ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Knight Hawk Coal, LLC,

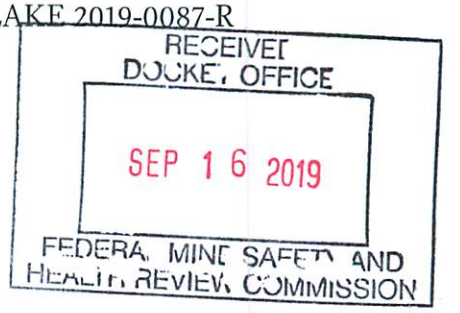
Contestant

v.

Secretary of Labor, Mine Safety and Health Administration,

Respondent

No. LAKE 2019-0087-R



Petition for Discretionary Review

The Secretary of Labor petitions the Federal Mine Safety and Health Review Commission to review the decision of a Commission administrative law judge issued on August 16, 2019 (and amended on August 19, 2019) in this case.

The Prairie Eagle – Underground mine's ventilation plan allowed Knight Hawk Coal, LLC to engage in perimeter mining, a form of retreat mining in which cuts are made into the pillars around the perimeter of worked-out areas. The plan allowed Knight Hawk to make extended, 40-foot perimeter cuts that were dead ends. After a study at another mine that wanted to use a similar method revealed that the extended cuts were not adequately ventilated, MSHA realized that it needed to review Prairie Eagle's ventilation system to determine whether the extended cuts in that mine were adequately ventilated. MSHA's study revealed that there was virtually no air movement in the deep cuts and that air movement was not controlled through the

worked-out areas. This meant that methane could build up in the extended cuts, and because the air direction was not controlled through the worked-out areas, mine examiners could not evaluate whether air was being moved correctly to sweep any gases out of the mine.

MSHA determined that Knight Hawk needed to address these deficiencies and, over the course of ten months and in detail, explained why. Despite MSHA's repeated requests, Knight Hawk never submitted a revised ventilation plan. So, after approving an interim plan under which the mine could operate, MSHA revoked the ventilation plan.

At the outset of the hearing, the judge opined that the law governing review of MSHA's plan-approval determinations was in "flux," observed that the Commission had a "new composition," and announced that he was "going to put [this case] before the Commission." Tr. 12.[1] In this regard, the judge was successful. In most every other regard, the judge was not.

The Secretary seeks review of the judge's decision on the grounds that it is not supported by substantial evidence, that it is contrary to law, and that it involves a substantial question of law, policy, and discretion. 30 U.S.C. §§ 823(d)(2)(A)(ii)(I), (III), (IV); 29 C.F.R. §§ 2700.70(c)(1), (3), (4).

Assignment of Error

The judge's finding that MSHA arbitrarily revoked the Prairie Eagle mine's ventilation plan is not supported by substantial evidence.

[1] Citations to the Secretary's exhibits are abbreviated "G.X."; to the transcript, "Tr."; to Joint Stipulations, "J.S."; and to the amended decision, "Dec."

Statement of the Case

1. Background

Perimeter mining is a form of retreat mining in which cuts are made into the pillars around the perimeter of sets of rooms in worked-out areas. *See, e.g.*, G.X. 12, at 21–29 (dead end cuts around the perimeter). Three mines under MSHA District 8's (and District Manager Ron Burns's) jurisdiction operate, or operated, with perimeter mining: Gateway North, Viper, and Prairie Eagle. Tr. 159.

Gateway North's ventilation plan allowed perimeter mining with 20-foot cuts. Tr. 160. These standard cuts can generally be adequately ventilated without additional controls. Tr. 161. In 2017, Gateway North wanted to begin making extended, 40-foot, cuts in the perimeter. Tr. 160. Extended cuts are difficult to ventilate: the deeper the cut, the less air reaches the face. Tr. 162. This is especially problematic because methane is often liberated at the face. Tr. 162. So before the district approved the plan, it asked MSHA's Directorate of Technical Support to conduct a ventilation study to determine whether the worked-out areas, including the extended cuts, could be adequately ventilated. Tr. 160.

The study showed that extended perimeter cuts, at least those that were dead ends, were not adequately ventilated. Tr. 162. It also showed that the air in the worked-out areas was not moving in the direction indicated by the ventilation plan, or that it was moving in inconsistent directions within the bleeder system. Tr. 162. Gateway North revised its ventilation plan to address the latter issues (Tr. 163), and though it was still allowed to conduct perimeter mining with 20-foot cuts, it decided not to pursue perimeter mining with extended cuts. Tr. 164–65.

2. The Prairie Eagle mine's ventilation plan

In 2010, MSHA had approved Prairie Eagle's ventilation plan, allowing it to conduct perimeter mining with extended cuts. J.S. 9, 17; G.X. 12, at 8. After Prairie Eagle finished advance mining in a set of rooms (a "block") and before it developed the next block, it made extended cuts into the perimeter. G.X. 1, at 6. The perimeter cuts were generally dead ends and unbolted; they made most of the block effectively recovered pillar area that could not be travelled. Tr. 55; G.X. 1, at 6. (These blocks functioned as bleeder entries. G.X. 1, at 6.) Rooms were connected with bleeder entries; the ventilation plan established evaluation points (locations from which the mine examiner was to test the ventilation system) in these entries. G.X. 1, at 6–7; G.X. 12, at 8.

Because Prairie Eagle's plan was similar to the plan MSHA had found inadequate at Gateway North, Burns and other MSHA personnel realized that they needed to evaluate Prairie Eagle's ventilation to ensure that it was adequate. Tr. 165. So, in December 2017, Burns asked Tech Support to conduct an independent study of Prairie Eagle's perimeter mining / bleeder system. Tr. 165–66. Burns gave Tech Support no instructions about how to conduct the study or what conclusions to reach. Tr. 46, 165.

