FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 29, 2008

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. WEST 2007-892-E
v.	:	
TWENTYMILE COAL COMPANY	:	

BEFORE: Duffy, Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY THE COMMISSION:

This case is before the Commission on a referral of an emergency response plan dispute by the Secretary of Labor pursuant to Commission Rule 24(a), 29 C.F.R § 2700.24(a), and section 316(b)(2)(G) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), as amended by the Mine Improvement and New Emergency Response Act of 2006 ("MINER Act"), 30 U.S.C. § 876(b)(2)(G), 120 Stat. 493, 495-96. This proceeding involves a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Twentymile Coal Company ("Twentymile"). Administrative Law Judge Richard Manning affirmed the citation at issue and directed Twentymile to include a provision in its emergency response plan requiring a refuge chamber with post-accident breathable air for trapped miners in the main entries. 29 FMSHRC 844, 861 (Oct. 2007) (ALJ). Twentymile filed a petition for discretionary review that the Commission granted. For the reasons that follow, the judge's decision stands as if affirmed.

I.

Factual and Procedural Background

A. The Statutory and Regulatory Backdrop

Section 2 of the MINER Act, which became effective on June 15, 2006, and amends section 316 of the Mine Act, 30 U.S.C. § 876, requires underground coal mine operators to

develop and submit for MSHA approval[1] and periodic review an emergency response and preparedness plan ("Emergency Response Plan" or "ERP"). *See* 30 U.S.C. § 876(b)(2)(A). The basic goals of an ERP are twofold: to evacuate miners who are endangered by a mine emergency; and to maintain miners who are trapped underground and are not able to evacuate. *Id.* at § 876 (b)(2)(B)(i) and (ii). The MINER Act specified that operators were to develop ERPs within 60 days after the date of the statute's enactment (June 15, 2006) and then submit them for approval by the Secretary. *Id.* at § 876(b)(2)(A) and (C).

In an effort to enhance the chances of survival of miners who are underground following a mine accident, the MINER Act specifies that all ERPs must contain, inter alia, provisions addressing post-accident communications, tracking of miners, lifelines, and breathable air. *Id*. at § 876(b)(2)(E)(i) – (vi). With regard to post-accident breathable air, the MINER Act specifies:

> (iii) POST-ACCIDENT BREATHABLE AIR. – The plan shall provide for –
>
> (I) emergency supplies of breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time;
> (II) in addition to the 2 hours of breathable air per miner required . . . under the emergency temporary standard . . . , caches of self rescuers providing in the aggregate not less than 2 hours per miner to be kept in escapeways from the

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[1] Section 316(b)(2)(C) provides:

> (C) PLAN APPROVAL. – The accident response plan . . . shall be subject to review and approval by the Secretary. In determining whether to approve a particular plan the Secretary shall take into consideration all comments submitted by miners or their representatives. Approved plans shall —
>
> (i) afford miners a level of safety protection at least consistent with the existing standards, including standards mandated by law and regulation;
> (ii) reflect the most recent credible scientific research;
> (iii) be technologically feasible, make use of current commercially available technology, and account for the specific physical characteristics of the mine; and
> (iv) reflect the improvements in mine safety gained from experience under this Act and other worker safety and health laws.

30 U.S.C. § 876(b)(2)(C).

> deepest work area to the surface at a distance of no further than an average miner could walk in 30 minutes . . . .

30 U.S.C. § 876(b)(2)(E)(iii)(I) - (II).

In the legislative history accompanying the MINER Act, Congress made clear that "escape is the first and preferred option" in the event of an underground accident. S. Rep. No. 109-365, 109th Cong., at 6 (2006) (hereafter "*S. Rep.*"). "However, whether miners are effectuating an escape or awaiting rescue, where escape proves impossible, breathable air is essential . . . ." *Id.* As the report further noted, the MINER Act provided for increased numbers of self-contained self-rescuers ("SCSRs") in the event of evacuation or entrapment, and "with regard to an entrapment, the [MINER Act] requires that emergency plans analyze likely risks to determine if breathable air beyond the increased stores of SCSRs is necessary . . . ." *Id.*

The Secretary elected to provide guidance to the mining community with respect to development of ERPs through a series of Program Policy Letters and a Program Information Bulletin. 29 FMSHRC at 845. On July 21, 2006, the Secretary issued Program Policy Letter No. P06-V-8 ("PPL") to guide operators in drafting ERPs for MSHA approval. R. Ex. 50. In the PPL, the Secretary emphasized that miners should make every effort to evacuate the mine:

> Barricading should be considered an absolute last resort and should be considered only when evacuation routes have been physically blocked. Lifelines, tethers, Self-Contained Self-Rescuers (SCSRs), and proper training provide essential tools for miners to evacuate through smoke and irrespirable atmospheres.

Id. at 1.

Subsequently, the Secretary issued a policy directive specifying her interpretation of the quantity of air necessary to maintain trapped miners for "a sustained period of time," until a mine rescue team could reach them. Program Information Bulletin, No. P07-03, at 1 (Feb. 8, 2007) (hereafter "PIB"). The PIB directed mine operators to include in their ERPs a provision specifying how breathable air will be maintained. *Id.* at 2. In addition, the PIB specified several "options that may satisfy the breathable air requirement," including that "each miner should be provided a 96-hour supply of breathable air located within 2,000 feet of the working section." *Id.* The PIB concluded by stating that operators "must submit" the portion of their ERPs relating to breathable air within 30 days. *Id.* at 3.

Issued with the PIB was an attachment entitled "Breathable Air Questions and Answers." 29 FMSHRC at 860; R. Ex. 57. In response to the question, "How can outby miners . . . be provided with breathable air?," MSHA stated:

> As with air provided to miners at the working section, breathable air should be provided to outby miners working in established work positions within an inflatable chamber, barricade, or other alternative that isolates miners from contaminated environments . . . . To increase the chances that outby miners could reach breathable air supplies after an accident, District Managers generally will be looking for breathable air locations to be located not more than one hour travel distance from each other. This will help assure that miners would not need to travel more than 30 minutes in either direction to reach a refuge area.

29 FMSHRC at 860; R. Ex. 57 at 1. In the introduction to the questions and answers, MSHA emphasized that "mine-specific conditions in some mines may make alternative arrangements appropriate to the circumstances in the mine." R. Ex. 57 at 1.

Also, MSHA issued a final rule, on December 8, 2006, addressing mine emergency evacuations, a matter that had been addressed in an emergency temporary standard ("ETS") prior to the passage of the MINER Act.[2] 71 Fed. Reg. 71,430. A major aspect of the final rule was to increase the availability of SCSRs to evacuating miners in the event of a mine emergency. *Id.* at 71443. The rule further provided for additional SCSRs in escapeways, when each miner cannot safely evacuate within 30 minutes, by requiring that SCSR storage locations be no greater than the distance an average miner can walk in 30 minutes, consistent with provisions in the MINER Act. *Id.* Finally, the rule eliminated a requirement in the ETS that a mine operator submit an outby SCSR storage plan because that requirement was to be addressed in the ERP under the MINER Act. *Id.* at 71443-44.

B. Events Leading to the Citation

Twentymile operates the Foidel Creek Mine, an underground longwall coal mine in Colorado. *See* Jt. Ex. 7. About 100 miners work on each shift at the mine. Tr. 39. Miners enter and exit the mine through one of the two portals in the 1 Main North ("MN") section. *See* Jt. Ex. 7. There are at least six entries in the mine between the portals and the 6 MN intake air shaft. Tr. 32-34; *see* Sec. Exs. 3, 3A. The direction of the air in the entries is from the portals inby the 6 MN. Tr. 35-36; 38-39. Approximately ten miners, including belt shovelers, rock dusters, and belt maintenance personnel, work in the area from the portals to the 6 MN. Tr. 160.

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[2] On March 9, 2006, MSHA had issued an ETS, 71 Fed. Reg. 12,252, to establish "a more integrated approach to mine emergency response and evacuation." 71 Fed. Reg. 71,430. The ETS went into effect immediately, and MSHA requested public comments on the ETS and held public hearings. *Id.* Following, inter alia, consideration of the hearings, public comments on the ETS, and provisions in the MINER Act, MSHA issued the final rule discussed above with some changes from the ETS. *Id.*

The entries are 18 to 20 feet wide and eight to nine feet high with a downward slope ranging from 14 to 17 percent on average. Tr. 32-35; *see* Jt. Ex. 7. The No. 2 entry, which is on the left side, and the No. 5 entry, which is on the right side, run parallel to each other and are designated as escapeways. These entries are supplied separately with intake air and isolated with stoppings so that there is no air exchange between them. Tr. 35-36; 60-61. Miners going to work typically travel through the No. 2 or 5 entries in pickup trucks or diesel-powered vehicles. Tr. 39. The belt line is in the No. 3 entry, which is separated from the other entries by permanent stoppings. Tr. 37.

In the event of a mine emergency, miners can exit the mine through the portals, using either the No. 2 or 5 escapeway. Tr. 35-36. In addition, miners can go through the escapeways to the 6 MN, where there is an intake air shaft with an escape hoist. Tr. 28. Finally, they can go inby the 6 MN where there are two other escape shafts in back of the longwall (11 right bleeder shaft and 18 right bleeder shaft). Stip. 37 at 11-12; Tr. 60; *see* Jt. Ex. 7 (the escape shafts that are inby the 6 MN are marked "C" and "D" on the mine map). The distance between the portals and the 6 MN intake shaft is about four miles. 29 FMSHRC at 858.

In compliance with the deadlines established in section 2 of the MINER Act, Twentymile submitted its first ERP on August 11, 2006. *Id*. at 846; R. Ex. 1. In the ERP, Twentymile stated that it was awaiting further guidance from MSHA to address the availability of breathable air for miners trapped underground. R. Ex. 1 at 2. However, in addressing the evacuation of miners, the plan provided for caches of SCSRs in escapeways, in addition to the two hours of breathable hour required in MSHA's ETS. *Id*. MSHA responded to Twentymile's plan on October 30, 2006, and subsequently met with representatives of Twentymile. 29 FMSHRC at 846; R. Ex. 2.

Twentymile submitted a revised ERP on February 1, 2007. 29 FMSHRC at 846; R. Ex. 3. As noted above, on February 8 (one week later), MSHA issued the PIB in order to give operators additional guidance on complying with the breathable air requirements in the MINER Act. The PIB also required all operators to submit revised ERPs for MSHA's review by March 12, 2007. 29 FMSHRC at 846. On March 2, 2007, MSHA responded to Twentymile's February 1 submission by stating that "the type, amount and location of oxygen must be specified for the ERP to be approved." *Id.* In addition, MSHA stated that caches of SCSRs must be located at intervals over distances that miners could walk in 30 minutes. R. Ex. 4 at 2.

On March 12, Twentymile submitted an amended ERP. 29 FMSHRC at 847; R. Ex. 5. Twentymile noted in the plan that "barricade chambers currently being developed do not provide the atmosphere acceptable to [us]. We are evaluating the individual units as improvements are made." R. Ex. 5 at 2. MSHA rejected the portion of the ERP dealing with post-accident breathable air and directed Twentymile to provide additional clarification of placement of breathable air for miners trapped underground. 29 FMSHRC at 847; R. Ex. 6.

On March 28, Twentymile submitted another revised ERP. 29 FMSHRC at 847; R. Ex. 7. In addressing post-accident breathable air, Twentymile specified the use of rescue chambers

for miners in the working sections of the longwall panels. R. Ex. 7 at 2. For miners "outby the section," the ERP provided that "[t]he recently completed intake ventilation shaft [in the 6 MN] can be easily isolated from the main air courses with equipment doors and is accessible." 29 FMSHRC at 847; R. Ex. 7 at 3. On April 13, MSHA's District Manager, Allyn Davis, responded to Twentymile, stating that its ERP did not meet the post-accident breathable air provisions of the MINER Act and that Twentymile should specify how the breathable air requirement will be met for "outby personnel." 29 FMSHRC at 847; R. Ex. 8.

On April 23, in response to MSHA's comments, Twentymile submitted an ERP in which it had revised the provision on post-accident breathable air. 29 FMSHRC at 847. The ERP continued to provide for rescue chambers with 96 hours of breathable air in the working sections within 2000 feet of the loading point. R. Ex. 9 at 2. The plan also contained a new provision addressing post-accident breathable air for outby miners:

> **Outby the section**
>
> Personnel working in outby areas can readily access the recently completed intake ventilation shaft should escape from the mine be impossible.
>
> This shaft will be outfitted with an emergency escape hoist later this year.
>
> Personnel working outby the working sections, either inby or outby the shaft, will have access to the shaft or access to one of the two intake escapeways to the portal.
>
> Other means of escape are available to outby personnel, depending on their location, including the 18 Right intake bleeder shaft.

29 FMSHRC at 847; R. Ex. 9 at 2-3. As did the prior ERP submitted to MSHA, this plan also contained a succeeding section entitled "Additional SCSR's in Escapeways," in which Twentymile provided for additional caches of SCSRs beyond the number required by the Secretary's ETS (*see* n.2, *supra*). R. Ex. 9 at 3-4.

