

No. 12-3598

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MACH MINING, LLC,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH ADMINISTRATION,

Respondents.

ON PETITION FOR REVIEW OF A DECISION
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR RESPONDENT THE SECRETARY OF LABOR

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JURISDICTIONAL STATEMENT

The jurisdictional statement of the petitioner, Mach Mining, LLC (“Mach”), is not complete and correct.

1. The Jurisdictional Defect

This case arises under the Federal Mine Safety and Health Act of 1977 (the “Mine Act” or the “Act”), as amended. 30 U.S.C. § 801 *et seq.* The Secretary of Labor administers and enforces the Mine Act through the Mine Safety and Health Administration (“MSHA”). 29 U.S.C. § 557a. The Mine Act established the Federal Mine Safety and Health Review Commission (the “Commission”) -- an adjudicatory agency independent of the Department of Labor, *see* 30 U.S.C. § 823 -- to adjudicate enforcement actions brought by the Secretary under the Act.

The Commission obtained subject matter jurisdiction over this case as a result of Mach’s timely contest on October 1, 2009, of two citations issued by the Secretary on September 29, 2009. 29 C.F.R. § 2700.20(b) (thirty-day deadline for contesting citation); *see* Administrative Record (“AR”) 1-20. The Commission assigned the case to an administrative law judge (“ALJ”), who, at Mach’s request, conducted an expedited hearing from November 3-5, 2009. *See* 29 C.F.R. § 2700.52 (expedition of proceedings).

After the Secretary issues a citation or order, he must notify the operator of the proposed penalty for the alleged violation “within a reasonable time.” 30 U.S.C. § 815(a). Once that notification is issued, the operator has thirty days in which to contest the penalty; absent a timely contest, the proposed penalty “shall be deemed

a final order of the Commission and not subject to review by any court or agency.”

Id. The Secretary notified Mach on November 4, 2009, that the penalty proposed for each of the two citations was \$100. AR 1257-59. Instead of contesting the penalties, Mach paid them by check dated November 30, 2009. AR 1260. With that payment, the Commission and its ALJ lost the jurisdiction they had over this case. 30 U.S.C. § 815(a); 29 C.F.R. §§ 2700.26, .27; *see Sec’y of Labor v. Old Ben Coal Co.*, 7 FMSHRC 205, 209 (1985) (“the fact of a violation cannot continue to be contested once the penalty proposed for the violation has been paid”).

Neither the ALJ nor the parties’ attorneys, however, were aware of this jurisdictional defect at the time. Thus, the ALJ issued her decision on January 28, 2010, affirming the two contested citations. JA 154. Mach filed a petition for discretionary review of the ALJ’s decision with the Commission on Monday, March 1, 2010 -- within the thirty-day period allowed by 30 U.S.C. § 823(d)(2)(A)(i). AR 1174-1210. The Commission, also unaware of the jurisdictional defect, directed discretionary review. AR 1211-1212.

2. The Cure

After Mach filed its opening brief with the Commission, appellate counsel for the Secretary discovered the jurisdictional defect and informed Mach’s appellate counsel. After consultation with Mach, the Secretary filed a motion to hold Mach’s appeal in abeyance pending the filing and disposition of a motion for relief from the final Commission order to be filed by Mach. AR 1221-35. The next day, the Commission granted the Secretary’s motion and Mach filed its motion for relief from the final Commission order, alleging that its failure to contest the proposed

penalties was inadvertent and that its payment of the penalties was a mistake. AR 1236-68.

The Commission has held that it possesses jurisdiction to grant relief from its own final orders, including orders in which uncontested penalties were paid, pursuant to Federal Rule of Civil Procedure (“FRCP”) 60(b). *Jim Walter Res., Inc. v. Sec’y of Labor*, 15 FMSHRC 782, 788-89 (1993); *see* 29 C.F.R. § 2700.1(b) (the Commission may look for guidance to, *inter alia*, the FRCP on any procedural question not regulated by the Mine Act, the Commission’s Rules, or the Administrative Procedure Act (the “APA”)). No court of appeals has addressed whether the Commission possesses such authority under the Mine Act, although the D.C. Circuit raised the issue during a recent oral argument in a pending case in which an operator challenged the Commission’s denial of such a motion. *Lone Mountain Processing Co., Inc. v. Sec’y of Labor et al.* (D.C. Cir. No. 11-1431) (oral argument held October 16, 2012).¹

Under the Occupational Safety and Health Act (the “OSH Act”), which contains virtually identical language regarding the effect of failure to contest a penalty, 29 U.S.C. § 659(a), two courts of appeals have split over whether the OSH Review Commission possesses such reopening authority. *George Harms Constr. Co. v.*