Dennis Beiter, a mining engineer and senior Tech Support official responsible for investigating ventilation in mines nationwide, led the study. Tr. 29, 42, 572. He was assisted by Tech Support and District 8 personnel and accompanied by mine personnel. Tr. 47–48; G.X. 1, at 1.

MSHA conducted the study using "standard investigation procedures and standard procedures for collecting ventilation related data." Tr. 48. They measured methane and oxygen levels, pressure differentials across temporary and permanent ventilation controls, and air

velocity. Tr. 48–49. To measure air velocity, MSHA used anemometers when possible, but when there was not enough air to turn the anemometer, they used chemical smoke. Tr. 49, 255. MSHA also used chemical smoke to confirm which direction air was flowing. Tr. 49. (MSHA did not use tracer gas because tracer gas is used to confirm that air is flowing in a known direction, rather than to discover whether air is moving at all or in what direction it is moving. Tr. 560–61; *see also* Tr. 533.)

MSHA also used a probe to release chemical smoke into the extended perimeter cuts to determine whether there was air movement in the cuts. Tr. 51–53. A cloud of smoke, illuminated by cap laps attached to the probe, was released near the face; MSHA watched whether it moved left or right to determine the direction of airflow. Tr. 51, 53. If there was very little airflow, or none at all, the smoke would rise to the roof and billow out, or dissipate. Tr. 53, 262.

Beiter personally conducted some of the smoke tests in extended cuts. He noted that there was often no perceptible movement; the smoke would just rise to the roof and dissipate. Tr. 67, 69–70. In some cuts where there was minimal air movement, it was inconsistent: one smoke release might move a bit, but the next would move in a different direction or stop altogether. Tr. 78–79. Beiter explained that this was because of "eddy currents": air moving across the edge of the perimeter cuts (away from the face) created incidental movement in the cuts, like eddies in a stream. Tr. 79–80.

Other, less senior MSHA officials, including Diane Doyle-Coombs, conducted some of the smoke tests. Tr. 541. Beiter instructed them about how to conduct the tests properly. Tr. 542–43. He explained that when the smoke moved inconsistently, that should be recorded as intermittent movement, rather than perceptible or not perceptible movement. Tr. 543–44. He

also explained that when smoke rises to the roof and dissipates, that is not perceptible movement, which resulted in Doyle-Coombs's correcting a few initially erroneous notations. Tr. 543–44, 567–68.

Additionally, Doyle-Coombs was taking most of the notes, so Beiter wanted to be sure they were accurate. Tr. 543. Mine superintendent Thomas Hasenstab was accompanying MSHA, and Beiter noticed that Doyle-Coombs sometimes recorded Hasenstab's observations as MSHA's observations. Tr. 565–66. Beiter explained that MSHA's notes should record MSHA's observations and should distinguish between those observations and Hasenstab's, if they were different. Tr. 566–67.

The study took two days to complete. Tr. 47. After analyzing the data, Tech Support prepared a report summarizing its findings. G.X. 1. The key findings were:

- The direction of net airflow through many blocks was difficult, and in some blocks impossible, to discern.
- There was no perceptible air movement in 56 of the 138 extended perimeter cuts MSHA tested (of the 615 total extended perimeter cuts in the panel), and where there was air movement, it was intermittent (inconsistent and uncontrolled). Because the intermittent movement was more pronounced where the air flowing past the edge of perimeter cut was stronger, the movement that did exist was merely the result of eddy currents.
- Air directions through the rooms with perimeter cuts were not always consistent through the individual rooms or with the net direction through the block.

- Air direction was not always consistent in adjacent bleeder entries within a block, or within individual bleeder entries.
- At evaluation points, neither the direction of air through the blocks nor the ventilation of extended cuts could be confirmed.

G.X. 1, at 2.

Burns and Beiter shared some preliminary results with Knight Hawk during a January 29, 2018 meeting. Tr. 167–68. Burns asked Knight Hawk to submit a revised ventilation plan to address the deficiencies identified in the study. Tr. 168. And after Tech Support finalized its report on the study in February, Burns shared it with Knight Hawk. Tr. 170.

Knight Hawk responded on March 13 with a letter that listed benefits of perimeter mining (lower exposure to respirable dust, noise, and red zone hazards, and fewer citations and injuries, as compared with Prairie Eagle's other mining methods). G.X. 2. The letter stated that Knight Hawk disagreed with some of the information in Tech Support's report (G.X. 2, at 7), but it did not address the ventilation deficiencies MSHA had identified.

Burns reviewed this letter and believed that Knight Hawk might be confused about his concerns, since the letter did not address them. Tr. 180, 185. So he responded on April 12 with a letter that identified six deficiencies discussed at the January meeting: it explained that the air was not controlled within the blocks, that air direction within the blocks at and evaluation points was not shown on the ventilation map, and that the deep cuts were not ventilated. G.X. 3, at 1. The letter also referred to a then-recent incident in which a roof support drill hole broke through the roof into a bleeder and liberated significant methane; a bottle sample read 4.7%. G.X. 3, at 1. Burns included the reference because it demonstrated his concern that, even though Prairie Eagle

generally has low levels of methane, methane can be liberated at any time, such as by a roof fall (which is far from unlikely in an unbolted extended cut) in the worked-out area. Tr. 182–83. If the ventilation was not adequate to eliminate that methane, and if the examiners could not adequately evaluate the bleeder system's effectiveness, the methane could build up and become a serious explosion hazard. Tr. 183.