In late May, a Twentymile representative spoke with MSHA employee Hillary Smith, who was involved with plan review at MSHA District 9, to discuss the issue of outby personnel and breathable air. 29 FMSHRC at 847. The Twentymile representative asked Smith to explain why Twentymile's ERP had not been approved when plans with similar breathable air provisions for outby personnel had been approved in another MSHA district. *Id.* at 847-48. In addition to citing differences at the Foidel Creek Mine, Smith said that she did not think District Manager Davis would approve an ERP that failed to provide breathable air in the main entries at the mine

for travel distances exceeding 15,000 feet. *Id.* at 848. The Twentymile representative responded that he did not believe that MSHA's position was correct. *Id.*

On June 14, 2007, Twentymile submitted an ERP in which it revised the section addressing breathable air for miners in the outby section. *Id.* at 848-49; R. Ex. 10. The ERP contained greater detail with regard to the intake air shaft in the 6 MN and how miners could barricade themselves there and be hoisted out. 29 FMSHRC at 848-49. The ERP further specified:

> Personnel working outby the working sections, either inby or outby the shaft, will have access to the shaft or access to one of the two intake escapeways to the portal. Personnel working in these areas will at no time be more than 10,000 feet from either the portal or the 6 Main North intake shaft. The main entries are outfitted with two separate intake escapeways, each travelable with diesel pick-up mantrips, each containing caches sufficiently spaced for individuals walking and for the number of personnel working inby that point.

Id. at 849.

In a three-page letter dated June 22, MSHA District Manager Davis responded to Twentymile's ERP. *Id.*; R. Ex. 11. Davis stated that Twentymile's ERP must be modified in order to comply with the breathable air requirements in the MINER Act. R. Ex. 11. Initially, Davis noted that post-accident breathable air provisions may vary from mine to mine based on mine-specific circumstances. *Id*. at 2. He further stated that in the ERP for the Foidel Creek Mine:

> Post accident breathable air needs to be addressed in the main entries an approximate distance of 10,000 to 15,000 feet from the portal. *The distance from the portal to the intake shaft is too great a distance not to maintain some sort of post accident breathable air*, and two isolated intake escapeways to the same portal locations do not provide the same amount of protection as breathable air.

29 FMSHRC at 849-50 (emphasis added). MSHA required that the ERP state how the "requirement of 96 hours of [b]reathable [a]ir will be met for those sections that do not have two intake air escapeways." R. Ex. 11 at 2.

In addressing "SCSRs Sufficient to Permit Escape," Davis requested that Twentymile "[i]nclude a map of the work areas, tracking zones, post-accident breathable air, and SCSR storage locations." *Id.* at 3. With regard to provisions of the ERP that MSHA had approved,

Davis instructed Twentymile to implement them. *Id.* Davis concluded by requesting that Twentymile address the deficiencies that MSHA had identified in the plan and submit a complete ERP by June 29, 2007. *Id.*

On June 28, Twentymile's safety director, Dick Conkle, informed MSHA that Twentymile's revised ERP would not include refuge chambers in the main entries and stated that miners could not be trapped in this area because they had multiple ways out of the mine. 29 FMSHRC at 850. On July 2, Twentymile submitted an ERP that was substantially similar to the one that it had submitted on June 14. *Id.*; Jt. Ex. 1. The section of the plan addressing post-accident breathable air for outby personnel was unchanged. *See* Jt. Ex.1 at 3-4.

By letter dated July 31, MSHA District Manager Davis notified Twentymile that its ERP was approved with the exception of the provision addressing breathable air for outby miners. 29 FMSHRC at 850. The letter stated, in relevant part:

> [W]e have determined that the July 2nd ERP fails to provide sufficient quantities of breathable air for miners who might be trapped in outby areas. Specifically, we cannot approve an ERP in full for the Foidel Creek Mine unless post-accident breathable air is provided at some point in the main entries at a distance of between 10,000 to 15,000 feet from the portal. Breathable air is necessary within this area to maintain miners who are traveling or performing maintenance/examination activities in the main entries and who could be trapped within the approximately 20,000-foot and often significantly sloped, expanse between the portal and the intake air shaft, if an event (e.g., fire or explosion) compromises the intake escapeways and circumstances prevent miners from reaching the portal or the intake air shaft. In such an instance, breathable air would be necessary in the area that we have identified to permit miners to survive for a sustained period of time prior to rescue.

Id.; Jt. Ex. 2 at 1-2. The letter further stated that the conditions in the main entries required that a "revised ERP . . . provide[ ] breathable air for outby miners . . . in the same manner as that specified in the July 2nd ERP for miners in active gateroad and mains development locations."[3] Jt. Ex. 2 at 2. The letter concluded by stating that Twentymile should correct the deficiencies in the ERP and submit it to MSHA by August 7, 2007. *Id.* at 3.

On August 7, Twentymile submitted the ERP which is the subject of this litigation. 29 FMSHRC at 850. In the cover letter that accompanied the ERP, Twentymile noted:

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[3] However, MSHA would allow Twentymile to provide 72 hours of breathable air for miners in the main entries, as opposed to the 96 hours of breathable air that was provided for miners in the active gateroads and main development locations. Jt. Ex. 2 at 2.

> We consider the Twentymile Mine configuration unique in that multiple directions are available for personnel working underground to use if an event required evacuation from the mine. We feel the requirement of a rescue chamber for the area in question, from the portal to the intake shaft, is not applicable because of the multiple directions available . . . .

Id. at 850; Jt. Ex. 3 at 1. Therefore, with the exception of some minor wording changes in the breathable air section for outby personnel and the addition of some supplies at the 6 MN intake shaft, the ERP submitted was the same as the one that Twentymile had submitted on June 14. 29 FMSHRC at 851.

On September 10, MSHA District Manager Davis wrote to Twentymile and asked to be informed by September 13, 2007, what Twentymile intended to do with regard to the placement of a refuge chamber in the location between the portal and the 6 MN intake air shaft. *Id.*; Jt. Ex. 5. Davis concluded the letter by stating that, "if you still refuse to amend your current ERP and to place a rescue chamber or an established refuge area in this location, MSHA will conclude that the parties are at an impasse." 29 FMSHRC at 851; Jt. Ex. 5 at 2. On September 13, Twentymile responded to Davis by reiterating its position that the Foidel Creek Mine was unique because "multiple directions are available for personnel working underground" from the portal to the intake air shaft. 29 FMSHRC at 851; Jt. Ex. 6.

On September 18, 2007, MSHA issued Citation No. 7284469 alleging that Twentymile violated section 316(b)(2) of the Mine Act by failing to develop and submit for approval an ERP that provided for the maintenance of miners trapped underground. 29 FMSHRC at 851; S. Referral, Attachment A. The citation further states that the ERP "does not provide materials and equipment necessary to supply breathable air for miners who may be trapped in the main entries . . . in the approximately 20,000-foot distance between the portal and intake air shaft near the 6 MN section." 29 FMSHRC at 851; S. Referral, Attachment A. Because of this, MSHA could not approve the ERP. Thereafter, on September 20, the Secretary filed a referral with the Commission. 29 FMSHRC at 852; S. Referral. Twentymile timely responded to the referral and requested a hearing. 29 FMSHRC at 852; T. Resp. to Referral.

C. Judge's Decision

On October 2, a hearing was held in Denver, Colorado. 29 FMSHRC 844. On October 16, the judge issued his decision. *See* 30 U.S.C. § 876(b)(2)(G)(ii).[4] The judge agreed with the

[4] Section 2 of the MINER Act provides for referral to the Commission of disputes arising over ERPs, and Commission Procedural Rule 24 implements the referral process by providing for the expeditious resolution of disputes that come before the Commission. Briefly, if there is a dispute between an operator and the Secretary over a plan provision, the Secretary must issue a citation. 30 U.S.C. § 876(b)(2)(G)(ii). Thereafter, Rule 24 provides for the filing of a referral of

Secretary that the central issue was whether MSHA's decision to require the placement of a refuge chamber in the main entry, near the midpoint between the portal and the 6 MN intake air shaft, was arbitrary and capricious. 29 FMSHRC at 857. With regard to Twentymile's arguments that the MINER Act is unconstitutionally vague and that the Secretary's use of PPLs and the PIB is contrary to law because they were not subject to notice-and-comment rulemaking, the judge held that the scope of the hearing was limited to review of the disputed plan provision. *Id.* at 857-58. The judge further held that the Secretary bore the burden of proving that MSHA's refusal to approve Twentymile's ERP was not arbitrary and capricious. *Id.* at 858.

The judge noted that it was about 4 miles from the portal to the 6 MN air shaft. *Id.* The judge rejected Twentymile's position that, because it was not "likely" that miners would ever become trapped in outby areas, it was unlikely that a refuge area in the outby areas would ever be used. *Id.* Rather, the judge concluded that it was not unreasonable for the District Manager to require the inclusion of an outby refuge area in the plan. *Id.* Although the judge noted that Twentymile was "an exemplary underground coal mine operator," the judge concluded that the Secretary established that there was a reasonable possibility of a major accident or multiple accidents that could trap miners, especially injured miners, between the portal and the 6 MN air shaft. *Id.* at 859. The judge rejected Twentymile's argument that the District Manager failed to consider the specific conditions at the mine when he refused to approve plan provisions for miners working in the outby area. *Id.* The judge also rejected Twentymile's reliance on the District Manager's approval of a provision for the active longwall section that was similar to what Twentymile proposed for the outby miners. *Id*. The judge found it persuasive that, in the longwall section, the entries receive intake air from two independent sources from opposite directions, in contrast to the mains where air travels down two parallel intake escapeways, thereby raising the threat of air contamination if ventilation controls were damaged. *Id.*

The judge also affirmed his trial ruling on the Secretary's motion *in limine* to exclude evidence that Twentymile sought to offer with regard to ERPs with breathable air provisions for outby miners that were approved in other districts. *Id.* at 860. The judge viewed Twentymile's effort to introduce this evidence as part of its larger argument that the Secretary's use of PPLs and the PIB produced inconsistent results. *Id.* However, the judge noted that the issue of breathable air for outby miners had been addressed in the "Breathable Air Questions and Answers," which had accompanied the PIB issued by the Secretary, pp. 3-4, *supra*. The judge stated that the District Manager's insistence on a refuge area was consistent with the guidelines.

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the citation with the Commission within two days. 29 C.F.R. § 2700.24(a). The rule further provides for the submission of materials relevant to the dispute, or a hearing, within 15 days of the referral. *Id.* § 2700.24(e). Within 15 days of the judge's receipt of materials or hearing testimony, he or she must issue a decision. *Id.* § 2700.24(f)(1). Thereafter, if the judge rules in the Secretary's favor, the disputed provision must be included in the ERP unless the judge or the Commission grants a stay. *Id.* § 2700.24(f)(2). Following issuance of the judge's decision, a party may seek review of the judge's decision by filing a petition for discretionary review. *Id.* § 2700.24(g).

Id. The judge concluded by finding that the Secretary had carried her burden of proof that the District Manager's refusal to approve the breathable air provision for outby miners was not arbitrary and capricious and her position was taken in good faith and was not unreasonable. *Id.* at 860-61. The judge affirmed the citation and ordered further negotiations to work out the details of the post-accident breathable provision for the ERP. *Id.* at 861.

II.

Disposition

Before the Commission, Twentymile first challenges the judge's granting of the Secretary's motion *in limine* to preclude Twentymile from introducing into evidence approved ERPs from other mines in other MSHA districts that contained breathable air provisions similar to Twentymile's proposed ERP. T. Br. at 11; T. Reply Br. at 5-6. Twentymile maintains that this evidence would have shown that the District Manager acted improperly in requiring Twentymile to include a refuge chamber in the main entries in its plan. T. Br. at 11-14. Twentymile also argues that the judge erred when he applied an "arbitrary or capricious" standard of review in upholding the Secretary's refusal to accept Twentymile's plan. *Id.* at 15-16. Twentymile further argues that the judge erred in interpreting the MINER Act by requiring a refuge chamber for the "reasonable possibility" that an event such as a belt or equipment fire would entrap miners underground. T. Br. at 18-19; T. Reply Br. at 6-9. Twentymile contends that the legislative history of the MINER Act supports a reading that breathable air provisions in ERPs address "likely" risks. T. Br. at 19-20. Twentymile additionally contends that the judge misinterpreted "entrapped" as used in the MINER Act. *Id.* at 20-21. As a final argument, Twentymile contends that there were no standards to guide the District Manager's approval process and that he failed to account for the mine specific conditions at Twentymile. *Id.* at 23-30; T. Reply Br. at 9-11.

In response,[5] the Secretary argues that the judge correctly applied the breathable air provisions of the Mine Act when the judge determined that it was "reasonably possible" that miners could be entrapped. S. Br. at 18-20. In support, the Secretary contends that a plain meaning approach to the MINER Act provisions supports her position, as does the legislative history. *Id.* at 20-26. Alternatively, the Secretary argues that, if the statutory language is ambiguous, the Commission should defer to her interpretation. *Id.* at 26-28. The Secretary further argues that the MSHA District Manager's refusal to approve Twentymile's ERP should be reviewed under an "arbitrary and capricious" standard. *Id.* at 29-34. The Secretary contends that the actions of the District Manager in refusing to approve the plan were reasonable in light of the conditions in the areas outby the 6 MN air shaft. *Id.* at 35-43. Finally, the Secretary argues

[5] Prior to filing its brief in this proceeding, the Secretary filed a Motion to Exceed Page Limit as established in the Commission's Procedural Rules, 29 C.F.R. § 2700.75(c). The motion was unopposed. However, at the time the motion was filed, the Commission did not have a working quorum. We now grant the motion.

that the judge properly granted the Secretary's motion *in limine* to exclude evidence of MSHA approval of ERPs in other districts. *Id.* at 43-46. The Secretary concludes by requesting that the Commission affirm the judge's decision. *Id.* at 47.