¹ Arguably, the D.C. Circuit recognized the Commission’s authority to reopen a final order in *Sec’y of Labor v. Spartan Mining Co.*, 415 F.3d 82 (D.C. Cir. 2005). In that case, after the Secretary appealed a Commission decision in favor of an operator, it was discovered that the operator had inadvertently paid the penalty for the violation at issue. The Court agreed with the parties that if the operator ultimately prevailed, it could recover the money paid, *id.* at 84 fn.1, citing *Sec’y of Labor v. Phelps Dodge Sierrita, Inc.*, 24 FMSHRC 661, 662 (2002). In *Phelps Dodge Sierrita*, the Commission granted an operator’s request for reopening under FRCP 60(b).

Chao, 371 F.3d 156, 160-63 (3d Cir. 2004) (the OSH Commission and its ALJs have jurisdiction under Rule 60(b)(1) to entertain late notices of contest to citations that have become final under 29 U.S.C. § 659(a)); *contra Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 228-29 (2d Cir. 2002).² Even if the Second Circuit's decision is correct, however, this case is distinguishable. The Second Circuit reasoned that when an employer fails to timely contest a citation, the Commission never obtains jurisdiction. Rather, the uncontested citation is "deemed" -- meaning "treated as if" it were -- a final order of the Commission, even though there really is no Commission order. *Id.* Thus, there is nothing to reopen. Unlike in *Le Frois*, here the Commission properly obtained jurisdiction, and then lost it.

On August 31, 2010, the Commission granted Mach's motion for relief from the final order over the Secretary's opposition, and ordered the Secretary to file a petition for assessment of penalties within 45 days. AR 1287-90; *see* 29 C.F.R. § 2700.28(a) (requiring the Secretary to file a penalty petition within 45 days of receiving the operator's notice of contest). The Secretary filed a petition for assessment of the two \$100 penalties on October 5, 2012. AR 1291-1317. Mach answered, stating that it had no objection to the two \$100 penalties, but reiterating its contest of the underlying citations. AR 1318-20.

In order to cure any remaining potential jurisdictional defect, the Secretary and Mach jointly stipulated that all the evidence admitted during the November 3-5, 2009, hearing was relevant, and requested that the ALJ, in her order on the penalty

² Under the OSH Act, the OSH Review Commission plays a role analogous to that of the Commission under the Mine Act. *See* 29 U.S.C. §§ 659, 661.

petition, reiterate, reissue, and incorporate by reference the contents of her January 28, 2010, decision. AR 1324-32. In her November 3, 2010, order, the ALJ assessed a \$100 penalty for each of the two citations, and reiterated, reissued and incorporated by reference her January 28, 2010, decision. AR 1333-35.

3. Additional Jurisdictional Facts

On November 16, 2010 -- within the thirty-day appeal period -- Mach filed a petition for discretionary review with the Commission. AR 1336-78. The Commission directed review and, on the joint motion of the parties, consolidated the new appeal with the prior appeal that had been held in abeyance. AR 1379-80, 1386-87.

The Commission issued its decision on August 9, 2012, affirming the ALJ's decision in part, vacating it in part, and remanding for consideration of one issue. Required Short Appendix ("SA") 1-25. On remand, the parties agreed, and the ALJ found in her decision on remand dated September 21, 2012, that the remanded issue was moot. AR 1550-52. Mach timely filed a petition for discretionary review with the Commission on October 11, 2012, within the thirty-day appeal period. AR 1553-1600. The Commission denied discretionary review on October 24, 2012, AR 1601-02; as a result, the ALJ's decision became the final order of the Commission on October 31, 2012, forty days after the issuance of the ALJ's decision. *See* 30 U.S.C. § 823(d)(1).

Mach filed its petition for review with this Court on November 14, 2012, within the thirty-day period afforded by Section 106(a)(1) of the Mine Act. 30 U.S.C. §

816(a)(1).³ Additionally, the coal mine at which the two contested citations were issued is located in Illinois, which is within this Court's geographic jurisdiction. This Court therefore has jurisdiction.

STATEMENT OF THE ISSUE

The Mine Act requires an underground coal mine operator to adopt a ventilation plan "approved by the Secretary." 30 U.S.C. § 863(o). If the Secretary denies a proposed plan, the operator may obtain adjudication of the dispute by operating briefly under a non-approved plan, triggering the issuance of a "technical" citation, contest of which invokes the Commission's jurisdiction. Does a Commission ALJ review the Secretary's disapproval of an operator's proposed ventilation plan under the "arbitrary and capricious" standard?