Knight Hawk responded on April 22, asserting that its ventilation system complies with the law because the mine generally has low levels of methane, because the system complies with MSHA Program Policy Letter No. P13-V-12, and because examiners can evaluate the system at evaluation points. G.X. 4, at 1–3. The letter also expressed disagreement with parts of the Tech Support report. G.X. 4, at 3–4. Knight Hawk suggested that it and Burns may have been at an impasse—after only one meeting with and one letter from MSHA. G.X. 4, at 4. It proposed no revisions to its ventilation plan. *See generally* G.X. 4.

Burns disagreed that the parties had reach an impasse. Tr. 192–93. Burns had no issue with the mine's system of making perimeter cuts and simply needed to know how the mine would adequately ventilate the cuts after they were made. Tr. 192–93. Because Knight Hawk had still not addressed the deficiencies Burns had identified, he and other MSHA personnel held a conference call with Knight Hawk on April 30 and sent another letter a few days later. Tr. 197; G.X. 5. In this letter, Burns referred to some of MSHA's ventilation standards to help Knight Hawk understand his concerns. Tr. 197; G.X. 5, at 1.

Knight Hawk responded on May 15, disagreeing with Burns in boilerplate language. G.X. 6. It offered only one revision to its plan: in response to Burns's concern that the mine ventilation map did not indicate the air direction through the blocks, Knight Hawk offered to "add a

statement . . . to better describe the direction of air movement through the worked-out areas." G.X. 6, at 2. This statement would be something like, "The direction of airflow for the worked-out area . . . is from EP4 to EP3 to EP2 to EPl." G.X. 6, at 2. This offer did not adequately address Burns's concern, because it was only a general statement that air was going from Point A to Point B without indicating how it got there. Tr. 199, 200–01. The map needed to show the direction of air through the blocks so that examiners (and MSHA inspectors) could determine whether the ventilation was functioning correctly. Tr. 200–01. Without knowing which direction the air was supposed to be moving, that evaluation would be impossible. Tr. 199–200, 201, 204.

On June 7, Burns sent another letter in response. G.X. 7. It explained that the ventilation system in the blocks must not just dilute methane but also control the air in the entire block, that extended cuts must be adequately ventilated, and that maps must show the actual direction of air movement. G.X. 7, at 1–2. The letter also explained that Burns would accept perimeter mining with 20-foot cuts, as long as the other deficiencies were addressed. G.X. 7, at 1; Tr. 203.

Not quite two weeks later, mine superintendent Hasenstab and MSHA ventilation specialist supervisor John Hohn met to discuss the plan. Tr. 329. Hohn explained two specific changes Knight Hawk could make to the ventilation plan. Tr. 329. Hasenstab rejected one, based on concerns like subsidence and the need for more roof bolting, and though he was not fully sure he understood the other, sought no clarification from MSHA and did not pursue it. Tr. 333, 344.

A few weeks after that meeting, on July 5, Knight Hawk sent Burns another letter, again asserting that they had reached an impasse and requesting a technical citation (still without submitting any revised plan). *See* G.X. 8, at 1. At that point Burns realized he would likely have to revoke the plan. Tr. 207. After confirming the necessary procedures (Tr. 207), on October 22, he

sent Knight Hawk a final letter describing the deficiencies in the plan: air movement was not controlled through the blocks, the extended cuts were not adequately ventilated, and the ventilation map did not indicate the direction of air through the blocks. G.X. 9, at 1–3. Burns also told Knight Hawk he would revoke the plan on November 12. G.X. 9, at 3. Knight Hawk and Burns negotiated an interim plan, *see* G.X. 15, and on November 14, MSHA revoked the plan and issued a technical citation. *See* G.X. 10, 11.

The citation identified five deficiencies:

- The air direction was not controlled through the individual blocks; in many extended cuts and some bleeder entries, there was no perceptible movement at all, and in other parts of the blocks, the air direction was inconsistent.
- There was no method to ventilate the extended cuts.
- The ventilation plan drawings and ventilation plan map did not show the direction of air through each block, so the mine examiner could not effectively evaluate the bleeder system during weekly examinations.
- The ventilation plan drawings and ventilation plan map did not show the direction of air at evaluation points, so the mine examiner could not effectively evaluate the bleeder system during weekly examinations.
- The plan did not provide enough information to evaluate the effectiveness of the bleeder system, including whether the air was moving in the proper direction through each block, whether extended cuts were properly ventilated, and the general effectiveness of ventilation through the worked-out area.

See G.X. 11. (The citation was originally issued as No. 8429603, but that number had been assigned to a different citation, so this citation was reissued as No. 9035600. Tr. 265–67.)

3. The judge's decision

The judge opined that the law governing review of MSHA's plan-suitability determinations is "in flux" and downplayed binding precedent from the Commission and the Courts of Appeals. Dec. 24–26 & nn.28–35. (The judge also dismissed as "inherently flawed" the Supreme Court's seminal decision in *Martin v. OSHRC*, 499 U.S. 144, 152–53 (1991). Dec. 24 n.28.) The judge stated that he would have required the Secretary to prove that the plan was unsuitable and would have found that the Secretary did not do so. Dec. 24–25. But, bound by the Commission's decisions in *Prairie State Generating Co., LLC*, 35 FMSHRC 1985 (July 2013), *aff'd*, 792 F.3d 82 (D.C. Cir. 2015), and *Mach Mining*, 34 FMSHRC 1784 (Aug. 2012), *aff'd*, 728 F.3d 643 (7th Cir. 2013), he conceded that the arbitrary and capricious standard applied to review MSHA's decision to revoke the plan. Dec. 27.