A. Legislative Background

Passed in response to the tragic loss of life in several mine accidents in 2006, the MINER Act took a multi-faceted approach to enhancing safety and managing risk in underground coal mines. *S. Rep*. at 1-3. Section 2 of the MINER Act requires that each underground coal mine operator adopt a written Emergency Response Plan. 30 U.S.C. § 876(b)(1), (2). Thus, the MINER Act requires the development of plans, "which must provide for the evacuation of miners who may be endangered in an emergency or, if miners cannot evacuate, provide for their maintenance underground." *S. Rep.* at 4.

With regard to the drafting and approval of ERPs, the legislative history of the MINER Act states, "In order to facilitate implementation of the [MINER] [A]ct's revisions, the [Senate] committee decided to make use of the 'plan' model since all parties were familiar with its use in other contexts." *Id*. Thus, Congress intended that the principles governing the process of formulating ERPs be similar to those governing other mine plans under the Mine Act. With regard to mine plans, the Commission has long held, "[M]ine ventilation or roof control plan provisions must address the specific conditions of a particular mine." *Peabody Coal Co.*, 15 FMSHRC 381, 386 (Mar. 1993) ("*Peabody I*"). However, in addition to mine-specific provisions in plans, the MINER Act provides for the inclusion in ERPs of six "areas of concern that have universal applicability and are therefore susceptible of more generalized regulation." *S. Rep.* at 5. *See* 30 U.S.C. § 876(b)(2)(E)(i) - (vi). One of these areas of general applicability is post-accident breathable air. *Id.* at § 876(b)(2)(E)(iii).

The MINER Act further specifies certain minimum requirements for "post-accident breathable air in each plan." Thus, the MINER Act provides "for individuals trapped underground sufficient [air] to maintain such individuals for a sustained period of time," and for evacuating miners "caches of self-rescuers providing . . . not less than 2 hours per miner to be kept in escapeways from the deepest work areas to the surface . . . ." 30 U.S.C. § 876(b)(2)(E)(iii)(I) and (II).

B. General Legal Principles – Standard of Review

One of the cornerstone principles with regard to plan formulation under the Mine Act is that MSHA and the affected operator must negotiate in good faith for a reasonable period concerning a disputed plan provision. *Carbon County Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). The Commission has noted, "Two key elements of good faith consultation are giving notice of a party's position and adequate discussion of disputed provisions." *C.W. Mining Co.*, 18 FMSHRC 1740, 1747 (Oct. 1996). In this proceeding, neither party disputes the presence of good faith consultations, and the record fully supports that the Secretary and Twentymile had

extensive back-and-forth consultations over a period of a year regarding the breathable air provisions in the ERP. *See Emerald Coal Res., LP*, 29 FMSHRC 956, 967 (Dec. 2007).

While the contents of a plan are based on consultations between the Secretary and operators, the Commission has recognized that "the Secretary is [not] in the same position as a private party conducting arm's length negotiations in a free market." *Id.* at 1746. As one court has noted, "the Secretary must independently exercise [her] judgment with respect to the content of . . . plans in connection with [her] final approval of the plan." *UMWA v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989), *quoting* S. Rep. No. 181, 95th Cong., 25 (1977), *reprinted* in Senate Subcom. on Labor, Com. on Human Res., 95th Cong., Legislative History of the Federal Mine Safety and Health Act of 1977, at 613 (1978). Ultimately, the plan approval process involves an element of judgment on the Secretary's part. *Peabody Coal Co.*, 18 FMSHRC 686, 692 (May 1996) ("*Peabody II*"). "[A]bsent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval." *C.W. Mining*, 18 FMSHRC at 1746; *see also Monterey Coal Co.*, 5 FMSHRC 1010, 1019 (June 1983) (withdrawal of approval of water impoundment plan was not arbitrary or capricious where MSHA's conduct throughout the process was reasonable). In its initial decision involving review of MSHA's refusal to approve an ERP, the Commission adopted the arbitrary and capricious standard to review MSHA's actions in the plan approval process. *Emerald Coal*, 29 FMSHRC at 966.

On review in this proceeding, Twentymile argues that the "arbitrary and capricious" standard is not appropriate and that the Secretary should be required to demonstrate that the *operator's plan* is unreasonable. T. Br. at 15. As the Commission stated in *Emerald Coal*, however, review of the Secretary's actions under an "arbitrary and capricious" standard is in accordance with Commission precedent. 29 FMSHRC at 966. The standard involves a review of the record to determine whether the Secretary properly exercised her discretion and judgment in the plan approval process. To the extent that Twentymile argues that the Commission should apply a reasonableness standard, T. Br. 18, the Commission's standard of review incorporates an element of reasonableness in reviewing the Secretary's actions. *See Monterey Coal*, 5 FMSHRC at 1019 (in affirming a citation in which an operator was cited for failing to supply data relating to impoundment pond construction, the Commission concluded that the course of action taken by MSHA was "a reasonable approach, and not arbitrary or capricious"); *accord Peabody II,* 18 FMSHRC at 692 & n.6 (in reviewing the Secretary's refusal to approve a ventilation plan provision, Commission noted that the plan approval process involves an element of judgment on the part of the Secretary that is reviewed under an arbitrary and capricious standard).

In further support of its position that the Commission should review the reasonableness of the operator's plan, Twentymile contends that the intent of the MINER Act was to permit operators to develop and implement their own plans before MSHA review. T. Br. at 18; T. Reply Br. at 1-4. We disagree. There is no statutory language that directs operators to unilaterally implement ERPs prior to MSHA approval. Rather, the legislative history accompanying the passage of the MINER Act makes clear that the approval process, with the involvement of

MSHA district office personnel, is an integral part of the plan formulation process. *S. Rep.* at 4. Morever, the facts in this proceeding belie Twentymile's argument. In its June 22, 2007, response to Twentymile's draft ERP, MSHA specifically instructed Twentymile to implement the provisions of the ERP that MSHA had approved. R. Ex. 11 at 3. Thus, we are not persuaded that Twentymile was obligated to formally implement its ERP before MSHA approval.

To the extent that Twentymile also argues that the Secretary committed legal errors in the plan approval process, the Commission is well within its authority to review MSHA's decisions for those errors. *See Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991) ("Abuse of discretion may be broadly defined to include errors of law."). Finally, an arbitrary and capricious standard of review of the Secretary's actions in the plan approval process encompasses the Commission's review of the judge's factual findings under a substantial evidence standard.[6] *Emerald Coal*, 29 FMSHRC at 966.

C. Whether the Secretary Properly Interpreted the Relevant Provisions of Section 316 of the Mine Act

Twentymile argues that the Secretary erred in interpreting the post-accident breathable air provisions of the Mine Act and then further erred when she applied those provisions at the Foidel Creek mine. T. Br. at 19-21. In response, the Secretary contends that, under a plain meaning approach, the MINER Act provisions that require breathable air for trapped miners clearly apply when a fire or explosion is "reasonably possible" and that the District Manager's refusal to approve Twentymile's ERP without a refuge chamber in the main entry between the portal and the 6MN intake shaft was not arbitrary and capricious. S. Br. at 18-34. The proceeding thus turns in large part on the meaning and application of the breathable air provisions of the MINER Act.

The breathable air provision in section 316 of the Mine Act, as amended by the MINER Act, requires: (1) that the ERP provide for "emergency supplies of breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time " and (2) that the ERP provide for a minimum of 2 hours of breathable air per miner in the form of caches of SCSRs in escapeways "from the deepest work area to the surface at a distance of not further than an average miner could walk in 30 minutes" to facilitate the evacuation of miners. 30 U.S.C. § 876(b)(2)(E)(iii)(I) & (II).

[6] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co*., 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). Deference to an agency's interpretation of the statute may not be applied "to alter the clearly expressed intent of Congress." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (citations omitted). In determining whether Congress had an intention on the specific question at issue, courts utilize traditional tools of construction, including an examination of the "particular statutory language at issue, as well as the language and design of the statute as a whole." *Id.*; *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d at 44; *Coal Employment Project v. Dole*, 889 F.2d 1127, 1131 (D.C. Cir. 1989). The examination to determine whether there is such a clear Congressional intent is commonly referred to as a "*Chevron* Step One" analysis. *See Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin*, 18 FMSHRC at 584; *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 13 (Jan. 1994). If the statute is ambiguous or silent on the point in question, a second inquiry, commonly referred to as a "*Chevron* Step Two" analysis, is required to determine whether an agency's interpretation of a statute is a reasonable one. *See Chevron*, 467 U.S. at 843-44; *Coal Employment Project*, 889 F.2d at 1131; *Thunder Basin Coal* Co., 18 FMSHRC at 584 n.2; *Keystone*, 16 FMSHRC at 13.

1. The meaning of the word "trapped"

Twentymile and the Secretary disagree over the meaning of "trapped" as used in section 316 of the Mine Act, as amended by the MINER Act. Twentymile contends that, in order for miners to be trapped, there must be a "physical obstruction of egress from the mine." T. Br. at 20. However, the Secretary maintains that no physical obstruction is necessary and that miners may be "trapped" for many other reasons. S. Br. at 27-28.

In the absence of a statutory or regulatory definition of a term, the Commission applies the ordinary meaning of that term. *E.g., Jim Walter Res., Inc.*, 28 FMSHRC 983, 987-88 (Dec. 2006). "Trap" means "to place . . . in a restricted or difficult position; confine, entangle . . . ." *Webster's Third New Int'l Dictionary, Unabridged* 2431 (1986). Thus, the dictionary definition of the term does not specifically require a physical obstruction.

Further, in addition to the literal definition of "trapped, " the context in which the term is used also gives meaning to the term.[7] As noted above, section 316 of the Mine Act contains the

[7] "In order to discern a standard's plain meaning, the standard must be read in context." *RAG Shoshone Coal Corp.,* 26 FMSHRC 75, 80 n.7 (Feb. 2004), citing *Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 45 (D.C. Cir. 1990) ("If the first rule of . . . construction is 'Read,' the second rule is 'Read on!'"); *Borgner v. Brooks*, 284 F.3d 1204, 1208 (11th Cir. 2002), *cert. denied sub nom. Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080 (2002) (in discerning a statutory provision's plain meaning, court must construe the statute in its entirety).

dual requirements of breathable air for evacuating miners and for those miners who are trapped and unable to evacuate. The legislative history that accompanied the MINER Act is instructive in describing the circumstances when miners would need breathable air and possibly face entrapment:

> In committee hearings, there was agreement among safety experts that in the event of an underground mine accident, escape is the first and the preferred option. The act does not signify a change in that philosophy. However, whether miners are effectuating an escape or awaiting rescue, where *escape proves impossible*, breathable air is essential to sustaining life.

S. Rep. at 6 (emphasis added). The committee report further refers to "possible incidents" and conditions which give rise to the need for breathable air. *Id.* at 6-7. Notably absent from these broad descriptions of the events that trigger the need for breathable air are any words that would limit application to a specific mine condition. *See Walker Stone Co.,* 19 FMSHRC 48, 51 (Jan. 1997), *aff'd*, 156 F.3d 1076 (10th Cir. 1998). Accordingly, the events that give rise to the provision of breathable air are not limited to situations involving physical obstruction in mines. However, conditions in the mine must be so arduous that evacuation from the mine becomes impossible. This is the scenario envisioned by section 316, which imposes the additional breathable air requirement "sufficient to maintain such individuals for a sustained period of time." 30 U.S.C. § 876(b)(2)(E)(iii)(I). This reading is also consistent with other sections of the MINER Act and the corresponding legislative history.[8]

Finally, the plain meaning approach to reading the MINER Act and the reference to "trapped" miners is not only consistent with the provisions of the statute and its legislative history, but also is consistent with the primary purpose of the legislation and experiences from the mine disasters that led to the legislation. As the legislative history states, the purpose of the MINER Act is to further the goals in the Mine Act and "to enhance worker safety in our nation's mines." *S. Rep.* at 1. A reading of the MINER Act that would include all types of mine emergencies that make escape impossible, not just physical obstructions in mines, best furthers this purpose.

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[8] Chairman Duffy and Commissioner Young note that, in addressing the requirement for post-accident lifelines in ERPs in the MINER Act, 30 U.S.C § 876(b)(2)(E)(iv), the committee report recognizes the importance of flame-resistant directional lifelines to provide assistance in following escape routes in circumstances of diminished visibility. *S. Rep.* at 7. They believe that the lifelines requirement for plans indicates a concern for dangers posed by smoke and fire that force miners to evacuate the mine. None of these circumstances involves physical obstructions in the mines. They conclude that it is apparent from these cumulative provisions that the drafters of the MINER Act foresaw that miners would attempt to evacuate mines under difficult circumstances, including the presence of smoke, fire, and non-breathable air. This leaves ERPs to address the maintenance of trapped miners who are faced with even more hazardous conditions of the same nature that make escape "impossible."

In short, based on the clear language of the MINER Act, the context in which the language appears, and the legislative history accompanying the breathable air provisions, we conclude, in agreement with the Secretary, that the reference to "trapped" does not require a physical obstruction of egress from a mine.

2. The Secretary's "reasonable possibility" test

The judge adopted the Secretary's standard of "reasonable possibility" in considering whether outby miners at the Foidel Creek mine could become trapped, which would trigger the requirements of section 316(b)(2)(E)(iii)(I) of the Mine Act. 29 FMSHRC at 858-59.[9] On appeal, as noted above, Twentymile continues to argue that the legislative history of the MINER Act supports its contention that breathable air beyond increased stores of SCSRs is necessary only in the event of "likely" risks of entrapment. T. Br. at 18-20; T. Reply Br. at 6-9.

