proper direction at EPs as prescribed in the ventilation plan.⁴⁴ Section 75.364(a)(2)(iv) provides that an operator may offer, “in lieu of the requirements of [(a)(2)(iii)], an alternative method of evaluation” in a submitted ventilation plan.

MSHA’s determination that Knight Hawk violated § 75.364(a)(2)(iii) runs counter to the evidence. As noted above, this regulation requires weekly examinations where an examiner travels at least one bleeder entry of each set of entries, and for evaluations of air quality and movement at EPs as identified in the ventilation plan. Hasenstab identified the weekly route followed by an examiner to determine the effectiveness of the bleeder system at the EPs. P. Ex. 30 at 9; Tr. 320-22; *see also* Tr. 504 (Hartsog). Knight Hawk’s expert, Hartsog, credibly testified that “it would be an effective way of evaluating the system. It meets the requirements in that it goes to the extremities of the system. And it travels the entire perimeter of the bleeder area, of the bleeder system, bleeder entries.” Tr. 505.

The undersigned is persuaded by Hasenstab’s description of the weekly examinations. Tr. 320-22.⁴⁵ Hasenstab testified that the weekly examination involved traveling along the bleeder

⁴³ It should be noted that MSHA cited Knight Hawk for operating without an approved ventilation plan, not for failing to follow an approved ventilation plan. As such, the findings of the ventilation survey should have no effect on whether the ventilation plan or map complied with § 75.371 or § 75.372.

⁴⁴ Section 75.362(a)(2)(iii) uses the term “measurement point locations” rather than “evaluation points.”

⁴⁵ The Secretary offered no evidence contrary to Hasenstab’s description.

entries from EP to EP and checking air quality and direction at each EP. Tr. 320-21; G. Ex. 13 at 9. Beiter's report to Burns confirmed that "[t]he required examination of the bleeder system included travel of bleeder entries to evaluate its effectiveness" and that "[b]leeder entries were routinely traveled in each block in which an [EP] was located and across the front of the completed blocks." G. Ex. 1 at 7. Consequently, the evidence clearly demonstrates that the weekly examinations occurred and included travel of "[a]t least one entry of each set of bleeder entries" to conduct the tests, meeting the requirements of § 75.362(a)(2)(iii). MSHA again offered no explanation as to why the weekly examinations themselves were inadequate under this regulation. As such, MSHA acted in an arbitrary and capricious manner when finding that Knight Hawk violated § 75.362(a)(2)(iii). *Motor Vehicle Mfrs.*, 463 U.S. at 43.

Additionally, although MSHA identified alleged deficiencies with the weekly examinations, none of these alleged deficiencies are grounded in the regulations. First, Burns, both in testimony and in his June 7 letter, identified the weekly examinations as deficient because the plan did not

define[] the proper air direction through individual "blocks" Definition of the proper direction of airflow through bleeder entries and pillared areas, as well as the EP locations, also is necessary for the mine examiner to determine if air is moving in the proper direction when conducting tests during the weekly examination.

G. Ex. 9 at 2. Setting aside for the moment that MSHA, again without explanation, found fault with the written ventilation plan deemed acceptable in 2010, MSHA rejected Knight Hawk's offer to cure the alleged deficiency with written statements. *Id.* The only explanation for this rejection was that displaying the airflow with arrows on the map itself was required by the plain language of the regulation. Tr. 204. Because the Secretary relies on the plain language of the regulation, the Secretary's interpretation of the regulation does not get deference. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) ("[A] court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference." (citations omitted)); *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012) (holding that "[d]eference is . . . unwarranted when there is reason to suspect that the agency's interpretation 'does not reflect the agency's fair and considered judgement on the matter in question.'"). Looking to the plain language of § 75.372, there is no requirement as to how, or in what format, the information must be provided on the ventilation map. Consequently, the Secretary does not provide any basis for this requirement, and this is yet another example of MSHA acting in an arbitrary and capricious manner to achieve the desired result. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

Second, MSHA also alleged that the weekly examinations were deficient because

[t]he 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.

G. Ex. 11 at 3. None of these requirements can be found in the cited regulation. The *only* requirement in § 75.364(a)(2)(iii) is that “[a]t least one entry of each set of bleeder entries used as part of the bleeder system . . . shall be traveled in its entirety” and that the weekly examination will include tests for air quality and movement. There is no requirement in § 75.364(a)(2)(iii) for additional tests outside of the EPs or the addition of more EPs than are required in the approved ventilation plan. Based on the language from the citation, MSHA created additional requirements that have no basis in the regulation. Again, it should be emphasized that this regulation pertains to whether Knight Hawk is conducting weekly examinations as prescribed by the ventilation plan and maps in the first instance, not whether those examinations revealed shortcomings in the ventilation plan.⁴⁶

On this point, Beiter testified that the evaluation was insufficient because “there were places in the bleeder system in which airflow was not being controlled in a manner that would allow that evaluation to take place.” Tr. 112-13. Even assuming that Beiter were completely correct that there were portions of the mine that did not have controlled airflow, this testimony goes to the results of the weekly examinations, not to whether Knight Hawk was conducting the weekly examinations in compliance with § 75.364(a)(2)(iii) in the first instance. Even uncontrolled airflow, except in extreme cases, would not prevent Knight Hawk from conducting adequate weekly examinations. To put it another way, where § 75.364(a)(2)(iii) asks whether Knight Hawk conducted weekly exams adequate to evaluate the bleeder system, Beiter faults Knight Hawk for the expected results of that test. This is akin to faulting Knight Hawk for not taking a test because, in MSHA’s view, Knight Hawk should fail that test. As this regulation goes to whether Knight Hawk is conducting the proper examinations—not what the result of that test may be—MSHA does not support this alleged violation.⁴⁷ In short, it is a non sequitur to allege that Knight Hawk failed to conduct weekly examinations because “there were places in the bleeder system in which airflow was not being controlled.” Tr. 112-13.

⁴⁶ Although the Secretary never presents this argument, the best argument in support of the Secretary’s position is that, if Knight Hawk had been conducting proper weekly examinations, those examinations should have demonstrated that the ventilation plan was not suitable based on the results of the ventilation survey. Therefore, this argument continues, since the weekly examinations did not reveal the plan’s unsuitability, Knight Hawk must not have been performing proper weekly examinations. Even beyond the reasons stated above, this argument fails because the improperly conducted ventilation survey lies at the heart of this argument. Its reasoning fails once the keystone of the ventilation survey is found flawed.

⁴⁷ Burns testified that “[w]e did not feel the bleeder system was being ventilated. We did not feel it was being adequately examined.” Tr. 171. He did not, however, provide any concrete support as to why the weekly examinations themselves were inadequate, nor did the Secretary proffer any citations to support such conclusion. Rather, the Secretary only proffers results from an unreliable and suspect ventilation survey in areas where examiners would not travel.

As noted above, the law requires MSHA to offer a reasoned explanation when departing from its standard course; “an agency changing its course must supply a reasoned analysis.” *Motor Vehicle Mfrs.*, 463 U.S. at 57 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)). Here, the Secretary offers no reasoned explanation why the additional deficiencies that it grafted onto regulatory language are necessary under § 75.364(a)(2)(iii), or how Knight Hawk’s execution of the weekly examinations runs afoul of that regulation.⁴⁸

Turning to § 75.364(a)(2)(iv), this regulation, by its plain language, only applies where an operator submits an alternative weekly examination plan “in lieu of the requirements of” § 75.364(a)(2)(iii) in a ventilation plan. The evidence is clear that Knight Hawk *did not* submit an alternative weekly examination plan in its ventilation plan. G. Ex. 12 at 9. Consequently, MSHA’s reliance on this regulation runs counter to the evidence. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

As a final matter, insofar as the Secretary relies on PPL P13-V-12 as the impetus that changed the substantive requirements for the submitted ventilation plan and maps, such reliance is improper as PPL P13-V-12 did not go through proper notice-and-comment rulemaking. As noted in the Findings of Fact, on December 30, 2013, after the approval of the mine’s ventilation plan, MSHA, through Administrator Kevin Stricklin, issued the policy “to clarify and improve the examination and evaluation of bleeder systems by mine operators.” R. Ex. 13 at 1. PPL P13-V-12 states that “[i]t is anticipated that District Managers would not suggest changes to the relevant portions of existing approved ventilation plans absent conditions affecting the safety or health of miners that arise following the issuance and effective date of” the policy. *Id.* PPL P13-V-12 defines a bleeder system to “include[] the area from which pillars are wholly or partially recovered, bleeder entries, bleeder connectors, and all associated ventilation control devices that control the air movement through the area.” *Id.* at 2.

Hartsog credibly testified that PPL P13-V-12 changed the definition of a bleeder system. Specifically, Hartsog testified that the policy includes as part of the newly defined bleeder system “any pillar that’s left untouched Commonly, we don’t refer to certain pillars next to the gob or around the gob as being part of the bleeder system. It’s part of the gob.” Tr. 513. Hartsog stated that perimeter cuts “are in the abandoned area. Once those are mined, I would not expect them to be re-examined once left.” Tr. 480. Hartsog also credibly testified that the policy redefined what constituted a bleeder entry. He stated that the policy “defines bleeder entries as being any entries that . . . are between or around blocks that have not been second mined. Before this [policy] document came out, that was not the case.” Tr. 523.

PPL P13-V-12 made substantive and definitional changes to § 75.300 dealing with bleeder systems that lack the force of law purportedly used to justify the revocation of Knight Hawk’s ventilation plan. It is the Secretary’s burden to appropriately promulgate new proposed changes in substantive legal requirements through proper notice-and-comment procedure. 30 U.S.C. § 811; *see Alaska Professional Hunters v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999)

⁴⁸ Like the unreliable smoke tests, this appears to be yet another example where MSHA created additional requirements for extended-cut perimeter mining that were not required for other forms of second mining.

(“When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment.”); *Drummond Company, Inc.*, 14 FMSHRC 695 (1992) (affirming the judge’s holding that the Secretary was required to promulgate a policy program letter through notice-and-comment rulemaking and concluding that the policy, as an invalidly issued substantive rule, can be accorded no legal weight or effect). Further, the Secretary failed to set forth any convincing reasons upon which policy changes may be exempt from notice-and-comment due to good cause. 5 U.S.C. § 553(b)(3)(B). Therefore, PPL P13-V-12 cannot justify changing the requirements of the submitted ventilation plan and maps.

The undersigned finds unpersuasive the Secretary’s argument that, even apart from the measurements taken within the perimeter cuts, the ventilation survey indicated that Knight Hawk had to revise its ventilation plan. Specifically, the Secretary contends that “[t]he direction of air movement in adjacent bleeder entries was not always consistent within a block[;] at several locations air moved in opposing directions across an individual bleeder entry, and in portions o[f] other bleeder entries there was no perceptible air movement at all.” Sec’y Post-Hearing Br. at 48-49. This argument relies on the definition of “bleeder entry” from PPL P13-V-12. When applying the pre-PPL P13-V-12 definition, the pillars that have not been second mined and are not adjacent to the perimeter cuts are not part of the bleeder system. Tr. 513. Consequently, applying the pre-PPL P13-V-12 definitions, there is a single bleeder entry and the ventilation survey found consistent air movement through the bleeder entry and through the area adjacent to the perimeter cuts. G. Ex. 18-1. The Secretary’s unpersuasive argument demonstrates exactly how PPL P13-V-12 changed the definition of a bleeder entry and the substantive consequences of that change.

In summary, MSHA acted in an arbitrary and capricious manner under *Motor Vehicles Mfrs.*, 463 U.S. at 43. First, MSHA relied on factors—the unreliable smoke tests within the perimeter cuts and a bias against perimeter mining—that were not intended to be considered. Second, MSHA entirely failed to consider important aspects of the revocation issue—the no-less-protection standard; using tracer gas; and the disagreements within the survey team and from Knight Hawk representatives concerning the varied and inconsistent results of the smoke tests. Finally MSHA either offered an explanation that ran counter to the evidence before it or failed to offer any explanation to support its decision that the previously approved plan no longer satisfies §§ 75.370, 75.371, and 75.372.

IV. CONCLUSION

For the foregoing reasons, the technical citation is vacated, and the previously approved ventilation plan is reinstated.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Administrative Law Judge

Distribution:

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

R. Henry Moore
Fisher & Philips, LLP
301 Grant Street
Suite 4300
One Oxford Centre
Pittsburgh, PA 15219

/ztb

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, D.C. 20004
Telephone No.: (202) 434-9900 / Fax No.: (202) 434-9949

August 19, 2019

KNIGHT HAWK COAL, LLC,
Contestant

v.

SECRETARY OF LABOR
MINE SAFETY AND 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

AMENDED DECISION AND ORDER

Appearances: R. Henry Moore, Jackson Kelly PLLC, Pittsburgh, PA for the Contestant¹

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

Before: Judge McCarthy

This proceeding is before the undersigned on a Notice of Contest and Motion to Expedite filed November 15, 2018, by Knight Hawk Coal, LLC, pursuant to § 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), which states that “[t]he 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 systems at the mine.”

A hearing was held in St. Louis, Missouri, on March 28-29 and April 1, 2019. During the hearing, the parties offered lay and expert witness testimony and documentary evidence.² Witnesses were sequestered. The parties submitted post-hearing and reply briefs, the latest of which was filed on June 7, 2019.

¹ Although Mr. Moore was with Jackson Kelly, PLLC, when the contest was filed, he is currently at Fisher Phillips LLP, Pittsburgh, PA.

² In this Decision, “Tr.” refers to the hearing transcript, “P. Ex. #” refers to the Contestant’s exhibits, and “G. Ex. #” refers to the Respondent’s exhibits. P. Exs. 13-28, 30, and 34-40, and G. Exs. 1-12 and 14-18, were received into evidence. Tr. 281-82.

Based on a careful review of the record, including the parties' post-hearing and reply briefs, and observation of the demeanor of witnesses,³ the undersigned makes the following findings of fact and conclusions of the law and orders that the technical citation be vacated and the previously approved ventilation plan be reinstated.

I. STIPULATIONS

The parties submitted the following stipulations, which have been accepted into the record:

1. The Prairie Eagle Underground Mine (PEUG) is a "mine" as that term is defined in Section 3(h) of the Mine Act.
2. Knight Hawk is engaged in mine operations in the United States, and its mining operations affect[ed] interstate commerce.
3. Knight Hawk is the operator of the PEUG, MSHA ID No. 11-03147.
4. Knight Hawk is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801 et seq.
5. The Administrative Law Judge has jurisdiction in this matter.
6. Citation No. 8429603 was issued to the mine operator on November 14, 2018, and subsequently modified to correct the citation number – Citation No. 9035600.
7. The subject Citation was properly served by a duly authorized representative of the Secretary upon an agent of Knight Hawk on the date and place stated therein, and may be admitted into evidence for the purposes of establishing its issuance.
8. The Prairie Eagle Underground Mine mines coal utilizing continuous miners.
9. The PEUG began production in August 2006 with a single MMU. Since that time, it has implemented four (4) additional MMU's; each of them going through the extended cut evaluation process where they began at 20-foot cuts and worked their way to 40-foot cuts. These evaluations, as outlined in [Procedure Instruction Letter] I12-V-11 (Reissue of I10-V-09, I08-V-03, I06-V-6), consisted of a mine history evaluation, plan provisions, training requirements, on-site evaluation, ventilation plan approval, and supplemental information pertaining to cut depth, ventilation, respirable dust, methane, and roof support. All five MMU's operate with extended

³ In evaluating testimony, the undersigned has taken into consideration the nature of the questioning and testimony given in response, the demeanor of the witnesses, their evasiveness or forthrightness, their interests in this matter, the inherent probability of their testimony in light of other events, corroboration or lack of corroboration for their testimony, their experience and credentials, and their consistency or lack of consistency vis-à-vis their own testimony and the testimony of other witnesses.

cut plans and each of them conducted perimeter mining. Specifically, each extended cut plan, including perimeter mining, was approved by a District Manager, including the current one. The Ventilation Plan for each MMU is identical.

10. [Procedure Instruction Letter] 112-V-11 is marked as [G. Ex. 14] and may be admitted into evidence.

11. Program Policy Letter P13-V-12 is marked as [G. Ex. 13] and may be admitted into evidence.

12. Knight Hawk has conducted perimeter mining since January 2007.

13. During the initial startup of the mine, the Roof Control Plan and the Ventilation Plan [were] subject to an initial evaluation of both plans, including perimeter mining. That continued for 22 months for the Roof Control Plan and 41 months for the Ventilation Plan.

14. Roof bolting is generally eliminated during perimeter mining because after the entry is mined and the continuous miner withdrawn, it is barricaded off. Some limited roof bolting is still performed during perimeter mining in approaches to evaluation points. Per the approved roof control and ventilation plans, installation of four props/jacks [were] required prior to beginning each perimeter cut and the props/jacks must be left in place or removed remotely after a cut is completed.