The judge found that MSHA arbitrarily revoked the plan. Dec. 27–39. The judge found that MSHA:

- inappropriately relied on smoke tests (Dec. 28);
- was biased against and trying to eliminate perimeter mining (Dec. 29);
- did not consult its own experts (Dec. 29–30);
- did not consider the safety benefits of active perimeter mining (Dec. 31);
- did not state the basis for its conclusion that revoking the plan did not reduce the safety the plan offered, violating § 101(a)(9) of the Mine Act, 30 U.S.C. § 811(a)(9) (Dec. 31–32);

- did not use tracer gas during the ventilation study (Dec. 32);
- did not consider disagreements among the Tech Support team and between the team and Knight Hawk personnel (Dec. 32–33);
- did not prove violations of the standards it referenced in letters to Knight Hawk and in the citation (Dec. 33–37); and
- arbitrarily relied on PPL P13-V-12 because it was a substantive, rather than an interpretive, rule that was invalid because it had not gone through notice-and-comment. Dec. 37–38.

Argument

Substantial evidence does not support the judge's finding that MSHA arbitrarily revoked the Prairie Eagle mine's ventilation plan.

1. MSHA negotiated with Knight Hawk in good faith.

The judge did not make the required threshold finding that MSHA and Knight Hawk negotiated in good faith. *See Carbon Cnty. Coal Co.*, 7 FMSHRC 1367, 1371 (Sept. 1985). The judge's finding that MSHA was biased against and trying to eliminate perimeter mining (which is unsupported by the evidence, *see* pp. 17–21, *infra*) suggests that he believed MSHA did not negotiate in good faith. But the evidence compels the conclusion that MSHA did: over ten months, MSHA sent Knight Hawk numerous letters explaining its concerns and offering to discuss them. *See* G.X. 3, 5, 7. MSHA personnel met with Knight Hawk to do just that. Tr. 197, 329. MSHA suggested revisions that could be approved. Tr. 329; G.X. 7, at 1. In other words, MSHA "communicated its legal position to [Knight Hawk] and engaged in discussions concerning" the plan dispute, which satisfied its obligation to negotiate in good faith. *Peabody*

Coal Co., 15 FMSHRC 381, 388 (Mar. 1993). Knight Hawk, in contrast, never submitted a revised plan for MSHA's review and, almost immediately after learning that MSHA believed the plan was deficient, declared an impasse. *See* G.X. 4, at 4.

2. MSHA's decision to revoke the plan was reasoned and adequately explained.

> An agency action is arbitrary and capricious if the agency
>
> 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). But arbitrary and capricious review is "narrow and a court is not to substitute its judgment for that of the agency." *Id.* As long as MSHA "examine[d] the relevant data and articulate[d] a satisfactory explanation for [his] action including a 'rational connection between the facts found and the choice made,'" *id.* (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)), its determination must be affirmed.

Every part of an underground coal mine must be adequately ventilated or sealed. In worked-out areas, ventilation must be adequate to remove gases from the mine. And mine examiners (and MSHA inspectors) must be able to understand how the air is moved through worked-out areas in order to evaluate whether the ventilation system is functioning correctly.

MSHA determined that Prairie Eagle's ventilation system was unsuitable on both points: the extended perimeter cuts were not adequately ventilated, and air was not controlled through the worked-out areas, so mine examiners did not know which way the air was supposed to be moving and therefore could not evaluate whether the air was actually moving in the correct direction. This determination was rational and reasoned, not arbitrary and capricious.

A. MSHA reasonably concluded that the deep cuts were not adequately ventilated.

The ventilation study showed that the extended cuts were not adequately ventilated. There was little or no air movement at the face of the dead-end cuts. G.X. 1, at 2; Tr. 69–70. The little movement that could be detected was not controlled airflow, but eddy currents. G.X. 1, at 2; Tr. 79–80. That the results of the smoke tests were sometimes inconsistent within the same cut (Tr. 78–79) also showed that the air in the extended cuts was not controlled or adequate to ventilate them.

The unventilated extended cuts posed serious hazards. Methane was more likely to be released at the face of the cuts, farthest from what ventilation there was. Tr. 162. Most of the cuts were unbolted (Tr. 77), so the roof could collapse. Tr. 176, 177, 183, 351. This, too, could release methane. Tr. 183. If the cuts were not adequately ventilated to remove methane, it could accumulate and explode. Tr. 183. The mine does usually have low levels of methane (Tr. 183), but methane can be encountered at any time (Tr. 183, 351), and low methane does not mean that an area is adequately ventilated. Tr. 98, 195. MSHA reasonably, not arbitrarily, concluded that the ventilation plan was unsuitable in part because it did not adequately ventilate the extended cuts.

Nor was it arbitrary for MSHA to have requested the study of Prairie Eagle after it saw the results of the study at Gateway North. That study showed that it was extremely difficult to ventilate extended perimeter cuts at one mine, and it was rational for MSHA to try to determine whether that was true at other mines using similar systems as well. Indeed, it would have been irresponsible for MSHA *not* to have acted once it had evidence that Prairie Eagle's ventilation plan might not have been suitable; inaction could well have endangered miners.

B. MSHA reasonably concluded that the plan did not allow the mine examiner to determine whether the worked-out areas were adequately ventilated.

The ventilation study also showed that air was not adequately controlled through the blocks. The air entered on the intake side and exited on the return side into the bleeder system (Tr. 96), but it was not controlled as it moved through the blocks (except for areas where ventilation controls like curtains were used). G.X. 1, at 2–3; Tr. 90, 96–97. Within the blocks, the air moved haphazardly or not at all. Tr. 97.