STATEMENT OF THE CASE

A. Nature of the Case

The Mine Act was enacted to improve and promote safety and health in the Nation's mines. 30 U.S.C. § 801. The Act authorizes the Secretary to promulgate health and safety standards for mines, conduct regular inspections, issue citations and orders for violations of the Act or the standards, and propose penalties for those violations. 30 U.S.C. §§ 811(a), 813(a), 814(a), 815(a), 820(a); *see generally Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984). Citations and orders contested by mine operators are adjudicated by Commission ALJs in

³ Mach named the Commission as a respondent pursuant to Federal Rule of Appellate Procedure 15(a)(2)(B). This Court, however, has stated that when an operator petitions for review of a Commission decision, the Secretary is "the only proper respondent." *Jeroski v. FMSHRC*, 697 F.3d 651, 653 (7th Cir. 2012) (dismissing the Commission as a respondent).

conformance with the APA, subject to discretionary review by the Commission and judicial review by an appropriate United States Court of Appeals. 30 U.S.C. §§ 815(d) (incorporating 5 U.S.C. § 554), 816(a)(1).

This case involves a dispute between Mach and the Secretary over the contents of Mach's proposed mine ventilation plan. Section 303(o) of the Mine Act requires the operator of an underground coal mine to adopt a ventilation plan that is "suitable to the conditions and the mining system of the coal mine" and "approved by the Secretary." 30 U.S.C. § 863(o). Section 303(o) is implemented by 30 C.F.R. § 75.370, which delegates the Secretary's authority to MSHA's District Managers. Subsection (a) of that standard requires an underground coal mine operator to "develop and follow" a ventilation plan that is: (1) "approved by the district manager," (2) "designed to control methane and respirable dust," and (3) "suitable to the conditions and mining system at the mine." 30 C.F.R. § 75.370(a). In light of the third requirement, a ventilation plan is "individual [in] nature" and "mine-specific." *Sec'y of Labor v. Peabody Coal Co.*, 15 FMSHRC 381, 385-86 (1993). Subsection (d) prohibits an operator from implementing a ventilation plan (or a revision of a plan) "before it is approved by the district manager." 30 C.F.R. § 75.370(d). Similarly, subsection (d) also prohibits "any intentional change to the ventilation system . . . that could materially affect the safety and health of the miners" without the District Manager's prior approval. *Id.* Once approved by the District Manager and implemented by the operator, a ventilation plan's provisions are enforceable as if

they were mandatory standards. *E.g., Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976)⁴; S. Rep. 95-181, at 25 (1977).

If the District Manager objects to any provision in the operator's proposed plan, the parties must negotiate in good faith for a reasonable period of time. *See Sec'y of Labor v. C.W. Mining Co.*, 18 FMSHRC 1740, 1746-47 (1996) (citing *United Mine Workers of America [UMWA] v. Dole*, 870 F.2d 662, 669 n.10 (D.C. Cir. 1989)).⁵

Ultimately, the District Manager must exercise his or her judgment with respect to the content of such plans in finally approving or disapproving a plan. *Id.*; *see also* S. Rep. No. 95-181, 95th Cong., 1st Sess. 25 (1977), U.S. Code Cong. & Admin. News 1977, p. 3425 ("the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan"). If good-faith negotiations yield an impasse, the operator may obtain adjudication of the dispute by notifying MSHA of its intent to implement a non-approved plan, implementing the non-approved plan momentarily, and receiving from MSHA a "technical" citation alleging a violation of Section 75.370(d). *See, e.g., Sec'y of Labor v. Carbon County Coal*, 7 FMSHRC 1367, 1371 (1985). MSHA

⁴ *Zeigler Coal Co.* was decided under the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969, the relevant language of which was identical to the Mine Act. *See Zeigler Coal Co.*, 536 F.2d at 401 n.5 (quoting 30 U.S.C. § 863(o) (1970) (requiring a ventilation plan to be "approved by the Secretary")).

⁵ *UMWA* did not involve a ventilation plan, but rather involved the validity of MSHA standards governing the analogous subject of roof control plans under Section 302(a) of the Mine Act. 30 U.S.C. § 862(a). In terms of the relevant statutory language, there is no difference between a roof control plan and a ventilation plan. Both must be "approved by the Secretary."

generally assesses only a nominal penalty for such “technical” violations -- like the two \$100 penalties in this case.

B. Course of the Proceedings

Good-faith negotiations between Mach and the District Manager concerning both Mach’s base and its site-specific ventilation plans yielded an impasse over several provisions in each plan.⁶ Consequently, the District Manager issued separate “deficiency letters” to Mach disapproving each plan for specified reasons. *See* Stipulated Joint Appendix (“JA”) at 129, 133. MSHA also issued two “technical” citations to Mach alleging violations of Section 75.370(d) -- one for each plan -- consisting of implementing a ventilation plan that was not approved by the District Manager. Mach timely contested the citations, triggering a hearing before a Commission ALJ.