15. Specifically, each MMU began at the following date and the extended cut plan, including perimeter mining, was approved by the following District Manager on the following dates:

* MMU 002 – June 2008, Acting DM Mary Jo Bishop (March 1, 2010)

* MMU 003 – December 2011, DM Robert Simms (August 17, 2012)

* MMU 004 – July 2013, DM Robert Simms (December 9, 2013)

* MMU 005 – August 2017, DM Ronald Burns (September 27, 2017)

16. The Roof Control Plan timeline is as follows:

* 01/26/06 – Conditional approval with no perimeter mining. MSHA stated, “an in-mine evaluation, to evaluate the mine’s specific mining conditions and the effectiveness of the plan in addressing those conditions will be required before any such approval can be considered.” The plan expired 07/26/06.

* 07/31/06 – Extension of the conditional approval until 01/26/07.

* 01/18/07 – Received a conditional approval for perimeter mining and an extension of the base plan; both until 07/18/07.

* January 2007 – Perimeter Mining begins at PEUG.

* 07/02/07 – Knight Hawk requested, “Due to the extent of mining completed to date, the multiple visitations/evaluation from Mr. Jeff Williams, and the

successful implementation of the plan, we are hereby requesting removal of the ‘conditional’ approval of the Roof Control Plan and that the plan be placed into effect.”

- * 07/10/07 – Conditional approval extended another 6 months for further evaluation until 01/18/08.
- * 01/11/08 – Knight Hawk requested removal of the ‘conditional’ approval.
- * 03/11/08 – Conditional approval extended until 05/12/08.
- * 04/11/08 – Consolidated plan submitted as per MSHA request.
- * 05/30/08 – Plan approved without the ‘conditional’ constraint; including perimeter mining.

17. The Ventilation Plan timeline is as follows:

- * 08/02/06 – Conditional approval with perimeter mining. The plan expired 11/03/06.
- * 10/31/06 – Request to either remove the ‘conditional’ approval or extend the date.
- * 11/08/06 – Extension of the conditional approval until 02/03/07.
- * January 2007 – Perimeter Mining begins at PEUG.
- * 01/29/07 – Request to either remove the ‘conditional’ approval or extend the date.
- * 02/01/07 – Extension of the conditional approval until 05/03/07.
- * 05/02/07 – Request to either remove the ‘conditional’ approval or extend the date.
- * 05/02/07 – Extension of the conditional approval until 08/02/07.
- * 07/23/07 – Request to either remove the ‘conditional’ approval or extend the date.
- * 08/04/07 – Extension of the conditional approval approved until 10/09/07.
- * 10/02/07 – Request to either remove the ‘conditional’ approval or extend the date.
- * 12/28/07 – Extension of the conditional approval until 03/28/08.
- * 03/17/08 – Request to either remove the ‘conditional’ approval or extend the date.
- * 04/11/08 – Consolidated plan submitted as per MSHA request. The same date [Contestant] submitted a consolidated Roof Control Plan per MSHA’s request as well. No approval received.
- * 12/08/08 – Consolidated plan submitted as per MSHA request. No approval received.

- * 11/12/09 – Consolidated plan submitted as per MSHA request.
- * 03/01/10 – Plan approved without the ‘conditional’ constraint; including perimeter mining.

18. A typical Perimeter Mining Panel is 1 mile in length and 1,240 feet in width; approximately 150 acres. It takes approximately 11 months to complete a Perimeter Mining Panel and PEUG typically seals each panel within 30 days from completion of mining.

19. At the request of District Manager Ronald Burns, on December 19, 2017, the MSHA Pittsburgh Safety and Health Technology Center (“Tech Support”) performed an evaluation of the bleeder system which includes areas where perimeter mining was conducted at Prairie Eagle Underground on January 9-10, 2018. A report was prepared and submitted to the District Manger on or about February 8, 2018 and is marked as [G. Ex. 1] and may be admitted into evidence.

20. Similar evaluations were requested by District Manager Burns at the Viper Mine operated by ICG Illinois LLC and of the Gateway North Mine operated by Peabody Gateway North Mining LLC and are marked as [P. Exs. 35 and 34] respectively and may be offered into evidence at the hearing in this matter, subject to the objections outlined in the Secretary’s Motion in Limine.^[4]

21. On January 29, 2018, Knight Hawk met with MSHA to discuss the preliminary findings of Tech Support’s evaluation of the mine’s bleeder system. During that meeting[,] District Manager Ronald W. Burns requested that Knight Hawk address the issues raised by those preliminary findings.

22. On March 7, 2018, Knight Hawk received a copy of Tech Support’s report. A copy of the report is marked as [G. Ex. 1]. A copy of the analytical gas sampling results from the Tech Support evaluation is marked as [G. Ex. 16] and may be admitted into evidence.

23. Knight Hawk’s ventilation plan including perimeter mining was last approved on February 15, 2015. A copy is marked as [G. Ex. 12] and may be admitted into evidence.

24. On March 13, 2018, Thomas Hasenstab[, a mining engineer and the current superintendent for Knight Hawk,] sent a letter to Mr. Burns outlining Knight Hawk’s response concerning perimeter mining. Such letter is marked as [G. Ex. 2] and may be admitted into evidence.

25. On April 12, 2018, Mr. Burns wrote Mr. Hasenstab directing Knight Hawk to revise its ventilation plan. Such letter is marked as [G. Ex. 3] and may be admitted into evidence.

26. On April 22, 2018, Mr. Hasenstab sent a letter to Mr. Burns submitting a response to his letter of April 12, 2018 with an attached copy of Knight Hawk’s March 13, 2018 letter. Such letter is marked as [G. Ex. 4] and may be admitted into evidence.

⁴ The undersigned denied the Secretary’s Motion in Limine. Order Denying the Secretary’s Motion in Limine, 41 FMSHRC 217 (Mar. 2019) (ALJ).

27. On May 3, 2018, Mr. Burns wrote Mr. Hasenstab as a follow-up to a conference call on April 30, 2018. Such letter is marked as [G. Ex. 5] and may be admitted into evidence.

28. On May 15, 2018, Mr. Hasenstab wrote Mr. Burns responding to his May 3, 2018 letter. Such letter is marked as [G. Ex. 6] and may be admitted into evidence.

29. On June 7, 2018, Mr. Burns wrote Mr. Hasenstab responding to his letter dated May 15, 2018. Such letter is marked as [G. Ex. 7] and may be admitted into evidence.

30. On July 5, 2018, Mr. Hasenstab wrote Mr. Burns in response to his letter of June 7, 2018. Such letter is marked as [G. Ex. 8] and may be admitted into evidence.

31. On October 22, 2018, Mr. Burns wrote Mr. Hasenstab in response to his July 5, 2018 letter. Such letter is marked as [G. Ex. 9] and may be admitted into evidence.

32. On November 14, 2018, Mr. Burns wrote Mr. Hasenstab revoking Knight Hawk's approved ventilation plan. Such letter is marked as [G. Ex. 10] and may be admitted into evidence.

33. In order to abate the Citation and to continue to operate[,] Knight Hawk submitted a ventilation plan which MSHA approved. A copy of such Interim Plan is marked as [G. Ex. 15] and may be admitted into evidence.

34. Citation No. 9035600 was issued on November 14, 2018, pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 814(a) alleging a violation of Section 75.370(a)(1).

35. Under the heading and caption "Condition or Practice" the Citation alleges as follows:

The mine operator is mining without a ventilation plan approved by the District Manager. The operator's plan is revoked on this date because it fails to address existing, identified deficiencies. The parties' negotiations have reached impasse. In numerous discussions, and by letters dated April 12, May 3, June 7, and October 22, MSHA advised Knight Hawk Coal of concerns and of certain issues required to be addressed in its ventilation plan. Specifically:

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 CFR Sections 75.334(b)(1), 75.334(c)(4), 75.371(bb), and 75.372(b)(9).]

Section 75.334 requires a bleeder system to be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases....Both conditions must be addressed in the bleeder system design.

The bleeder system in this case is not controlling the air in an effective manner as determined by the ventilation survey conducted in January 2018.

Effective ventilation requires sufficient air movement in appropriate directions. The ventilating device intended to control air movement through the area did not effectively control the air movement.

Air movement was not perceptible in portions of the pillared areas, including many extended-depth perimeter cuts. The air direction through the rooms from which the perimeter cuts were mined w[as] not always consistent throughout the length of the room, nor with the net direction of airflow through the block. No perceptible air movement was observed in approximately 57 of the 138 perimeter cuts examined. A few of the bolted perimeter cuts were examined in greater detail. Movement of air was observed in approximately 57 of the 138 perimeter cuts examined. A few of the bolted perimeter cuts were examined in greater detail. Movement of air was detected in parts of some of these cuts near the adjacent rooms, but not near the faces. Air movement was not perceptible in some perimeter cuts in which air flowed past the front of the cut. Where air movement was detected in perimeter cuts, it appeared to be intermittent and/or the result of eddy currents created by air flowing past the front of the cut, rather than the result of ventilation control devices directing airflow into the perimeter cuts. Observations indicated the stronger the air flowing past the front of the cut, the more pronounced the movement of air at the test location within the perimeter cut. Movement of air caused by eddy currents for which no tests could practically be conducted in all the perimeter cuts (some were not accessible due to their location with respect to accessible areas) is not considered [an] appropriate or reliable means to control air movement.

Air movement was not adequately controlled through all sets of bleeder entries. Direction of air movement was not uniformly consistent in adjacent bleeder entries within a block or throughout the entire length of individual bleeder entries. Air moved in opposing direction across an individual bleeder entry at several locations. No perceptible air movement was observed in portions of bleeder entries in several locations. The direction of the net airflow through many blocks was difficult to discern; in some blocks it could not be determined due to inconsistent airflow direction. Tests for airflow directions using chemical smoke in the rooms across the front and back of each completed block did not consistently determine the direction of airflow through the block. Comparisons of air quantity measurements between blocks (in the cut-through connections and in the former section entries) were not always conclusive in determining air direction within a block due to the net flow of air through the block being less than reasonable inaccuracies in air quantity measurements.

2. The method to control air movement to ventilate the unbolted extended-depth perimeter cuts within the pillared area is not provided. The extended 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 CFR Sections 75.334(b)(1), 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 CFR Sections 75.364(a)(2)(iii) and 75.372(b)(9)]

The direction of airflow through bleeder entries and pillared areas, as well as at evaluation point (EP) locations, must be defined to determine whether a proposed means of evaluation will result in proper evaluation of the effectiveness of the bleeder system, including the pillared areas. Definition of the proper direction of airflow through bleeder entries and pillared areas, as well as at EP locations, also is necessary for the mine examiner to determine if air is moving in the proper direction while conducting tests during the weekly examination to evaluate the effectiveness of the bleeder system.

4. The air direction at EP locations is not shown in the ventilation plan drawings or on the ventilation map. [30 CFR Sections 75.364(a)(2)(iii), 75.371(y), 75.371(z), and 75.372(b)(9)]

The direction of airflow through bleeder entries and pillared areas, as well as at EP locations, is necessary to determine whether a proposed means of evaluation results in proper evaluation of the effectiveness of the bleeder system. Definition of the proper direction of airflow through bleeder entries and pillared areas, as well as at EP locations, is necessary for the mine examiner to determine if air is moving the proper direction while conducting tests during the weekly examination to evaluate the effectiveness of the bleeder system.

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 CFR Sections 75.334, 75.364(a)(2)(iii), 75.364(a)(2)(iv), 75.371(y), and 75.371(z)]

In letters dated April 22, May 15, and July 5, 2018, Knight Hawk Coal failed to provide adequate responses to MSHA’s concerns. In MSHA’s October 22, 2018 letter, Knight Hawk Coal was informed of the district manager’s intent to revoke the ventilation plan if the stated deficiencies were not addressed.

Standard 75.370(a)(1) was cited 22 times in two years at mine 1103147 (22 to the operator, 0 to a contractor).

36. The Citation was terminated on November 13, 2018. A copy of such Citation is marked as [G. Ex. 11] and may be admitted into evidence.

37. The parties have identified [G. Exs. 1-20] for the Secretary and [P. Exs. 1-39] for Knight Hawk and such exhibits may be offered into evidence without objection except [P. Exs. 34-35 and G. Exs. 19-20].

Jt. Ex. 1.

II. FINDINGS OF FACT

At Prairie Eagle Underground Mine (“PEUG” or “mine”), Knight Hawk conducted perimeter mining—a form of second coal mining⁵ where a series of extended-depth cuts⁶ are made around the perimeter of a block, including the area between blocks. Perimeter mining involves the reduction in pillars.⁷

Perimeter mining developed in Illinois where a high percentage of the land on the surface of underground mines is prime farmland. P. Ex. 37 at 1. As a result, Illinois has strict limitations on subsidence in mining. *Id.*⁸ Perimeter mining has been used since at least the 1990s. *Id.* at 2.

At the mine, each block consists of several rooms.⁹ Once the rooms are mined out through continuous, advance mining, cuts are made into the solid coal around the perimeter of the block. These perimeter cuts are unsupported and contain no permanent roof supports, except for two cuts per block that are bolted in order to maintain access for examination of the cut-through connection that will join a subsequent block. G. Ex. 1 at 5-7.

On March 1, 2010, MSHA approved a ventilation plan for the mine, without conditions. Jt. Ex. 1, ¶17. The ventilation plan included 40-foot, extended-cut perimeter mining. G. Ex. 12 at 38. The ventilation plan required a bleeder system to continuously dilute and move methane-air

⁵ Hasenstab testified that second mining is also known as retreat mining. Tr. 339; *see also*, Tr. 337 (“I agree that perimeter mining is second mining.”).

⁶ If perimeter cuts measure more than 20 feet from the nearest row of permanent roof supports, they are considered extended-depth cuts. Tr. 75.

⁷ The *Dictionary of Mining, Minerals, and Related Terms* (2d ed. 1997) defines “pillar” as “a column of coal . . . left to support the overlying strata or hanging wall in a mine.” Hasenstab credibly testified that the areas between the blocks were pillars. Tr. 334-35 (“[W]e all have agreed [it] is a pillar, albeit a very large pillar, and we are partially recovering from that pillar.”).

⁸ The *Dictionary of Mining, Minerals, and Related Terms* (2d ed. 1997) defines “subsidence” as “[t]he sudden sinking or gradual downward settling of the Earth’s surface with little or no horizontal motion. . . . Subsidence may be caused . . . by human activity such as subsurface mining or the pumping of oil or groundwater.”

⁹ The parties presented differing and contradictory evidence as to the precise definition of a room. *Compare* G. Ex. 1 at 5 (describing multiple rooms within a single block) *with* Tr. 357 (“A block is a room.”). However, the precise definition of a room is not material to this Decision.

mixtures and other gases, dusts, and fumes from a worked-out area away from active workings and into a return air course or to the surface of the mine. Tr. 83, 325; *see* 30 C.F.R.

§ 75.334(b)(1). The approved ventilation plan stated that it “contains the minimum ventilation system designed to control methane and respirable dust . . . in accordance with 30 C.F.R.

§ 75.370. The methods and practices are considered to be suitable for the mining systems employed at this mine, and upon [approval], shall be followed until such time that a revised method or methods are submitted for review and approved for use by the MSHA District Manager.” G. Ex. 12 at 1.

Under the ventilation plan, the bleeder system consisted of a single bleeder entry into each room and a bleeder connector—connecting the bleeder entry to the mined-out area—as well as stoppings and curtains to control the airflow through the area. Tr. 500; *see generally* G. Ex. 12.¹⁰ In order to evaluate the effectiveness of the bleeder system, the ventilation plan included evaluation points (“EPs”). Tr. 320; P. Ex. 30 at 9. Examination of the bleeder system involved traveling in each block to EPs to test the concentrations of methane and oxygen as well as the direction and quality of airflow at the EPs. Tr. 319-21; P. Ex. 30 at 8, 9; *see* 30 C.F.R. § 75.364(a)(2)(iii).