This was true even at designated evaluation points. G.X. 1, at 3; Tr. 91. The purpose of the evaluation points and the weekly examination was to enable Knight Hawk to evaluate whether the ventilation system was functioning correctly. Tr. 90–91, 97–98, 171–72; *see* G.X. 12, at 8. If the air was not controlled, then examiners could not know which direction it was supposed to be moving, and therefore could not evaluate whether the air was moving in the right direction, i.e., whether the ventilation system was functioning correctly. Tr. 97, 171–72, 199–200, 204. Inadequate evaluations like those are obviously dangerous, because they might not reveal serious ventilation problems, which of course are among the most dangerous hazards in underground coal mines. Tr. 97–98, 183, 199–200.

MSHA did not arbitrarily reject Knight Hawk's offer to address this problem. Its only offer was to add to the ventilation map statements generally describing the direction of air movement, such as, "from EP4 to EP3 to EP2 to EPl." G.X. 6, at 2. MSHA rationally determined that those general statements did not describe *how* the air was supposed to get from EP4 to EP3 to EP2 to EP1, which was necessary to enable adequate evaluations. Tr. 200–01, 204. And MSHA did not act arbitrarily by determining that the ventilation plan was unsuitable in part

because it did not allow Knight Hawk to conduct adequate evaluations and examinations of the ventilation system.

C. MSHA thoroughly explained its reasons for revoking the plan.

In meetings with and letters to Knight Hawk over the course of almost ten months, MSHA explained the reasons for its determination that Prairie Eagle's plan was unsuitable. G.X. 3, 5, 7, 9. MSHA did so in increasing detail, trying to ensure that Knight Hawk understood the deficiencies and giving Knight Hawk the chance to address them. Tr. 180–81, 185, 197. Only after it became clear that Knight Hawk was not going to submit a revised ventilation plan did MSHA decide that it had to revoke the plan. Tr. 206.

In sum, MSHA gave Knight Hawk ample opportunity to address his concerns and thoroughly considered its responses. MSHA ultimately exercised its statutory authority to determine that Prairie Eagle's plan was deficient, and MSHA did so rationally and with adequate explanation.

3. The Commission is required to review MSHA's decision to revoke the plan under the arbitrary and capricious standard.

The Commission has twice held that it reviews MSHA's plan-suitability determinations under the arbitrary and capricious standard. *Prairie State Generating Co., LLC*, 35 FMSHRC 1985 (July 2013), *aff'd*, 792 F.3d 82 (D.C. Cir. 2015); *Mach Mining*, 34 FMSHRC 1784 (Aug. 2012), *aff'd*, 728 F.3d 643 (7th Cir. 2013). That holding has been affirmed by both the Seventh and the D.C. Circuits. *Prairie State*, 792 F.3d 82; *Mach Mining, LLC*, 728 F.3d 643.

The judge has invited the Commission to overrule *Prairie State* and *Mach Mining*, reasoning that arbitrary and capricious review is a "permissible interpretation" of the Mine Act that the Commission may change. Dec. 26–27. But the Seventh Circuit — to which this case can

be appealed, *see* 30 U.S.C. § 816(a)(1) — has held that the Mine Act *requires* the Commission to review MSHA's plan-approval determinations under the arbitrary and capricious standard. *Mach Mining*, 728 F.3d at 646–58, 658 n.21. This holding forecloses the application of any different standard of review in this case.

4. Substantial evidence does not support the judge's finding that MSHA arbitrarily revoked the plan.

The judge's finding that MSHA arbitrarily revoked the plan can be affirmed only if it is supported by substantial evidence. *See Prairie State*, 792 F.3d at 434–35; *Mach Mining*, 728 F.3d at 659; 30 U.S.C. § 823(d)(2)(A)(ii)(I). Under this standard, the Commission must review "the whole record" and "consider anything in the record that 'fairly detracts' from the weight of the evidence that supports a challenged finding." *Rex Coal Co., Inc.*, 38 FMSHRC 208, 211 (Feb. 2016) (quoting *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997)). The evidence in this case conclusively establishes that MSHA did not arbitrarily revoke the plan, so there is no need for remand, and the judge should be reversed. *See Arnold Stone, Inc.*, 39 FMSHRC 1719, 1723 (Sept. 2017).

A. MSHA was not biased against or trying to eliminate perimeter mining.

Much of the judge's decision is connected to his finding that MSHA was engaged in a campaign to incrementally eliminate perimeter mining. The judge made this finding by crediting Eslinger and Hartsog and discrediting Hasenstab and Burns. Dec. 10–11, 29, 30. None of those determinations is supported by the evidence.

Although the Commission does not "lightly overturn" a judge's credibility determinations, it will do so "if there is no evidence or dubious evidence to support them," *Consolidation Coal Co.*, 11 FMSHRC 966, 974 (June 1989); if they are contradicted by other

evidence, *Morgan v. Arch of Illinois*, 21 FMSHRC 1381, 1389 (Dec. 1999); or not supported by substantial evidence. *Bussen Quarries*, 39 FMSHRC 970, 983 (May 2017) (Comm'rs Althen and Young, in favor of reversing the judge), *rev'd*, 895 F.3d 1039 (8th Cir. 2018). This is because "'[c]redibility involves more than a witness' demeanor and comprehends an overall evaluation of testimony in the light of its rationality or internal consistency and the manner which it hangs together with other evidence.'" *Arch of Illinois*, 21 FMSHRC at 1389 (quoting 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2586, at 578–79 (2d ed. 1995)).

Every witness who had firsthand knowledge of these negotiations testified that MSHA was not trying to eliminate perimeter mining. The judge erred by ignoring or discrediting that evidence.