The course of the proceedings before the Commission and its ALJ is set forth fully in the jurisdictional statement, above. In short, the ALJ affirmed the citations and the accompanying \$100 penalties, and the Commission affirmed the ALJ. JA 172, 174; SA 25.

C. Disposition Below

1. The ALJ’s Decision

Citing Commission case law, the ALJ found that the issue before her was “whether the Secretary properly exercised h[is] discretion and judgment in the plan approval process.” JA 167. The ALJ therefore considered the issue of “suitability in terms of

⁶ Mach’s base ventilation plan applied generally throughout the entire mine, except for those areas governed by a site-specific plan. *See* Mach Brief at 5.

the discretion of the District Manager.” *Id.* Consequently, the ALJ excluded certain evidence that Mach had not proffered to the District Manager. JA 171-72. The ALJ found that the District Manager did not abuse his discretion in determining that Mach’s proposed plan was not suitable and that MSHA’s alternative plan was suitable, and that those determinations were not “arbitrary and capricious.” JA 166-71. The ALJ also rejected Mach’s contention that in order to change a previously-approved plan, the Secretary had to prove that his plan addresses a hazard that either exists or is reasonably likely to occur at the mine. JA 171. Rather, the ALJ found that under Commission case law, when the Secretary seeks to change a previously-approved plan, the Secretary must identify a condition that exists at the mine and that was not addressed in the previously-approved plan. *Id.* (citing *Sec’y of Labor v. Peabody Coal Co.*, 18 FMSHRC 686, 690 (1996)). The ALJ concluded that the Secretary “met h[is] burden of proving that the [D]istrict [M]anager did not abuse his discretion in determining that the prior Mach ventilation plan [wa]s no longer suitable . . . and that the provisions proposed by MSHA [we]re suitable.” JA 172.

The ALJ also addressed the disputed evidentiary rulings she had made during the hearing. The ALJ explained that she had excluded Mach’s proffered evidence of ventilation plans at other mines, ventilation and dust surveys taken at other mines, and other evidence that was not presented to the District Manager because it was “not relevant to the decision regarding the circumstances and suitability of the plan to this mine.” JA 171-72. The ALJ acknowledged that “many plans are based upon

the experience at other mines,” but found it “extremely unlikely that two underground coal mines would present exactly the same factual situation and the same needs in their ventilation plan.” JA 172. Additionally, the ALJ explained that her role was to determine whether the District Manager’s determination was “arbitrary and capricious,” a role rendering irrelevant any evidence that was not presented to the District Manager. *Id.* For the same reasons, the ALJ also found that the testimony of a former District Manager concerning whether a particular plan was “suitable” had no probative value. *Id.*

Finally, the ALJ assessed a penalty of \$100 against Mach for each of the two violations. JA 174.

2. The Commission’s Decision

The Commission affirmed the ALJ’s decision in part and remanded in part. First, the Commission affirmed that the “arbitrary and capricious” standard applies when an ALJ reviews a District Manager’s disapproval of an operator’s ventilation plan. SA 6-9. The Commission explained that the ALJ correctly interpreted its case law in so finding, and that that result was “supported by the plain language of Section 303(o) of the Mine Act” and its legislative history. SA 7-8. The Commission noted that “the Secretary bears the burden of proof in a dispute over a plan’s provisions,” and that imposing that burden on the Secretary was “not inconsistent with” its holding that the “arbitrary and capricious” standard of review applies. SA 7 n.13. The Commission observed that it was unclear whether the ALJ “focused on Mach’s current plan [for panels one and two] rather than on the proposed plans [for panel three],” but held that any such error was harmless except with respect to the one

disputed plan provision that the Commission remanded to the ALJ for further consideration. SA 10.

Next, the Commission affirmed the ALJ's findings that the District Manager's determinations regarding six of the seven plan provisions that remained disputed were not "arbitrary and capricious." SA 10-21. As mentioned above, the Commission remanded one provision, but as discussed in the jurisdictional statement (above), the ALJ found on remand that the dispute over the remanded provision was moot. SA 15; JA 177.