Although MSHA approved the ventilation plan in 2010, former District 8 supervising mining engineer and ventilation supervisor, Mark Eslinger,¹¹ credibly testified that “District 8 want[ed] to get rid of perimeter mining.” Tr. 416. Eslinger testified about multiple occasions since 2010 where MSHA employees of District 8 expressed the view that District 8 was attempting to “get rid” of perimeter mining, including conversations that Eslinger had with Stan Reider, an engineer in District 8, and Doug Herndon, the District 8 Roof Control Supervisor, who told Eslinger that District 8 was “going to say [perimeter mining]’s illegal.” Tr. 417. Eslinger also credibly testified that he served a 90-day detail in 2001 in Arlington, Virginia, where he had discussions that led him to believe “that people in MSHA headquarters want to get rid of perimeter mining.” Tr. 444. When pressed for names on extended cross-examination by the Secretary, Eslinger credibly testified that “I have had discussions with Kevin Stricklin[, the Administrator for Coal Mine Health and Safety (Tr. 470),] and he did not seem to be in favor of perimeter mining.” Tr. 445. On the other hand, Thomas Hasenstab, a mining engineer and the current superintendent for Knight Hawk, testified that he did not think that District Manager

¹⁰ Although Dennis Beiter, Respondent’s expert (*infra* note 15), testified that there were up to five bleeder entries into a room, the undersigned does not credit this testimony. Tr. 61-63. Beiter equivocated and was evasive on this point, stating that some of what he identified as bleeder entries “are not necessarily called bleeder entries, but they function as bleeder entries.” Tr. at 61. Beiter’s testimony also relies on the definition of bleeder entry from Policy P13-V-12, discussed further below in Section III.C. As explained below, Policy P13-V-12 improperly made a substantive change to regulations. Beiter’s reliance on Policy P13-V-12 further indicates the unreliability of Beiter’s testimony on this point.

¹¹ Eslinger worked at MSHA or its predecessor agency for 38 years. Based on his experience as an MSHA ventilation supervisor, registered professional engineer, committee member that rewrote subpart D (the §75.300 series) of the MSHA ventilation regulations from 1983 through the final rule in 1996, Eslinger was qualified, absent objection, as an expert witness in mine ventilation and regulation for the Contestant. Tr. 399-410.

Ronald Burns was trying to eliminate perimeter mining (Tr. 354), and Burns testified that he “ha[d] not told anybody that [he’s] trying to keep them from doing perimeter mining” (Tr. 212). The undersigned discounts this testimony from Hasenstab and Burns in light of the motivations of the witnesses and the totality of the evidence in the record. In his role as the superintendent for Knight Hawk, Hasenstab regularly interacts with District 8 and must maintain an ongoing relationship with its District Manager. Furthermore, it is irrelevant what Hasenstab thinks or Burns may have said; the important consideration is the actions, not the words, of MSHA and District Manager Burns.

On December 30, 2013, after the approval of the mine’s ventilation plan, Stricklin issued Program Policy Letter No. P13-V-12 (“PPL P13-V-12”) “to clarify and improve the examination and evaluation of bleeder systems by mine operators.” G. Ex. 13 at 1. PPL P13-V-12 states that “[i]t is anticipated that District Managers would not suggest changes to the relevant portions of existing approved ventilation plans absent conditions affecting the safety or health of miners that arise following the issuance and effective date of” PPL P13-V-12. *Id.* PPL P13-V-12 defines a bleeder system to “include[] the area from which pillars are wholly or partially recovered, bleeder entries, bleeder connectors, and all associated ventilation control devices that control the air movement through the area.” *Id.* at 2. PPL P13-V-12 also states that

some entries and/or rooms surrounding the pillared area may not have been routinely identified as traveled bleeder entries. These entries and/or rooms have been commonly referred to as primary internal airflow paths, open areas within the worked-out area, inner bleeders, mine foreman entries, part of the gob, or by other names. However, these entries and/or rooms around the pillared area are an inherent part of many bleeder systems and function as entries.

Id. at 3-4.

Contestant’s expert, Gary Hartsog,¹² credibly testified that PPL P13-V-12 changed the definition of a bleeder system. Specifically, Hartsog testified that PPL P13-V-12 included as part of the bleeder system “any pillar that’s left untouched Commonly, we don’t refer to certain pillars next to the gob or around the gob as being part of the bleeder system. It’s part of the gob.” Tr. 513. Hartsog testified that perimeter cuts “are in the abandoned area. Once those are mined, I would not expect them to be re-examined once left.” Tr. 480. Hartsog also credibly testified that PPL P13-V-12 redefined what constituted a bleeder entry. Tr. 493-94. He stated that PPL P13-V-12 “defines bleeder entries as being any entries that . . . are between or around blocks that have not been second mined. Before this [policy] document came out, that was not the case.” Tr. 523.

¹² Hartsog was qualified, absent objection, as an expert witness in mine ventilation for the Contestant based on his experience and education, including a Master of Science in mine engineering with a thesis in mine ventilation, his status as a registered professional engineer in West Virginia, and his experience teaching classes in mine ventilation, including bleeder systems, for groups such as state mine inspectors and engineers. Tr. 458-471; *see also* P. Ex. 36 (resume for Hartsog).

In 2017, Gateway North, operated by Peabody Gateway North Mining, LLC (“Peabody”), was also conducting perimeter mining under an approved ventilation plan that included 20-foot perimeter cuts. Tr. 159-160. When Gateway North submitted a plan for 40-foot perimeter cuts, Burns talked with MSHA Arlington headquarters and Pittsburgh Tech Support about performing a ventilation survey at Gateway North because “we had concerns that those 40-foot cuts could be ventilated properly.” Tr. 160.¹³ From February 8 through March 1, 2017, MSHA conducted a ventilation survey of the Gateway North Mine bleeder system and “determined that there [were] deficiencies in the design of perimeter mining.” Tr. 159; P. Ex. 34. As a result of the Gateway North investigation, MSHA found that

[a]ll methane concentrations detected were less than 0.1%; [a]ll oxygen concentrations detected were greater than 20.6%; [t]he outby room of the first pod was not ventilated; [t]he direction of airflow through most pods was difficult to discern; [i]n ten of the eighteen pods, the general direction of airflow was opposite the direction indicated in the mine ventilation plan; [t]here was no perceptible air movement found in almost all perimeter cuts probed; [t]he total ventilating pressure differential between the belt air course and the left side return entries at the front of the 2nd North Panel was less than 0.2 inches of water gauge; [and t]he pressure differential across MPL regulator was less than 0.1 inches of water gauge.”

P. Ex. 32 at 2.

Although MSHA did not revoke Gateway North’s extant ventilation plan, MSHA never approved a ventilation plan that included 40-foot perimeter cuts. Tr. 164-65. Shortly after the ventilation survey, Gateway North ceased conducting perimeter mining entirely. Tr. 223, 235-36, 246-47.

After conducting the ventilation survey at Gateway North, MSHA decided to conduct a ventilation survey at Viper Mine, another mine conducting perimeter mining, and at PEUG. Tr. 160. MSHA chose to inspect PEUG first because MSHA “felt the hazards may be more for Prairie Eagle than Viper.” Tr. 165. In particular, the Viper mine was only engaged in doing perimeter cuts around, not between blocks. Tr. 166, 239.¹⁴

¹³ Prior to working for District 8, Burns had never worked in or inspected any mines that had perimeter mining. Tr. 219.

¹⁴ After the ventilation survey at PEUG, MSHA conducted a ventilation survey at Viper Mine. Tr. 168, 212, 215. Burns testified that he was diligently working with Viper in order to approve 40-foot cuts based on good-faith negotiations. Tr. 216. However, the Secretary never provided evidence that Viper presented a situation different than Gateway North or PEUG to the point that it could satisfy District 8’s ventilation requirements for extended-cut perimeter mining.

On January 9 and 10, 2018, Respondent's expert, Dennis Beiter,¹⁵ headed a team from MSHA Tech Support¹⁶—Bradley R. Wurl, Diane M. Doyle-Coombs, Gaetano J. Iannacchione, A. Zharif MdAzmi, and George N. Aul—as well as John Hohn, District 8 ventilation specialist supervisor, and Michael Pritchard and Bernard Reynolds, District 8 ventilation specialists. G. Ex. 1. Hasenstab and Bill Jankousky, the corporate safety director for Knight Hawk, assisted the MSHA team on January 9, 2018. Tr. 297.

As part of the survey, the MSHA team measured air quality for methane and oxygen levels through handheld devices and bottle samples and used chemical smoke to determine airflow direction at various locations in the mine. G. Ex. 1 at 2. This included testing air quality and airflow in the perimeter cuts themselves. Beiter testified that perimeter mining offered a “unique opportunity” to conduct a survey in a pillared area because a survey team would not ordinarily be able to access a mined-out area in second mining, such as longwall mining or full pillar extraction. Tr. 563. Burns also testified that, when conducting a ventilation survey, “as a general rule,” one does not go into or analyze the ventilation in pillared areas. Tr. 222.

When conducting tests in unbolted perimeter cuts, the MSHA team would not themselves go into the unbolted perimeter cuts, which are areas where miners do not normally work or travel. Tr. 298-99. The team would send a probe into the cut with one tube that would collect an air sample and a second tube that would release smoke. This smoke was created using a chemical reaction that resulted in heat, making the smoke rise. Tr. 536-37. The MSHA team then attempted to observe the movement of the smoke from approximately 44 feet away in order to determine whether, and in what direction, there was air movement in the perimeter cut. Tr. 52-53, 257. To aid these attempts in the dimly lit perimeter cut, an MSHA representative would point a light from outside the perimeter cut into the cut, while a pair of lights on the probe itself also provided some level of illumination. Tr. 122, 520. The results of the chemical smoke tests were not always repeatable. Tr. 561-62.

While conducting the PEUG ventilation survey, the members of the MSHA team were not always in agreement as to the results of the chemical smoke tests. Tr. 543. Hasenstab testified about disagreements within the survey team regarding perceptible movement and a “general uncertainty in regards to movement or no movement” among MSHA personnel. Tr. 299. Hasenstab also testified that “there were several times [Doyle-Coombs from the MSHA survey team] said that there was perceptible movement and Mr. Beiter would come up and say no, that’s not movement.” Tr. 378. Hasenstab also credibly testified that during the ventilation survey:

There w[ere] definitely some varying interpretations of movement of the smoke. . . . I do recall Mr. Beiter arriving and very quickly making a

¹⁵ Through his experience, including earning a Bachelor of Science in mining engineering, working as a mining engineer for MSHA, and overseeing underground ventilation in a mine, Beiter qualified as an expert in underground mine ventilation for the Respondent. Tr. 32.

¹⁶ The technical support group provides consultative support for MSHA’s coal mine safety and health branch and metal and nonmetal safety and health branch.

determination that the current perimeter cut we were in when smoke was released was no perceptible movement. I disagreed with that interpretation of that particular cut. From that point forward, MSHA personnel—I'll just say they seemed to be very quick as to a determination if there was movement or not.

Tr. 349-50.

Similarly, Jankousky credibly testified that at least one member of the survey team, Doyle-Coombs, observed perceptible movement, but became visibly upset when Beiter overruled her observations and then directed that some of her notes be rewritten and some of her observations, or those of Knight Hawk's representatives, be changed in accordance with Beiter's interpretations. Tr. 378-79, 389-90, 567-68. Beiter also acknowledged that MSHA personnel were not able to come to a consensus as to the results of these smoke tests until he intervened and imposed his explanation of the "expected phenomenon." Tr. 104-105.

MSHA's survey team did not use tracer gas, a technique for determining air movement by releasing a certain gas in one area and then sampling for that gas in another area to assess how long it takes the tracer gas to move and to assess its concentration level. Tr. 533, 560. MSHA did not use tracer gas despite the fact that Beiter admitted that "[u]sually you would use tracer gas when we can't confirm that there is airflow." Tr. 573. Hartsog testified that he believed that the chemical smoke tests were not valid tests but "an attempt by District 8 to get rid of perimeter mining." Tr. 415. Based on the record evidence, further stated below, bolstering this opinion, including the unique and sui generis use of the smoke tests, the actions of Beiter during the ventilation survey that resulted in overruling other members of the survey team, and the fact that the smoke tests were at times unrepeatable, the undersigned finds Hartsog's expert opinion to be persuasive.

District Manager Burns testified about three particular concerns that he had with regard to perimeter mining as a result of the PEUG ventilation survey and Beiter's subsequent report. First, Burns was concerned about the possibility of a spontaneous combustion¹⁷ event occurring due to a general lack of ventilation. Tr. 239. Although at the time of the November 14, 2018 plan revocation there had been no spontaneous combustion events at PEUG (G. Ex. 2 at 6), Burns relied on heating events that he identified as spontaneous combustion events, and he was focused on preventing a first spontaneous combustion event from occurring. Tr. 174-75.

Burns' second concern involved the possibility of the release of methane from a roof fall due to the fact that the perimeter cuts themselves were unbolted. Tr. 182. Hartsog testified that, if there were a roof fall, any methane liberated in the roof fall would be effectively "diluted and rendered harmless by the ventilation system." Tr. 488; *see also* Tr. 149. The ventilation survey, which found roof falls in some perimeter cuts but no elevated levels of methane, bolsters this testimony. G. Ex. 18-1.

¹⁷ The *Dictionary of Mining, Minerals, and Related Terms* (2d ed. 1997) defines "spontaneous combustion" as "[t]he heating and slow combustion of coal and coaly materials initiated by the absorption of oxygen."

Burns' third concern dealt with methane and oxygen levels within the general area of the perimeter cuts. Tr. 177. Burns based this concern on a single bottle sample showing a concentration of methane of 4.7% where a roof support drill hole penetrated a "bleeder" in the roof of an active area not subject to perimeter mining. Burns relied on this event as "evidence that methane may be encountered at any time." Tr. 177; *see also* Tr. 149. Under the approved ventilation plan, the methane from the bleeder was effectively diluted to less dangerous levels. Tr. 149. Additionally, Hartsog testified that there were no ignition sources in the mine that might contribute to the dangers of methane buildup. Tr. 492. The Secretary failed to rebut this testimony.

On January 29, 2018, Beiter and Burns met with, and gave the preliminary results of the survey to, Hasenstab, Jankousky, Dale Winter, Kyle Griggs, Bernie Kern, Brian Wallace, and other staff from Knight Hawk. Tr. 93, 290-91. At this meeting, MSHA showed Knight Hawk maps of the mine indicating the findings of the ventilation survey, including levels of methane and oxygen as well as the presence and direction of airflow at specific locations. Tr. 167. These maps were introduced into evidence as G. Ex. 18. After reviewing Beiter's report, Burns determined that there were deficiencies in Knight Hawk's ventilation plan and the bleeder system was not adequate and effective to ventilate the mine. Tr. 171-72. Burns requested that Knight Hawk submit a revised ventilation plan to address the deficiencies. Tr. 168.

On February 8, 2018, Beiter and the MSHA team drafted an internal report summarizing the results of the survey. G. Ex. 1. Concerning air quality, the report stated that the highest concentration of methane was 0.12% and that the lowest concentration of oxygen was 20.2%. *Id.* at 1-2. These results were well within the allowable limit of methane below 1% under 30 C.F.R. § 75.323(c)(1), and the allowable minimum level of oxygen above 19.5% under 30 C.F.R. § 75.321(b). *See also* G. Ex. 16 at 2. Both Beiter and Hasenstab testified that the mine had a low oxidation rate. Tr. 98, 326. The oxidation of coal results in a reduction in the level of oxygen. Tr. 510.

Concerning air movement, the report set forth several alleged deficiencies, including: 1) "The direction of net airflow direction through many blocks was difficult to discern; in some blocks it could not be determined"; 2) "No perceptible air movement was observed in approximately 57 of the perimeter cuts examined"; 3) "The air directions through the rooms . . . were not always consistent throughout the length of the room, nor with the net direction of airflow through the block"; 4) the "[d]irection of air movement was not always consistent in adjacent bleeder entries within a block, or the entire length of individual bleeder entries"; and 5) "[n]o perceptible air movement was observed in portions of bleeder entries in a few locations." G. Ex. 1 at 2-3.¹⁸ The report and Beiter's testimony discounted air movement observed in perimeter cuts as a result of "eddy currents created by air flowing past the front of the cut." G. Ex. 1 at 2; Tr. 81. Beiter opined that he did not "think eddy current[s] would be an appropriate means of actually providing ventilation for that extended cut because the eddy currents are depend[ent] upon the amount of airflow moving by [the cut] and there is nothing in the ventilation plan that indicated there had to be a certain amount of airflow or certain velocity

¹⁸ The bleeder entries referenced were those redefined in Policy P13-V-12. G. Ex. 13 at 3-4.

of airflow in the airflow moving in that room in front of there.” Tr. 81. The previously approved ventilation plan required 7,000 cubic feet per minute of airflow over the continuous miner during perimeter mining. G. Ex. 12 at 7; G. Ex. 1 at 6. The previously approved ventilation plan did not require any specific amount of airflow across perimeter cuts. G. Ex. 12. Nor is there any evidence that MSHA suggested any minimum amount of airflow across perimeter cuts during negotiations with Knight Hawk or listed this as a deficiency in the approved ventilation plan.

