# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 1, 2020

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| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) | : | Docket No. LAKE 2019-0087-R |
| v. | : | |
| KNIGHT HAWK COAL, LLC | : | |

BEFORE: Rajkovich, Chairman; Althen and Traynor, Commissioners

## ORDER

BY: Rajkovich, Chairman, and Althen, Commissioner

This proceeding comes before us on a Motion for Stay by the Secretary of Labor ("Secretary"). The Secretary seeks a stay of the Commission's decision of July 23, 2020 affirming a decision of the Administrative Law Judge ("ALJ") which vacated the Mine Safety and Health Administration's ("MSHA") revocation of a 12-year longstanding MSHA-approved ventilation plan of Knight Hawk Coal, LLC's Prairie Eagle Underground Mine ("PEUM").[1] We affirmed the vacation of that attempted revocation and that such vacation of the Secretary's attempted revocation resulted in the reinstatement of that plan.

We review the Secretary's motion under the familiar four factor formula set forth in S*ecretary on behalf of Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (Aug. 1987); *UMWA ex rel. Franks & Hoy* v. *Emerald Coal Res., LP*, 35 FMSHRC 2373, 2374 (Aug. 2013) (noting that a "stay constitutes 'extraordinary relief'"). These are (1) a likelihood that the party will prevail on the merits of its appeal; (2) irreparable harm to it if the stay is not granted; (3) adverse effects on other interested parties; and (4) the public interest. *See 35* FMSHRC at 2374.

Based upon those factors, and the discussion set forth below, the Secretary's motion for a stay is denied.

[1] The Secretary filed an appeal of the Commission's Decision with the United States Court of Appeals for the District of Columbia Circuit on August 7, 2020. Thereafter, the Commission committed, through conversation between counsel, that it would issue this order early in the week of August 31. Earlier today, September 1, the Secretary filed an Expedited Motion for Stay Pending Appeal with the court. The Commission is forwarding this order to the court to indicate that the Secretary has *now* exhausted his administrative remedies with respect to the stay.

## I.

## BACKGROUND

### A. *General*

Sufficient ventilation of underground coal mines is critical for miner health and safety. It is crucial that there be a sufficient quantity and flow of uncontaminated air to provide miners fully adequate oxygen and to avoid exposure to toxic levels of harmful contaminants. The ventilation system must also sweep away any liberated methane and any other noxious gases. To assure sufficient ventilation, the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act"), and mandatory safety standards apply a two pronged approach. Mine Act sections 303(a) through (z) contain extensive statutory ventilation requirements. 30 U.S.C. § 863. Separately, from the enforcement agency perspective, the Mine Safety and Health Administration ("MSHA") enforces extensive mandatory safety standards at 30 C.F.R. subpart D, sections 75.300 through 75.389, regulating underground coal mines' ventilation to achieve safe and healthy mine atmospheres. Of course, MSHA inspectors frequently inspect mines in order to assure compliance.

Pursuant to section 303(o), 30 U.S.C. § 863(o), the operator must develop a ventilation system, methane, and dust control plan. Because the plan must be "suitable to the conditions and the mining system of the coal mine," it is the operator's duty to develop the plan. *Id.* In short, it is the operator's plan. After the operator prepares its plan, it must submit the plan to MSHA for review for suitability before it is implemented.

### B. *Knight Hawk's Ventilation Plan*

An important and unusual factor in this case is that it does *not* involve a request for approval of a newly-submitted plan. Instead, it arises from a decision by MSHA to revoke an *existing, approved* ventilation plan that had been in place for more than 12 years. That plan allowed Knight Hawk to utilize "perimeter mining," which is a method wherein it was allowed to take 40 foot long cuts of coal from the perimeter of the area being mined as it "retreated" from a section that had been advance-mined. In perimeter mining, the operator mines coal in diagonals along the edges of the area from which it is leaving. See Attachment 1.

Knight Hawk received conditional approval for its ventilation plan 14 years ago in 2006. During the initial startup of the mine, the plan was subject to an initial evaluation that continued for 41 months. 41 FMSHRC 522, 524-25 (Aug. 2019) (ALJ). MSHA District 8 granted unconditional approval 4 years later in 2010, and again in 2015. *Id.* at 526.

Three years later, on January 9 and 10, 2018, MSHA performed an evaluation of the bleeder system which included areas where perimeter mining was being conducted at PEUM. After that evaluation, the parties engaged in conversations and correspondence regarding the suitability of the approved ventilation plan. Finally, 11 months later, on November 14, 2018, MSHA's District Manager sent a letter to Knight Hawk revoking approval of the approved plan.

*Id.* at 526-27. Thus, Knight Hawk had been operating under the approved ventilation plan, reviewed by multiple MSHA District Managers, for 12 years until its revocation in 2018.

Thereafter, the parties followed the procedure for issuance of a technical citation and challenge.[2] The validity of MSHA's revocation of the approval of the plan was heard before the ALJ at a three day hearing on March 28-April 1, 2019.

## II.

## ALJ AND COMMISSION REVIEW

After the hearing, the ALJ made extensive findings of fact and reached legal conclusions. He vacated MSHA's revocation of the approved plan as arbitrary and capricious and reinstated the approved plan. After briefing and oral argument, the Commission affirmed the ALJ's decision 3 – 2. Rather than attaching the full ALJ Decision, summaries of findings of fact in the ALJ's Decision are set forth in Attachment 2.

## III.

## STANDARD OF REVIEW

We review the request for a stay according to the factors identified in *Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958) and accepted by the Commission in *UMWA ex rel. Franks & Hoy* v. *Emerald Coal Res., LP*, 35 FMSHRC at 2374 (noting that a "stay constitutes 'extraordinary relief'"). Again, the factors are (1) a likelihood that the party will prevail on the merits of its appeal; (2) irreparable harm to the movant if the stay is not granted; (3) any adverse effect on other interested parties; and (4) a showing that the stay is in the public interest.