Finally, the Commission affirmed the ALJ's evidentiary rulings. SA 23-25. First, the Commission held that the ALJ did not abuse her discretion in excluding evidence that was not presented to the District Manager. In particular, the Commission held that the ALJ had a "legally correct basis" for excluding ventilation plans and surveys from other mines because: (1) Mach's ventilation system was "somewhat novel"; and (2) only conditions at Mach's mine were relevant. SA 24. Regarding the exclusion of the information relied on by Mach's ventilation expert, Gary Hartsog, the Commission observed that the ALJ nevertheless admitted and considered Hartsog's testimony as to the conclusions he had reached about Mach's proposed ventilation plans. SA 24. Regarding the exclusion of former District Manager Lawless' proposed testimony regarding his knowledge of the plan approval process, the Commission held that "such matters are legal rather than factual." *Id.* Further, the Commission held that the ALJ properly excluded Lawless' proposed testimony regarding the suitability of the plans because different District

Managers, “like baseball umpires . . . have . . . slightly different strike zone[s].” SA 24. The Commission explained that if ALJs compared one District Manager’s determination to another District Manager’s, “it would encourage a race to the bottom.” In other words, the suitability standard would “essentially . . . be set by the most lenient” District Manager. *Id.*

STATEMENT OF THE FACTS

The Secretary agrees with the description of longwall mining at Mach’s No. 1 Mine contained in Mach’s “statement of the facts,” Section B (“The Mach No. 1 Mine”). Mach Brief (“Br.”) at 10-11. The Secretary also generally agrees with Sections C (“Overview of Mach’s Ventilation System”), D (“MSHA’s Ventilation Surveys”), and E (“Mach’s Earlier Ventilation Plans”) of Mach’s “statement of the facts.” Mach Br. at 11-14. Although the Secretary does not dispute the facts concerning the method by which Mach proposed to evaluate the effectiveness of its bleeder system, the Secretary does dispute Mach’s statement that its proposed method of evaluation “allowed Mach to confirm the bleeder entries were working effectively.” Mach Br. at 13. That issue was disputed. Two ventilation surveys that MSHA’s Technical Support Division conducted for the District Manager during his consideration of Mach’s proposed plans for longwall panel three concluded that Mach’s proposed method for evaluating the effectiveness of its bleeder system was not sufficient. JA 100, 118. JA 158-59, 168-70; *see also* JA 158-59, 168-70 (ALJ’s discussion of this issue).

The Secretary agrees that Mach did not propose anything different for longwall panel three than what MSHA had already approved for the first two longwall

panels. *See* Mach Br. at 14. By the time Mach submitted its proposed ventilation plan for longwall panel three, however, circumstances had changed in two ways:

- First, as a result of the progression of normal mining operations, the mining out of longwall panels one and two created additional open spaces where gas could accumulate and new airflow paths through the worked-out area, resulting in a more complex ventilation system. AR 315; JA 168.

- Second, because roof conditions in the bleeder entries deteriorated dramatically during the mining of panels one and two, AR 245; JA 157, Mach drove the gate entries for panel three 1,000 feet deeper than it had for first two panels, an action that created a “stair-step” in the bleeder entries at the end of panel three. AR 248; JA 157; *see* JA 143-45 (mine maps). In other words, the bleeder entries no longer ran in a straight line. Thus, Mach intentionally altered its ventilation system without the prior approval of the District Manager, thereby committing a violation of 30 C.F.R. § 75.370(d), for which MSHA issued a citation that Mach contested, litigated, and lost. *Sec’y of Labor v. Mach Mining, LLC*, 31 FMSHRC 709 (ALJ 2009).

SUMMARY OF THE ARGUMENT

Section 303(o) of the Mine Act requires the operator of an underground coal mine to adopt a ventilation plan “suitable” to the mine and “approved by the Secretary.” 30 U.S.C. § 863(o). That section confers broad discretion on the Secretary, who delegated his authority to MSHA’s District Managers (30 C.F.R. § 75.370(d)), to approve or disapprove a proposed ventilation plan. When an operator disagrees with a District Manager’s disapproval of a proposed plan, it may obtain

adjudication of the dispute by the Commission. Agency actions, especially actions involving an exercise of the agency's discretion, are reviewed under the "arbitrary and capricious" review standard. *See, e.g., Mount Sinai Hosp. Med. Ctr. v. Shalala*, 196 F.3d 703, 708 (7th Cir. 1999). The Commission, therefore, when reviewing a District Manager's disapproval of proposed ventilation plan, must apply the "arbitrary and capricious" standard. The Commission rejected Mach's arguments to the contrary below. So should the Court.