The Secretary argues that, under a *Chevron I* analysis, a literal reading of section 316 indicates that the breathable air requirement applies any time that miner entrapment is a "reasonable possibility." S. Br. at 20-22. In addition to the literal reading of the statutory language, the Secretary's primary support for the "reasonable possibility" standard is the committee report accompanying the MINER Act in which the drafters referred to how much breathable air to provide:

> Although at least one jurisdiction has adopted a fixed time standard for breathable air, the committee elected not to do so. Instead the committee believes an emergency plan should address *possible* incidents and the attendant need for sufficient breathable air. The projected need is obviously fact specific.

S. Rep. at 6 (emphasis added).

However, we are not convinced that Congress directly spoke to the issue of what test should be used in determining when additional breathable air should be required in case miners are trapped. Contrary to the Secretary's argument, S. Br. at 20-26, nothing in the statutory language mentions a "reasonable possibility" test or otherwise indicates that such a test is mandated. In addition, the language from the committee report relied upon by the Secretary merely indicates that an ERP should address "possible incidents" and does not set forth any particular test for determining when breathable air is required.

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[9] The judge found that the Secretary established that "there is a 'reasonable possibility' that a major accident . . . could trap miners, especially injured miners, between the portal and the 6 MN air shaft." 29 FMSHRC at 859. The judge further noted that the District Manager evaluated the "distances involved and the possibility of a belt fire, an equipment fire, or another unexpected event near the portal." *Id.*

Moreover, as argued by Twentymile, T. Br. at 19-20, the same committee report accompanying the MINER Act can also be read to direct a different approach to assessing the need for breathable air by analyzing "*likely risks*" at a mine. *S. Rep.* at 6 (emphasis added). While the Secretary seeks to dismiss this portion of the committee report as a "single snippet of legislative history," S. Br. at 25, we conclude that this "likely risk" standard would also comport with the language of the MINER Act and the context of the breathable air provision. In sum, we conclude that the Secretary's "reasonably possible" interpretation is not compelled under a *Chevron I* analysis.

Where, as here, the statute appears to be silent on the point in question, a *Chevron II* analysis is therefore appropriate. Under that analysis, the question is whether the Secretary's interpretation of the statute is a reasonable one. *Chevron*, 467 U.S. at 843-44. In this case, the Secretary's reliance on a "reasonable possibility" test is a reasonable approach to interpreting and applying the breathable air requirement of section 316. Nothing in the statutory language would prevent the use of such an approach, and, as discussed above, the legislative history is generally consistent with such an approach even though other approaches would also be permissible. The Secretary's interpretation also furthers the safety purposes of the Mine Act. Moreover, as the judge acknowledged, "The vast majority of refuge areas that are being established under the MINER Act will never be used because either the catastrophic events that could necessitate their use will never occur or because the affected miners will be able to escape the mine." 29 FMSHRC at 858.

Thus, we affirm the judge's use of a "reasonable possibility" test in this case. *See Dolese Bros. Co.*, 16 FMSHRC 689, 693 (Apr. 1994). We next consider whether the Secretary properly applied that test in considering Twentymile's proposed ERP.

The Commissioners are evenly divided regarding whether the judge correctly determined that the MSHA District Manager did not act arbitrarily and capriciously when he rejected Twentymile's draft ERP because it did not provide for a refuge chamber in the mains near the midpoint between the portals and the 6 MN intake air shaft. Commissioners Jordan and Cohen would affirm the portion of the judge's decision in which he held that the District Manager's refusal to approve the draft plan without such a provision was not arbitrary and capricious. Chairman Duffy and Commissioner Young would reverse the judge's determination on that issue. The effect of the split decision is to allow the judge's order, in which he required Twentymile to provide for a refuge chamber approximately halfway between the portals and the 6 MN air shaft, to stand, as if affirmed. *See Pennsylvania Elec. Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992). The Commissioners are also evenly divided on the issue of whether the judge properly granted the Secretary's motion *in limine*. The separate opinions of the Commissioners follow:

III.

Separate Opinions of the Commissioners

Commissioner Jordan and Commissioner Cohen, in favor of affirming the decision of the administrative law judge:

A. Whether the District Manager's Action in Refusing to Approve Twentymile's ERP without a Provision for a Refuge Chamber in the Main Entry was Arbitrary and Capricious

This case emerges out of a lengthy process of good faith negotiations between Twentymile and District 9 of MSHA concerning the MINER Act's requirements for an emergency response plan, or "ERP." *See* 30 U.S.C. § 876(b)(2)(A). It appears that Twentymile and MSHA consulted with each other and both made adjustments in their positions on several issues. However, on one question they reached an impasse. This was whether Twentymile must make provision for "breathable air" under section 316(b)(2)(E)(iii)(I) of the Mine Act, 30 U.S.C. § 876(b)(2)(E)(iii)(I), for miners who work in the approximately 20,000-foot distance between the portals and the 6 Main North ("MN") intake air shaft ("outby miners"). In his opinion, Administrative Law Judge Richard W. Manning affirmed the District 9 decision to require a refuge chamber at a midpoint between the portals and the intake air shaft. 29 FMSHRC 844, 861 (Oct. 2007) (ALJ).

We must decide whether substantial evidence supports Judge Manning's decision that the District Manager's requirement of a refuge chamber in the mains was not arbitrary and capricious.[1] In so doing, we bear in mind the manner in which the arbitrary and capricious standard of review should be applied:

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

[1] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

> agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfr's. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citations omitted).

1. The Alleged Lack of Ascertainable Standards

Twentymile argues that the District Manager's decision was arbitrary and capricious because the Secretary has "no ascertainable standards" for applying section 316 of the Act. T. Br. at 23-25. According to Twentymile, there are no ascertainable standards because the Secretary has not promulgated regulations for ERPs through notice-and-comment rulemaking.[2] *Id*. at 24. However, Twentymile's argument fails in consideration of the record in this case and our recent decision in *Emerald Coal Resources, LP*, 29 FMSHRC 956 (Dec. 2007).

As the judge noted, the District Manager's insistence on the establishment of a refuge area between the portals and the 6 MN air shaft was consistent with guidelines published by the Secretary in an attachment to her Program Information Bulletin ("PIB") P07-03 (Feb. 8, 2007) entitled "Breathable Air Questions and Answers."[3] 29 FMSHRC at 860. The attachment stated:

> As with air provided to miners at the working section, breathable air should be provided to outby miners working in established work positions within an inflatable chamber, barricade, or other alternative that isolates miners from contaminated environments . . . . To increase the chances that outby miners could reach breathable air supplies after an accident, District Managers generally will be looking for breathable air locations to be located not more than one hour travel distance from each other. This will help assure that miners would not need to travel more than 30 minutes in either direction to reach a refuge area.

Id., *citing* R. Ex. 57.

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[2] We note that the Secretary recently published a proposed rule addressing requirements for refuge alternatives. 73 Fed. Reg. 34,140 (June 16, 2008).

[3] The Secretary also published an attachment to PIB P07-03 entitled "Methods for Providing Breathable Air." R. Ex. 59.

The record shows that after MSHA promulgated PIB 07-03, Twentymile submitted six separate Emergency Response Plans, to which the District Manager responded in five separate letters. 29 FMSHRC at 846-851. Discussions between the District Manager and Twentymile lasted for six months and included telephone calls, e-mails, and meetings, as well as letters. *See* Stip. 25-42 at 6-14; Tr. 156-57. In these negotiations, the District Manager spelled out the need for a refuge chamber for the outby miners. The District Manager noted that the refuge chamber for outby miners in the main entries would require only 72 hours of breathable air, in contrast with the 96 hours of breathable air per miner in active gateroad and mains development locations.[4] In making this distinction, the District Manager specifically noted the "specific circumstances and conditions in which breathable air would be used at this location." Jt. Ex. 2 at 2. Twentymile's argument that it lacked notice of the Secretary's requirements ultimately is belied by the fact that the District Manager approved the ERP in its entirety, except on the issue of breathable air for outby miners. 29 FMSHRC at 850; Jt. Ex. 2.

In *Emerald Coal*, the Commission noted that the MINER Act did not require notice and comment rulemaking. We stated, "Indeed, the short time period provided for the submission of ERPs following the passage of the MINER Act suggests that Congress did not intend for MSHA to proceed by rulemaking." 29 FMSHRC at 970. We also held that operators had adequate notice of MSHA's position because of the written communications specific to the proposed ERPs. *Id*. at 971. Thus, it cannot be said that Twentymile had inadequate notice of the requirements for breathable air. Indeed, if Twentymile is correct that the Secretary acted in an arbitrary and capricious manner because she has not promulgated regulations through notice and comment rulemaking, every MSHA decision on an Emergency Rescue Plan anywhere in the country would be vulnerable to attack.

2. Substantial Evidence

We now turn to an examination of the evidence in this case to determine whether the decision of the District Manager was arbitrary and capricious. Twentymile argues that he did not consider the specific conditions relating to the Foidel Creek Mine. However, Judge Manning found "that the [D]istrict [M]anager considered the specific conditions present in the outby areas of the mine when he reached his decision to reject the proposed language in the plan dealing with breathable air in outby areas." 29 FMSHRC at 859. The judge further determined that "[t]he [D]istrict [M]anager took into consideration all of the safety features . . . as well as the presence of caches of SCSRs located along the intake entries and the availability of vehicles in the entries." *Id*. at 860.

The consideration of whether Judge Manning's decision is supported by substantial evidence involves two distinct factual issues – (1) whether there is a reasonable possibility that in

[4] MSHA District 9 had originally required that the refuge chamber between the portals and 6 MN air shaft provide 96 hours of breathable air, R Ex. 11, but after further consideration reduced the requirement to 72 hours of breathable air. Jt. Ex. 2.

the event of a fire or explosion, outby miners will be unable to escape through the portals, and (2) whether, in the event of such inability to escape through the portals, outby miners will be unable to reach the 6 MN intake air shaft. We will address these two issues separately.

a. Escape Through the Portals

It is uncontroverted that Foidel Creek is a progressive mine with significant safety features. MSHA's witness William Reitze acknowledged that fact in his testimony, Tr. 30, 57, as did Judge Manning in his decision. 29 FMSHRC at 859. Judge Manning nevertheless concluded that there was a reasonable possibility that miners could be trapped by a mine accident between the portals and the 6 MN air shaft. For example, a single event could contaminate the intake air in the two escapeways, and thus block escape through the portals. *Id*. This determination is supported by substantial evidence.

Reitze, the supervisory mining engineer for the ventilation section of the MSHA District 9 technical services branch, testified in detail about the possibility of a belt fire that would compromise the stoppings, thus allowing smoke to travel into both escapeways. Tr. 29, 44-48. He also voiced concerns about an equipment fire that could generate significant amounts of smoke and possibly contaminated air that would restrict miners from exiting at the portals. Tr. 29, 52-54. In addition, Reitze testified about the possibility that float coal dust could be suspended into the air, and, coupled with the possibility of a fire from either a belt or mechanical equipment fire, create an explosion that would cause problems in the intake escapeways. Tr. 29-30, 55-56. The District Manager relied on these scenarios in refusing to fully approve Twentymile's ERP. 29 FMSHRC at 859; Tr. 58.

MSHA Senior Fire Protection Engineer Derrick Tjernlund also testified as to how a fire could start in the belt entry and how miners would not be able to escape through the portals. Tr. 123-27. In addition, he stated that the stoppings are not really built to be fire-resistant in conditions which occur in actual mine fires. Tr. 128. Tjernlund also explained how an equipment fire could occur, Tr. 135-38, and how an explosion could occur. Tr. 132-35. Tjernlund agreed with Reitze that in the event of a belt fire, equipment fire, or explosion, it was reasonably possible that outby miners could not escape the mine through the 1 MN portals. Tr. 129, 135, 138-39.

Judge Manning credited the testimony of Reize and Tjernlund that outby miners could be trapped by a fire or explosion and thus be unable to escape through the 1 MN portals. 29 FMSHRC at 858. On issues of witness credibility, we are not permitted to substitute our judgment for that of the administrative law judge. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd*

sub nom. Secretary of Labor v. Keystone Coal Mining Corp., 151 F.3d 1096 (D.C. Cir. 1998).

We would further note that Twentymile witness Robert Thorel Johnson, a mining engineer who is Technical Safety Coordinator at the Foidel Creek Mine, agreed that there was a possibility that outby miners could be prevented by a fire from escaping through the portals. Tr. 154-55, 169. Twentymile's counsel conceded this possibility at oral argument. Oral Arg. Tr. 76-77. Moreover, our colleagues do not appear to dispute that the Secretary has established the reasonable possibility that outby miners could be prevented by a fire from escaping through the portals.

b. Reaching the 6 MN Air Shaft

Having found that substantial evidence supports the ALJ's conclusion that there was a reasonable possibility that outby miners could be prevented from escaping through the portals, we next address whether these miners might not be able to reach the 6 MN intake air shaft.