With regard to ventilation plan disputes, the D.C. Circuit identified the standard of review for the Commission:

> We review the legal determinations of the Commission and its ALJs *de novo* and factual findings for substantial evidentiary support. 30 U.S.C. § 816(a)(1); *Black Beauty Coal Co. v. Fed. Mine Safety & Health Review Comm'n,* 703 F.3d 553, 558 (D.C.Cir.2012); *Sec'y of Labor v. Keystone Coal Mining Corp.,* 151 F.3d 1096, 1099 (D.C.Cir.1998). We review evidentiary rulings for abuse of discretion, *Mach Mining*, 728 F.3d at 659; *cf. Veritas Health Servs., Inc. v. NLRB*, 671 F.3d 1267, 1273 (D.C.

[2] This technical citation and challenge procedure is described in *Prairie State Generating Co. LLC v. Sec'y of Labor*, 792 F.3d 82, 87-88 (D.C. Cir. 2015). To abate the citation and continue operating, Knight Hawk was required to submit a ventilation plan that MSHA would approve, which it did. 41 FMSHRC at 527, 529.

> Cir. 2012), and accord "great deference" to the ALJ's credibility determinations, *Keystone Coal*, 151 F.3d at 1107.

*Prairie State Generating Co., LLC v. Sec'y of Labor*, 792 F.3d 82, 89 (D.C. Cir. 2015).[3] Accordingly, if MSHA denies plan approval, it must be able to articulate a reasonable basis for such denial, and not merely cite generalized dangers without any explanation of how the circumstances of a specific mine might result in the occurrence of a hazard. This means the Secretary must present a theory based on the actual evidence that an injury might occur. Of course, there need not be a "likelihood" of any injury, but there must be more than an unsupported theory. There must be supporting facts in the record. The explanation must be based on reasons grounded in the facts of the case as found by the ALJ. In short, the Commission applied the arbitrary and capricious standard in affirming the ALJ's decision under the proper standard of review.[4] We further apply those standards, here, in considering the Secretary's likelihood of success on appeal.[5]

[3] The D. C. Circuit further explained that under the substantial evidence standard of review, which is "highly deferential," the court "may not reject reasonable findings and conclusions, even if we would have weighed the evidence differently." *Cumberland Coal Res., LP v. Fed. Mine Safety & Health Review Comm'n*, 717 F.3d 1020, 1028 (D.C. Cir. 2013) (citation omitted). Thus, the question is "whether a theoretical 'reasonable factfinder' could have reached the conclusions actually reached by the Commission and the ALJ." *Id.* (citation omitted); *see also Biestek v. Berryhill*, ___ U.S. ___, 139 S.Ct. 1148, 1154 (2019).

[4] The term "plausible harm" as used in the decision is simply a means of expressing that if an operator submits a plan, a determination by MSHA finding the plan unsuitable must be explained by a rational and reasonable assessment of, and citation to, the facts of the plan's operation. It is taken from Black's Law Dictionary, which defines "plausible" as meaning "[c]onceivably true or successful; possibly correct or even likely . . . reasonably convincing and seemingly truthful, though possibly mendacious." *Plausible*, Black's Law Dictionary (11th ed. 2019). It is a means of explaining the arbitrary and capricious standard. If MSHA fails to reasonably identify ways in which the plan fails to be suitable, a finding that the plan is unsuitable is arbitrary. Obviously, the same standard applies with as much force when MSHA seeks to revoke a plan previously approved as suitable.

[5] It is thus incorrect that the Commission is requiring the Secretary to prove unsuitability. Mot. for Stay at 3. Rather, the Secretary has failed at the task of providing an argument that appears to be accurate based on the evidence. Put another way, the Secretary's action in this case lacks a rational basis. *Mach Mining, LLC*, 34 FMSHRC 1784, 1790-91 (Aug. 2012) (internal citation omitted); *see also Prairie State*, 792 F.3d at 92 (the Secretary must show that the district manager "did not abuse his discretion . . . in making his suitability determination, for instance by failing to examine relevant facts and draw reasonable conclusions."). The ALJ found no substantial evidentiary foundation for the decision to revoke the operator's plan here.

## IV.

## DISPOSITION

### A. *Irreparable Harm to MSHA and/or Interested Persons*

Ordinarily, we would start by analyzing the likelihood that the Secretary would prevail on the merits. However, the Secretary's motion emphasizes the fear of a tragedy. A motion to stay anchored by a forecast of a possible mine explosion is of paramount concern to us. Therefore, we first consider the second and third factors described above.

Our primary focus must be on possible harm to miners. Our central consideration on review of the underlying issue was the possibility of irreparable harm that might arise from continued use of the long approved plan. In a most important and very basic way, therefore, the issue of irreparable injury runs throughout the Commission's decision. The Secretary has failed to make a showing of irreparable harm, absent a stay, for the same reason the revocation was vacated. The Secretary has failed to articulate a scenario under which a hazard arises from continued use of the long approved ventilation plan.

MSHA's observations and measurements during its review of perimeter mining in the survey did not find excessive methane in the perimeter areas or any other areas of the relevant mining sections.[6] In fact, every measurement of methane showed levels far below any measure of concern. The ALJ accepted testimony from a Knight Hawk expert that there were no ignition sources in the mine that might contribute to the dangers of methane buildup. The ALJ also accepted the Knight Hawk expert's testimony that in the unlikely event of a roof fall in a perimeter cut, given the composition of the roof, any methane would have been effectively diluted.[7] 41 FMSHRC at 546. The ALJ further found that the Secretary failed to rebut this testimony. Moreover, the Secretary did not provide any evidence of the presence of float coal

[6] Section 103(i) of the Mine Act requires spot inspections for methane every 5 days, for mines that release more than one million cubic feet of methane during a 24-hour period. 30 U.S.C. § 813(i). Furthermore, such spot inspections are required every 10 or 15 days at mines that liberate five hundred thousand, or two hundred thousand cubic feet, respectively, of methane or other explosive gases during a 24-hour period. *Id.* The last U.S. mine explosion occurred in 2010 in a mine releasing more than a million cubic feet of methane in a 24 hour period. PEUM does not fall into any of the categories for release of excessive methane and is not on a spot inspection schedule.