The fact that the Commission's review occurs in the context of an enforcement proceeding brought by the Secretary does not require a different result. Although the Mine Act requires the Commission to provide a hearing in conformance with the APA, *see* 30 U.S.C. § 815(d) (incorporating 5 U.S.C. § 554)), that requirement does not empower the Commission to substitute its judgment for the Secretary's regarding the "suitability" of a ventilation plan. Nor does the fact that the Commission is not a court require a different result. The Commission is an independent agency whose sole function, under the split-enforcement scheme established by the Mine Act, is to adjudicate enforcement proceedings. *See* 30 U.S.C. § 823 (creating the Commission). The Commission is, in effect, a special Mine Act court. *See Jeroski*, 697 F.3d at 652 (the Commission "is the equivalent of a court"). Indeed the Commission applies the "arbitrary and capricious" standard in reviewing several other types of actions entrusted to the Secretary under the Mine Act, such as orders issued under Section 103(k) (30 U.S.C. § 813(k)) to ensure the safety of persons in a mine after an accident has occurred, or orders issued under

Section 107(a) (30 U.S.C. § 817(a)) to withdraw miners from a mine where there is an imminent danger.

Mach's remaining arguments are premised on, and therefore must fall with, its arguments against the applicability of the "arbitrary and capricious" review standard. Mach does not challenge the ALJ's finding -- affirmed by the Commission -- that the District Manager's "suitability" determinations were not "arbitrary and capricious."

Accordingly, the Court should affirm the decision below.

ARGUMENT

A District Manager's "Suitability" Determinations Regarding a Ventilation Plan Are Reviewed Under the "Arbitrary and Capricious" Standard

A. Standard of Review

The Court must affirm the Commission's factual findings if they are supported by substantial evidence on the record as a whole. 30 U.S.C. § 816(a)(1); *see, e.g., Sellersburg Stone Co.*, 736 F.2d at 1149 fn.2. The Court reviews questions of law *de novo*. *Northern Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844, 847 (7th Cir. 2002). An ALJ's evidentiary rulings are subject to review under the "abuse of discretion" standard. *Roundy's, Inc. v. NLRB*, 674 F.3d 638, 648 (7th Cir. 2012); *Sec'y of Labor v. Twentymile Coal Co.*, 30 FMSHRC 736, 765, 778 (2008).

B. The Mine Act Entrusts the Approval or Disapproval of a Ventilation Plan to the Secretary's Judgment

Section 303(o) of the Mine Act unequivocally vests the Secretary with the authority to approve or disapprove a ventilation plan proposed by an underground coal mine operator:

A ventilation system and methane and dust control plan and revisions thereof suitable to the conditions and the mining system of the coal mine and *approved by the Secretary* shall be adopted by the operator

30 U.S.C. § 863(o) (emphasis added). The Secretary has delegated this authority to MSHA's District Managers. 30 C.F.R. § 75.370(a)(1) (“[t]he operator shall develop and follow a ventilation plan approved by the district manager”).

Equally unequivocally, Section 303(o) also entrusts that approval or disapproval to the Secretary's judgment:

. . . The plan shall show the type and location of mechanical equipment installed and operated in the mine, such additional equipment *as the Secretary may require*, the quantity and velocity of air reaching each working face, and such other information *as the Secretary may require*. Such plan shall be reviewed by the operator and the Secretary at least every six months.

30 U.S.C. § 863(o) (emphasis added). The statute thus leaves the contents of a ventilation plan to the Secretary's discretion, with the exception of the two items specified in Section 303(o) (*i.e.*, the type and location of mechanical equipment, and the quantity and velocity of air reaching each working face). The italicized language, “as the Secretary may require,” unmistakably confers broad discretion on the Secretary. *E.g.*, *C.W. Mining Co.*, 18 FMSHRC at 1746 (“absent bad faith or arbitrary action, the Secretary retains the discretion to insist upon the inclusion of specific provisions as a condition of the plan's approval”); *see City of Cleveland v. Ohio*, 508 F.3d 827, 842 (6th Cir. 2007) (statutory phrase “as the Secretary may require” confers “broad discretion” on the Secretary of Transportation to approve local governments' contracts under the Federal-Aid Highway Act).

The Senate Committee Report on the Mine Act made clear Congress' intention to confer broad discretion on the Secretary to approve or disapprove ventilation plans. The Report explained that "while the operator proposes a plan and . . . is entitled to further consultation with the Secretary over revisions, the Secretary must independently exercise his judgment with respect to the content of such plans in connection with his final approval of the plan." S. Rep. 95-181, at 25 (1977). Considering this legislative history, the D.C. Circuit has observed that "while the mine operator had a role to play in developing plan contents, MSHA always retained final responsibility for deciding what had to be included in the plan." *UMWA*, 870 F.2d at 669 n.10; *see also C.W. Mining Co.*, 18 FMSHRC at 1746 (quoting *UMWA*).