It is almost four miles from the portals to the 6 MN air shaft, mostly at a very steep downgrade slope. 29 FMSHRC at 858; Tr. 33-34, 42-43, 167. Thus, if escape through the portals is impossible, miners would have to travel potentially three-and-a-half miles to get to the shaft. 29 FMSHRC at 860. Twentymile claims that the miners would not be trapped because they could traverse this distance using motorized vehicles. T. Br. at 27-28. However, Judge Manning found that the District Manager took into consideration the availability of vehicles in the entries. 29 FMSHRC at 860. In fact, Reitze, who helped evaluate Twentymile's ERP for District 9, Tr. 26, was aware that vehicles were potentially available to be used to escape from the mine. Tr. 61-62.[5] Twentymile's Johnson, stated that "[i]n most cases" people evacuating the mine would be using a vehicle," Tr. 162, which indicates that Twentymile does not contend that vehicles would be available to all outby miners. Similarly, at oral argument, Twentymile's counsel acknowledged the possibility that miners could be isolated from the vehicles. Oral Arg. Tr. 33. It was not unreasonable for the District Manager to conclude that there was no guarantee that all miners

[5] Relying on our recent decision in *Emerald Coal* and the Supreme Court's decision in *State Farm*, our colleagues insist that any rationale for the District Manager's decision to require a refuge chamber in the ERP must appear within the four corners of his correspondence to the operator, and that trial testimony "cannot supply post hoc rationales that are absent from the District manager's decision." Slip op. at 39. Neither of these cases stand for this proposition. In *Emerald Coal*, in holding that the Secretary's ERP requirements were reasonable and not arbitrary and capricious, we relied on the testimony of MSHA's lead reviewer of ERPs for the relevant District, who stated at hearing why the District Manager insisted on the provision at issue. 29 FMSHRC at 968-969. *State Farm* involved petitions for review of an agency decision (after a lengthy rulemaking process) filed with the United States Court of Appeals. 463 U.S. at 39. In that case, the admonition that a court may not supply the basis for an agency decision came in the context of appellate review of a rulemaking in which there were "no findings and no analysis . . . to justify the choice made." *Id.* at 48. There was no subsequent testimony offered by the agency after its final rule was issued.

would have access to vehicles if an evacuation were necessary. The District Manager prudently insisted upon the refuge chamber as a safety measure for those miners who would need to evacuate by walking along the escapeway.[6]

The Secretary presented evidence that with smoke in the escapeways, miners who were exhausted, injured and/or disoriented might not be able to walk the three-and-a-half miles to the 6 MN intake shaft. Tr. 48-50, 130. At the hearing, Reitze was asked about the type of entrapment scenario that MSHA was particularly concerned about if both intake air escapeways became filled with smoke. He responded:

> If they were both to the point where they could not escape through the portal areas, the individuals would have to travel a fair amount of distance, all the way into the Six Main North escape facility. While that is absolutely the preferable way to do it, if those individuals were for whatever reason exhausted from trying to fight the fire, or injured, or whatever, they may not be able to physically get to the Six Main North escape facility.
>
> . . . .
>
> You would be walking downhill for up to approximately four miles, three and a half miles, to arrive at the escape facility, and you would be walking, again, downhill most of the way. Some of the areas could be very steep, as depicted by the 15 and 17 percent. And if you had an injured person or whatever, it could be fatiguing to get there. Or they may not be able to get to the Six Main North facility at all due to the injuries.

Tr. 49-50.

Our colleagues cite to the testimony of MSHA supervisor Donald Gibson, stating that he testified that "walking inby would be 'downhill'" and it would be relatively "easy." Slip op. at 42. However, that assessment was made in comparison to the effort it would take to exit the mine, which he declared would be "tough . . . It is uphill, the grade of the mine. It is a tough climb." Tr. 111. In any event, Reitze's compelling testimony, rebuts the contention that walking to the 6 MN

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[6] Indeed, in the preamble to its final rules on emergency mine evacuation, MSHA explained how an evacuation may involve a combination of travel modes, including both walking and mechanized transportation, and acknowledged that often mechanized transportation will be utilized. However, MSHA emphasized that "[t]he unique characteristics of the escapeways, [or] conditions caused by the emergency . . . may prevent the use of mechanized transportation. Walking may be necessary in those circumstances." Emergency Mine Evacuation, 71 Fed. Reg. 71,430, 71,440 (Dec. 8, 2006).

air shaft will be "easy." Walking for three-and-a-half miles on a steep slope, on uneven ground, in intense smoke is not an "easy walk." Considering that miners could be exhausted, injured, and/or disoriented, substantial evidence certainly supports the judge's determination that the District Manager was not arbitrary or capricious in requiring a rescue chamber.

Quoting the "Breathable Air Questions and Answers" attached to the Secretary's PIB 07-03, Ex. R. 57, our colleagues assert that "the Secretary has essentially directed District Managers to base their decisions regarding the requirement for additional breathable air in outby areas solely upon the distance over which miners would have to travel." Slip op. at 36. They additionally assert that the Secretary would require "'breathable air locations to be located not more than one hour travel distance from each other' so that miners 'would not need to travel more than 30 minutes in either direction to reach a refuge area.'" *Id*. at 37 (citation omitted). In support of this contention, our colleagues cite the statement by MSHA representative Hillary Smith that the District Manager would not "'accept an ERP from Twentymile that failed to provide breathable air in the main entries at Foidel Creek for travel distances exceeding 15,000 feet.'" *Id.*, *citing* Stip. 32 at 8. Based on these assertions, our colleagues then argue that the "Secretary's policy for outby miners effectively ignores the individualized approach to ERPs and miner safety that is directed in the MINER Act" and avoids consideration of individual mine conditions, contrary to the intent of Congress. *Id.* at 37-38.

Our colleagues' reference to the "Breathable Air Questions and Answers" is a red herring. The issue is not whether the Secretary would require refuge chambers to be placed so that miners would not have to travel more than 30 minutes. The Secretary here looked at this mine and recognized, as Reitze testified, Tr. 49-50, that it is approximately 20,000 feet from the 1 MN portals to the 6 MN air shaft, down a very steep slope. If the portals were blocked, and outby miners had to walk three and a half miles, this would take far longer than 30 minutes. In 30 C.F.R. § 75.1714-4(c)(2)(ii), addressing storage locations for caches of additional SCSRs in escapeways, MSHA has provided a rule of thumb that the maximum distance one could expect miners to travel in 30 minutes, in an entry where the miners could walk erect (as at Foidel Creek) with grades not over 5 percent (which is not the case at Foidel Creek), is 5700 feet. If outby miners were trapped near the portals at Foidel Creek, and had to walk to the 6 MN air shaft, it would take at least one and a half hours (without adjusting for the steep grade), using the regulation's rule of thumb. This is the fact that the Secretary looked at, rather than a theoretical rule of not walking more than 30 minutes.[7] Thus, the Secretary did not avoid consideration of the

[7] Our colleagues assert that, in the Stipulations agreed to by the Secretary, it was agreed that "the questions and answers were *the basis* for the District Manager's requiring Twentymile to provide for breathable air beyond the SCSRs in the mains." Slip op. at 37 n.8, *citing* 29 FMSHRC at 847-48 (emphasis added). This is not a complete representation of the Stipulations. As noted by Judge Manning, 29 FMSHRC at 848, Stipulation 32 states that MSHA's Hillary Smith stated to Twentymile that given the Questions and Answers, "she did not think that District Manager Davis would accept an ERP from Twentymile that failed to provide breathable air in the main entries at Foidel Creek for travel distances exceeding 15,000 feet." The time it

individual mine conditions at Foidel Creek.

c. Alleged Inconsistency with a Refuge Chamber for the Active Longwall Section

Twentymile additionally argues that it was inconsistent, arbitrary and capricious for the District Manager to require a refuge chamber in the mains while not requiring a refuge chamber for the active longwall section. However, Judge Manning addressed this question, and found that the distinction made by the District Manager was reasonable. 29 FMSHRC at 859. The ALJ's decision in this regard is supported by substantial evidence. The testimony indicated that the longwall section receives intake air from two independent sources from opposite directions, unlike the intake air escapeways. Tr. 60-61, 87-88; J. Ex. 7. Miners in the longwall section can escape in two opposite directions. Tr. 60. Consequently, unlike in the main entries, a single event would not present the same chance of contaminating or disabling both means of escape from the longwall section. Tr. 87-88. By contrast, the two separate escapeways in the main entries are no longer separate if the stoppings and other ventilation controls become damaged or destroyed in a fire or explosion. Tr. 47-48, 87-88, 128-29.

After weighing all of the evidence, Judge Manning concluded that the District Manager's requirement of a refuge chamber approximately midway between the portals and the 6 MN shaft was not arbitrary and capricious. 29 FMSHRC at 860-61. We agree, as the testimony discussed above demonstrates, that the District Manager's decision to require the rescue chamber was not "so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicles Mfr's. Ass'n,* 463 U.S. at 43.

The Secretary conceded that it was not likely that a chain of events would occur whereby the outby miners are prevented from escaping through the portals because of a fire, and are then unable to reach the 6 MN shaft to escape. Tr. 30. But the issue is not the likelihood that such events will occur. The question is whether there is a "reasonable possibility" such events might occur. With that standard in mind, we conclude that substantial evidence supports Judge Manning's determination that the District Manager's refusal to accept Twentymile's proposal on breathable air in the outby area of the mine was not arbitrary and capricious.

3. The Legal Standard

In their discussion of the applicable law, our colleagues posit a two-step test to evaluate whether MSHA acted in an arbitrary and capricious manner in requiring Twentymile to make provisions in its ERP for a refuge chamber (i.e., breathable air beyond that provided by SCSRs) in the mains between the portals and the 6 MN air shaft. The first inquiry, according to them, is to determine whether the breathable air requirement in section 316(b)(2)(e)(iii) is "triggered in the

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would take outby miners in the Foidel Creek mains to walk to the 6 MN air shaft would be approximately three times the maximum 30 minutes referred to in the Questions and Answers.

outby areas in this case." Slip op. at 33. This inquiry is not limited to the needs of trapped miners, as section 316(b)(2)(e)(iii), to which they refer, contains all of the breathable air provisions of the Act, both those relating to trapped miners and those relating to miners who evacuate. Thus, in effect, their first inquiry includes the question: are SCSRs even required at all? The second prong of our colleagues' proposed standard is whether, if the requirement for breathable air is "triggered," the ERP must provide for breathable air beyond SCSRs. Slip op. at 33. This is the inquiry relating to trapped miners, who are referred to only in section 316(b)(2)(E)(iii)(I). With regard to the first inquiry, our colleagues say that the legal standard is whether there is a "reasonable possibility" that the breathable air requirements would be triggered. Slip op. at 33-34. However, with regard to the second inquiry, our colleagues say that the standard involves a weighing of "likely risks." Our colleagues further state the two-step test that they posit, and the legal standards for each test, are directly mandated by Congress. *Id.* at 34-35.

The initial problem with our colleagues' formulation is that the first step of their two-step test is not an "inquiry" which involves a "trigger." Rather, it is a given, mandated by the statute in every ERP. The MINER Act's provision for "POST-ACCIDENT BREATHABLE AIR," section 316(b)(2)(E)(iii), provides that an ERP "shall provide for" various safety features including, in subsection (II), "caches of self-rescuers providing in the aggregate not less than 2 hours per miner to be kept in escapeways from the deepest work area to the surface at a distance of no further than an average miner could walk in 30 minutes." 30 U.S.C. § 876(b)(2)(E)(iii)(II). In other words, *every* ERP for *every* underground mine *must* provide caches of SCSRs from the deepest part of the mine to the surface at intervals which an average miner could reach in walking for 30 minutes. This is because Congress has already made the initial determination that enough risk exists in *every* mine to require SCSRs. There is neither an "inquiry" nor a "trigger" under the statute, as our colleagues posit. Otherwise, it would be possible to have an ERP with no provision whatsoever for SCSRs. Hence, the only true question is what our colleagues have characterized as the second one, i.e. whether the ERP must provide, under subsection (I), emergency supplies of breathable air beyond SCSRs for trapped miners (in this case, a refuge chamber).

As noted above, our colleagues would apply a "reasonable possibility" standard to their first inquiry and a "likely risk" standard to their second inquiry. However, since their first "inquiry" is not an inquiry at all, this would in effect read the "reasonable possibility" standard out of the analysis. They have in effect created a straw man – a need to undertake an inquiry as to whether something is required, when the clear statutory language already mandates it. Having earlier assented to the use of the "reasonable probability test," slip op. at 17-18, they now relegate its application to a meaningless inquiry, as the statutory language universally and emphatically has already answered the question they pose. Consequently, under their analysis, all that would be left is our colleagues' standard involving the weighing of "likely risks" to determine if a refuge chamber is required as part of an ERP. The discussion in section II.C.2. of our joint opinion becomes essentially irrelevant to their analysis, as they have rendered the application of a "reasonable possibility" test a nullity.

Our colleagues state that the Secretary did not offer an interpretation of the statute that addresses the test to be used to determine whether breathable air beyond SCSRs is required. Slip

op. at 35. This assertion is incorrect. In urging adoption of a "reasonable possibility" test, the Secretary did not concern herself with the irrelevant first question posed by our colleagues. Rather, as discussed in detail in her brief, the Secretary focused on the legal standard to be applied in determining when emergency supplies of additional breathable air are required for miners who are "trapped underground." S. Br. at 20-27, citing 30 U.S.C. § 876(b)(2)(E)(iii)(I). In this context, the Secretary argued that breathable air beyond SCSRs is required "where miner entrapment is a *reasonable possibility*." S. Br. at 20 (emphasis in original).

In addition, our colleagues state that their two-step test, and their related use of the "reasonable possibility" and "likely risk' standards, are mandated by Congress because "Congress has directly spoken to the question." Slip op. at 34-35. However, in rejecting the Secretary's *Chevron I* analysis of the test to apply to determine when the breathable air requirement applies, all Commissioners agreed in our joint opinion that "the statute appears to be silent on the point in question," *id*. at 18, and stated that "we are not convinced that Congress directly spoke to the issue of what test should be used in determining when additional breathable air should be required in case miners are trapped." *Id.* at 17. We added that "[w]here, as here, the statute appears to be silent on the point in question, a *Chevron II* analysis is therefore appropriate," *id.* at 18, and because the Secretary offered a reasonable interpretation of the test to be used to ascertain the need for breathable air for trapped miners, we adopted it. Consequently, we are puzzled by our colleagues' subsequent assertion that, on the issue of "whether . . . breathable air beyond . . . SCSRs" is required, they believe that "Congress directly spoke to that issue," *id.* at 34, in a manner inconsistent with the views expressed earlier.