[7] The perimeter cuts are areas into which no miner has ever entered and into which entry is thereafter explicitly prohibited and barred. Tr. 54, 105. Obviously, after the cut is made, no mining activity occurs that could create a spark. Even if one were to conjecture that loose roof material could fall to the floor creating some type of spark, we take judicial notice that methane is lighter than air. Thus, if any methane were to exist in a cut over time, it would rise toward the roof, unaffected by anything happening on the floor. Nevertheless, no evidence exists for such an incident. Likewise, the mine had never experienced a spontaneous combustion.

dust or other particles in the end of a perimeter cut that could propagate any ignition, even if a small ignition could have occurred.

The Secretary's fundamental argument for a stay is the claim that if Knight Hawk engages in perimeter mining during the appeals process, it will be operating without an MSHA approved ventilation plan.[8] That suggestion is unfounded.

After MSHA revoked the approval of the ventilation plan, Knight Hawk invoked its statutory right to a review by the Commission. A Commission Judge found that the Secretary's decision was arbitrary and capricious. Performing our statutory duties, we affirmed his decision vacating the revocation.

The review process has rendered the revocation null and void and, thus, returned the parties to the status quo ante. Consequently, Knight Hawk is bound by that previously approved plan, and subject to MSHA inspections for compliance with that plan.[9] While MSHA defends its revocation decision during this appeal, Knight Hawk will therefore be operating under an approved plan. For the Secretary to argue, contrary to the results of the review process, that Knight Hawk must now be mining without an approved plan is to assign ventilation decisions to an endless loop that may be ended only by capitulation by the operator to MSHA's ventilation plan.

As to the status quo ante, and as noted *supra*, Knight Hawk received conditional approval for its ventilation plan 14 years ago in 2006. Operations under that plan had thereafter occurred for 12 years. Consequently, we must take the continuation of that long approved plan into account in considering the likelihood of irreparable harm while Knight Hawk operates under that plan during the appeal. Continuing to operate under the previously approved plan does not preclude MSHA from continuing to inspect and review perimeter mining, generally, or specifically at the PEUM mine. Nothing in our decision prevents such continued enforcement.

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[8] We specifically note that the issue of operating without an approved ventilation plan, as a consequence, was never brought up to the Commission in its petition for discretionary review below, in accordance with section 113(d)(2)(A)(ii) of the Mine Act. 30 U.S.C. § 823(d)(2)(A)(ii). Nevertheless, we address that point for purposes of this Motion.

[9] Given the Secretary's stance, it is not clear how the Secretary would react if he does not prevail before the D.C. Circuit, since both the Commission and the Circuit Court act as appellate bodies with power to review decisions by MSHA. Under MSHA's apparently faulty reasoning, the operator would be caught in an endless loop in which its rights have been abused without remedy, and an appellate body has reversed MSHA in accord with Mine Act review principles without any effect whatsoever. The Secretary's position is tantamount to asserting that MSHA is beyond the review power of the Commission or the courts. It also directly contradicts the position the Secretary took before the court in defending the Commission's decision in *Mach Mining*, extolling the Commission's review role in plan disputes as "promot[ing] efficiency." S. Resp. Br. at 32-33, *Mach Mining, LLC v. MSHA*, 728 F.3d 643 (7th Cir. 2013) (No. 12-3598).

Importantly, it appears MSHA allowed Knight Hawk to continue to operate under that same plan until issuance of the technical citation eleven months after the two day inspection and survey in January 2018. After 12 years of operation without incident, and MSHA's permitted use of the plan for eleven months after the study, the Secretary must show that irreparable harm may result from use of that same plan for the months required for Circuit Court review. In other words, the essence of MSHA's argument is that the use of the plan presents a threat of irreparable harm *now* that was not present previously, even after MSHA had been aware, for nearly a year, of the conditions that supposedly rendered the plan unsuitable. There is no basis for this in the record.

In sum, the Secretary provided essentially no evidence of any set of circumstances that might result in a convergence of any type of ignition in a perimeter cut with explosive quantities of methane. Moreover, there is no evidence of any such incident occurring during the 12 years of operation under the plan. In fact, at no time, either before the Judge or during our review, has MSHA been able to provide a rational basis for its concerns, as required under the standard of review.

**B. *Likelihood of Success on the Merits***

The failure to even meet the minimum requirement of providing a "satisfactory explanation" for its decision defeats MSHA's position on the other factors as well. The ALJ supported his findings of fact with appropriate citations to the record, and MSHA has not explained how those findings are defective or refuted by substantial evidence. The Judge also made crucial credibility determinations in support of his decision. The deference accorded the ALJ's credibility determinations is especially notable here. Unlike the Commission decisions in *Mach Mining*, 34 FMSHRC at 1784 and *Prairie State Generating Co., LLC*, 35 FMSHRC 1985 (July 2013), the ALJ rejected the MSHA witnesses' testimony in this case. *See, e.g.*, 41 FMSHRC at 531 n.10, 532, 541. He did not overturn an MSHA decision to reject a *new proffered* plan. He overturned MSHA's revocation of an *existing approved* plan.[10]

In making these findings, the ALJ relied upon and cited the stipulations of the parties and specific testimony of evidentiary and expert witnesses. His findings are based on substantial testimony as well as his analysis of the basis, reliability, and credibility of the testimony and evidence. Substantial evidence supports each of the findings. MSHA did not build a factual foundation supporting a reasonable basis for its rejection of the long-approved plan as suddenly unsuitable.

For example, the ALJ found that MSHA's tests were less accurate and its methods resulted in inconsistent and inconclusive readings. Testimony regarding the conditions supports his conclusion. MSHA's survey used chemical smoke tests from 44 feet away rather than more accurate gas-tracing tests. 41 FMSHRC at 534. The results of the chemical smoke tests were not always repeatable. *Id*. Those readings were brought further into question since members of the MSHA team were not always in agreement as to the results of the chemical smoke tests. *Id*.

[10] As noted before, this Decision effectively reinstated the operator's plan, and MSHA's argument on appeal that the operator would be mining without an approved plan—an argument not raised before the Commission—is meritless.

On at least one instance, revisions were made in response to the reprimand of an inspector when she did not record observations to the satisfaction of the MSHA supervisor. *Id*. Regarding that supervisor, the ALJ did not find his testimony to be credible as an expert. In contrast, the ALJ found Knight Hawk's expert credible. *Id*.