On March 13, 2018, Knight Hawk sent a letter in response to the concerns raised by MSHA in the January 29, 2018 meeting and those raised in Beiter’s February 8 report, which Knight Hawk did not receive until March 7, 2018. G. Ex. 2. According to Knight Hawk, the short period of time since the receipt of the report limited its ability to comment, or to retain an expert, if further evaluation became necessary. G. Ex. 2 at 6. Knight Hawk alleged that Beiter’s February 8 report contained opinion and speculation and used “assumed definitions and designation” of the terms “pillared areas, bleeder entries, partial recovery second mining, and return air split” as well as differing interpretations among MSHA investigators as to the definition of “no perceptible movement.” *Id.* at 7. The March 13 letter also stated that the February 8 report contained conflicting information and inaccuracies between the report and the sketches of the ventilation plan. *Id.* at 7.

Knight Hawk’s March 13 letter also documented, with extensive detail, the safety record of perimeter mining and established that “[p]erimeter mining results in a lower miner exposure to respirable dust, lower citations, a lower injury rate, a lower exposure to noise, and a lower exposure to red zone/danger zone” and did not involve roof bolting in most perimeter cuts, eliminating all hazards associated with that process. *Id.* at 2. The letter further noted that the mine had never experienced any spontaneous combustion events. *Id.* at 6.

Testimony bolstered the safety benefits of perimeter mining. Burns conceded that perimeter mining “is a safe form of mining” and provides less exposure to certain hazards released into the air than other forms of mining. Tr. 173. Hasenstab agreed that the previously approved ventilation plan has “significant” safety benefits. Tr. 337. Jankousky echoed this sentiment. Tr. at 370-71. Contestant’s expert Hartsog testified that perimeter mining was not only a safe form of mining, but that it was safer than continuous mining. P. Ex. 37 at 2; *see also* Tr. 371 (Jankousky) (“Definitely perimeter mining is safer.”). Burns admitted that perimeter mining was a safer form of second mining. Tr. 224.

On April 12, 2018, MSHA sent a letter to Knight Hawk that listed the alleged deficiencies in the mine’s ventilation plan for the first time. G. Ex. 3. Although this letter does not reference Knight Hawk’s March 13 letter, Burns testified that he considered that letter before sending the April 12 letter. Tr. 136-37. The undersigned discredits this testimony. Burns’ April 12 response belies actual consideration of and fails to specifically address the safety and health benefits of perimeter mining or whether revocation of the previously approved ventilation plan would result in less protection under the interim plan. *See generally* G. Ex. 3. As Mine Superintendent Hasenstab noted in his April 22 correspondence with Burns, “[w]e have attached [our March 13] letter as we are currently unsure if you have received and/or read the letter because your letter did not refer to it. We believe that it sets out the many safety and health

benefits of our current mining system that you should consider as well as supporting the mine specific nature of the plan.” G. Ex. 4 at 1.

Apart from self-serving trial testimony elicited in an attempt to show that MSHA considered the important safety and health advantages of perimeter mining and did not summarily discount them and leave them unanswered, there is no evidence during negotiations that Burns actually addressed or expressly considered such arguments that he acknowledged at trial were irrelevant. Rather, Burns testified that such purportedly considered arguments were not relevant considerations during his ventilation plan review because they dealt with mining conditions while the perimeter cuts were made (Tr. 173-74), and did not address MSHA’s specified deficiencies that the bleeder system was being adequately ventilated, examined and evaluated. Tr. 171-72. According to Burns, his concern was “after the bleeder system was established, after they left there.” Tr. 174.

Burns failed to explain how or why he would actually consider safety and health concerns that he deemed irrelevant. Furthermore, the Citation relied on § 75.334(b)(1), which concerns the bleeder system during pillar recovery, not “after they left there.” Tr. 174. The undersigned remains unconvinced by Burns’ post hoc rationalization at trial, which was never explained to Contestant during negotiations. In these circumstances, the undersigned finds Burns’ testimony that he actually considered the significant safety and health protections afforded by perimeter mining under the revoked plan to be disingenuous and not credible.

The April 12 letter lists six alleged deficiencies in the mine’s previously approved ventilation plan:

- The design 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.”
- The method to control air movement to ventilate the unbolted extended-depth perimeter cuts within the pillared area is not provided.
- 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.
- The air direction at EP locations is not shown in the ventilation plan drawings or on the ventilation map.
- The use of permanent ventilation control devices, such as regulators and stoppings, to control air movement through the worked-out area would be prudent. Temporary control devices such as curtains are more susceptible to damage

and/or inadvertent change than permanent control devices.^[19]

- The specified means of evaluation of the worked-out area does not provide sufficient information to determine the effectiveness of the bleeder system.

G. Ex. 3 at 1. This letter also indicated that a bottle sample, taken on March 1, 2018, found a concentration of methane of 4.7% where a roof support drill hole penetrated a “bleeder” in the roof of an active area not subject to perimeter mining, “which is evidence that methane may be encountered at any time.” *Id.*; see also Tr. 149. Under the approved ventilation plan, that methane was effectively diluted to less dangerous levels by the air used to ventilate the section. Tr. 149.

On April 22, 2018, Knight Hawk sent another letter to MSHA. G. Ex. 4. Knight Hawk contended that the ventilation system in the worked out area “does not fit readily into the term ‘bleeder’ in 30 C.F.R. § 75.334(b) because the area at issue does not involve ‘pillar recovery.’” *Id.* at 2 n.2. Knight Hawk did not advance this position at the hearing or in its post-hearing brief, and the undersigned rejects it.

Addressing the alleged deficiencies listed in MSHA’s April 12 letter, Knight Hawk explained how the approved ventilation plan does indicate airflow direction and ventilation controls such as stoppings, regulators, and curtains. *Id.* at 2. Furthermore, Knight Hawk explained that the ventilation plan was working effectively and preventing the accumulation of gases, dusts, or fumes, as shown by the low levels of methane. *Id.* Knight Hawk also addressed the concentration of methane found on March 1, 2018, stating that the bleeder was penetrated in an active unit—not during perimeter mining—and reiterated that no roof penetration occurs during perimeter mining. *Id.* at 1.

In its April 22 letter, Knight Hawk also stated that “[t]he ability to continue to use the current plan is consistent with MSHA Program Policy Letter No. P13-V-12, which addresses the evaluation of bleeder systems and states, ‘[i]t is anticipated that District Managers would not suggest changes to the relevant portions of existing approved ventilation plans absent conditions affecting the safety or health of miners.’” *Id.* at 2. Knight Hawk’s April 22 letter also reiterated the contention that the definition of “perceptible movement” “varied among the MSHA personnel” and different interpretations of “no perceptible movement” “was evident and apparent” among the MSHA investigation team. *Id.* at 3. This letter closed by stating that “[i]t appears we may be at an impasse in discussions about the plan.” *Id.* at 4.

¹⁹ MSHA later removed this alleged deficiency as a violation of a mandatory regulation and acknowledged it as prudent, but not mandatory. G. Ex. 9.

On May 3, 2018, MSHA responded to Knight Hawk's April 22 letter. G. Ex. 5. MSHA reiterated the six alleged deficiencies identified in its April 12 letter, but, for the first time, included citations to regulations for each alleged deficiency. Specifically, the letter alleged that:

- the bleeder system does not control the airflow direction through all blocks, including in the "pillared area," citing 30 C.F.R. §§ 75.334(b)(1), 75.334(c)(4), 75.371(bb), and 75.372(b)(9);
- the method to control air movement to ventilate the perimeter cuts is not provided, citing 30 C.F.R. §§ 75.334(b)(1), 75.334(c)(4), 75.371(bb), and 75.372(b)(9);
- the airflow direction is not shown through the blocks, citing 30 C.F.R. §§ 75.364(a)(2)(iii) and 75.372(b)(9);
- the airflow direction at EPs is not shown on the ventilation plan, citing 30 C.F.R. §§ 75.364(a)(2)(iii), 75.371(y), 75.371(z), and 75.372(b)(9);
- the plan should use permanent ventilation control devices rather than temporary ones, citing 30 C.F.R. §§ 75.333(b)(5) and 75.334(c)(4); and
- the specified means of evaluation do not provide sufficient information to determine the effectiveness of the bleeder system, citing 30 C.F.R. §§ 75.334, 75.364(a)(2)(iii) and (iv), and 75.371(y) and (z).

The letter ended by granting Knight Hawk two weeks to submit a ventilation plan in response to the alleged deficiencies.²⁰

On May 15, 2018, Knight Hawk responded and addressed each of the alleged deficiencies and cited regulations in detail. G. Ex. 6. Knight Hawk's May 15 letter goes into great depth referencing each cited regulation, and even addresses those regulations that are not applicable. This letter further elucidated Knight Hawk's earlier contentions, stating that: 1) the current ventilation plan dilutes and moves methane, other gases, dust, and fumes out of the worked-out area; 2) controls such as stoppings, regulators, curtains, and connectors are illustrated on the ventilation plan; and 3) the ventilation map indicates the airflow direction within the entirety of the mine. Knight Hawk offered that it would also add more statements to the plan to help make the exact airflow patterns more clear, such as, "[t]he direction of airflow for the worked[-]out area in the 5W/3N/2ME is from EP4 to EP3 to EP2 to EP1." *Id.* Knight Hawk also argued that the mine's ventilation system does not fit within the definition of "bleeder" under 30 C.F.R. § 75.334(b) because the area does not involve "pillar recovery." *Id.* at

²⁰ MSHA originally granted Knight Hawk a two-week grace period for abatement, beginning on May 3, 2018. Although the record does not indicate that MSHA explicitly granted Knight Hawk extensions, MSHA did not issue the technical citation until November 14, 2018.

5.²¹ Finally, Knight Hawk emphasized that when MSHA “Tech Support performed their evaluation of airflow in the mined out entries,” they entered “barricaded/dangered off” areas “where miners do not normally travel.” *Id.* at 7.

On June 7, 2018, MSHA responded to Knight Hawk’s May 15 rejoinder and alleged that Knight Hawk “**did not** address the noted deficiencies” and “did not provide any other revisions to the currently approved ventilation plan to address the 30 CFR standards.” G. Ex. 7 at 1. MSHA then offered its explanation of why Knight Hawk’s responses were inadequate and relied on the January 2018 ventilation survey and § 75.334(b)(1) to allege for the first time that the bleeder system was not controlling the air passing through the area. *Id.* The letter specifically emphasized that “[t]he location of current ventilating devices does not control the air movement **throughout the entire** worked-out area” and “[t]he worked-out area is not ventilated **throughout** the entire pillared area, as determined by the ventilation survey conducted in January 2018.” *Id.* at 2. The word “throughout” is not found in the regulations cited in MSHA’s May 8 letter, but it does appear in 30 C.F.R. § 75.334(a)(1), a different regulation than what the Citation relies on. Despite Burns’ earlier May 3 letter citing specific regulations, Burns testified that the use and emphasis of the word “throughout” in his June 7 letter was not referring to any specific regulation, but it “was just my term there to make sure they understand that I’m not just talking about the mouth [of a panel]. I mean from the active working section to the mouth of the panel. Throughout the entire area has got to be done.” Tr. 205. The undersigned does not credit this testimony. Rather, Hasenstab credibly testified that the term “throughout” does not capture the intent of the plain meaning of the regulation, “I believed we complied in so far as the intent of the law is to ventilate through the worked out area, not throughout.” Tr. 335.

MSHA’s June 7 letter also rejected Knight Hawk’s offer to add statements describing the direction of airflow. G. Ex. 7. Specifically, the letter stated that “[s]tatements on maps are not a substitute for showing the actual direction of airflow.” *Id.* at 1. The letter provided no support for this assertion. At the hearing, Burns testified that written statements were not adequate because “the way we read the regulation in plain language it says you show the direction on the maps and you show the direction at EP[s].” Tr. 204. Hartsog testified that he had seen approved ventilation plans that described airflow direction with words rather than arrows. Tr. 501-02.

After the June 7 letter, Knight Hawk spoke with MSHA personnel by conference call on June 14 and in person on June 19, 2018. G. Ex. 8. Burns could not remember or testify about either discussion. Tr. 206. At these meetings, two alternative methods for ventilating perimeter cuts were discussed: 1) connecting two perimeter cuts from opposite sides by holing together angled cuts with straight cuts so air would flow through there, and 2) “sawtooth” cutting. Tr. 329-31. Knight Hawk rejected connecting angled and straight perimeter cuts because roof control and subsidence issues were unfavorable, the geometry would not work with regard to crosscut distances, and the combined cuts would exceed 40 feet. Tr. 332-33, 362. At the time, the term

²¹ As noted, the undersigned rejects this pre-hearing position. As found above, perimeter mining involves second mining and pillar recovery. Consequently, perimeter mining at the mine squarely falls under § 75.334(b)(1) and its requirements that “[d]uring pillar recovery a bleeder system shall be used.”

“sawtooth” cutting was never defined by MSHA, nor did Knight Hawk ask for clarification of the term. Tr. 333, 344.²²

On July 5, 2018, Knight Hawk sent a letter in response to MSHA’s June 7 letter and the subsequent discussions with MSHA personnel. G. Ex. 8. Knight Hawk opined that its May 15 letter offered changes to the currently approved ventilation plan that addressed the alleged deficiencies and the parties were at apparent impasse. In anticipation of MSHA’s issuance of a technical citation, Knight Hawk requested that abatement be extended until an ALJ ruled on the validity of the existing plan because the mine “has operated safely and effectively under the current plan since 2007 and it provides significant safety benefits.” *Id.* Otherwise, Knight Hawk requested discussions about what was acceptable to abate the technical citation and operate under an interim ventilation plan during litigation. *Id.*

On October 22, 2018, MSHA sent another letter to Knight Hawk. G. Ex. 9. This letter again laid out the alleged deficiencies, but listed only five deficiencies. *Id.* MSHA revised one of the previously identified deficiencies—the alleged requirement that the ventilation plan use permanent rather than temporary ventilation controls—as “prudent” rather than mandatory. Burns’ letter stated that “[a]bsent modification of the ventilation plan to provide the miner protection outlined above, I will revoke your currently approved plan on November 12, 2018.” *Id.* at 3. The letter concluded that MSHA “will be more than happy to discuss a plan, which would be consistent with the provisions addressed above[, which] would permit mining to be conducted until a resolution is reached.” *Id.*

The record establishes that MSHA did not consider the experiential opinions and learning from District 8’s own ventilation specialists and inspectors intimately familiar with the mine during the plan revocation process. District Manager Burns, who was generally unfamiliar with and had limited experience with perimeter mining (Tr. 240-41), confirmed that he did not talk to or seek input from his own inspectors during the plan revocation process, despite the fact that his ventilation specialists would regularly perform six-month plan reviews on site and review mine maps to identify problems and ensure the plan was still “adequate.” Tr. 155-58, 233-34. During such reviews, “[a]n evaluation of the bleeder system was done in accordance with what the plan was as far as one of the evaluation points. We did not go to any area that the mine examiners would not go to during that time.” Tr. 158. District 8 ventilation specialist, Mike Pritchard, regularly performed such ventilation plan reviews. Tr. 383. Specifically, “he walks the air courses, walks intakes, returns, bleeders, and he . . . evaluates the bleeders.” Tr. 387. In January 2019, shortly after revocation of the plan, safety director Jankousky discussed perimeter mining and MSHA’s revocation of the ventilation plan with Pritchard during an underground, six-month

²² Hasenstab testified that sawtooth cutting involved making perimeter cuts where two of them intersected at the back end, although the design and layout would be much different than holing perimeter cuts together. Tr. 359.

ventilation review. Tr. 381-82. Pritchard told Jankousky that he did not see anything wrong with the revoked system of ventilation for perimeter mining. Tr. 381, 383, 385-86.²³

By attachment to letter dated November 5 and attached revisions to letter dated November 6, 2018, Knight Hawk submitted an interim ventilation plan that did not include perimeter mining. G. Ex. 15; *compare* G. Ex. 12 with G. Ex. 15. By separate letters both dated November 14, 2018, MSHA approved the interim plan (G. Ex. 15), which does not permit perimeter mining (Tr. 354), and formally revoked the mine's ventilation plan, which included perimeter mining (G. Ex. 10). On November 14, 2018, MSHA also issued the technical citation at issue under 30 C.F.R. § 75.370(a)(1) for mining without a ventilation plan approved by the District Manager. G. Ex. 11.²⁴ Under questioning from the undersigned, Burns verified that nothing had changed at all since 2010, except for the ventilation survey. Tr. 240-41.²⁵

²³ Former District 8 ventilation supervisor Eslinger testified based on extensive experience with numerous district managers that a district manager would consult with his own ventilation specialists when contemplating revocation of a ventilation plan, and could not recall any instance in which MSHA "just yanked a plan on somebody, disapproved a plan." Tr. 424-26. When asked by the undersigned whether a district manager ever consulted with him about revoking a perimeter mining plan, Eslinger testified:

When Robert Phillips became the district manager in about 2007, he made some comments about perimeter mining. And he expressed his desire to get rid [of] and eliminate perimeter mining. He brought up some issues. I responded to some of the issues. The roof control supervisor responded to some of the issues. We had some discussions. The plans for perimeter mining were not revoked while I was the supervisor. We had some new mines going in, and they had a heck of the time trying to get perimeter mining approved, but we did not revoke any of the plans for the mines that had perimeter mining in them.