We also question our colleagues' analysis of the legislative history. To read their description of the relevant standard to apply, it would appear that Congress had clearly set out, in chronological order, two separate tests: a consideration of "possible incidents" at a mine and then an analysis of "likely risks" to miners from such incidents. *Id.* at 33, 34. Congress did nothing of the sort. Although, as we acknowledged in our joint opinion, the standards articulated in the Senate Report could appear confusing, *id.* at 17-18, it is clear to us that they were not written as our colleagues imply. In the general introductory section of the Senate Report on "Breathable air," the Senate Committee did indeed state that "with regard to an entrapment, the act requires that emergency plans analyze likely risks to determine if breathable air beyond the increased stores of SCSRs is necessary." S. Rep. at 6. However, in the sole paragraph devoted to Subpart (I) of the legislation (regarding breathable air for trapped miners), the Report states that "the committee believes an emergency plan should address possible incidents and the attendant need for sufficient breathable air." *Id*. We fail to see how the introductory language can be cobbled together with the relevant language in the section analyzing Subpart (I) of the breathable air provisions to somehow create the two-step process put forth by our colleagues. Slip op. at 33.

B. Whether the Judge Erred in Granting the Secretary's Motion *In Limine*

The final issue involves Twentymile's challenge to the judge's decision in granting the Secretary's motion *in limine*. Prior to the hearing, the Secretary filed a motion to prevent Twentymile from presenting evidence relating to the approval of ERPs with post-accident breathable air provisions for main entries in at least six other MSHA districts. Mot. at 1; T. Resp. at 1-2. The Secretary argued that the other plans were of "no relevance" to this proceeding and further noted that each ERP "must 'account for the specific physical characteristics of the mine.'" *Id.* at 2, *quoting* 30 U.S.C. § 876(b)(2)(C)(iii). The judge granted the Secretary's motion at trial. Tr. 80-81. Twentymile's counsel made an offer of proof, indicating that the ERPs that he sought to put into evidence would show that other MSHA districts had ERPs for large longwall mines without refuge chambers with breathable air where there were multiple ways out of the mine. *Id.* at 82. *See* R. Ex. 70-75.

In his decision, the judge affirmed his trial ruling, reiterating that the scope of the proceeding was whether the District Manager's rejection of the ERP was arbitrary and capricious and that the evidence Twentymile sought to introduce would be of little probative value.[8] 29 FMSHRC at 860. The judge concluded, "Even if two mines were similar, the only issue in the present case would be whether District Manager Davis acted reasonably." *Id.*

Before the Commission, Twentymile's primary argument is that the rejected evidence would demonstrate that the Secretary acted improperly in requiring Twentymile to have a refuge chamber in the main entries.[9] T. Br. 11-14. In response to Twentymile, the Secretary argues that

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[8] Commission Procedural Rule 63(a) states that "[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). The judge's reference to the rejected exhibits as not being "probative" is essentially the same standard as the relevance standard in Rule 63(a). Moreover, as one noted commentator has explained "relevance does not ensure admissibility." 1 Kenneth S. Broun, McCormick on Evidence § 185 (6th ed. 2006). Much evidence is excluded on the ground that the costs outweigh the benefits, such as when "the evidence offered and the counterproof could consume an inordinate amount of time." *Id.*

At oral argument, counsel for Twentymile indicated he would "actually want to depose all nine district managers and the like" because if he could "provide some evidence of inconsistency . . . that's appropriate for the judge to hear." Oral Arg. Tr. 16. He agreed, in response to comments from the bench, that to present this issue fully ("to do it right") would involve extensive testimony about the similarities and differences in each of the mines that counsel wished to compare to Twentymile and could require an additional week of trial. *Id.* at 16-17. Clearly the judge could appropriately decide that the costs of this evidence would outweigh its benefit.

[9] We find no merit to Twentymile's equal protection argument that it contends would be supported by the evidence excluded by the motion *in limine*. Our conclusion that the District

the District Manager's plan approval is largely based on mine specific factors and the "'substance and timing'" of the negotiating process. S. Br. at 44 (citation omitted).

When reviewing a judge's evidentiary ruling, the Commission applies an abuse of discretion standard. *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000). "Applying an abuse of discretion standard is consistent with the discretion accorded judges in matters related to the conduct of a trial." *Marfork Coal Co., Inc.*, 29 FMSHRC 626, 634 (Aug. 2007) (citation omitted). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Pero*, 22 FMSHRC at 1366 (citations omitted).

Applying this standard to the judge's denial of the admission of these other plans into evidence (and the related examination that would accompany their admission), we conclude that the judge did not abuse his discretion in denying their admission. We agree with the judge that the excluded evidence would not have been probative in showing whether the District Manager acted reasonably. 29 FMSHRC at 860. The judge correctly noted that, in approaching the approval of breathable air provisions at individual mines, it is unlikely that two underground coal mines would "present exactly the same factual situation." *Id*. The location and method of providing breathable air in an ERP is based ultimately on mine specific circumstances. Indeed, the legislative history of the MINER Act and the portion of the breathable air provisions for trapped miners in section 316 states, "The projected need [for breathable air] is obviously fact specific." *S. Rep.* at 6.

Our colleagues suggest that the proffered evidence was admissible because Reitze "admitted that when reviewing Twentymile's plan, members of the District 9 office looked to see what other distracts were approving and were aware of approved plans without supplies of breathable air in mines with multiple ways out." Slip op. at 44. While this is a correct statement, it is incomplete. Reitze also testified that he was aware of such approved plans only where miners would have to walk distances of less than 20,000 feet. Tr. 73. Significantly, in his offer of proof, counsel for Twentymile did not indicate that any of the approved plans which he was seeking to introduce in evidence involved a mine in which miners would have to travel a distance comparable to the 20,000 feet between the portals of the Foidel Creek Mine and the 6 MN air shaft. Tr. 82.

Moreover, we are concerned about where such evidence would lead. District Managers are individuals. Like baseball umpires, they each have a slightly different strike zone. Additionally,

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Manager's refuge chamber requirement in the ERP was not arbitrary and capricious largely militates against a determination that the same conduct violated principles of equal protection. *See Emerald Coal*, 29 FMSHRC at 972 n.19. With regard to Twentymile's due process argument, in *Emerald Coal* the Commission rejected a similar due process argument because the operators there had actual notice of the Secretary's position on the breathable air provisions in the MINER Act through extended negotiations. *Id.* at 971. We see no discernible difference between Twentymile's position in this proceeding and the position taken by the operators in *Emerald Coal*.

there are differences from mine to mine, and the ERP for each mine must be considered on its own merits. If we tell administrative law judges that, in weighing whether a particular District Manager acted in an arbitrary and capricious manner, they should consider what other District Managers do in allegedly comparable situations, it would encourage a race to the bottom. That is, a District Manager would necessarily have to be looking over his or her shoulder to consider whether his or her decision would eventually be found arbitrary and capricious because it was more stringent than the decision of another District Manager. A District Manager in this situation would have an inducement to shade the requirements of the law in an operator's favor so as to avoid unfavorable comparison with other District Managers. This would lead to the standard essentially being set by the most lenient District Manager, a process which would be detrimental to mine safety.

In light of the foregoing, the judge did not err in granting the Secretary's motion *in limine*.[10]

C. Conclusion

For the foregoing reasons, we would affirm the judge's determination that Twentymile include a refuge chamber near the midpoint between the portals and the 6 MN intake air shaft, as required by the MSHA 9 District Manager.

Mary Lu Jordan, Commissioner

Robert F. Cohen, Jr., Commissioner

[10] We do not hold that evidence of the provisions of other approved ERPs would never be admissible in an ERP dispute proceeding. Rather, we conclude only that the judge did not abuse his discretion in excluding such evidence in this case.

Chairman Duffy and Commissioner Young, in favor of reversing the decision of the administrative law judge:

A. Whether the District Manager's Action in Refusing to Approve Twentymile's ERP without a Provision for a Refuge Chamber in the Main Entry Was Arbitrary and Capricious

At the outset, we recognize that the Secretary and MSHA were and are under strong public and Congressional pressure to implement the provisions of the MINER Act as expeditiously as possible. We further note that Congressional guidance on implementing many of the provisions of the MINER Act is limited. Terse though it may be, the legislative history of the MINER Act, nevertheless, does set forth certain principles for determining how ERPs should be developed, reviewed, and implemented. Slip op. at 12-14.

As discussed above, *id.* at 17-18, we have upheld the Secretary's use of a "reasonable possibility" test to determine the possible occurrence of an event giving rise to a mine emergency and the "attendant need for sufficient breathable air." *S. Rep*. at 6. However, our inquiry cannot stop there in this proceeding. In reviewing the District Manager's decision to disapprove the ERP, we must further examine whether additional breathable air was needed in the mains, *beyond the additional caches of SCSRs already required by the Act and the ERP*, in the event of a mine emergency. Moreover, the scope of our review under the "arbitrary and capricious" standard encompasses the question of whether legal and/or factual errors occurred in the District Manager's analysis of the relevant factors in this case. *See* cases cited, slip op. at 14 & n.6.

As explained below, we conclude that the District Manager's decision was "arbitrary and capricious" because it contained both legal and factual errors. In particular, the District Manager failed to consider relevant mine-specific factors in this case contrary to congressional intent or to explain why those factors need not be considered. In addition, the legal approach utilized by the District Manager and supported by the Secretary contravened Congress's directive that the Secretary base her decision regarding whether additional breathable air beyond the increased numbers of SCSRs be based on a risk analysis considering mine-specific factors. Finally, the judge's conclusion that the District Manager did properly consider all relevant factors is clearly not supported by substantial evidence.

1. Legal Errors

Congress made clear that ERPs would be based on the "plan" model used in other parts of the Mine Act. In its overall guidance regarding the ERP development and approval process, the committee report accompanying the passage of the MINER Act states:

> The individual plan model contemplates that safety solutions and risk-management plans will be designed and reviewed by those who are "on the ground," and therefore most familiar with the unique circumstances and most practical approaches.

S. Rep. at 4. Thus, Congress intended that, in the development, review, and approval of ERPs, local MSHA representatives would carefully weigh potential risks and then determine appropriate measures based on the conditions and capabilities in each individual mine, i.e., mine-specific factors.

The central question in this case is whether Twentymile's ERP must provide breathable air beyond the increased numbers of SCSRs (i.e., whether it must require a refuge chamber) in the outby areas in the main sections. The answer to this question turns on two separate inquiries. First, whether as an initial matter the breathable air requirement for mine emergencies in section 316(b)(2)(E)(iii) of the Mine Act is triggered in the outby areas in this case. Second, whether, if the requirement is triggered, the ERP must provide for breathable air *beyond* SCSRs.[1]

With regard to the first question, the committee report states that MSHA and the operator must address the need for breathable air to enable all miners to exit the mine "under emergency circumstances." *S. Rep*. at 7. More particularly, Congress called on MSHA to first address the "possible incidents" that would trigger "the attendant need for sufficient breathable air." *Id*. at 6.

The Secretary in her brief stated that she interpreted the MINER Act as providing for the use of a "reasonable possibility" test to determine whether the breathable air requirement in section 316(b)(2)(E)(iii) is triggered in a particular area of a mine. S. Br. at 20-28. As discussed above, we agree that the Secretary's "reasonable possibility" test is a permissible reading of the statute

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[1] Section 316(b)(2)(E)(iii) states that with regard to "post-accident breathable air" an ERP shall provide for:

> (I) emergency supplies of breathable air for individuals trapped underground sufficient to maintain such individuals for a sustained period of time;
> (II) in addition to the 2 hours of breathable air per miner required . . . under the emergency temporary standard . . . caches of self-rescuers providing in the aggregate not less than 2 hours per miner to be kept in escapeways from the deepest work area to the surface at a distance of no further than an average miner could walk in 30 minutes. . . .

30 U.S.C. § 876(b)(2)(E)(iii)(I) and (II).

under a *Chevron II* analysis.[2] Thus, based on mine-specific factors, the Secretary, acting through the District Manager, was to determine whether the breathable air requirement was triggered in the outby area of the Foidel Creek Mine. Our examination of the record indicates that there was a reasonable possibility that the breathable air requirement would be triggered. *See* 29 FMSHRC at 859.

With regard to the second question – whether the ERP must provide for breathable air beyond that which will be provided by SCSRs – the initial issue is what test is to be applied to determine whether such additional breathable air is necessary. We conclude that Congress directly spoke to that issue under *Chevron I*. The Senate committee report explained that the MINER Act increases the amount of breathable air required, through a greater number of SCSRs stored underground "both in the event of escape and entrapment." *S. Rep*. at 6. However, to address the further possibility of entrapment, Congress expressly stated that ERPs must also analyze "likely risks" to determine the extent to which additional breathable air is necessary:

> In addition, with regard to an entrapment, the [MINER] [A]ct requires that emergency plans analyze likely risks to determine if breathable air beyond the increased stores of SCSRs is necessary; and, if so, by what means can the goal be attained.

Id.[3] Congress further recognized that there will be "diverse . . . means by which a goal of additional breathable air can be achieved," including the "use of additional caches of SCSRs . . . [or] secure refuge areas . . . ." *Id.* at 7.