MSHA's survey also found that air flowed through the section as required by the regulations. Methane readings throughout the section were substantially below the allowable limits for methane concentration, and the allowable limits of course are themselves far below an explosive concentration. *Id*. at 536. 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. *Id.* at 546.

There also was no evidence of appreciable methane anywhere in the perimeter mining area, and MSHA only had evidence of meaningful methane in the mine from one sample bottle previously taken in the roof of an active area not subject to perimeter mining. Under the approved ventilation plan, any methane from the bleeder was being effectively diluted, in accordance with the plan, the Mine Act, and the standards governing ventilation. *Id*. at 536. At the time of the plan revocation, there was no evidence of any spontaneous combustion event of any kind at any place in the mine at any time over the years of its operations.[11] *Id*.

Accordingly, the ALJ's findings are based on substantial testimony as well as his analysis of the credibility of that testimony and evidence. MSHA simply failed to provide a reasonable basis for rejection of the long approved plan.

The ALJ's conclusion that MSHA's action was arbitrary corresponds directly to these well-found facts. Having made the findings set forth above, the ALJ correctly analyzed the controlling law and its application to the facts he had found. Citing Commission decisions and the decisions of the circuit courts in *Mach Mining*, 728 F.3d at 658 and *Prairie State*, 792 F.3d at 82, the ALJ reviewed MSHA's decision under the arbitrary and capricious standard, finding that the Secretary needed to establish only that MSHA's revocation of the mine's previously approved ventilation plan was not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.[12]

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[11] After the MSHA survey, one alleged spontaneous combustion event occurred underground at the mine. The ALJ, however, found that it could not be determined whether the event was spontaneous combustion. Furthermore, perimeter mining was not involved in the event. Therefore, the ALJ found the alleged event had little materiality for the case. 41 FMSHRC at 544.

[12] Notably, *Mach Mining* and *Prairie State* involved review of MSHA's review of *proffered new* ventilation plans. This case, again, involves revocation of an *existing* plan that MSHA had found suitable for eight years. Moreover, in his motion, the Secretary misstates the Commission's decision and incorrectly argues that the Commission did not apply an arbitrary and capricious standard. Apart from that misrepresentation, there can be no argument, however specious, that the ALJ applied and repeatedly invoked an arbitrary and capricious standard in reaching the decision under review.

Utilizing the guidance of *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), as applied by the D. C. Circuit court in *Mach Mining*, the ALJ considered whether MSHA (1) relied on factors that were not intended to be considered; 2) failed to consider an important aspect of the problem; 3) offered an explanation for its decision that ran counter to the evidence before the agency; or 4) was so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

The ALJ found MSHA acted in an arbitrary and capricious manner under *Motor Vehicles Mfrs.*, 463 U.S. at 43, in that MSHA was applying tests to perimeter mining that were not applied to any other form of retreat mining. 41 FMSHRC at 549-50. Citing *Burlington Northern & Santa Fe R. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005), the ALJ found that MSHA failed to explain this conduct with a reasoned explanation and, therefore, acted arbitrarily and capriciously by invoking such different standards without explanation. *Id*. He also found that MSHA entirely failed to consider important aspects of the revocation issue--the no-less-protection standard. 41 FMSHRC at 560.

The Commission agreed that, with no evidence to support a failure in any way of the approved plan to meet the standard of suitability, there was no rational basis for rejection. 42 FMSHRC ___, slip op. at 13, No. LAKE 2019-0087-R (July 23, 2020). Further, no evidence contradicted MSHA's earlier conclusion that the approved plan controlled methane and dust effectively and protected miners against the hazards of methane accumulations. It short, the plan was suitable for the purposes of ventilation and MSHA failed to articulate a reasonable basis for finding it unsuitable.[13]

The thoroughness of the ALJ's review, and our own review of the record, convinces us that substantial evidence supports the findings of fact. In turn, we affirmed the ALJ's finding based on the evidence that the Secretary did not support revocation of the approved mine plan by a reasoned explanation drawn from the record. Consequently, the ALJ correctly determined that the revocation of the approved mine plan was arbitrary and capricious.

Having found the findings of fact supported by substantial evidence, we agreed with the ALJ that MSHA had not supplied a reasoned explanation for revocation of the approved mine plan and, therefore, had acted with arbitrariness and caprice. Consequently, we applied the arbitrary and capricious standard set forth by the D.C. Circuit in *Prairie State*.

We find no support for the Secretary's reliance on *Pueblo of Sandia* v. *Babbitt*, 231 F.3d 878 (D.C. Cir. 2000). Mot. for Stay at 2 n.1. In *Pueblo*, the district court had remanded the Solicitor of the Interior's denial of a request for a corrected land survey. On appeal, the circuit court dismissed the appeal for lack of jurisdiction on the basis that the district court's remand order was not final. The circuit court noted that the decision below did not identify the true boundaries of the land grant or direct Interior to take action, it simply remanded the case for

[13] Even were one to consider the Secretary's charge that the Commission did not apply the correct standard, it remains clear that the Judge applied the arbitrary and capricious standard. Thus, the Judge's decision, standing on its own, would merit affirmation on any further review.

further proceedings. *Id*. at 881. Conversely, in this matter neither the ALJ nor the Commission have ordered any further proceedings.

In contrast here, Knight Hawk exercised its right under the Mine Act to obtain Commission review of MSHA's final action of revoking a previously approved plan. In turn, the Commission, acting pursuant to its statutory obligation, vacated MSHA's decision which reinstated the plan that had been revoked by MSHA. 42 FMSHRC at __, slip op at 2. There is nothing more for MSHA to consider with respect to its letter revoking the approval or its technical citation. While the parties may ultimately decide to enter talks to discuss a *new* plan approval process, the technical citation at issue is dismissed and finished and the originally revoked plan has been reinstated. Unlike the boundary dispute in *Pueblo*, there is no unfinished business regarding the current plan dispute.

Moreover, the court in *Pueblo* commented that the district court's decision to remand to the agency for further proceedings was consistent with precedent under the applicable judicial review provision for the agency's decision, section 706(2)(A) of the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A), where the agency record in support of its decision was found wanting. *Id*. at 881. Section 706 of the APA, however, was expressly excluded as applicable to the Mine Act proceedings. *See* 30 U.S.C. § 956 ("Except as otherwise provided in this Act, the provisions of sections 551 to 559 and sections 701 to 706 of Title 5 [of the United States Code] shall not apply to the making of any order, notice, or decision made pursuant to this Act, or to any proceeding for the review thereof.").