Tr. 425.

²⁴ When MSHA first issued the citation, the citation number used was already in use for another violation, and MSHA modified the original citation to change the citation number. G. Ex. 11; Tr. 267.

²⁵ Q. What changed, if anything, between approval of the plan and revocation?

A. We done our investigation and found out that areas of the mine was not being ventilated. And so the plan needed to address it at that time. Before we done the investigation in 2018 for them and 2017 for Prairie Eagle. I don't think we had ever done any kind of same type of ventilation survey on perimeter mining. When I got there in 2015, and this was like two months after I had been there, maybe less than two months, we approved the plan. Yeah, I knew—I had questions about it, about perimeter mining because I had never seen it before. I was used to from eastern Kentucky, full pillar

(continued...)

Subsequent to the revocation of the mine's ventilation plan, two alleged spontaneous combustion events occurred at the mine, one underground and one on the surface. Tr. 175, 376, 492, 512. The evidence as to the cause of these events was inconclusive. Tr. 376. Having considered arguments and evidence as to the progeny of the events, the undersigned credits Jankousky's conclusion that it could not be determined whether the events were spontaneous combustion. Tr. 376. Furthermore, perimeter mining was not involved in either event, and both events occurred after the revocation of the ventilation plan. Tr. 225. Consequently, the undersigned finds that these events have little material bearing on resolution of the issues presented.

III. LEGAL PRINCIPLES AND ANALYSIS

The Secretary contends that the sole issue in this case is whether MSHA acted arbitrarily and capriciously when it revoked the mine's previously approved ventilation plan. Tr. 11. Knight Hawk contends, instead, that there are four issues: 1) whether the previously approved ventilation plan was suitable; 2) whether the revocation was improper and contrary to law; 3) what is the Secretary's burden of proof in this matter; and 4) how should the decisions 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 *Signal Peak Energy, LLC*, 40 FMSHRC 1059 (Aug. 2018), *appeal docketed*, No. 18-72837 (9th Cir. 2018), be considered with *Peabody Coal Co.*, 18 FMSHRC 686 (1996). Tr. 11.

As noted in the undersigned's Order Denying the Secretary of Labor's Motion in *Limine*, Commission case law regarding the standard of review applicable to determining whether a district manager's rejection of a ventilation plan appears to be in a state of flux. 41 FMSHRC 217 (Mar. 2019) (ALJ). MSHA alleges that Knight Hawk operated without a suitable ventilation

²⁵ (...continued)

extraction or something, but at that time, I did not know enough about this to know exactly how I guess the ventilation system and everything would work or where it would not be working. So when we done the ventilation survey starting at Gateway North, we found out a lot. *I went through this and developing—not developing concerns, but looking at concerns we found that yes there is areas that's not ventilated.* That's what happened between when this was approved and when we revoked.

Tr. 240-41 (emphasis added). The undersigned finds Burns' verbal leak that they were "developing . . . concerns" to be telling. This verbal leak adds credence to the inference that Burns' concerns arose out of a preconception of what he expected to find at PEUG after Gateway North, rather than treating PEUG independently, and to the inference that MSHA wanted to get rid of perimeter mining.

plan as required by § 303(o) of the Mine Act. 30 U.S.C. § 863(o);²⁶ *see also Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406-07 (D.C. Cir. 1976). If I were working from a clean slate, I would find that the burden of proof that lies with the Secretary is the same as any violation the Secretary brings before this tribunal. It is a burden of proof the Secretary must satisfy before this fact-finding body and not a standard of review as if the undersigned merely functions as an appellate body for the Secretary's decision. As the Court of Appeals for the District of Columbia found in *Zeigler*,²⁷ ventilation plans are enforceable as mandatory standards. 536 F.2d at 409. Consequently, during the enforcement of such a plan, the Secretary would have to satisfy the same burden for a violation of § 303(o) as any other mandatory standard found in the Mine Act. *Id.* (“[W]e conclude that requirements of duly adopted ventilation plans are generally enforceable under § 104(b) and the statute's other enforcement provisions.”). The revocation of a ventilation plan in its entirety should not provide a means for the Secretary to avoid this burden. I would reject the position that the Commission must defer to the Secretary because to act otherwise would be to “displace entirely the expertise of the Secretary.” *Mach Mining, LLC v. MSHA*, 728 F.3d 643, 658 (7th Cir. 2013) (*Mach Mining II*), *aff'ing*, *Mach Mining*, 34 FMSHRC 1784 (Aug. 2012) (*Mach Mining I*). This position gives short shrift to the expertise inherent in the Commission itself. 30 U.S.C. § 823(a) (“The Commission shall consist of five members . . . who by reason of training, education, or experience are qualified to carry out the functions of the Commission.”).²⁸

If I were working from a clean slate, I would apply the standard as articulated in *Peabody*. Under this standard, the Secretary bears the burden of proof to establish by a preponderance of the evidence that “(1) the previously approved [ventilation] plan is no longer suitable to the conditions and the mining system of the coal mine, and (2) the new plan provision is suitable.” 18 FMSHRC at 690. To be blunt, the Secretary utterly fails to satisfy this burden. As more fully explained below, the Secretary relies on evidence—the smoke tests and the ventilation survey overall—that I find unreliable. Of note, the Secretary failed to establish the propriety or reliability of the smoke tests when used in second mining, and substantial evidence demonstrated that the smoke tests as conducted at the mine were unreliable. Tr. 52-53, 561-62.

²⁶ “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.” 30 U.S.C. § 863(o).

²⁷ Although *Zeigler* did not explicitly adopt the arbitrary and capricious standard, *Zeigler* began the path that ultimately led to the application of the arbitrary and capricious standard of review seen in *Mach Mining, LLC v. MSHA*, 728 F.3d 643, 657-58 (7th Cir. 2013) (*Mach Mining II*), *aff'ing*, *Mach Mining*, 34 FMSHRC 1784 (Aug. 2012) (*Mach Mining I*).

²⁸ I see the same flaws inherent in *Martin v. Occupational Health & Review Commission*, 499 U.S. 144, 152-53 (1991) (“[T]he Secretary is more likely to develop the expertise relevant to assessing the effect of particular regulatory interpretation.”).

Credible evidence demonstrated that the ventilation at the mine effectively ventilates the mine according to 30 C.F.R. § 75.334(b)(1). This evidence includes levels of methane and oxygen that were described as “excellent.” Tr. 428. Furthermore, I found the Secretary’s expert to be, by and large, unreliable. He was evasive and frequently avoided answering questions directly.

Turning to the merits of Burns’ three concerns regarding perimeter mining, the concentrations of methane and oxygen established that the previously approved ventilation plan continuously diluted and moved methane-air mixtures and other gases, dusts, and fumes from the worked-out area. G. Ex. 1 at 1-2. The evidence also established that, prior to the revocation of the ventilation plan, PEUG did not experience any spontaneous combustion events. G. Ex. 2 at 6. Finally, the plan adequately mitigates any risk of a roof fall, and testimony established that a hypothetical roof fall would be effectively rendered harmless. Tr. 488. In other words, Burns’ concerns were unwarranted. The record demonstrates that the previously approved plan continues to be suitable to the conditions and mining system of the mine. Consequently, the Secretary failed to satisfy by a preponderance of the evidence that Knight Hawk’s previously approved ventilation plan was unsuitable.

However, the undersigned is not working from a clean slate. In *Signal Peak*, the Commission split 2-2 on what standard of review applies when considering an MSHA district manager’s revocation of a ventilation plan, creating no precedential decision.²⁹ 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*, 40 FMSHRC at 1064.³⁰ They relied on *Mach Mining*, 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 under an arbitrary and capricious standard, and on *Prairie State II*, 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*, 40 FMSHRC at 1074. They opined that *Mach Mining I* and *Prairie State I* were wrongly decided; however, they acknowledged that those Commission decisions were upheld by the

²⁹ Accordingly, the judge’s decision to apply the arbitrary and capricious standard of review was affirmed under *Pennsylvania Electric Co.*, 12 FMSHRC 1652 (Aug. 1990), *aff’d on other grounds*, 969 F.2d 1501 (3d Cir. 1992).

³⁰ Generally, under the arbitrary and capricious standard of review, a district manager’s decision will 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*, 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).

circuit courts as permissible interpretations. *Id.* at n.10.³¹ In the end, Commissioners Young and Althen stated that it was unnecessary to reject such circuit court precedent because substantial evidence did not support rejection of the operator’s proposed ventilation plan when analyzed under the safety standard at issue. They observed that the Commission has taken conflicting positions on the Secretary’s burden of proof, comparing the *Peabody* and *C.W. Mining*, 18 FMSHRC 1840 (Oct. 1996), cases cited by Contestant in his Response, with both the *Mach Mining* and *Prairie State I* cases cited by the Secretary in his Motion. *Signal Peak*, 40 FMSHRC at 1075-76.³²

Thus, given the apparent evolving Commission precedent concerning the appropriate standard of review for evaluating a district manager’s revocation of a mine’s ventilation plan, the recent change in Commission composition,³³ and the prerogative of the new Commission to rationally explain reversal of existing precedent,³⁴ even in light of appellate court or Supreme

³¹ 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.

³² *But see Mach Mining II*, 728 F.3d at 658 n.21, cursorily 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. In doing so, however, the court in *Mach Mining II* failed to require the Commission to give any reasoned explanation as to its change in interpretation. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (*FCC*) (“An agency may not . . . depart from a prior policy *sub silentio* or simply disregard rules that are still on the books. And of course the agency must show that there are good reasons for the new policy.”). I also reject the notion that the more deferential standard of review is required, rather than simply permissible, under the statute. As noted above, the court in *Mach Mining II* based its finding on the assumption that “[t]o permit the Commission to substitute its view for that of the Secretary simply would displace the expertise of the Secretary,” an assumption that discounts the expertise of the Commission itself. *Mach Mining II*, 728 F.3d at 658.

³³ 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.

³⁴ *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) (“As 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.”).

Court affirmation of existing precedent,³⁵ the undersigned concludes that the most recent Commission precedent follows the permissible interpretation that applies an arbitrary and capricious standard in these circumstances. Although the Commission split 2-2 in *Signal Peak*, creating no precedential decision and leaving the judge's decision below in place, this is a permissible interpretation and one that the Commission may, upon a reasoned explanation, change. *FCC*, 556 U.S. at 514.

Accordingly, applying the arbitrary and capricious standard as a permissible interpretation, the Secretary must establish that MSHA's revocation of the mine's previously approved and presumptively suitable ventilation plan was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law ("arbitrary and capricious"). 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Prairie State*, 792 F.3d at 82; *Mach Mining I*, 34 FMSHRC at 1790.

It is of critical note that the agency bears the burden of articulating a "rational connection between the facts found and the choice made." *Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). This inquiry involves "examining the reasons for agency decisions—or, as the case may be, the absence of such reasons." *Judulang v. Holder*, 565 U.S. 42, 52-53 (2011); see *FCC*, 556 U.S. at 515 (noting "the requirement that an agency provide reasoned explanation for its action").

As delineated in *Motor Vehicle Mfrs.*, an agency action is arbitrary and capricious when it: 1) relies on factors that were not intended to be considered; 2) entirely failed to consider an important aspect of the problem; 3) offered an explanation for its decision that runs counter to the evidence before the agency; or 4) is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. 463 U.S. at 43. MSHA acted arbitrarily and capriciously under these factors.

A. MSHA relied on inappropriate factors.

MSHA revoked the previously approved ventilation plan by technical citation citing five major deficiencies that Knight Hawk allegedly failed to address or include in a modified or revised plan submission. MSHA grounded the alleged deficiencies in mandatory ventilation standards set forth in 30 C.F.R. §§ 75.334(b)(1); 75.334(c)(4); 75.364 (a)(2)(iii) and (iv); 75.371(y), (z), and (bb); and 75.372(b)(9). Although the Secretary mentions seven other

³⁵ 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)).

regulations, discussed further below in Section III.C, the citation largely rests on § 75.334(b)(1) to revoke the ventilation plan.³⁶ This regulation states that

During pillar recovery a bleeder system shall be used to control the air passing through the area and to continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area away from active workings and into a return air course or to the surface of the mine.

30 C.F.R. § 75.334(b)(1). This regulation has two requirements: 1) that the bleeder system “control the air passing through the area”; and 2) that the bleeder system “continuously dilute and move methane-air mixtures and other gases, dusts, and fumes from the worked-out area.” There is no question that the mine has low levels of methane and adequate levels of oxygen. G. Ex. 1 at 1-2; Tr. 25, 70, 141-42, 296, 421, 485-86. However, MSHA alleges that the bleeder system fails to control the air passing through the mine. *See, e.g.*, G. Ex. 9 at 1. To support this allegation, MSHA relies on the ventilation survey. G. Ex. 3 at 1. This included the use of chemical smoke tests inside the extended-depth perimeter cuts. Tr. 120-21.

As noted above, an agency action is arbitrary and capricious if it relies on factors that were not intended to be relied upon. *Motor Vehicle Mfrs.*, 462 U.S. at 43. Here, MSHA improperly relied on two factors: unreliable smoke tests conducted inside the perimeter cuts, and a bias against perimeter mining that is supported by substantial record evidence.

In using the smoke tests inside the perimeter cuts, MSHA gathered data that would not have been considered in other forms of second mining or in the consideration of a bleeder system under § 75.334(b)(1). Tr. 559-60, 573. As Respondent’s expert Beiter repeatedly testified, the ability to go into a perimeter cut presented a “unique opportunity” because a survey team would not be able to access a mined-out area in second mining. Tr. 563; *see also* Tr. 50, 117, 559, 571. As Beiter further testified, because a survey team could not access a mined-out area in longwall or full pillar recovery mining, a ventilation survey would only include taking measurements from the crosscut leading up to and coming out of the mined-out area. Tr. 116. Beiter agreed that he had “never done a ventilation survey actually in a pillared area, either full extraction, partial extraction, or longwall.” Tr. 116-17. Burns echoed this sentiment and testified that, “as a general rule,” one does not go into or analyze the ventilation in pillared areas. Tr. 222.

In revoking the mine’s ventilation plan, MSHA improperly relied on a “unique” opportunity to apply a different standard—requiring perimeter mining to pass a test not required of any other form of second mining—without explanation; “where an agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.” *Burlington Northern & Santa Fe R. Co. v. Surface Transp. Bd.*, 403 F.3d

³⁶ While § 75.334(b)(1) applies “[d]uring pillar recovery,” § 75.334(b)(2) applies “[a]fter pillar recovery.” Although both arguably apply to the mine, the Citation and the Secretary’s theory of the case—as supported by testimony (Tr. 190, 194) and the Secretary’s briefs—rely exclusively on § 75.334(b)(1). *See* G. Ex. 11. Therefore, this Decision will only consider the alleged violation of § 75.334(b)(1) and not § 75.334(a)(1) or (b)(2).

771, 777 (D.C. Cir. 2005). Accordingly, MSHA's revocation of the mine's ventilation plan was arbitrary and capricious.³⁷

Despite the inability to obtain comparable measurements from inside a pillared area in other forms of second mining, MSHA relied heavily on the measurements taken from inside the perimeter cuts at the mine. In doing so, MSHA applied a different test to perimeter mining than it applied to any other types of second mining under § 75.334(b)(1). Other than describing the situation as "unique," there was no explanation given as to why perimeter mining was subject to requirements that were not applied to any other type of second mining.

In addition, MSHA exhibited a bias against perimeter mining, and there is substantial evidence in the record to warrant the inference that MSHA was engaging, by incremental steps, in an attempt to eradicate perimeter mining. This bias led MSHA to conduct the ventilation survey seeking a predetermined result. *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 711 (10th Cir. 2010) (using arbitrary and capricious standard in reviewing predetermination claim). The most probative evidence and credible testimony demonstrate that District 8's true aim was to "get rid" of perimeter mining and declare it "illegal." Tr. 417. Former MSHA District 8 supervising engineer, Mark Eslinger, credibly testified that he served a 90-day detail in 2001 in Arlington, Virginia, where he had discussions that led him to believe "that people in MSHA headquarters want to get rid of perimeter mining." Tr. 444. When pressed for names on further cross-examination by the Secretary, Eslinger credibly testified that he "had discussions with Kevin Stricklin and he did not seem to be in favor of perimeter mining." Tr. 445. Stricklin executed PPL P13-V-12, without notice-and-comment rulemaking. Eslinger also testified that Reider, an engineer in District 8, warned that District 8 was trying to "get rid" of perimeter mining. Tr. 417. Furthermore, MSHA roof control supervisor, Doug Herndon, told Eslinger during a December 2018 meeting presented by Tech Support that MSHA was going to declare perimeter mining was "an illegal system of mining. That's how they are going to get rid of it." Tr. 441-42.