Burns repeatedly testified that he had no problem with perimeter mining generally. Tr. 163 ("I never told anybody that they couldn't do perimeter mining."), 173 (agreeing that perimeter mining "is a safe form of mining" while it is being performed), 179 (same), 203 (a plan that included perimeter mining with 20-foot cuts would likely be acceptable), 212 ("I have not told anybody that I'm trying to keep them from doing perimeter mining. Just perimeter mining needs about done in compliance with the regulation."), 213–14 (explaining that he would approve a plan including 40-foot cuts for the mine if the plan provided suitable ventilation), 242–43 ("Every conversation we had with [Knight Hawk] I would say I am not -- it is not our intent to take away your plan, your perimeter mining. You just have to comply with the regulation."). Burns's letters to Knight Hawk confirm this point: he explained that perimeter mining with 20-foot cuts would be acceptable (if other deficiencies were addressed). G.X. 7, at 1; G.X. 9, at 2.

Other witnesses corroborated this testimony. Beiter testified that perimeter mining is generally a safe method of mining, as long as it complies with the relevant standards (Tr. 555, 569) and that he knew of no plot — at District 8, at MSHA headquarters, or anywhere in the country — to eliminate perimeter mining. Tr. 548–49. Even Hasenstab, the mine superintendent, testified that he did not think Burns was trying to eliminate perimeter mining, that Burns "clearly stated" to Hasenstab that he did not intend to eliminate perimeter mining, and that Burns simply wanted a suitable ventilation plan. Tr. 354. Hasenstab confirmed this in response to a follow-up question from the judge. Tr. 354.

Burns's testimony that he had no bias against perimeter mining is corroborated by the fact that he approved other ventilation plans including perimeter mining. He approved a plan allowing 20-foot cuts at Gateway North, and would consider 40-foot cuts if the mine could prove the cuts could be ventilated. Tr. 163. He also expected to approve a plan including 40-foot cuts at the Viper mine. Tr. 216.

All of this evidence contradicts the judge's finding that MSHA was plotting to eliminate perimeter mining. *See Arch of Illinois*, 21 FMSHRC at 1389. The judge did not explain the contradiction, except to cite "the motivations of the witnesses and the totality of the evidence in the record." Dec. 11. That cursory and general statement, lacking any citation to or explanation of the evidence, is not sufficient to support his determination, especially in light of the evidence to the contrary. *See Bussen Quarries*, 39 FMSHRC at 983 (Comm'rs Althen and Young) (when a judge's decision "'rests on a negative credibility evaluation, the [judge] must make findings on the record and must support those findings by pointing to substantial evidence on the record'") (quoting *Ceguerra v. Sec'y of Health & Human Servs.*, 933 F.2d 735, 738 (9th Cir. 1991)).

The judge also erred by discrediting Hasenstab's testimony that MSHA was not trying to eliminate perimeter mining. The judge's speculative reason for discrediting Hasenstab's testimony — that he must have wanted to preserve a good relationship with MSHA (Dec. 30) — is not supported by anything in the record. Pure speculation is not a reason to discredit a witness. *Bussen Quarries*, 39 FMSHRC at 982–83 (Comm'rs Althen and Young). This speculation also makes little sense: if Hasenstab was so concerned with conserving his relationship with MSHA that he was willing to give inaccurate testimony, surely he would have just revised the ventilation plan to avoid the conflict with MSHA in the first place.

The testimony that the judge did credit was either irrelevant or so dubious that it does not support his determinations. *See Consolidation Coal Co.*, 11 FMSHRC at 974. Eslinger, who has not worked for MSHA since 2009 (Tr. 400), testified that two individuals had suggested that MSHA was going to eliminate perimeter mining (Tr. 416–17) and that discussions with an official at MSHA headquarters in 2001 led him to believe that the official "did not seem to be in favor of perimeter mining." Tr. 444–45. This secondhand testimony is unreliable and, more importantly, irrelevant, since none of these people were involved in MSHA's decision to revoke this plan. Eslinger's vague testimony about his impressions of discussions almost 20 years ago is also dubious, or at least not so persuasive that it can overcome the uncontroverted firsthand evidence that MSHA was not plotting to eradicate perimeter mining. This is especially true because Eslinger never worked with, talked with, or even *met*, Burns, and so had no personal knowledge about Burns's thoughts on perimeter mining. Tr. 443–44.

The judge's finding is also inherently unreasonable. If MSHA were trying to eliminate perimeter mining, it would eliminate perimeter mining. Instead, MSHA approved ventilation

plans that allow it (Tr. 163, 216) and told Knight Hawk that it would approve a plan with perimeter mining and 20-foot cuts. G.X. 7, at 1; G.X. 9, at 2. The only reasonable inference is that MSHA had no problem with perimeter mining, as long as worked-out areas could be adequately ventilated.

B. The ventilation study was reliable and unaffected by bias.

The judge found that MSHA arbitrarily relied on the results of the smoke tests because those tests were unreliable. Dec. 28. 29, 32–33. He found that the tests were infected by MSHA's bias against perimeter mining (Dec. 29), and that MSHA conducted smoke tests in the perimeter cuts (Dec. 28), did not use tracer gas (Dec. 32), and did not consider "disagreements" about what the tests showed or the "varied and inconsistent results" of the tests. Dec. 33.

As a general matter, smoke tests are a common and reliable method for assessing ventilation in mines. *See* Tr. 49 (Beiter), 347–48 (Hasenstab), 511 (Hartsog). The only testimony that the smoke tests were unreliable was Eslinger's speculative statement that they were part of MSHA's purported plot to eliminate perimeter mining. Tr. 415.[2] Hartsog's testimony that he might have used tracer gas (Tr. 533) does not make it arbitrary for MSHA to have chosen a different reliable method, particularly given MSHA's good reasons for not using tracer gas. *See* p. 22, *infra*.