There is no provision in the sections of the Mine Act governing Commission review of MSHA enforcement actions that incorporates section 706 of the APA. In contrast, the drafters of the Mine Act were quite cognizant of the APA, and did not hesitate to apply its provisions to MSHA actions in certain instances. See 30 U.S.C. § 811(a) (providing that section 553 of the APA would govern MSHA rulemaking proceedings). The Mine Act drafters did not do so with respect to section 303(o). Consequently, *Pueblo* is inapplicable, here.

The Secretary argues that the Commission seeks to shift responsibility for making technical policy and enforcement related decisions to the Commission. This is simply untrue. Congress determined that cases arising under the Mine Act, including the review of operational plans, must be subject to independent review. It is therefore fundamental that actions of MSHA and/or the Secretary, such as revocation of mining approvals, be reviewed to assure they are unbiased and principled—that is, that they are reasoned and rational, rather than arbitrary and capricious. That is the role of the Commission. *See* 30 U.S.C. § 823. The Secretary had the benefit of a full evidentiary hearing and review under the most forgiving standard in administrative law, and could not provide a plausible explanation grounded on substantial record evidence. Arguing that a decision must be accepted when challenged based solely on the credentials of the party making the argument is contrary to logic and the law. *Mach Mining* and *Prairie State* require the Secretary to provide a "satisfactory explanation" for his decision. 34 FMSHRC at 1790-91; 35 FMSHRC at 1983. He failed to do so.

In this case, the Commission has not abrogated or interfered with the legitimate functions of the Secretary. Rather, it reflects a permissible exercise of our authority under the Act to

assure that agency actions are at least made on the basis of reason and facts rather than caprice and bias.

### C. *Interest of Third Parties*

Neither the Secretary nor Knight Hawk presents any significant argument with respect to the impact upon the interest of third parties.[14] As noted above, each ventilation plan is specifically tailored to each mine. This approved Knight Hawk plan can only be used at PEUM. It is not dependent upon any other plan issued to any other operator at any other mine. Likewise, no plan issued to another operator for another mine is dependent upon the one issued to Knight Hawk.

The Secretary failed to note that it is uncontested that perimeter mining is safer than other forms of retreat mining.[15] It provides lower exposure to hazards that might occur during roof bolting or working around moving equipment. The Secretary's own hearing exhibit shows that perimeter mining also affords lower exposure to respirable dust and noise. Sec'y Ex. 2 at 3-6. That is clearly a benefit to the interest of PEUM's miners.

### D. *The Public Interest*

Finally, perimeter mining does provide a positive public benefit in the protection of valuable surface farmland from subsurface subsidence, since the support pillars are left intact to support the surface. 41 FMSHRC at 530. Thus, it allows for the recovery of the energy resource while protecting farmers and the environment.

MSHA has failed to support its decision to revoke the operator's plan because it has been unable to express a reasonable basis for rejection of the approved plan. If there is no rational basis for believing harm may occur, there is, *a fortiori*, no threat to the public interest, either.

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[14] The Secretary misconstrues this element of the stay analysis. This factor is intended to function as a counterpoint to the question of irreparable harm. While the second factor asks whether the *moving party* will suffer irreparable harm if the stay is *not granted*, the third factor asks whether *other parties* will suffer adverse effects if the stay *is granted,* as a way to weigh potentially competing interests and determine whether a stay would be equitable. *Virginia Petroleum*, 259 F.2d at 925. However, rather than addressing whether the operator will face adverse effects in the event of a stay, the Secretary reiterates the alleged risk of an explosion or mine fire and argues that denying the stay will have adverse effects on miners and the community at large. Mot. for Stay at 5. Regardless, as discussed above, the record does not support a finding of such a risk.

[15] Roof bolting is generally eliminated during perimeter mining [the diagonal cuts of coal at the edge of the section being mined] because after the entry is mined and the continuous miner withdrawn, it is barricaded off. 41 FMSHRC at 524. This benefits operators and miners by more expeditious and safer retreat mining. *Id*. at 552.

In fact, the contrary is true. The Commission held that there is a public interest, expressed in the Mine Act, in ensuring that public agencies adhere to the law and make rational decisions respecting the matters delegated to them by Congress. Where Congress has insisted, as it has in the Mine Act, that due process requires independent review, the Secretary must defend his decision under the law. The public interest, therefore, does not support the stay of a decision made in conformance with the Mine Act and our precedents.

Accordingly, we find that the Secretary has not proven (1) a likelihood that he will prevail on the merits of its appeal; (2) irreparable harm if the stay is not granted; (3) adverse effects on other interested parties; or (4) the public interest. Accordingly, his motion is DENIED.

Marco M. Rajkovich, Jr., Chairman

William I. Althen, Commissioner

Commissioner Traynor, dissenting:

Absent a stay of my colleagues' decision that "the revocation of the operator's plan was arbitrary and capricious," it appears Knight Hawk intends to engage in extended-cut perimeter mining at the Prairie Eagle Underground mine without an MSHA-approved plan for at least the duration of the Secretary's appeal.[1] *Knight Hawk Coal, LLC*, 42 FMSHRC __, slip op. at 18, No. LAKE 2019-0087-R (July 23, 2020) ("*Knight Hawk*"). The alternative, of course, is that Knight Hawk be prohibited from extended-cut perimeter mining unless and until it adopts a ventilation plan deemed acceptable by the Secretary for that purpose, at least through a final decision from the Circuit Court or other final resolution of this case.