Where Congress confers such broad discretion on an administrative agency, the agency's action is subject to review under the APA's "arbitrary and capricious" standard. *See, e.g., Mount Sinai Hosp.*, 196 F.3d at 708. That standard is "highly deferential" and presumes the validity of agency action. *E.g., Smith v. Office of Civilian Health and Medical Program of Uniformed Services*, 97 F.3d 950, 955 (7th Cir. 1996). The Commission and the courts have applied that standard when reviewing other actions entrusted to the Secretary's judgment under the Mine Act. As this Court stated in *Old Ben Coal Co. v. Interior Bd. Of Mine Operations*, 523 F.2d 25, 31 (7th Cir. 1975), an inspector's issuance of an "imminent danger" withdrawal order must be upheld "unless there is evidence that he abused his

discretion or authority.”⁷ *See also Energy West Mining Co. v. FMSHRC*, 111 F.3d 900, 902 (D.C. Cir. 1997) (affirming the Commission’s holding that substantial evidence supported the ALJ’s finding that the inspector did not abuse his discretion in issuing a withdrawal order under Section 104(d) of the Mine Act (30 U.S.C. § 814(d)). Likewise, the Commission reviews a notice of safeguard issued by an inspector pursuant to Section 314(b) of the Mine Act (30 U.S.C. § 874(b)) under the “abuse of discretion” standard. *Sec’y of Labor v. Cyprus Cumberland Res. Corp.*, 19 FMSHRC 1781, 1785 (1997).⁸ Similarly, in *Pattison Sand Co., LLC v. FMSHRC*, 688 F.3d 507, 512-13 (8th Cir. 2012), the court held that the Commission applies the “arbitrary and capricious” standard when reviewing an order issued under Section 103(k) of the Mine Act (30 U.S.C. § 813(k)), which authorizes the Secretary to issue any order that he “deems appropriate to insure the safety of any person” in a mine after a mine accident. In *Sec’y of Labor v. Drummond Coal Co.*, 14 FMSHRC 661, 691 (1992), the Commission held an MSHA “Program Policy Letter” concerning the calculation of penalties to be “arbitrary” in a proceeding to enforce a penalty calculated pursuant to that letter. *See also Sec’y of Labor v. Consolidation*

⁷ *Old Ben* arose under the predecessor to the Mine Act, but the relevant statutory language is virtually identical to that in the Mine Act. Section 107(a) of the Mine Act states that, if an inspector “finds that an imminent danger exists,” s/he must issue an order requiring the operator to withdraw all persons (except those necessary to abate the dangerous condition) from the mine. 30 U.S.C. § 817(a).

⁸ Section 314(b) of the Mine Act states that “. . . safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials shall be provided.” 30 U.S.C. § 874(b).

Coal Co., 11 FMSHRC 483, 489-90 (1989) (reviewing an inspector's exclusion of certain persons from accompanying him on his inspection under the "arbitrary and capricious" standard).

The "arbitrary and capricious" standard of review also applies to review of mandatory health and safety standards promulgated by the Secretary. *See UMWA*, 870 F.2d at 666-67; *see also American Dental Ass'n v. OSHA*, 984 F.2d 823, 827, 831 (7th Cir. 1993) (applying "arbitrary and capricious" review to a standard promulgated under the OSH Act).⁹ That principle is significant because, as Mach itself recognizes (*see Mach Br.* at 9), the provisions of an approved plan are enforceable as if they were mandatory safety or health standards. *Zeigler Coal Co.*, 536 F.2d at 409; *UMWA*, 870 F.2d at 667 n.7. The reason for such enforceability is two-fold: (1) a plan has protective purposes similar to those of mandatory standards; and (2) a plan is subject to a "notice-and-comment" type procedure similar to that of mandatory standards inasmuch as an operator must have an opportunity for notice and comment before a District Manager approves or disapproves a ventilation plan. *Zeigler Coal Co.*, 536 F.2d at 405-07. Just as a ventilation plan is enforceable as if its provisions were mandatory standards, a ventilation plan should be reviewed under the same "arbitrary and capricious" standard as mandatory standards are. Because a ventilation plan is mine-specific, however, *see Peabody Coal Co.*, 15 FMSHRC at 385-86, review of a ventilation plan

⁹ The United States Courts of Appeals have exclusive jurisdiction over challenges to standards promulgated under the Mine and OSH Acts. 30 U.S.C. § 811(d); 29 U.S.C. § 655(f).

dispute -- unlike review of a mandatory standard -- must proceed through the Commission's administrative review process before judicial review is available. *Cf.* 30 U.S.C. § 811(d) (court of appeals review is the "exclusive means of challenging the validity of a mandatory health or safety standard").