Thus, Congress clearly stated that, if MSHA determines that the breathable air requirement is triggered in a particular situation, MSHA must then conduct an analysis of "likely risks" affecting miners in an emergency to ascertain whether additional breathable air beyond SCSRs,

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[2] However, we disagree that the "reasonable possibility" test governs the analysis of all successive events following a fire, explosion, or roof fall, such as miner injuries, the use of escapeways, and the failure of fire suppression systems. As we show below, such an approach ignores the risk analysis mandated by Congress.

[3] Our colleagues question our use of the quoted portions of the committee report, which appears under the heading "Breathable Air." Slip op. at 28. By its own language, the committee report plainly addresses the need for breathable air in the circumstance of entrapment along with the accompanying risk analysis. There is nothing to suggest that the language does not mean what it says. In addition, our colleagues state that the "reasonable possibility" test is limited in application to trapped miners. *Id.* Once again, the committee report is clear in addressing the needs of *all* miners for breathable air in light of the possibility of a mine accident: "The [MINER] [A]ct increases the quantity of [SCSRs] . . . and thus, increases the amount of breathable air available to underground personnel both in the event of escape and entrapment." *S. Rep.* at 6.

e.g., a refuge chamber, must be required by the particular ERP.[4] In other words, Congress envisioned a two-step process in determining whether breathable air beyond SCSRs is required in an ERP: a consideration of "possible incidents" at a mine and, if the breathable air requirement is triggered, an analysis of "likely risks" to miners from such incidents based on mine-specific factors.

Our colleagues apparently misunderstand the two-step process for determining how an ERP is to address the question of how much breathable air is necessary in a particular mine area. They contend that the first step of the two-step test "is a given, mandated by the statute in every ERP" and therefore is supposedly meaningless. Slip op. at 27. We recognize that in subparagraph (II) of section 316(b)(2)(E)(iii) Congress provided that a required number of SCSRs must be placed in every mine, but this requirement is clearly independent from the breathable air requirement in subparagraph (I). Thus, the inquiry that arises under subparagraph (I) is whether additional breathable air is necessary, how much is needed, and how should it be provided. Congress made clear that, to address those questions, MSHA is to first look at "possible incidents" that might require sufficient breathable air (which can be based on a "reasonable possibility test"). *S. Rep.* at 6. Once those incidents are identified, Congress explicitly called for an analysis of "likely risks" based on mine-specific conditions so that MSHA and the operator could ascertain whether and how much additional breathable air is necessary and how it should be provided, e.g., through additional SCSRs, through refuge chambers, or through some other means. *Id.*

We note that the Secretary did not offer an interpretation of the statute that addresses the test to be used in specifically determining whether breathable air beyond SCSRs is required.[5] Rather, the Secretary's interpretation in her brief addresses only the initial question of whether the breathable air requirement is triggered, *not whether breathable air beyond SCSRs is required*. In particular, the Secretary states: "Applying the language of the MINER Act, its legislative history, and its safety purpose, the Secretary required that Twentymile's ERP provide breathable air where miner entrapment is a reasonable possibility" (emphasis in original). S. Br. at 20. In any event,

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[4] We do not believe that Congress intended that the risk analysis would be extremely detailed or extensive or that it should impose a substantial burden on MSHA. Rather, in conducting the risk analysis, the District Manager should simply consider all the relevant mine-specific factors that would affect miners' ability to escape in a serious mine emergency and explain how those factors impact on the need for breathable air beyond SCSRs. These factors would include such considerations as the placement and number of SCSRs, alternative means of escape, distances to be traveled, safety measures that are present at the mine, and any unusual safety hazards at the mine.

[5] Moreover, the Secretary's approach to the breathable air requirement in section 316(b)(2)(E) offers no assistance to her District Managers (or mine operators) in reconciling the dual requirements for additional SCSRs to evacuating miners, who may be unable to exit a mine (and may then be "trapped"), and providing additional air to trapped miners who must be sustained underground until rescue.

because Congress has directly spoken to the question, there is no reason to remand the issue to the Secretary. Under *Chevron I*, the reasonableness of the Secretary's interpretation is to be considered only when Congress has not directly spoken to the question involved. *Chevron*, 467 U.S. at 843-44.

Rather than analyzing "likely risks" and mine-specific factors to determine whether breathable air beyond SCSRs is required, the Secretary has essentially directed District Managers to base their decisions regarding the requirement for additional breathable air in outby areas solely upon the distance over which miners would have to travel. In other words, the Secretary has effectively established a binding norm to govern all ERPs regardless of mine-specific conditions.[6] In "Breathable Air Questions and Answers," which were attached to the PIB that addressed breathable air for trapped miners, the Secretary requires that "outby miners" be provided breathable air "within an inflatable chamber, barricade or other alternative that isolates miners from contaminated environments."[7] 29 FMSHRC at 860, *quoting* R. Ex. 57 at 1. Further, the Secretary

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[6] Our colleagues rely upon *Emerald Coal*, 29 FMSHRC at 970, in attempting to show that notice-and comment-rulemaking was not required to implement ERP requirements and therefore that the Secretary could proceed to require refuge chambers based on certain statements contained in the question and answer documents discussed, *infra*. Slip op. at 21. However, the situation in *Emerald* was very different. In that case, operators were given various options in deciding how to comply with breathable air requirements and the issue before the Commission was only a timing issue, i.e., when should operators be required to commit in their ERPs to following the refuge chamber option they had freely chosen. In this case, the Secretary has effectively established a firm requirement to use a refuge chamber in an outby area based on nothing more than the distance to be traveled by miners, and the District Manager has not meaningfully considered relevant mine-specific factors.

[7] The only guidance that the Secretary issued with regard to breathable air primarily addressed trapped miners in working sections. Thus, the PIB, which MSHA issued to provide guidance on the breathable air provisions of the MINER Act, dealt with the location and quantity of breathable air located within 2000 feet of the *working section,* not in outby areas such as those involved here. *See* PIB P07-03 at 1-2. This is also consistent with the Secretary's approach in the Program Policy Letters ("PPL"), which were issued prior to the PIB. *See* PPL No. P06-V-8 at 2-3 (7/21/06); PPL No. P06-V-9 at 2-3 (8/04/06); and PPL No. P06-V-10 at 3-4, 5 (10/24/06). In the PPLs, the Secretary addressed the needs of miners in outby areas of mines by requiring increased numbers of SCSRs for evacuation. *Id.*

The Secretary further addressed the breathable air requirement for outby miners only in the "Breathable Air Questions and Answers," a multi-paged document attached to the PIB that contained 73 questions and answers. R. Ex. 57. There, the Secretary for the first time stated that "refuge areas" should be provided at "every other cache of SCSRs (1 hour intervals)." *Id.* at 1. This distance-driven requirement became the "norm" for the District Manager, who refused to

states that "District Managers generally will be looking for breathable air locations to be located not more than one hour travel distance from each other" so that miners "would not need to travel more than 30 minutes in either direction to reach a refuge area." *Id.* At the local level, Hillary Smith, a representative of the MSHA District Manager, told Twentymile that, based on the questions and answers attached to the PIB, "she did not think that the [District Manager] would accept an ERP from Twentymile that failed to provide breathable air in the main entries at Foidel Creek for travel distances exceeding 15,000 feet." Stip. 32 at 8. The plan was, in fact, subsequently rejected on that basis.[8]

In affirming the MSHA District Manager's refusal to approve Twentymile's ERP, the judge also relied on the breathable-air questions and answers. 29 FMSHRC at 860. The judge stated that "the [D]istrict [M]anager's insistence on the establishment of a refuge area in the mains between the portal and 6 MN is consistent with this guideline." *Id.* However, the judge did not address the issue of whether use of the questions and answers was consistent with Congress' approach in section 316(b)(2)(E).

The Secretary's policy for outby miners effectively ignores the individualized approach to ERPs and miner safety that is directed in the MINER Act and the committee report that accompanied it. *S. Rep.* at 3, 4. *Compare Peabody I*, 15 FMSHRC at 386-87 (substantial evidence supported judge's finding that deep cut ventilation provision was mine-specific because of mines' high methane liberation rate). Further, by simply assuming the presence of adverse conditions that would make it impossible to evacuate, the Secretary has failed to implement the risk analysis mandated by the MINER Act to determine the amount of breathable air that would be needed for miners who face the possibility of a mine emergency and may be evacuating the mine or trapped. Thus, once the District Manager concluded that there was a "reasonable possibility" of a fire in the mine that could block miners from exiting through the portals, he then had to "analyze likely risks to determine if breathable air beyond the increased stores of SCSRs is necessary." *S. Rep.* at 6. This he failed to do. Instead, the District Manager only considered the distance that outby miners

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approve Twentymile's ERP because it failed to provide for refuge chambers in the main sections for outby miners.

[8] Our colleagues assert that the "Breathable Air Questions and Answers" attached to the Secretary's PIB is a "red herring." Slip op. at 25. However, that statement is not borne out by the record, which indicates (in stipulations agreed to by the Secretary) that the questions and answers were the basis for the District Manager's requiring Twentymile to provide for breathable air beyond the SCSRs in the mains. 29 FMSHRC at 847-48; Stip. 32 at 8. Moreover, as the judge held, after quoting from the questions and answers in the PIB, "The [D]istrict [M]anager's insistence on the establishment of a refuge area in the mains . . . is consistent with this guideline." 29 FMSHRC at 860.

would have to travel to evacuate, rather than specific mine conditions.[9] This approach is contrary to Congressional intent in drafting the MINER Act. Therefore, we conclude that the Secretary's approach was erroneous as a matter of law.

Finally, as we have stated, we agree with the Secretary's reading of "trapped" in the MINER Act in light of a mine emergency. However, the application of that term, without more, does not require an operator to provide a refuge chamber with breathable air for all miners who face the possibility of a mine emergency, such as a fire, irrespirable air, or a roof fall. To mechanically require, as the Secretary did here, a refuge chamber in the event that outby miners have to travel more than one hour to reach a mine exit or evacuation point fails to undertake the risk analysis required by the MINER Act and avoids consideration of individual mine conditions, contrary to the intent of Congress.

As we further show below, the record shows that the District Manager failed to properly analyze the specific conditions at the Foidel Creek Mine and the need for breathable air beyond SCSRs. Moreover, the District Manager ignored that miners who may be unable to exit a mine through the portals may still be evacuating the mine through emergency exits, such as the 6 MN intake air shaft. In that scenario, the breathable air requirement could be satisfied by increased numbers of SCSRs rather than a refuge chamber.

2. Substantial Evidence

Based on our review of the record, we conclude that the District Manager failed to consider the specific conditions at the Foidel Creek Mine and failed to provide an explanation for why he did not do so. Where, as here, the Secretary has determined to proceed by issuing PPLs, a PIB, and informal questions and answers, rather than by notice-and-comment rulemaking, it is incumbent on District Managers to clearly explain their rationale for the imposition of district-wide or agency-wide standards in ERPs and how all relevant mine-specific factors were considered in reaching a final decision. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971) (In deciding relevant issues before it, an administrative agency must establish that it "has taken a hard look at the issues with the use of reasons and standards."). As the D.C. Circuit has explained:

> [The arbitrary and capricious standard] requires an agency to "examine the relevant data and articulate a satisfactory explanation

[9] The Secretary incorrectly asserts that any foreseeable circumstance – e.g., fatigue, injury, irrespirable air, or limited visibility – would constitute grounds for assuming that escape would be impossible. S. Br. at 37, 40-41. Rather, those are circumstances that would make escape difficult but nevertheless possible – particularly in light of new requirements of the MINER Act relating to increased deployment of SCSRs, lifelines, and increased training of miners, as well as measures taken by the operator beyond those required by the MINER Act. *See* 71 Fed. Reg. at 71,430-431.

> for its action including a 'rational connection between the facts found and the choice made.'" The "agency must cogently explain why it has exercised its discretion in a given manner," and that explanation must be "sufficient to enable us to conclude that the agency's action was the product of reasoned decisionmaking."

Alpharma, Inc. v. Leavitt, 460 F.3d 1, 6 (D.C. Cir. 2006) (subsequent history omitted), *quoting Motor Vehicle Mfr's Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 48 (1983) (citations omitted).

As discussed below, we disagree with the judge's determination that the District Manager "considered the specific conditions present in the outby areas of the mine." 29 FMSHRC at 859. More particularly, it is not apparent that the District Manager considered at all the availability of vehicles in the outby areas of the mine to use to evacuate miners during mine emergencies.

At the outset, it is important to recognize that the District Manager is the decisionmaker in this case and that it is his written decision that must supply the rationale for MSHA's action in disapproving the ERP. In this regard, our examination of the approval process must properly focus in the first instance on the actions of the District Manager, not the judge. *See Emerald*, 29 FMSHRC at 968 ("In determining whether MSHA's determinations were arbitrary and capricious, we examine the circumstances before the MSHA District Manager when he considered the Operators' final revised ERPs . . . ."); *see also State Farm*, 463 U.S. at 43 ("The reviewing court should not attempt itself to make up for such deficiencies [in the agency's decision]; we may not supply a reasoned basis for the agency's action that the agency itself has not given." *citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Although the testimony provided at a hearing on an ERP may be useful in determining whether factual assertions made by the District Manager are accurate and whether his conclusions are reasonable, the testimony cannot supply post hoc rationales that are absent from the District Manager's decision.[10]

On June 14, 2007, Twentymile submitted a revised ERP in which it responded to the District Manager's concern about providing for breathable air in the main entries. Twentymile's proposed ERP provided, "The main entries are outfitted with two separate intake escapeways, each travelable with diesel pickup mantrips, each containing caches [of over 1500 SCSRs] sufficiently spaced for individuals walking and for the number of personnel working inby that point." 29 FMSHRC at 849, *quoting* R. Ex. 10 at 4. In his response, the District Manager rejected

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[10] Our colleagues discuss at great length testimony provided at the hearing in order to support their position regarding whether there is a reasonable possibility of miners being trapped. We note that the testimony cannot supply a legal or factual rationale for the District Manager's decision that may be missing from the decision itself. In addition, we note that, when the Secretary's witnesses were asked about the probability of specific emergency scenarios that MSHA considered at the Foidel Creek mine, they consistently admitted that the scenarios were not likely to occur. *See* Tr. 30, 57, 70, 139-140, 142-143.