The former approach is contrary to a Congressional mandate and implementing regulations requiring that all operators adopt an MSHA approved ventilation plan. *See* 30 U.S.C. § 863(o); 30 C.F.R. § 75.370(d) ("No proposed ventilation plan shall be implemented before it is approved by the district manager."). [2] And, it places miners at a corresponding increased risk of injury, illness and death. The latter approach, by contrast, encourages MSHA and the operator to continue during the pendency of the appeal to address the safety concerns uncovered by the Secretary's investigation. And it does not involve the Commission (or a reviewing court) making a decision that grants Knight Hawk what amounts to unprecedented permission to mine without an MSHA approved ventilation plan.[3]

The choice between these two alternatives, arrived at by balancing the equitable factors used to evaluate a stay request, is most saliently framed as follows: should this or any court make a decision that would, for the first time ever, allow a mine operator to operate a mine without a mine specific ventilation plan approved by the Secretary of Labor? My answer, especially in

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[1] Knight Hawk states in its briefing to the Commission, that it "has been hesitant to simply implement its previous plan because of the threats of severe and perhaps draconian sanctions by the Secretary" and therefore requests "that the Commission direct the Secretary to allow Knight Hawk to immediately conduct perimeter mining in a fashion consistent with the Commission's ruling." KH Resp. to Mot. at 9.

[2] Operators wishing to "create an opportunity to challenge the district manager's plan-suitability decisions" have in the past "momentarily operated the mine without [an] approved . . . ventilation plan[]," which triggers a citation for violation of this regulation. *Prairie State Generating Co., LLC v. Sec'y of Labor*, 792 F.3d 82, 85 (D.C. Cir. 2015); slip op. at 3 n.2. The operator in this case has expressed an intention to extend the duration of its non-compliance beyond "momentary operation" necessary to trigger review. *See supra* note 1; KH Resp. to Mot. at 8. And my colleagues in the majority seem to oblige, stating in their order denying the Secretary's stay petition, that "[w]hile the parties may ultimately decide to enter talks to discuss a *new* plan approval process, the technical citation at issue is dismissed and finished and the originally revoked plan has been reinstated." Slip op. at 10.

[3] If the final decision of the Commission vacating the citation is stayed, the Secretary may continue during the pendency of the appeal to enforce compliance with section 75.370(d) with a system of progressive sanctions, up to and including the withdrawal of miners.

light of the very strong likelihood the Secretary will prevail on the merits of his appeal, is no. And so for reasons discussed more fully below, I dissent from my colleagues' decision to deny the Secretary's request for a stay of the Commission's decision.

The Commission held that a party seeking a stay must satisfy the factors set forth in *Virginia Petroleum Jobbers Ass'n v. Fed. Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958): (1) a likelihood that the party will prevail on the merits of its appeal; (2) irreparable harm to it if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. *UMWA ex rel. Franks & Hoy v. Emerald Coal Res., LP*, 35 FMSHRC 2373, 2374 (Aug. 2013). "Each of these requirements may, of course, be applied flexibly according to the unique circumstances of each case." *McSurely v. McClellan*, 697 F.2d 309, 317 (D.C. Cir. 1982).

The equitable factor weighing most heavily in favor of granting the Secretary's motion for stay is the high likelihood he will prevail on the merits of his appeal. The Commission's majority decision in *Knight Hawk* was wrongly decided. More specifically, the Commission decision fails to faithfully apply an arbitrary and capricious standard of review, and thus, it is inconsistent with Commission and Court of Appeals precedent. The majority, paying only lip service to controlling law, concocted and applied a novel legal standard to review the Secretary's decision to deny approval of a mine operator's proposed ventilation plan.

Section 303(o) of the Mine Act states that a ventilation plan "shall" contain "such other information as the Secretary may require," and thus accords the Secretary discretion in determining what is required in an operator's ventilation plan. 30 U.S.C. § 863(o); *Mach Mining, LLC*, 34 FMSHRC 1784, 1791 (Aug. 2012), *aff'd*, 728 F.3d 643 (7th Cir. 2013). Congress recognized that maintaining space for the exercise of this discretion is essential, stating that "[t]he unpredictability of accidents in mines and uncertainty as to the circumstances surrounding them requires that the Secretary . . . be permitted to exercise broad discretion in order to protect the life or to insure the safety of any person." S. Rep. No. 95-181, at 29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 617 (1978).

If a dispute arises regarding the information that the Secretary requires, an operator may challenge the Secretary's determination at a hearing before a Commission Administrative Law Judge. The Secretary is required to demonstrate that the District Manager did not act in an arbitrary and capricious manner – that is, the manager must have considered the relevant data and provided a reasonable rationale based on the factors. *Mach Mining*, 34 FMSHRC at 1790-91; *Prairie State Generating Co.*, 35 FMSHRC 1985, 1989 (Jul 2013), *aff'd*, 792 F.3d 82 (D.C. Cir. 2015) ("The Secretary's burden is to persuade the Commission that the district manager did not abuse his discretion or act arbitrarily and capriciously in making his suitability determination, for instance by failing to examine relevant facts and draw reasonable conclusions."). The arbitrary and capricious standard of review focuses on the adequacy of the Secretary's decision-making. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

In *Knight Hawk*, the Commission majority held – for the first time ever – that the Secretary does not have the discretion to require information to be included in a ventilation plan unless the Secretary is able to connect that requirement to "some plausible harm to miners from methane, dust, noxious gases, or some other ventilation-related hazard." *Knight Hawk*, slip op. at 11; *Knight Hawk*, slip op. at 12 (The Secretary must provide "a fact-based explanation for why the proposed plan could expose miners to unsafe or unhealthful conditions."). The majority's holding is flatly inconsistent with *Mach Mining*, *Prairie State* and other governing case law. *See also, e.g., Peabody Coal Co.*, 18 FMSHRC 686 690 (May 1996) ("[w]e reject Peabody's proposal that the Secretary be required to prove the hazard addressed by a new plan provision either exists or is reasonably likely to occur."); *see also Hopkins County Coal, LLC*, 557 Fed. Appx. 515, 520-21 (6th Cir. 2014), *aff'g* 35 FMSRHC 134 (Jan. 2013) (ALJ) (finding that the Judge's determination that there was a rational connection between the facts and the requested revision does not depend on a precise finding of potential harm.).