This bias was evidenced not only from testimony, but also from the June 7, 2018 letter where MSHA specifically emphasized that the ventilation plan was inappropriate because "[t]he worked-out area is not ventilated *throughout* the entire pillared area." G. Ex. 7 at 2. As noted above, the undersigned discredits Burn's post hoc rationalization for the emphasis of a word that does not appear in § 75.334(b)(1). Far from simply being Burns' "term to make sure they understand that I'm not just talking about the mouth" of the panel, the term implies a standard not found in the cited regulation, but the standard found in § 75.334(a)(1). Tr. 205. The use and emphasis of the word "throughout," which does not appear in the cited regulation, demonstrates an application of that regulation outside normal bounds and suggests some motive other than an unbiased application of the proper regulation.

The application of the smoke tests also indicates MSHA's bias and result-driven conclusions. As found above, Hartsog persuasively testified that the chemical smoke tests were not valid tests, but "an attempt by District 8 to get rid of perimeter mining." Tr. 415. MSHA's bias was also evident from Beiter's actions, discussed below, overruling Doyle-Coombs when

³⁷ MSHA's heavy reliance on the smoke tests in the perimeter cuts alone is sufficient to find that the revocation of the ventilation plan was arbitrary and capricious.

she made notations documenting perceptible movement. Rather than consider the observations of a member of the survey team or even those from the operator's representatives, Beiter intervened and directed changes to those recorded observations that reflected less favorably on the previously approved ventilation plan.

The record establishes that MSHA also failed to consider the experiential opinions and expertise from District 8's own ventilation specialists and inspectors, who are intimately familiar with the mine, during the plan revocation process. Although Burns was generally unfamiliar with and had limited experience with perimeter mining (Tr. 240-41), he did not talk to or seek input from his own inspectors during the plan revocation process, despite the fact that his ventilation specialists would regularly perform six-month plan reviews on site and review mine maps to identify problems and ensure that the plan was still "adequate." Tr. 155-58, 233-34. These inspectors included Mike Pritchard, who told safety director Jankousky that he did not see anything wrong with the revoked system of ventilation for perimeter mining at PEUG. Tr. 381, 383, 385-86.

MSHA's unexplained failure to consider the expertise found in its own agency demonstrates that MSHA failed to consider an important aspect of the problem and supports the inference that MSHA was motivated by a desire to chip away at and to ultimately eradicate perimeter mining.

Although Hasenstab testified that he did not believe that Burns was trying to get rid of perimeter mining, the testimony and the actions of MSHA when confronted with requests for approval of ventilation plans that included perimeter mining demonstrate that District 8 was attempting to get rid of perimeter mining. Tr. 354. As noted above, the undersigned discounts Hasenstab's testimony on this point because he would not want to generate ill will with District 8, complicating a key relationship in operating a mine in that district. Other testimony from disinterested witnesses and the actions of MSHA establish that there was an active effort by District 8 against perimeter mining. While none of this evidence alone indicates a bias, taken together, the evidence—including the credited testimony, the use of inapplicable language, the use of the unreliable smoke tests, and the failure to consider the opinions of District 8's ventilation specialists intimately familiar with the ventilation plan at the mine—demonstrates a pattern of bias against perimeter mining that infected the decision-making process, leading to a predetermined, and thus arbitrary and capricious, decision. *Forest Guardians*, 611 F.3d at 711.

Either of these, the use of the unreliable smoke tests and the demonstrated bias against perimeter mining, would alone render MSHA's decision arbitrary and capricious. *Motor Vehicle Mfrs.*, 462 U.S. at 42 (An agency acts arbitrarily and capriciously when it relies on improper factors when making its decision.).

B. MSHA failed to consider important factors.

An agency action is arbitrary and capricious if the agency failed to consider an aspect of the problem. *Motor Vehicle Mfrs.*, 462 U.S. at 42. In revoking the mine's ventilation plan, MSHA failed to consider several important factors including the no-less-protection standard;

using tracer gas; and the disagreements within the survey team and from Knight Hawk's representatives concerning the varied and inconsistent results of the smoke tests.

At the outset, MSHA overlooked and failed to consider that its regulatory authority to revoke the previously approved ventilation plan is subject to a unique statutory limitation: “[n]o mandatory health or safety standard . . . shall reduce the protection afforded miners by an existing mandatory health or safety standard.” 30 U.S.C. § 811(a)(9); see *United Steel v. Mine Safety & Health Administration*, 925 F.3d 1279, 1288 (D.C. Cir. 2019). “This unusual limitation ‘expressly mandates that no reductions in the level of safety below existing levels be permitted, regardless of the benefits accruing from improved efficiency.’” *Id.* at 1282 (quoting *United Mine Workers of Am., Int’l Union v. Dole*, 870 F.2d 662, 666 (D.C. Cir. 1989)). This is the no-less-protection standard. The Mine Act requires that MSHA “state the basis for its conclusion” that a new health or safety standard satisfies the no-less-protection standard. *Id.* at 1282-83. Ventilation plans are the equivalent of safety and health regulations promulgated through notice-and-comment rulemaking. *Prairie State Generating Co. LLC v. Sec’y of Labor*, 792 F.3d 82, 86 (D.C. Cir. 2015). Accordingly, when revoking the previously existing plan that provided for perimeter mining, MSHA could not approve an interim plan without perimeter mining that provided less protection, and MSHA needed to state the basis for its conclusion that revocation of the status quo would not result in less protection for miners under the interim plan.

Knight Hawk presented substantial evidence to MSHA establishing that perimeter mining was a safe and effective method of mining at the mine that resulted 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. G. Ex. 2 at 3-7; Tr. 301. Burns conceded that perimeter mining “is a safe form of mining” and provides less exposure to certain hazards released into the air than other forms of mining. Tr. 173. Additional testimony bolstered the fact that perimeter mining is a safe form of mining. Tr. 337 (Hasenstab) (agreeing that the previously-approved ventilation plan has “significant” safety benefits); Tr. 370-71 (Jankousky). Hartsog went further and stated that not only was perimeter mining a safe form of mining, but it was safer than continuous mining. P. Ex. 37 at 2. Jankousky agreed. Tr. 371 (“Definitely perimeter mining is safer.”). Even Burns conceded that perimeter mining was a safer form of second mining. Tr. 224.

Despite substantial evidence that perimeter mining is a safe and likely safer form of mining with regard to recurring hazards, the credited, probative evidence in the record establishes that MSHA failed to even consider, much less address, the comparative safety advantages of perimeter mining under the previously approved ventilation plan. As noted above, the undersigned has discredited Burns’ testimony at trial that he actually considered the safety and health benefits of perimeter mining first raised by Knight Hawk in its March 13 letter.

More importantly, the Mine Act requires that MSHA “state the basis for its conclusion” that safety and health standards prevailing under the interim plan satisfies the no-less-protection standard. *United Steel*, 925 F.3d at 1282 (quoting *Nat’l Min. Ass’n v. MSHA*, 116 F.3d 520, 536

(D.C. Cir. 1997)). Any such statement by MSHA “is subject to review under the Administrative Procedure Act and must manifest that MSHA engaged in reasoned decisionmaking.” *Id.* (citing *Nat’l Min. Ass’n v. MSHA*, 116 F. 3d at 536).

Here, MSHA made no statement or analysis that the significant and uncontroverted safety and health protections afforded by perimeter mining under the revoked ventilation plan were actually considered or outweighed by safety and health standards that gave no less protection against respirable dust, noise, red zone, and roof bolting under the interim ventilation plan. MSHA failed to consider whether revoking the ventilation plan would result in Knight Hawk’s performance of more advance continuous mining than it would have performed if the ventilation plan remained in place. Because there is substantial evidence in the record demonstrating that advance continuous mining is less safe than perimeter mining, MSHA failed to consider an important factor in making its decision. Specifically, MSHA failed to consider the unique statutory limitation, which cabined its revocation discretion.

Such unexplained agency action in excess of statutory limitations found in 30 U.S.C. § 811(a)(9) is arbitrary and capricious decision making. *Motor Vehicle Mfrs.*, 463 U.S. at 43 (finding that an agency action is arbitrary and capricious “if the agency has . . . entirely failed to consider an important aspect of the problem”); see also *International Union, United Mine Workers of America v. U.S. Department of Labor*, 358 F.3d 40, 44-45 (D.C. Cir. 2004) (finding that MSHA’s failure to provide an adequate explanation for its decision to withdraw an air quality proposal was arbitrary and capricious action). Here, MSHA failed to offer any explanation, let alone an adequate one, as to why the revocation of the previously approved ventilation plan satisfied the limitations of the statutory no-less-protection standard. *United Steel*, 925 F.3d at 1282-83. This is a sufficient basis, standing alone, to vacate MSHA’s revocation action and reinstate the previously approved ventilation plan.

In addition to failing to consider the no-less-protection standard, MSHA acted in an arbitrary and capricious manner when it failed to consider a tracer gas test, which is usually employed to confirm airflow. In fact, MSHA failed to even consider the use of tracer gas to confirm its unreliable smoke tests. As noted above, tracer gas is a method of determining air movement by releasing a certain gas in one area and then sampling for that gas in another area. Beiter acknowledged that “[u]sually you would use tracer gas when we can’t confirm that there is airflow.” Tr. 573. Hartsog confirmed that tracer gas would be the “proper tool for the task” of determining the effectiveness of a bleeder system. Tr. 532-33.

However, in deviation from acknowledged usual practice, MSHA’s survey team did not use tracer gas, despite being unable to confirm airflow in the perimeter cuts. MSHA did not provide any reasoned explanation as to why it did not use tracer gas. Such an explanation is necessary, especially where testimony establishes that it was MSHA’s usual practice to use tracer gas where airflow could not be confirmed. At the very least, MSHA should have used this acknowledged usual practice to back up or confirm the findings of the smoke tests. This deviation meant that MSHA did not consider an important factor, the use of tracer gas, when revoking the mine’s ventilation plan. When such an aberration from usual practice in agency action goes unexplained, it is arbitrary and capricious. *Encino Motors, LLC v. Navarro*, 136 S.Ct.

2117, 2120 (2016) (citing *FCC*, 556 U.S. at 515). Consequently, MSHA's unexplained departure from a usual practice was arbitrary and capricious.³⁸

Finally, as noted above in Section III.A, MSHA did not properly consider differences in the opinions and observations from the survey team and the contrary opinions and observations from Knight Hawk's representatives concerning the varied and inconsistent results of the smoke tests. The survey team made observations of smoke rising approximately 44-feet away in dimly lit perimeter cuts from areas that miners do not normally work or travel. Tr. 52-54. This unique and questionable practice resulted in disagreements among the survey team and from Knight Hawk's representatives, which Beiter actively suppressed, directing some notes to be rewritten. Tr. 104, 299, 349-350.

Additionally, MSHA failed to consider that the smoke tests provided varied and inconsistent results regarding the direction and movement of airflow. As noted, Hasenstab credibly testified that there was "[g]eneral uncertainty in regards to movement or no movement." Tr. 299-300. At times, the tests were not even capable of being repeated. Tr. 561-62.

Even if the undersigned were to overlook the aberrant use of unreliable smoke tests inside the perimeter cuts, MSHA failed to consider the limitations placed on the survey team in conducting the smoke tests, disagreements among the survey team and Knight Hawk representatives concerning perceptible air movement in such cuts, and the varied and inconsistent results of the survey. By not considering these important factors, MSHA acted in an arbitrary and capricious manner. *Motor Vehicle Mfrs.*, 463 U.S. at 43 (An agency action is arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem.").

In short, MSHA revoked a previously approved ventilation plan through results-oriented, unreliable, and suspect investigation techniques that failed to consider several important aspects of the problem to ensure the reliability of data and observations relied upon and to ensure compliance with an important statutory limitation. MSHA failed to consider the no-less-protection standard; the simple use of tracer gas to validate or confirm the smoke tests; and the disagreements within the survey team and from Knight Hawk's representatives concerning the varied and inconsistent results of the smoke tests. These failures demonstrate that MSHA acted in an arbitrary and capricious manner in a unique and unprecedented scenario to revoke a previously approved plan found suitable by four District 8 managers or acting district managers and by District 8 ventilation specialist Pritchard, who inexplicably was never consulted about the revocation decision or called as a rebuttal witness. Any one of these three failures is sufficient to find the revocation of the ventilation plan arbitrary and capricious.

³⁸ Due to MSHA's heavy reliance on a ventilation survey that did not use tracer gas, this deviation from an acknowledged usual practice alone is sufficient to find that the revocation of the ventilation plan was arbitrary and capricious.

C. MSHA offered explanations counter to the evidence before it.

MSHA cited regulations that had no support in the record to justify its revocation of the mine's ventilation plan. MSHA revoked the previously approved plan by technical citation citing five major deficiencies that Knight Hawk allegedly failed to address or include in a modified or revised plan submission. The Secretary grounded the alleged deficiencies in mandatory standards set forth in 30 C.F.R. §§ 75.334(b)(1); 75.334(c)(4); 75.364(a)(2)(iii) and (iv); 75.371(y), (z), and (bb); and 75.372(b)(9). Of these regulations, only § 75.334(b)(1), discussed above, deals with whether a ventilation plan is effective. The remainder of the regulations pertains to the technical requirements of what must be in a written ventilation plan and map prior to submission to MSHA for its consideration. Specifically, five of the remaining seven regulations—§§ 75.334(c)(4); 75.371(y), (z), and (bb); and 75.372(b)(9)—pertain to what the ventilation plan and map must “specify” and what “information” the ventilation plan and map must contain prior to submission for approval. It should be emphasized that these regulations only pertain to what technical details must be included in a submitted plan and map and *not* whether the submitted plan and map constitute a suitable ventilation plan. In other words, these regulations prescribe what information an operator must include in a ventilation plan and map when submitting them for MSHA's initial consideration, but they do not speak to whether it is a suitable ventilation plan.

When MSHA approved the ventilation plan in 2010, MSHA found that the plan and map were in compliance with 30 C.F.R. § 75.370. G. Ex. 12 at 1. Under § 75.370, a “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.” As such, when a plan and map are found in compliance with § 75.370, they are likewise found in compliance with § 75.371 and § 75.372. Five of the cited regulations that MSHA alleged that Knight Hawk had violated—§§ 75.334(c)(4); 75.371(y), (z), and (bb); and 75.372(b)(9)—are components of § 75.371 and § 75.372. In 2010, MSHA found that the ventilation plan and map were in compliance with these five regulations concerning the required technical details.³⁹

When MSHA revoked the ventilation plan, nothing had changed in the written ventilation plan or map from the 2010-approved version. Tr. 240-41. Other than the PEUG ventilation survey, the Secretary offers no explanation as to why a plan found to include the necessary information in 2010 was suddenly lacking in 2018.⁴⁰ Furthermore, the Secretary offers no explanation why, even if the 2018 PEUG ventilation survey were accepted at face value, it rendered the technical details in the 2010 plan and maps improper for submission to MSHA for consideration. In essence, MSHA has declared, without explanation, that the previously

³⁹ Although 30 C.F.R. §75.370 does not explicitly reference 30 C.F.R. § 334(c)(4), the requirements of § 334(c)(4)—that a ventilation plan specify “[t]he location of ventilating devices”—are the same as those in 30 C.F.R. § 75.371(bb), which does incorporate § 334(c)(4) by reference.

⁴⁰ It should be noted that MSHA cited Knight Hawk for operating without an approved ventilation plan, not for failing to follow an approved ventilation plan. As such, the findings of the ventilation survey should have no effect on whether the ventilation plan or map complied with § 75.371 or § 75.372.

approved ventilation plan and map are suddenly unacceptable even for an initial submission for consideration by MSHA.

As noted above, an agency must “examine the relevant data and articulate a satisfactory explanation for its action.” *FCC*, 556 U.S. at 513 (quoting *Motor Vehicle Mfrs.*, 463 U.S. at 43). Here, the Secretary offers *no* explanation, satisfactory or otherwise, why the technical details of the 2010 written ventilation plan did not satisfy the requirements of §§ 75.371 and 75.372 in 2018 when the same technical details did so in 2010. Consequently, MSHA acted arbitrarily and capriciously and contrary to law when it determined that Knight Hawk had violated these regulations.