The judge discredited Beiter, whose testimony on many of these issues is significant, for being "evasive." Dec. 24. But the judge did not cite a single example of any "evasiveness," and such generalized, unsupported dismissals are not enough to explain an adverse credibility finding.

[2] The judge mistakenly attributed this testimony to Hartsog. Dec. 29.

See Bussen Quarries, 39 FMSHRC at 983 (Comm'rs Althen and Young). The Commission should accept Beiter's testimony on these issues.

Substantial evidence does not support the judge's other reasons for finding that the study was flawed. First, as explained (*see* pp. 17–21, *supra*), MSHA has no bias against perimeter mining.

Second, MSHA did not unfairly require perimeter cuts to pass tests it does not impose on other types of worked-out areas. The perimeter cuts did present a "unique opportunity" (Tr. 563) that MSHA has not generally had at other mines, but that is because MSHA — indeed, any human — cannot safely access longwall gob or areas where pillars have been fully extracted and have collapsed. That the extended perimeter cuts were unique did not make it arbitrary for MSHA to evaluate their ventilation; if anything, the uniqueness made it imperative for MSHA to do so. Moreover, MSHA did not unfairly analyze *only* Prairie Eagle's perimeter cuts: it also analyzed perimeter cuts at two other mines that had them. Tr. 42–43, 125–26. It was not arbitrary for MSHA to treat extended perimeter cuts consistently across mines and differently from different types of worked-out areas.

Third, Beiter explained why MSHA did not use tracer gas. Tracer gas is used to confirm that air is moving when the direction of the movement is already known. Tr. 560, 573. Since the direction of air movement in Prairie Eagle was not known, tracer gas was not a useful method, while smoke tests were. Tr. 560–61. Knight Hawk did not rebut this testimony.

Fourth, Beiter explained the "disagreements" about the smoke tests. Hasenstab did sometimes disagree with MSHA's conclusions that there was no perceptible movement (Tr. 261, 566–67), but it was not arbitrary for MSHA to draw its own expert conclusions. Similarly, Beiter

did not overrule other investigators or impose his will on them. Doyle-Coombs supposedly seemed upset when Beiter counseled her (Tr. 389–90), but that is not evidence of any sinister effort on Beiter's part; it is just evidence that most people do not like being publicly corrected. The explanation for Beiter's involvement is simple: he, the senior official, was teaching less experienced MSHA personnel about how to assess smoke movement and keep accurate notes. Tr. 543–44, 567–68.

And fifth, MSHA did not ignore the "varied and inconsistent results" of the smoke tests. MSHA considered the fact that smoke behaved inconsistently across tests in the same cut (Tr. 78–79) as evidence that the ventilation was not controlled or adequate.

C. MSHA consulted with agency experts before revoking the plan.

The judge found that MSHA did not consider its own agency expertise or the opinions of its front-line inspectors. Dec. 29–30. But MSHA did. For one, Burns commissioned a study from Tech Support, whose engineers and specialists are unquestionably agency experts. District 8 personnel also participated in the Tech Support study: ventilation specialist supervisor John Hohn and two specialists from the Marion, Illinois[3] field office were part of the study team. Tr. 254. Hohn was an integral and active participant in discussions with Knight Hawk about the plan's deficiencies and how to correct them. Tr. 258–60, 265–66, 328–29. (The judge did not even mention Hohn's testimony. *See generally* Dec.) And although Burns did not forward Knight Hawk's letters to the field office for review, he explained that he did not do so because Knight Hawk had not actually proposed any revised ventilation plan, so there was nothing to consult the field office about. Tr. 233–34.

[3] The transcript erroneously reads "Murray."

D. MSHA considered the safety benefits of active perimeter mining and reasonably determined that those benefits are irrelevant to whether a worked-out area is adequately ventilated after perimeter mining is complete.

The judge found that MSHA did not consider the safety benefits of perimeter mining. Dec. 31. That is not so. The Secretary's witnesses agreed that active perimeter mining is generally safe. Tr. 173, 179 (Burns), 265 (Hohn), 555 (Beiter). MSHA did consider the safety benefits Knight Hawk raised (lower exposure to respirable dust, noise, and red zone hazards, and fewer citations and injuries). Tr. 178–80. But those benefits are relevant to whether active perimeter mining is generally safe, not to whether worked-out areas are adequately ventilated after perimeter cuts are made. Tr. 173–74, 178, 179. MSHA did not arbitrarily conclude that the safety benefits of active perimeter mining have little to do with the adequacy of ventilation after active perimeter mining is completed.

E. Assuming § 101(a)(9) applies to plan-approval determinations, MSHA complied with it by explaining why revoking the plan would not reduce safety.

The judge also found that MSHA did not comply with the no-less-protection rule in § 101(a)(9) of the Mine Act because MSHA did not explain why revoking the plan was at least as protective as leaving it in place. Dec. 31–32. Assuming that § 101(a)(9) applies to plan-approval determinations, MSHA adequately explained its rationale for determining that revoking the plan would not reduce safety: it explained its reasons for determining that the existing plan was unsuitable, i.e., unsafe, and approved an interim plan that was suitable, i.e., safe. *See* G.X. 3, 5, 7, 9.

Moreover, the judge's finding that MSHA did not comply with § 101(a)(9) is based on MSHA's purported failure to consider the safety benefits of active perimeter mining. Dec. 31. MSHA acknowledged those benefits, but MSHA did not consider them because they are not

relevant to the wholly distinct question of whether ventilation is adequate after active perimeter mining has been completed.