My colleagues deny the Secretary's motion for a stay holding, in part, that the Secretary has not demonstrated a likelihood of success on the merits of his appeal. Curiously, in analyzing the Secretary's likelihood of success, my colleagues focus entirely on the ALJ decision.[4] The majority's order makes no mention of the novel legal standard that they applied for the first time on review in *Knight Hawk*, i.e., whether the Secretary demonstrated some "plausible harm to miners from methane, dust, noxious gases, or some other ventilation related hazard." *Knight Hawk*, slip op. at 11. Instead, the majority attempts to obscure their new standard from focus, inaccurately claiming that it simply applied the arbitrary and capricious standard set forth by the D.C. Circuit in *Prairie State*. Slip op. at 8. In doing so, the majority ignores the Secretary's primary argument as to why a stay of the majority's decision is warranted.

Accordingly, because the Commission majority decision is inconsistent with the Mine Act and Commission and Court of Appeals decisions, the Secretary has a very high likelihood of success on the merits of his appeal. This factor is nearly controlling in the circumstances of this case presenting the possibility that in the absence of a stay, for the first time since enactment of the Mine Act, an operator may send miners underground to mine pursuant to a ventilation plan the Secretary declined to approve.

I do find plausible the Secretary's contention that absent a stay he and the miners at the Prairie Eagle mine will suffer irreparable harm in the form of an increased risk of injury or death from disastrous fire or explosion. In other contexts, courts have accepted an increased risk that cannot be subsequently undone or remedied by damages as irreparable harm. *See, e.g.*, *Barbecho v. Decker*, No. 20-CV-2821 (AJN), 2020 WL 1876328, at *6 (S.D.N.Y. Apr. 15, 2020) (finding irreparable harm in the "significantly higher risk of contracting COVID-19" faced by immigration detainees). And proper ventilation is essential to safely mining coal underground.[5]

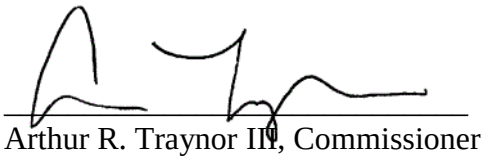
[4] For the reasons, articulated in my dissent in *Knight Hawk*, slip op. at 24-28, the Judge's decision is infected with numerous errors and could not possibly be affirmed as written. Rather than wrestle with these errors, the majority elected to consider the evidence *de novo*.

[5] "Congress recognized the hazards of improper ventilation and established a role for the government in addressing ventilation hazards. MSHA, with the cooperation of labor and

But the Secretary's motion did not provide much more than a conclusory statement that such harm is irreparable. The record contains compelling evidence that the deep cuts Knight Hawk proposed were not adequately ventilated and that the air was not controlled through the blocks.[6] *Knight Hawk*, slip op. at 22 (citing Tr. 78-79, 96-97). In addition, the record reflects MSHA's serious concern whether mine examiners could accurately assess the ventilation system. *Id*. at 23-24. When marshalled, the record facts bolster the Secretary's claim that if Knight Hawk is permitted to operate under the terms that were specifically rejected over concerns about air control, the Secretary and Knight Hawk miners face an unacceptable and irreparable increase in risk of accidents contributed to by inadequate air flow.

A stay of the Commission's decision pending appeal is plainly in the public interest. The decision to grant a stay preserves intact an unbroken history going back even to the predecessor of the 1977 Act of requiring underground mining only pursuant to an MSHA approved ventilation plan. No Commission majority or court has ever before allowed mining outside the terms of an approved plan and the public – to include Knight Hawk's competitor companies who were unable to secure approval of ventilation plans to perform perimeter mining – has an interest in this stay being granted to ensure the continued and consistent enforcement of the Act.

Viewed in light of the unique circumstance whereby denial of the Secretary's stay petition will permit the operator to mine without an approved ventilation plan and the Secretary's overwhelming likelihood of success on appeal, a stay to protect miners from unnecessary increased risk pending resolution of this appeal was the proper course of action.



Arthur R. Traynor III, Commissioner

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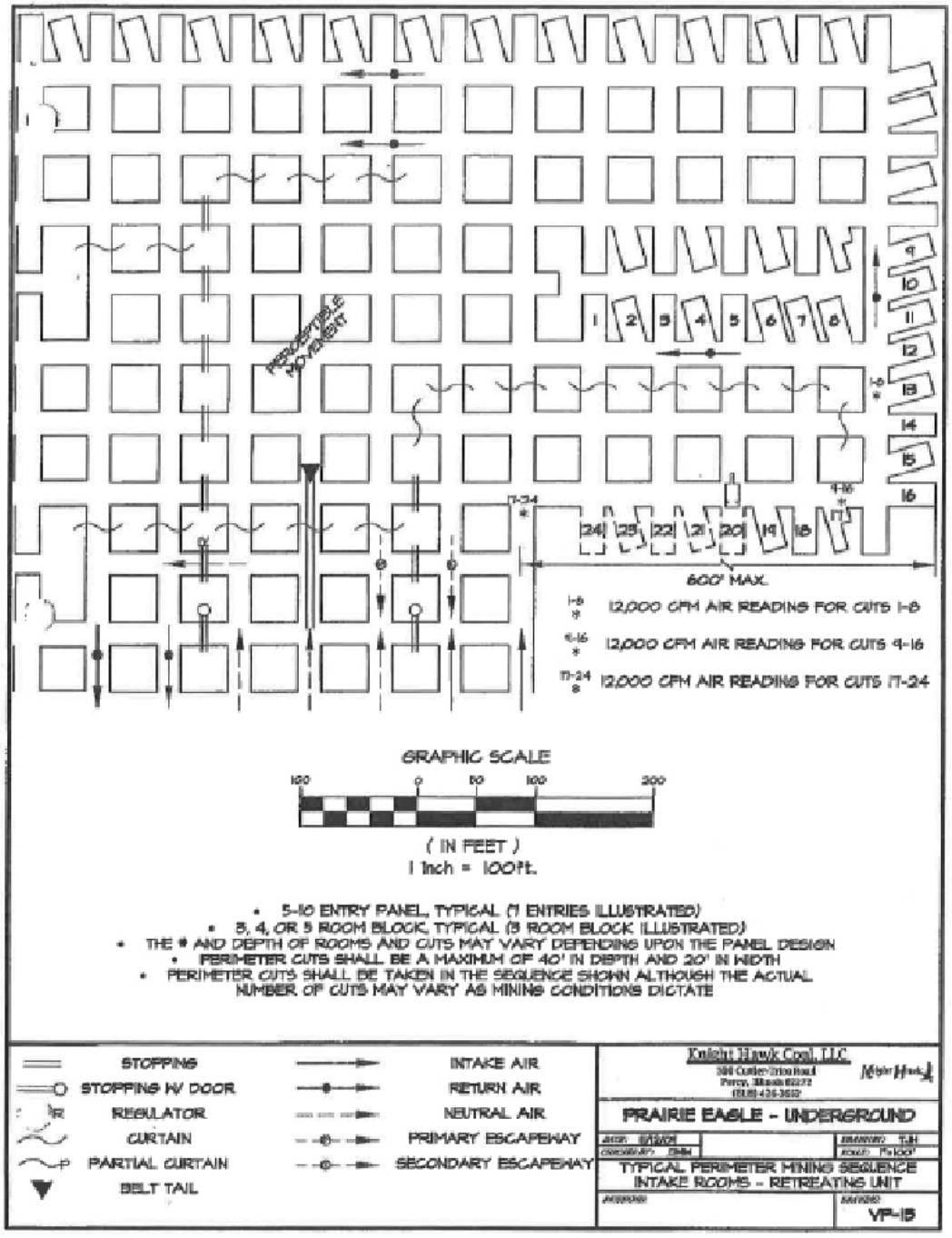
industry, has met with a large measure of success in reducing the accidents, injuries and fatalities that have resulted from poor ventilation practices . . . . To a great extent, the framework for this success has been the implementation of effective ventilation standards." Safety Standards for Underground Coal Mine Ventilation, 61 Fed. Reg. 9,764, 9,764 (Mar. 11, 1996).