The remaining two regulations—§§ 75.364(a)(2)(iii) and 75.364(a)(2)(iv)—require that the operator conduct weekly examinations of the ventilation system. Specifically, § 75.364(a)(2)(iii) requires that, at least every seven days, “[a]t least one entry of each set of bleeder entries used as part of the bleeder system . . . shall be traveled in its entirety.” Additionally, measurements shall be performed during the weekly examination to determine methane and oxygen levels as well as whether air is moving in the proper direction at EPs as prescribed in the ventilation plan.⁴¹ Section 75.364(a)(2)(iv) provides that an operator may offer, “in lieu of the requirements of [(a)(2)(iii)], an alternative method of evaluation” in a submitted ventilation plan.

MSHA’s determination that Knight Hawk violated § 75.364(a)(2)(iii) runs counter to the evidence. As noted above, this regulation requires weekly examinations where an examiner travels at least one bleeder entry of each set of entries, and for evaluations of air quality and movement at EPs as identified in the ventilation plan. Hasenstab identified the weekly route followed by an examiner to determine the effectiveness of the bleeder system at the EPs. P. Ex. 30 at 9; Tr. 320-22; *see also* Tr. 504 (Hartsog). Knight Hawk’s expert, Hartsog, credibly testified that “it would be an effective way of evaluating the system. It meets the requirements in that it goes to the extremities of the system. And it travels the entire perimeter of the bleeder area, of the bleeder system, bleeder entries.” Tr. 505.

The undersigned is persuaded by Hasenstab’s description of the weekly examinations. Tr. 320-22.⁴² Hasenstab testified that the weekly examination involved traveling along the bleeder entries from EP to EP and checking air quality and direction at each EP. Tr. 320-21; G. Ex. 13 at 9. Beiter’s report to Burns confirmed that “[t]he required examination of the bleeder system included travel of bleeder entries to evaluate its effectiveness” and that “[b]leeder entries were routinely traveled in each block in which an [EP] was located and across the front of the completed blocks.” G. Ex. 1 at 7. Consequently, the evidence clearly demonstrates that the weekly examinations occurred and included travel of “[a]t least one entry of each set of bleeder entries” to conduct the tests, meeting the requirements of § 75.362(a)(2)(iii). MSHA again offered no explanation as to why the weekly examinations themselves were inadequate under

⁴¹ Section 75.362(a)(2)(iii) uses the term “measurement point locations” rather than “evaluation points.”

⁴² The Secretary offered no evidence contrary to Hasenstab’s description.

this regulation. As such, MSHA acted in an arbitrary and capricious manner when finding that Knight Hawk violated § 75.362(a)(2)(iii). *Motor Vehicle Mfrs.*, 463 U.S. at 43.

Additionally, although MSHA identified alleged deficiencies with the weekly examinations, none of these alleged deficiencies are grounded in the regulations. First, Burns, both in testimony and in his June 7 letter, identified the weekly examinations as deficient because the plan did not

define[] the proper air direction through individual “blocks” Definition of the proper direction of airflow through bleeder entries and pillared areas, as well as the EP locations, also is necessary for the mine examiner to determine if air is moving in the proper direction when conducting tests during the weekly examination.

G. Ex. 9 at 2. Setting aside for the moment that MSHA, again without explanation, found fault with the written ventilation plan deemed acceptable in 2010, MSHA rejected Knight Hawk’s offer to cure the alleged deficiency with written statements. *Id.* The only explanation for this rejection was that displaying the airflow with arrows on the map itself was required by the plain language of the regulation. Tr. 204. Because the Secretary relies on the plain language of the regulation, the Secretary’s interpretation of the regulation does not get deference. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) (“[A] court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference.” (citations omitted)); *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012) (holding that “[d]eference is . . . unwarranted when there is reason to suspect that the agency’s interpretation ‘does not reflect the agency’s fair and considered judgement on the matter in question.’”). Looking to the plain language of § 75.372, there is no requirement as to how, or in what format, the information must be provided on the ventilation map. Consequently, the Secretary does not provide any basis for this requirement, and this is yet another example of MSHA acting in an arbitrary and capricious manner to achieve the desired result. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

Second, MSHA also alleged that the weekly examinations were deficient because

[t]he 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.

G. Ex. 11 at 3. None of these requirements can be found in the cited regulation. The *only* requirement in § 75.364(a)(2)(iii) is that “[a]t least one entry of each set of bleeder entries used as part of the bleeder system . . . shall be traveled in its entirety” and that the weekly examination will include tests for air quality and movement. There is no requirement in § 75.364(a)(2)(iii) for

additional tests outside of the EPs or the addition of more EPs than are required in the approved ventilation plan. Based on the language from the citation, MSHA created additional requirements that have no basis in the regulation. Again, it should be emphasized that this regulation pertains to whether Knight Hawk is conducting weekly examinations as prescribed by the ventilation plan and maps in the first instance, not whether those examinations revealed shortcomings in the ventilation plan.⁴³

On this point, Beiter testified that the evaluation was insufficient because “there were places in the bleeder system in which airflow was not being controlled in a manner that would allow that evaluation to take place.” Tr. 112-13. Even assuming that Beiter were completely correct that there were portions of the mine that did not have controlled airflow, this testimony goes to the results of the weekly examinations, not to whether Knight Hawk was conducting the weekly examinations in compliance with § 75.364(a)(2)(iii) in the first instance. Even uncontrolled airflow, except in extreme cases, would not prevent Knight Hawk from conducting adequate weekly examinations. To put it another way, where § 75.364(a)(2)(iii) asks whether Knight Hawk conducted weekly exams adequate to evaluate the bleeder system, Beiter faults Knight Hawk for the expected results of that test. This is akin to faulting Knight Hawk for not taking a test because, in MSHA’s view, Knight Hawk should fail that test. As this regulation goes to whether Knight Hawk is conducting the proper examinations—not what the result of that test may be—MSHA does not support this alleged violation.⁴⁴ In short, it is a non sequitur to allege that Knight Hawk failed to conduct weekly examinations because “there were places in the bleeder system in which airflow was not being controlled.” Tr. 112-13.

As noted above, the law requires MSHA to offer a reasoned explanation when departing from its standard course; “an agency changing its course must supply a reasoned analysis.” *Motor Vehicle Mfrs.*, 463 U.S. at 57 (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970)). Here, the Secretary offers no reasoned explanation why the additional

⁴³ Although the Secretary never presents this argument, the best argument in support of the Secretary’s position is that, if Knight Hawk had been conducting proper weekly examinations, those examinations should have demonstrated that the ventilation plan was not suitable based on the results of the ventilation survey. Therefore, this argument continues, since the weekly examinations did not reveal the plan’s unsuitability, Knight Hawk must not have been performing proper weekly examinations. Even beyond the reasons stated above, this argument fails because the improperly conducted ventilation survey lies at the heart of this argument. Its reasoning fails once the keystone of the ventilation survey is found flawed.

⁴⁴ Burns testified that “[w]e did not feel the bleeder system was being ventilated. We did not feel it was being adequately examined.” Tr. 171. He did not, however, provide any concrete support as to why the weekly examinations themselves were inadequate, nor did the Secretary proffer any citations to support such conclusion. Rather, the Secretary only proffers results from an unreliable and suspect ventilation survey in areas where examiners would not travel.

deficiencies that it grafted onto regulatory language are necessary under § 75.364(a)(2)(iii), or how Knight Hawk's execution of the weekly examinations runs afoul of that regulation.⁴⁵

Turning to § 75.364(a)(2)(iv), this regulation, by its plain language, only applies where an operator submits an alternative weekly examination plan "in lieu of the requirements of" § 75.364(a)(2)(iii) in a ventilation plan. The evidence is clear that Knight Hawk *did not* submit an alternative weekly examination plan in its ventilation plan. G. Ex. 12 at 9. Consequently, MSHA's reliance on this regulation runs counter to the evidence. *Motor Vehicle Mfrs.*, 463 U.S. at 43.

As a final matter, insofar as the Secretary relies on PPL P13-V-12 as the impetus that changed the substantive requirements for the submitted ventilation plan and maps, such reliance is improper as PPL P13-V-12 did not go through proper notice-and-comment rulemaking. As noted in the Findings of Fact, on December 30, 2013, after the approval of the mine's ventilation plan, MSHA, through Administrator Kevin Stricklin, issued the policy "to clarify and improve the examination and evaluation of bleeder systems by mine operators." R. Ex. 13 at 1. PPL P13-V-12 states that "[i]t is anticipated that District Managers would not suggest changes to the relevant portions of existing approved ventilation plans absent conditions affecting the safety or health of miners that arise following the issuance and effective date of" the policy. *Id.* PPL P13-V-12 defines a bleeder system to "include[] the area from which pillars are wholly or partially recovered, bleeder entries, bleeder connectors, and all associated ventilation control devices that control the air movement through the area." *Id.* at 2.

Hartsog credibly testified that PPL P13-V-12 changed the definition of a bleeder system. Specifically, Hartsog testified that the policy includes as part of the newly defined bleeder system "any pillar that's left untouched Commonly, we don't refer to certain pillars next to the gob or around the gob as being part of the bleeder system. It's part of the gob." Tr. 513. Hartsog stated that perimeter cuts "are in the abandoned area. Once those are mined, I would not expect them to be re-examined once left." Tr. 480. Hartsog also credibly testified that the policy redefined what constituted a bleeder entry. He stated that the policy "defines bleeder entries as being any entries that . . . are between or around blocks that have not been second mined. Before this [policy] document came out, that was not the case." Tr. 523.

PPL P13-V-12 made substantive and definitional changes to § 75.300 dealing with bleeder systems that lack the force of law purportedly used to justify the revocation of Knight Hawk's ventilation plan. It is the Secretary's burden to appropriately promulgate new proposed changes in substantive legal requirements through proper notice-and-comment procedure. 30 U.S.C. § 811; *see Alaska Professional Hunters v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment."); *Drummond Company, Inc.*, 14 FMSHRC 695 (1992) (affirming the judge's holding that the Secretary was required to promulgate a policy program letter through notice-and-comment rulemaking and concluding that the policy, as an invalidly

⁴⁵ Like the unreliable smoke tests, this appears to be yet another example where MSHA created additional requirements for extended-cut perimeter mining that were not required for other forms of second mining.

issued substantive rule, can be accorded no legal weight or effect). Further, the Secretary failed to set forth any convincing reasons upon which policy changes may be exempt from notice-and-comment due to good cause. 5 U.S.C. § 553(b)(3)(B). Therefore, PPL P13-V-12 cannot justify changing the requirements of the submitted ventilation plan and maps.

The undersigned finds unpersuasive the Secretary's argument that, even apart from the measurements taken within the perimeter cuts, the ventilation survey indicated that Knight Hawk had to revise its ventilation plan. Specifically, the Secretary contends that "[t]he direction of air movement in adjacent bleeder entries was not always consistent within a block[;] at several locations air moved in opposing directions across an individual bleeder entry, and in portions o[f] other bleeder entries there was no perceptible air movement at all." Sec'y Post-Hearing Br. at 48-49. This argument relies on the definition of "bleeder entry" from PPL P13-V-12. When applying the pre-PPL P13-V-12 definition, the pillars that have not been second mined and are not adjacent to the perimeter cuts are not part of the bleeder system. Tr. 513. Consequently, applying the pre-PPL P13-V-12 definitions, there is a single bleeder entry and the ventilation survey found consistent air movement through the bleeder entry and through the area adjacent to the perimeter cuts. G. Ex. 18-1. The Secretary's unpersuasive argument demonstrates exactly how PPL P13-V-12 changed the definition of a bleeder entry and the substantive consequences of that change.

In summary, MSHA acted in an arbitrary and capricious manner under *Motor Vehicles Mfrs.*, 463 U.S. at 43. First, MSHA relied on factors—the unreliable smoke tests within the perimeter cuts and a bias against perimeter mining—that were not intended to be considered. Second, MSHA entirely failed to consider important aspects of the revocation issue—the no-less-protection standard; using tracer gas; and the disagreements within the survey team and from Knight Hawk representatives concerning the varied and inconsistent results of the smoke tests. Finally MSHA either offered an explanation that ran counter to the evidence before it or failed to offer any explanation to support its decision that the previously approved plan no longer satisfies §§ 75.370, 75.371, and 75.372.

IV. CONCLUSION

For the foregoing reasons, the technical citation is vacated, and the previously approved ventilation plan is reinstated.

/s/ Thomas P. McCarthy
Thomas P. McCarthy
Acting Chief Administrative Law Judge

Distribution:

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

R. Henry Moore
Fisher & Philips, LLP
301 Grant Street
Suite 4300
One Oxford Centre
Pittsburgh, PA 15219

/ztb

ADMINISTRATIVE LAW JUDGE ORDERS

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004

July 23, 2019

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

v.

JAMES C. SCOTT, employed by
MILL BRANCH COAL CORP.,

and

DONNIE B. THOMAS, employed by
MILL BRANCH COAL CORP.,
Respondents

CIVIL PENALTY PROCEEDINGS

Docket No. VA 2018-0103
A.C. No. 44-07087-462566 A

Docket No. VA 2018-0104
A.C. No. 44-07087-462567 A

Mine: D-6 North Fork

DISMISSAL ORDER

Before: Judge Feldman

The captioned proceedings, brought by the Secretary pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977 (the “Act” or “Mine Act”), 30 U.S.C. § 820(c), concern whether James C. Scott and Donnie B. Thomas “knowingly” violated section 50.10(d) of the Secretary’s regulations, cited in Order No. 8178613, issued to Mill Branch Coal Corporation (“Mill Branch”). Section 50.10(d) requires an operator to contact the Mine Safety and Health Administration (“MSHA”) within 15 minutes after a water inundation has occurred.¹ 30 C.F.R. § 50.10(d). On April 12, 2018, the Secretary issued notices of civil penalty to Scott

¹ The provisions of section 50.10(d) require an operator to notify MSHA within 15 minutes of the occurrence of an accident. The definition of an “accident” in the Secretary’s regulations includes “[a]n unplanned inundation of a mine by a liquid or gas.” 30 C.F.R. § 50.2(4).

and Thomas for their alleged violations of section 50.10(d), 36 months after the April 8, 2015, issuance of underlying Order No. 8178613 to Mill Branch.²

The timeliness provisions of section 105(a) of the Act provide, in pertinent part:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation

30 U.S.C. § 815(a). Although the above statutory provisions require timely notification to mine operators of proposed civil penalties, the Secretary does not dispute that the timeliness provisions of section 105(a) also apply to the issuance of proposed civil penalties in personal liability cases brought pursuant to section 110(c) of the Act.

On March 27, 2019, the Secretary was ordered to show cause why the captioned 110(c) proceedings should not be dismissed. Order to Show Cause, 41 FMSHRC ___, slip op. at 3-4. Specifically, the Secretary was ordered to address whether the notices of personal liability for civil penalties issued to Scott and Thomas, 36 months after the underlying violation of section 50.10(d) occurred, complied with the reasonable time provisions of section 105(a) of the Act. The Order to Show Cause is incorporated by reference.

The Order to Show Cause, consistent with Commission case law and MSHA's Program Policy Manual ("PPM") concerning 110(c) cases, noted that the issuance of underlying Order No. 8178613 upon completion of the MSHA inspection on April 8, 2015, is the starting point for determining whether the Secretary issued the subject notices of personal liability within a reasonable time. *See Sec'y of Labor v. Sedgman*, 28 FMSHRC 322, 340 (June 2006) (holding that, when a citation or order is issued at the conclusion of an MSHA inspection, the starting point for assessing timeliness is the issuance of the citation or order); *See also* PPM, Vol. I, at 42 (2012). In addressing timeliness issues, the Commission has opined that the Secretary is not free to arbitrarily ignore reasonable time constraints as that would "deny fair play to operators" by "exposing operators to stale claims." *Long Branch Energy v. Sec'y of Labor*, 34 FMSHRC 1984, 1989 (Aug. 2012) ("*Long Branch*") (citing *Sec'y of Labor v. Salt Lake Road Department*, 3 FMSHRC 1713 (July 1981)). Consequently, the Secretary was ordered to

² The Petition for Assessment of Civil Penalty with respect to Mill Branch's liability for Order No. 8178613 in Docket No. VA 2016-0106 was filed with the Commission on April 5, 2016. The degree of an operator's negligence is a factor in determining the appropriate civil penalty. 30 U.S.C. § 820(i). The negligence of Scott and Thomas, as corporate agents, is imputed to Mill Branch. *Sec'y of Labor v. Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991) (citation omitted). The proposed civil penalty apparently was based, in significant part, on the alleged imputed negligence attributable to Scott and Thomas. 30 U.S.C. § 820(i). Order No. 8178613 was disposed of in an unpublished Decision Approving Settlement issued on August 3, 2016.

demonstrate adequate cause by providing a non-frivolous explanation for why the subject notices of liability were issued 36 months after the issuance of Order No. 8178613.