F. It was not arbitrary for MSHA to consider whether the plan satisfied mandatory standards.

The judge found that MSHA acted arbitrarily because MSHA did not prove that the plan failed to provide the protection required by mandatory standards. Dec 33–38. To the extent that the judge effectively required MSHA to prove violations in order to establish that its evaluation of the plan was not arbitrary, that was error: MSHA does not need to prove that a plan violates any particular standard in order to establish that it reasonably evaluated the plan. Ventilation plans are unique to each mine and encompass more than MSHA's general mandatory standards. *See* 30 U.S.C. § 863(o) (plans must be "approved by the Secretary" and must contain "such other information as the Secretary may require"); *see also* 30 C.F.R. § 75.371 ("The mine ventilation plan shall contain the information described below *and any additional provisions required by the district manager*") (emphasis added). Requiring MSHA to prove to the Commission that an operator violated a standard in order to establish that it did not arbitrarily revoke or disapprove a plan would essentially eliminate the difference between ventilation plans and general mandatory standards. It would also be inconsistent with the Mine Act's requirement that ventilation plans must be "approved by the Secretary." 30 U.S.C. § 303(o). If the Commission had to find a violation of a standard in order for MSHA's plan decision to be affirmed, that would read the crucial "approved by the Secretary" language out of the statute. *See Mach Mining*, 728 F.3d at 657 ("Use of such a de novo standard of review in the ventilation plan situation would undermine—substantially-the specific statutory language of 30 U.S.C.

§ 863(o) that the implemented plan must be one approved by the *Secretary*, not by the Commission.").

In addition, the evidence indicates that the plan, in fact, did not comply with mandatory standards, and substantial evidence does not support the judge's finding that MSHA acted arbitrarily in deciding as much.

The judge found that MSHA arbitrarily decided that the plans did not comply with five standards related to what information a plan must contain because MSHA did not explain why it decided that the plan, which had previously satisfied those requirements, now did not. Dec. 34 (citing 30 C.F.R. §§ 75.334(c)(4), 75.371(y), (z), (bb), and 75.372(b)(9)). But MSHA did explain why: MSHA performed the ventilation study and learned that the deep cuts were not adequately ventilated, and that mine examiners could not adequately evaluate the effectiveness of the system. *See generally* G.X. 1. This was ample reason for MSHA to determine that the plan did not comply with the standards.

Nor did MSHA arbitrarily consider whether the plan allowed for weekly examinations to evaluate the ventilation system's effectiveness. *See* 30 C.F.R. §§ 75.364(a)(2)(iii)–(iv). MSHA explained that mine examiners cannot adequately evaluate whether the ventilation system is effective without knowing how the air is supposed to move through the blocks and in which direction the air is supposed to be moving at evaluation points. Tr. 97, 171–72, 199–200, 204. The judge's finding that MSHA did not prove inadequate weekly examinations (Dec. 34–35) misunderstands this point: MSHA did not allege that the route the examiners took was inadequate; MSHA determined that the plan did not provide enough information for examiners

traveling that route to evaluate whether the ventilation system was functioning correctly, so that they could not adequately evaluate the system. Tr. 97, 171–72, 199–200, 204.

Similarly, it was not arbitrary for MSHA to consider whether the plan, which did not specify the direction of air at evaluation points, satisfied 30 C.F.R. § 75.364(a)(2)(iii) or (iv). *See* Dec. 35–36. Examiners who are conducting the examinations required by those standards must know how the air is supposed to move through the blocks and in which direction the air is supposed to be moving at evaluation points in order to adequately evaluate the ventilation system. Tr. 97, 171–72, 199–200, 204. MSHA determined that the plan did not provide that information. Tr. 199–200, 204.

MSHA did not, as the judge found (Dec. 35–36), arbitrarily determine that the plan had to describe air movement with arrows instead of words. MSHA did not reject Knight Hawk's proposal to include descriptions of air movement ("from EP4 to EP 3 to EP2 to EP1") because those descriptions were words; MSHA rejected the proposal because the words did not state *how* the air moved from EP4 to EP3 to EP2 to EP1. Tr. 199–200, 204. Again, to adequately evaluate the ventilation system, examiners must know how the air is supposed to be moving through the blocks and in which direction it is moving at evaluation points. Tr. 97, 171–72, 199–200, 204.

In sum, MSHA neither arbitrarily considered whether, nor arbitrarily determined that, the plan violated or failed to provide the protection required by mandatory standards.

G. MSHA did not rely on PPL P13-V-12 to determine that the plan was unsuitable.

The judge also concluded that PPL P13-V-12 invalidly changed the substantive definition of a bleeder system, that MSHA relied on the PPL as the fundamental basis for revoking the plan, and that MSHA's reliance was therefore arbitrary. Dec. 37-38. These findings are mistaken and irrelevant.

Knight Hawk, not MSHA, raised the issue of the PPL (Knight Hawk Post-Hg. Br. 6). Moreover, Knight Hawk did not argue that the PPL was invalid; it argued that the PPL essentially gave it a safe harbor. Knight Hawk Post-Hg. Br. 6. MSHA determined that the ventilation plan was unsuitable not because of the PPL, but because the plan did not adequately ventilate the extended perimeter cuts or allow mine examiners to evaluate whether the ventilation system was functioning correctly.

Even though the judge's conclusions about the PPL are mistaken and irrelevant, the Commission should vacate them. Whether the PPL is a substantive rule is a legal question, so the judge erred by finding that it was a rule based on testimony instead of legal analysis. *See* Dec. 38. (This issue was not raised or briefed by either party.) The judge's finding could also have implications for the Secretary's and operators' reliance on the PPL in the future, so the judge's conclusion — which is unnecessary to resolving this case — should be vacated.

Conclusion

For the reasons above, the Secretary urges the Commission to grant the petition for review.

Respectfully submitted,

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