[6] The majority decries the absence of specific evidence of particular types of potential imminent harm – e.g., accumulations of methane. But the increased risk to miners that flows from an operator being allowed to mine without an MSHA approved ventilation plan – one that ensures to the agency's satisfaction that air flow is continuously controlled – is best understood as analogous to the increased risk to the teen driver whose parent stops policing their seatbelt use. We may not be able to pinpoint the time, place or nature of the threat posing a likelihood of harm that is increased by this decision, but there is obvious increased risk.

# ATTACHMENT 1

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## ATTACHMENT 2

## The ALJ's Decision

### 1. The ALJ's Additional Findings of Fact and Credibility Determinations

1. Mining began at the following date and the extended cut (40 foot) plan, including perimeter mining, was approved by the following District Manager on the following dates:

    a. MMU 002 - June 2008, Acting DM Mary Jo Bishop (March 1, 2010)
    b. MMU 003 - December 2011, DM Robert Simms (August 17, 2012)
    c. MMU 004 - July 2013, DM Robert Simms (December 9, 2013)
    d. MMU 005 - August 2017, DM Ronald Burns (September 27, 2017)

    41 FMSHRC at 524 (Jt. Stip. 15).

2. On March 1, 2010, MSHA approved the ventilation plan. *Id*. at 526 (Jt. Stip. 17).

3. In performing tests, the MSHA employees used a long probe that would attempt to collect an air sample and a second tube that would release smoke in an attempt 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. *Id.* at 534.

4. Under the approved ventilation plan, the methane from the bleeder was effectively diluted to less dangerous levels. *Id*. at 536.

5. In making its evaluation, MSHA did not consider the experiential opinions and advice from District 8's own ventilation specialists and inspectors intimately familiar with the mine. *Id*. at 542.

6. District 8 ventilation specialist, Mike Pritchard, did not testify. However, there was testimony that he regularly performed ventilation plan reviews by walking "the air courses, walks intakes, returns, bleeders, and he . . . evaluates the bleeders." *Id*. The Judge cited testimony of a Knight Hawk witness that Pritchard said that he did not see anything wrong with the revoked system of ventilation for perimeter mining. *Id*. at 543.

7. The Judge found that the Secretary's expert was evasive and frequently avoided answering questions directly. Therefore, he was unreliable. *Id*. at 531 n.10.

### 2. The ALJ's Legal Conclusions

From those factual findings, the ALJ recites in extensive detail that in revoking the approved plan MSHA relied on inappropriate factors, failed to consider important factors, and offered explanations counter to the evidence before it. In doing so, he went through the regulations cited by the Secretary and the reasons such citations did not apply to and/or did not warrant revocation of the plan approval. For purposes of responding to the present motion, we

need not go through the basis of the legal conclusions in anything approaching the detail with which he covered the points in 12 pages of text.

Citing *Burlington Northern & Santa Fe Ry. Co. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005), the ALJ found that MSHA failed to explain this conduct with a reasoned explanation and, therefore, acted arbitrarily and capriciously by invoking such different standards without explanation. 41 FMSHRC at 549-50.

Additionally, the ALJ found convincing evidence in the record that MSHA was seeking to undertake tests with a predetermined goal to eliminate perimeter mining. *Id*. at 550. As an example, the ALJ cited evidence that the MSHA expert admonished a line inspector on her method and recordings of smoke tests even though he was not present when the tests were run.

The ALJ further noted that MSHA's District Director persisted in stating he requires ventilation "throughout" the previously mined area even though the regulation required ventilation "through" such area, and MSHA conceded that ventilation under the approved plan, in fact, did move through the area as the regulation requires. *Id*. at 550, 556.

The ALJ found that the record showed the District Manager did not utilize or take into account the views of the District's own ventilation experts—that is, the MSHA ventilation personnel with the most knowledge of perimeter mining within the District. The ALJ opined that 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." 41 FMSHRC at 551.

In terms of evidence ignored by MSHA, the ALJ found that, despite "substantial evidence that perimeter mining is a safe and likely safer form of mining with regard to recurring hazards," MSHA failed "to even consider, much less address, the comparative safety advantages of perimeter mining under the previously approved ventilation plan." *Id.* at 522.

Consequently, the ALJ found the evidence demonstrated that weekly examinations occurred and included travel of at least one entry of each set of bleeder entries to conduct the tests, thereby complying with the requirements of § 75.362(a)(2)(iii). *Id*. at 556-57. He reviewed and recited upon Knight Hawk's compliances with ventilation regulations and found MSHA offered no explanation as to why Knight Hawk's weekly examinations were inadequate under the regulation. *Id*.

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