In response to the Order to Show Cause, the Secretary relies on Supreme Court cases that apply the general five year statute of limitations for initiating civil proceedings, contained in 28 U.S.C. § 2642, as the relevant period for applying timeliness provisions in statutes other than the Mine Act. Sec’y’s Resp. to the Order to Show Cause at 3-4. As the inundation occurred on April 7, 2015, the Secretary argues the timeliness provisions of section 105(a) have not been violated, as the five year statute of limitation will not run until April 7, 2020. *Id.* However, the Commission has rejected the Secretary’s reliance on Supreme Court case law as a basis for abrogating the Secretary’s obligation to provide adequate cause in order to demonstrate that he has acted in a timely manner.³ See *Long Branch*, 34 FMSHRC at 1986-89.

Alternatively, the Secretary avers that the reasonableness of the length of MSHA investigations is an enforcement prerogative that is not subject to Commission review. Sec’y’s Resp. to the Order to Show Cause at 7-8. Thus, the Secretary contends that the period for determining reasonableness is the eight-day period that transpired between the referral of the investigation report to MSHA’s Office of Assessments and the issuance of the subject notices of personal liability without regard to the 36-month investigation period that preceded it. Sec’y’s Resp. to the Order to Show Cause at 4. The implications of this assertion, given the Secretary’s disinclination to provide any explanation for the lengthy 36-month investigation, have been addressed by Judge Zielinski:

[B]ecause there is a potential for substantial delay in the initiation and conduct of section 110(c) investigations, granting the Secretary carte blanche for that part of the process may well not comport with considerations of fair play and due process for individual respondents. One judge has noted that in cases against individual respondents “concepts of fair play and due process must be even more carefully protected.”

Sec’y of Labor v. Dyno Nobel East-Central Region, 35 FMSHRC 265, 267 n. 2 (Jan. 2013) (ALJ) (quoting *Curtis Crick*, 15 FMSHRC 735, 737 (Apr. 1993) (ALJ)). Rather, the Commission has stated that determining whether the timeliness provisions of section 105(a) are satisfied turns on “whether the delay is reasonable under the circumstances of each case.” *Sec’y of Labor v. Sedgman*, 28 FMSHRC 322, 338 (June 2006).

³ The Commission’s *Long Branch* decision referred to section 105(a) as the “basic framework” for requiring the Secretary to act in a timely manner. *Long Branch*, 34 FMSHRC at 1987. *Long Branch* concerned the Secretary’s failure to file a petition for assessment of civil penalty within 45 days of receipt of a contest of a proposed civil penalty assessment as required by Commission Rule 28(a). *Id.* Rule 28(a) interprets the statutory provisions of section 105(d) that require the Secretary to “immediately advise the Commission” after a timely notice of a contest is received. 29 C.F.R. § 2700.28(a); 30 U.S.C. § 815(d).

The Secretary does not have the liberty to substitute his self-serving interpretation of the timeliness provisions of section 105(a) by relying on a five-year statute of limitation, or, by alternatively relying on a de minimis eight-day interim period in striking disregard of the preceding lengthy 36-month investigation. It is well settled that the Commission, and not the Secretary, has the delegated authority to “interpret the Mine Act and adopt a specific test or standards for adjudicating [procedural and substantive] charges arising thereunder.” *Sec’y of Labor v. Berwind Natural Res. Corp., et al.*, 21 FMSHRC 1284, 1317 (Dec. 1999) (citations omitted); *see Long Branch* 34 FMSHRC at 1988; *see also* n. 3, *supra*.

In the final analysis, in responding to the Order to Show Cause, the Secretary could have availed himself of two options. Namely, responding to the Order to Show Cause by demonstrating that there was a “non-frivolous explanation” for the 36-month delay. *Long Branch*, 34 FMSHRC at 1991. Alternatively, the Secretary could have sought the Commission’s interlocutory review, pursuant to Rule 76, with respect to the significance of the date of issuance of a citation or order in determining the applicable interval for addressing timeliness under section 105(a). 29 C.F.R § 2700.76.

The Secretary has chosen neither option. Consequently, the captioned 110(c) proceedings must be dismissed as the Secretary has failed to provide any meaningful justification for the 36-month delay in the issuance of the notices of personal liability that serve as the basis for the captioned proceedings. As such, I need not address whether the Secretary’s delay has prejudiced the Respondents as a consequence of the closure of the D-6 North Fork mine and the resultant potential hardship with respect to obtaining mine records and locating relevant witnesses.

ORDER

In view of the above, **IT IS ORDERED** the captioned 110(c) proceedings **ARE DISMISSED** with prejudice as the Secretary has failed to demonstrate that the subject notices of personal liability were issued within a reasonable time as contemplated by section 105(a) of the Act.

/s/ Jerold Feldman
Jerold Feldman
Administrative Law Judge

Distribution (by certified mail):

Andrew R. Tardiff, Esq., U.S. Department of Labor, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, VA 22209 tardiff.andrew.r@dol.gov

Eric T. Frye, Esq., 1051 Main Street, Milton, WV 25541 eric.frye@blackjewel.us

Donnie B. Thomas, P.O. Box 1, Lejunior, KY 40849

James C. Scott, 3706 Turkey Creek, Inez, KY 41224

/nm

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9956 / FAX: 202-434-9949

August 19, 2019

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

v.

CIVIL PENALTY PROCEEDINGs

Docket No. VA 2019-86
A.C. No. 44-03088-482802

Docket No. VA 2019-105
A.C. No. 44-03088-486702

Docket No. VA 2019-121
A.C. No. 44-03088-490733

Mine: P-7 Pigeon Creek

Docket No. VA 2019-87
A.C. No. 44-07052-482807

Docket No. VA 2019-88
A.C. No. 44-07052-482807

Mine: D-10 Dorchester

Docket No. VA 2019-97
A.C. No. 44-07220-484725

Docket No. VA 2019-116
A.C. No. 44-07220-486712

Docket No. VA 2019-117
A.C. No. 44-07220-486712

Docket No. VA 2019-124
A.C. No. 44-07220-490741

Mine: D-17
Docket No. VA 2019-96
A.C. No. 44-07142-484723

Docket No. VA 2019-113 A.C. No. 44-
07142-486710

Mine: P-12 Flat Rock

Docket No. KENT 2019-227
A.C. No. 15-18647-486602

Mine: D-30 Clover Fork

BLACKJEWEL LLC,
Respondent.

ORDER OF DEFAULT AND ORDER TO PAY

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

These dockets involve 97 alleged violations and total proposed penalties of \$125,543.00. On July 29, 2019, these dockets were consolidated for a hearing that was to occur on August 20-22, 2019. When each docket was assigned to me, I issued a prehearing order directing the parties to submit prehearing reports no less than 20 days before the commencement of the hearing. The parties were further advised that failure to comply with the terms of the order could result in sanctions. The deadline for submitting a prehearing report for these dockets was July 31, 2019. Respondent failed to submit a prehearing report.

On August 12, 2019, I issued an Amended Order to Show Cause directing Respondent to explain why an order of default should not be issued against it given its failure to comply with my prehearing order. I held a conference call with the parties on August 13, 2019 to discuss Respondent's proposed course of action regarding the Amended Order to Show Cause. Respondent's counsel relayed that in light of pending bankruptcy proceedings, no response to the Amended Order to Show Cause would be forthcoming, unless he was directed to do so, and that Respondent would expect the court to do what is expected based upon an unanswered show cause order (dockets would be defaulted). Based on this representation, the consolidated hearing was vacated on August 14, 2019.

On August 15, 2019, the deadline for the Amended Order to Show Cause, Respondent's counsel informed my law clerk that Respondent would in fact be filing a response to that order. Respondent's response to the Amended Order to Show Cause did not address the reason for its failure to submit a prehearing report by the deadline. Instead, Respondent noted the complexity of the pending bankruptcy proceedings and asked for the case to be stayed. There is no mention of how the complexity of the separate and distinct bankruptcy proceeding prevented the filing of the prehearing statement. There was no request for an extension of the due date for the

prehearing order which this Court often grants.¹ In fact, it is the distinct impression of this Court that the Respondent has no intention of proceeding to hearing on these dockets.

Respondent has failed to comply with my Amended Order to Show Cause. The Commission's procedural rules permit a finding of default and summary disposition of a case after issuance of a show cause order when a party has failed to comply with a judge's orders. 29 C.F.R. § 2700.66.

WHEREFORE, I find Respondent to be **IN DEFAULT**.

Respondent's notice of contest and request for hearing are **DISMISSED**. Respondent is hereby **ORDERED** to pay a total penalty of \$125,543.00 within thirty (30) days of the date of this Order.²

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

¹ Respondent has also requested a stay of all dockets during the bankruptcy proceedings. There are currently 679 violations totaling \$1,028,754.00 pending before the judges of this Commission.

² Checks or money orders should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution (Electronic Mail & U.S. Certified Mail, Return Receipt Requested):

Robert S. Wilson, Regional Counsel, U.S. Department of Labor, 201 12th Street South,
Arlington, VA 22202

James K. McElroy, CLR, U.S. Department of Labor, MSHA, P.O. Box 560, Norton, VA 24273

David A. Steffey, CLR, U.S. Department of Labor, MSHA, P.O. Box 560, Norton, VA 24273

Hagel Campbell, CLR, U. S. Department of Labor, MSHA, P.O. Box 560, Norton, VA 24273

Joseph Jacobs, Blackjewel, LLC, P.O. Box 249, Stanville, KY 41659

Peter S. Gould, Squire Patton Boggs (US) LLP, 1801 California Street, Suite 4900, Denver,
Colorado 80202

Stephen D. Lerner, Squire Patton Boggs (US) LLP, 1801 California Street, Suite 4900, Denver,
Colorado 80202

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVENUE, NW, SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

August 20, 2019

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA), on
behalf of JAMES MCGAUGHRAN,
Petitioner,

v.

LEHIGH CEMENT COMPANY, LLC,
Respondent.

TEMPORARY REINSTATEMENT
PROCEEDING

Docket No. PENN 2019-0144-DM
MSHA Case No. NE-MD_19-05

Mine: Nazareth Plant I
Mine ID: 36-00190

ORDER GRANTING TEMPORARY ECONOMIC REINSTATEMENT

Before: Judge Rae

This matter is before me upon an Application for Temporary Reinstatement, filed by the Secretary of Labor (“Secretary”) on August 1, 2019, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). Section 105(c) prohibits operators from discharging or otherwise discriminating against miners who have engaged in safety related protected activity, and authorizes the Secretary to apply to the Commission for miners’ temporary reinstatement, pending full resolution of the merits of their discrimination complaints. The Secretary seeks an order requiring Lehigh Cement Company, LLC (“Lehigh”), to temporarily economically reinstate James McGaughran (“McGaughran”) in lieu of actual temporary reinstatement.

The Application is supported by the Declaration of MSHA Supervisory Special Investigator Jeffrey C. Maxwell, and a copy of the Discrimination Complaint filed by McGaughran on May 16, 2019. The Application alleges that McGaughran was terminated in March 2019 in retaliation for protected activity.

The parties subsequently negotiated and filed a Joint Motion to Approve Settlement Regarding Temporary Reinstatement, setting forth, for my approval, a proposal that resolves all issues in controversy with respect to this temporary reinstatement proceeding. The essential provisions of the Agreement are as follows:

1. Lehigh agrees to make payment to McGaughran, in the amount of \$9,317.02, to account for the time period between August 1, 2019 and the date of this Order;
2. Lehigh agrees to provide wages to McGaughran in the amount of \$4,658.51, less all appropriate and necessary deductions and withholdings, on Lehigh’s regularly scheduled paydays.

3. Lehigh agrees to compensate McGaughran with all benefits as if he were continuously employed, and there shall be no loss in McGaughran's seniority status during the temporary economic reinstatement period. Further, McGaughran shall be eligible for any raises and/or benefits that would accrue during the reinstatement period.
4. McGaughran is not entitled to request or collect any unemployment compensation benefits during the temporary economic reinstatement period.
5. Economic reinstatement of McGaughran shall continue unless MSHA finds that section 105(c)(1) has not been violated, or if the investigation or discrimination proceeding is otherwise discontinued for any reason. Should the Secretary elect to file a Complaint of Discrimination under section 105(c)(2) of the Mine Act, McGaughran's temporary economic reinstatement will only expire after the Commission's judgment in that matter becomes final.

WHEREFORE, the Joint Motion to Approve Settlement Regarding Temporary Reinstatement is **GRANTED**, and it is **ORDERED** that Lehigh Cement Company, LLC **TEMPORARILY ECONOMICALLY REINSTATE** James McGaughran, in accordance with all terms set forth in the parties' Joint Motion to Approve Settlement Regarding Temporary Reinstatement of August 16, 2019.

/s/ Priscilla M. Rae

Priscilla Rae

Administrative Law Judge

Distribution:

Margaret Lopez, Esq., Ogletree, Deakins, Nash, Smoak & Stewart P.C., 1909 K Street NW, Suite 1000, Washington, DC 20006

M. del Pilar Castillo, Esq., U.S. Department of Labor, 170 S. Independence Mall West, Suite 630E, Philadelphia, PA 19106

James McGaughran, 110, Marsh Lane, Wind Gap, PA 18041

/smp

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

August 30, 2019

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

v.

BLACKJEWEL LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. VA 2019-0132
A.C. No. 44-03088-492659

Mine: P-7 Pigeon Creek

ORDER OF DEFAULT AND ORDER TO PAY

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

This docket involves 7 alleged violations and total proposed penalties of \$2,170.00. On August 14, 2019, I issued an Order to Show Cause directing Respondent to explain why an order of default should not be issued against it given its stated posture of not responding to any administrative orders from this office. During a conference call with the parties on August 13, 2019, Respondent's counsel relayed that in light of pending bankruptcy proceedings, Respondent would expect the court to issue an order of default based upon its failure to respond to a show cause order. Respondent failed to show cause by the deadline of August 28, 2019.

Respondent has failed to comply with my Order to Show Cause. The Commission's procedural rules permit a finding of default and summary disposition of a case after issuance of a show cause order when a party has failed to comply with a judge's orders. 29 C.F.R. § 2700.66.

WHEREFORE, I find Respondent to be **IN DEFAULT**.

Respondent is hereby **ORDERED** to pay a total penalty of \$2,170.00 within thirty (30) days of the date of this Order.¹

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

Distribution (Electronic Mail & U.S. Certified Mail, Return Receipt Requested):

David A. Steffey, CLR, U.S. Department of Labor, MSHA, P.O. Box 560, Norton, VA 24273

Joseph Jacobs, Blackjewel, LLC, P.O. Box 249, Stanville, KY 41659

Peter S. Gould, Squire Patton Boggs (US) LLP, 1801 California Street, Suite 4900, Denver, Colorado 80202

Stephen D. Lerner, Squire Patton Boggs (US) LLP, 1801 California Street, Suite 4900, Denver, Colorado 80202

/smp

¹ Checks or money orders should be sent to: Mine Safety & Health Administration, U.S. Department of Labor, P.O. Box 790390, St. Louis, MO 63179-0390.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9950 / FAX: 202-434-9949

August 30, 2019

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

v.

BLACKJEWEL LLC,
Respondent.

CIVIL PENALTY PROCEEDINGS

Docket No. VA 2019-0139
A.C. No. 44-07220-492667

Mine: D-17

ORDER OF DEFAULT AND ORDER TO PAY

This case is before me upon a petition for assessment of civil penalties under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d).

This docket involves 1 alleged violation and a total proposed penalty of \$1,380.00. On August 14, 2019, I issued an Order to Show Cause directing Respondent to explain why an order of default should not be issued against it given its stated posture of not responding to any administrative orders from this office. During a conference call with the parties on August 13, 2019, Respondent's counsel relayed that in light of pending bankruptcy proceedings, Respondent would expect the court to issue an order of default based upon its failure to respond to a show cause order. Respondent failed to show cause by the deadline of August 28, 2019.

Respondent has failed to comply with my Order to Show Cause. The Commission's procedural rules permit a finding of default and summary disposition of a case after issuance of a show cause order when a party has failed to comply with a judge's orders. 29 C.F.R. § 2700.66.

WHEREFORE, I find Respondent to be **IN DEFAULT**.

Respondent is hereby **ORDERED** to pay a total penalty of \$1,380.00 within thirty (30) days of the date of this Order.¹

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

Distribution (Electronic Mail & U.S. Certified Mail, Return Receipt Requested):

Hagel Campbell, CLR, U. S. Department of Labor, MSHA, P.O. Box 560, Norton, VA 24273

Peter S. Gould, Squire Patton Boggs (US) LLP, 1801 California Street, Suite 4900, Denver, Colorado 80202

Stephen D. Lerner, Squire Patton Boggs (US) LLP, 1801 California Street, Suite 4900, Denver, Colorado 80202

/smp

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