Twentymile's plan, noting that with regard to the main entries the distance of 10,000 to 15,000 feet was too great not to maintain post-accident breathable air and that two isolated escapeways "do not provide the same amount of protection as breathable air." 29 FMSHRC at 849-50, *quoting* R. Ex. 11 at 2.

Without any explanation whatsoever, the District Manager apparently concluded that diesel equipment and pickup trucks could not be driven during any type of mine emergency. *See* 29 FMSHRC at 849-50. Similarly, the judge did not consider the use of motorized vehicles when he reviewed the distances that miners would have to walk. *Id.* at 859. In its brief, Twentymile notes that dense smoke would make it more difficult to walk, thereby making it more expeditious to drive. T. Br. at 27-28 & n.10.[11] Miners in the main sections generally traveled in pairs with a vehicle. Tr. 160-61. In addition, there were emergency vehicles parked at locations inby the 6 MN shaft. Tr. 61-62. The availability of vehicles to transport injured or fatigued miners during a mine emergency would address a primary concern of the District Manager in requiring refuge chambers. In short, notwithstanding the widespread availability of vehicles to transport miners in the main sections, the District Manager did not address the use of vehicles in evacuating the mine.[12]

In light of this, we can only conclude that there is no evidence, let alone substantial evidence, to support the judge's conclusion that the District Manager "considered the specific conditions present in the outby areas," 29 FMSHRC at 859,[13] when he rejected the breathable air provisions in Twentymile's proposed ERP. In particular, there is absolutely no evidence to support the judge's statement that the District Manager "took into consideration . . . the availability of vehicles in the entries." *Id*. at 860. That fact alone mandates that the decision below be overturned.

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[11] In this regard, on cross-examination, Twentymile's safety coordinator noted that driving in heavy smoke would be like "driving in a fog," and could be "difficult." Tr. at 167-68.

[12] Our colleagues state that "Reitze, who helped evaluate Twentymile's ERP . . . was aware that vehicles were potentially available to be used to escape from the mine." Slip op. at 23. However, there is no evidence in the plan decision indicating that the District Manager considered this fact. Therefore, what Reitze was aware of is not probative of what the District Manager considered in rejecting Twentymile's draft plan and its reliance on vehicles to evacuate the mine.

[13] In concluding "that the [D]istrict [M]anager did consider the specific conditions," the judge tersely referenced the District Manager's consideration of "the distances involved and the possibility of a belt fire, an equipment fire, or another unexpected event near the portal." 29 FMSHRC at 859. However, as we have shown above, the MINER Act requires not only an analysis of the "possible incidents," such as a fire, explosion, or roof fall, and the need for breathable air, but also an analysis of the further "likely risks," such as miner injury and fatigue and the use of vehicles to evacuate the mine, "to determine if breathable air beyond increased stores of SCSRs is necessary." *S. Rep.* at 6. This the District Manager failed to do.

In addition to the District Manager's failure to consider vehicles to evacuate the mine, we also conclude that, without further explanation and record support, it was arbitrary and capricious for the District Manager to require a refuge chamber in the outby area while at the same time approving Twentymile's plan for the longwall section without requiring a refuge chamber in that section. 29 FMSHRC at 859. Based solely on trial testimony, the judge concluded that it was "reasonable" for the District Manager to approve Twentymile's ERP and its provision for breathable air in the longwall section, while refusing to approve a similar provision for the outby section. *Id.* The judge further stated that "[t]he Secretary believes that a single event could contaminate both intake airways in the mains but that a single event could not contaminate both air courses in the longwall section." *Id.* However, the trial testimony regarding the basis for the decision not to require a refuge chamber in the longwall section was neither lengthy nor particularly helpful. At the hearing, witnesses explained that the two escapeways in the longwall section have air that travels in opposite directions, while air in the two escapeways in the main entries travels in the same direction even though air comes from two separate sources outside the mine. Tr. 61, 87-88.

Before the Commission, Twentymile contends that it is more significant that the escapeways in the main sections are isolated with independent sources of air. T. Br. at 25-26. The fact that the escapeways in the main sections are independently sourced is significant because a fire near the source of the air in one escapeway would not contaminate the air in the other escapeway. Contamination of the air in two escapeways in the main sections of the mine could occur only if a fire simultaneously compromised the stoppings in *both* escapeways. As Twentymile's safety coordinator testified, if one of the escapeways was contaminated, the other one would "most likely" be available. Tr. 159. Thus, a proper risk analysis by the District Manager would first consider the possibility of a fire and the blocking of the portals, and then consider the additional need for breathable air in the context of evacuation and further "likely risks," including the potential for events that could contaminate the air in both escapeways.

There are several other issues that arise because of the apparent inconsistency between the District Manager's treatment of the outby area and the longwall section which make it difficult to discern the District Manager's rationale in treating the two areas differently. For example, Twentymile argues that the main entries had additional escapeways that the longwall section did not have.[14] T. Br. at 26. *See* Jt. Ex. 7. The District Manager failed to acknowledge that, in the outby areas, the ten miners in the main entries had available for evacuation, mantrips in the main escapeway and pickup trucks parked at various locations for emergency situations in the alternate escapeway. Tr. 61-62, 160-61. Over 1500 SCSRs were located in caches in the main entries, in addition to the SCSRs on the miners and stored in the vehicles. T. Br. at 29 n.11, *citing* Jt. Ex. 4 at

[14] The committee report accompanying the passage of the MINER Act states that "[t]he projected need [for breathable air] is obviously fact-specific" and notes that a mine that is "accessible from alternative entries" presents a different set of circumstances than "a single entry mine." *S. Rep.* at 6-7.

4 and Jt. Ex. 7. Further, MSHA's main concern with emergency evacuations in the main entries was with a belt fire in the No. 1 or No. 2 MN that would prevent miners from exiting through the portals and require them to walk to the No. 6 intake air shaft. Tr. 27-30. *However, it is highly significant that MSHA supervisor Donald Gibson himself testified that walking inby would be "downhill" and that it would be "relatively easy.*" Tr. 111. In addition, the entries in the mains are 18 to 20 feet wide and eight to nine feet high. Tr. 32.

Finally, the inadequacy of the District Manager's analysis of Twentymile's ERP is borne out by the Secretary's questions and answers on breathable air. Question No. 59 describes a mine strikingly similar to the Foidel Creek Mine:

> One operator has a unique escapeway plan that utilizes dual intake airways for the section primary and alternate paths from active sections (sic). Both escapeways are accessible by driving for most if not all the distance. The active longwall panel and when connected, the set-up location for the next longwall panel are provided intake airways from two opposite directions. This condition should be considered in review of the breathable air requirement. If one of the escapeways is not travelable because of an incident, the other would be intact. Therefore, those individuals on the sections would not be trapped as described in PIB 07-03. How should this be considered in reviewing the plan?

R. Ex. 57 at 10. In the response, MSHA rejected the notion that an operator's ERP would not have to provide for breathable air for trapped miners. *Id.* However, MSHA further responded that "unique mine conditions and the emergency preparedness of the operator may affect a miner's *risk* of entrapment as well as the *risk* that such an entrapment will be lengthy." *Id.* (emphasis added). MSHA concluded its response by stating, "District Managers should consider unique mine conditions and proposals that provide equivalent protection." *Id.* It is apparent to us that the District Manager reviewing the Twentymile ERP failed to do that.[15]

Based on our review of the record and the legal and factual errors, we conclude that the Secretary failed to meet her burden of showing that the District Manager's determination was not

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[15] We note that, among other special precautions taken by Twentymile to enhance miner safety, there were sophisticated carbon dioxide monitoring along the belts, fire suppression systems on the belt drives, fire extinguishers and fire suppression systems on diesel equipment, separation of the belt entry from the escapeways with continuous stoppings, monitoring devices on conveyor belts to check for belt alignment, and exceptionally wide entries. As the judge noted, these and other safety features at the Foidel Creek Mine made Twentymile "an exemplary underground coal mine operator . . . interested in the safety of its employees." 29 FMSHRC at 859.

arbitrary and capricious. The District Manager clearly failed to consider all relevant mine-specific factors and failed to explain why he did not do so.

B. Whether the Judge Erred in Granting the Secretary's Motion *in Limine*

Twentymile also challenges the judge's decision to grant the Secretary's motion *in limine*. T. Br. at 11-14; T. Reply Br. at 5-6. Below, Twentymile sought to introduce evidence of other mines' approved ERPs to show that other MSHA District Managers had approved plans with provisions similar to Twentymile's rejected provision on breathable air in outby areas to support its contention that the District Manager's action here was arbitrary and capricious. 29 FMSHRC at 860; Tr. 75-80, 82. At the hearing, Twentymile's counsel made an offer of proof, indicating that the ERPs that he sought to put into evidence would show that other MSHA districts approved ERPs for longwall mines without refuge chambers where there were multiple ways out of the mine. Tr. 73, 82.

The judge granted the Secretary's motion *in limine* to exclude such evidence. 29 FMSHRC at 860; Tr. 80-81. He determined that the scope of the proceeding was limited to whether the Secretary's rejection of the disputed plan provision was arbitrary and capricious and held that the evidence was of little probative value. 29 FMSHRC at 860; Tr. 80-81. The judge explained that it was unlikely that two underground coal mines would present exactly the same factual situation. 29 FMSHRC at 860; Tr. 80-81.

When reviewing a judge's evidentiary ruling, the Commission applies an abuse of discretion standard. *Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1366 (Dec. 2000). Abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Id.* (citations omitted).

Commission Procedural Rule 63(a) states that "[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). Although the Commission has not defined "relevant evidence," it is defined in Rule 401 of the Federal Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The federal courts have viewed Rule 401 as having "a low threshold of relevancy." *In Re: Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 782-83 (3d Cir. 1994); *see also Hurley v. Atlantic City Police Dep't*, 174 F.3d 95, 109-10 (3rd Cir. 1999) ("Rule 401 does not raise a high standard.").

While it is true that each mine is unique, we disagree with the judge's conclusion that evidence of a similarly situated mine's ERP containing a provision for breathable air in outby areas of its mine would be of little relevance here, especially in the absence of clearly articulated standards for implementation of the breathable air requirement by MSHA. In excluding the evidence, the judge used an overly narrow relevancy standard requiring that other mines be exactly identical to Twentymile in order for their approved ERPs to be of any relevance to the question of breathable air in outby areas of a large longwall mine with multiple escapes. Evidence of other approved ERPs that contained provisions that are similar to Twentymile's proposed provision with

respect to breathable air in outby areas is relevant to the consideration of whether the District Manager acted arbitrarily in refusing to approve the same or a similar provision in Twentymile's plan. Although not determinative of whether Twentymile is required to provide a refuge chamber in the outby section of its longwall mine, a comparison of its plan with the approved plans of other mines with similar conditions would show whether, in applying the breathable air provision of the MINER Act, MSHA was consistent in implementing this requirement. By highlighting the differences and similarities between similarly situated mines, MSHA could provide the necessary basis to validate the District Manager's position in this case. This is especially true where the District Manager's decision failed to take into consideration relevant facts mitigating the need for a refuge chamber and provided no justification for such requirement other than the distance between the portal and the 6MN intake shaft.

Moreover, MSHA's consideration of other mines and ERPs when reviewing Twentymile's plan makes such evidence relevant in this proceeding. At the hearing, William Reitze, MSHA's supervisory mining engineer for District 9, admitted that when reviewing Twentymile's plan, members of the District 9 office looked to see what other districts were approving and were aware of approved plans without supplies of breathable air in mines with multiple ways out. Tr. 73. We agree with Twentymile that consideration of the actions of other District Managers provides a reference point for determining whether the District Manager here acted arbitrarily, particularly under the circumstances in this case, where no definite standards exist for the breathable air provision. T. Br. at 12.

We acknowledge the time constraints that the parties and the judge face given the expedited nature of emergency response plan proceedings. However, this dispute did not arise overnight. The parties were in discussions and negotiations from August 2006 until September 2007, over a year, prior to the initiation of this proceeding. It would seem that during that time, MSHA could have considered Twentymile's contentions regarding other approved plans and reviewed its policy on the issue to develop some consistency in its implementation of the breathable air provision. Moreover, Twentymile sought to introduce only six ERPs, Tr. 82, not over 400 plans as the Secretary alleged it would have to review to contend with Twentymile's allegations, Tr. 77-79. This hardly seems like an impossible feat for the parties and the judge to address within the scope of this proceeding. Hence, the probative value of such evidence far outweighs any allegation of potential prejudice or harm advanced by the Secretary. Tr. 77-79; S. Br. at 45-46.

Accordingly, we conclude that the judge erred in granting the Secretary's motion *in limine*. Nevertheless, given our conclusion that the District Manager's disapproval of Twentymile's ERP was arbitrary and capricious, as discussed previously, we conclude that the judge's error in excluding such evidence was harmless.

C. Conclusion

For all the foregoing reasons, we would reverse the judge's decision.

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Michael G. Young, Commissioner

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