Mach contends that its contest of the "technical" citations erased the Secretary's judgment and vested the Commission with authority to substitute its judgment for the Secretary's. *See generally* Mach Br. at 16-32. Mach relies on Section 105(d) of the Mine Act (30 U.S.C. § 815(d)), which requires a hearing that conforms to the APA (via incorporation of 5 U.S.C. § 554). The heart of Mach's argument is that plan disputes are no different than any other enforcement proceedings brought before the Commission, in which the Secretary bears the burden of proof by a preponderance of the evidence. Mach Br. at 21-28.

On the contrary, ventilation plan disputes are fundamentally different. A District Manager has "final responsibility for deciding" the contents of a ventilation plan. *See UMWA*, 870 F.2d at 669 n.10. The District Manager's determination is the Secretary's final decision on the matter. No Commission approval is required, notwithstanding the fact that an operator may challenge the Secretary's decision before the Commission by contesting a "technical" citation. In contrast, an inspector must issue a citation or order when he or she "believes" that a violation has occurred. 30 U.S.C. § 814(a).¹⁰ A citation or order is analogous to a complaint in

¹⁰ An inspector who issues a citation alleging that an operator implemented a non-approved ventilation plan makes no allegation about the merits of any underlying plan dispute. The inspector alleges only that the operator implemented a plan that

a civil action, *see Sec’y of Labor v. Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (1992), and therefore is not final agency action. *See Fed. Trade Comm’n v. Standard Oil*, 449 U.S. 232, 239 (1980) (an agency’s filing of a complaint is not “final agency action”). Indeed, Mach itself, as a plaintiff in *Elk Run Coal Co., Inc. et al. v. United States Dep’t of Labor*, 804 F. Supp. 2d 8 (D.D.C. 2011), argued that a District Manager’s disapproval of a proposed ventilation plan was “final agency action.” *Id.* at 30-31.

The fact that the Commission has jurisdiction to adjudicate contested citations, orders, and penalties under the Mine Act does not authorize the Commission to substitute its judgment for the Secretary’s regarding plan approvals. Nothing in Section 105(d) of the Mine Act or the APA provisions it incorporates overrides Section 303(o). *See Ingalls Shipbuilding Div., Litton Systems, Inc. v. White*, 681 F.2d 275, 289 (5th Cir. 1982) (“[w]e do not think the addition of APA procedures or the delegation of responsibilities to [ALJs] in the [Longshore and Harbor Workers’ Compensation] Act contradicts the plain mandate of § 908(i) (33 U.S.C. § 908(i) (1982)) that only deputy commissioners can approve agreed settlements”). Section 105(d) does nothing more than provide a procedural mechanism by which the substantive plan dispute under Section 303(o) can be brought before the Commission.

was not approved by the District Manager. The Secretary, of course, must prove those allegations by a preponderance of the evidence. Here, Mach argued below that its proposed plans had, in fact, been approved by the District Manager. The ALJ rejected that contention, the Commission affirmed, and Mach does not raise that issue before the Court.

Citing *Sec’y of Labor v. Peabody Coal Co.*, 18 FMSHRC 686 (1996), and similar Commission cases, Mach contends that the Commission here erroneously departed from its own precedent. Mach Br. at 22-23, 31, 40. According to Mach, those cases held that the Secretary is required to prove both the unsuitability of the operator’s existing plan and the suitability of the District Manager’s alternative plan. On the contrary, that case law reflects that the Secretary voluntarily accepted that burden of proof in those cases. *Peabody Coal*, 18 FMSHRC at 691. Further, Mach reads too much into the *Peabody* line of cases. The Secretary conceded in *Peabody* that when he seeks to revoke a previously-approved plan, he must demonstrate not merely that his own plan is “suitable” but also that the operator’s previously-approved plan is not suitable. That concession, however, although phrased in terms of the burden of proving suitability in the Commission’s case law, means only that the District Manager cannot revoke a previously-approved plan without first determining that it was not “suitable.” The concession does not mean that the Secretary must prove “non-suitability” by a preponderance of the evidence before the ALJ. The Secretary’s reading of the Commission’s *Peabody Coal* decision is confirmed by the D.C. Circuit’s decision in that case, which Mach neglects to mention. The D.C. Circuit applied the APA’s “arbitrary and capricious” review standard (*i.e.*, 5 U.S.C. § 706(2)(A)) in affirming the Commission’s decision sustaining the District Manager’s “suitability” determinations. *Peabody Coal Co. v. FMSHRC*, 111 F.3d 963, 1997 WL 159436 (D.C. Cir. 1997) (table). *See also Sec’y of Labor v. Emerald Coal Res., LP*, 29 FMSHRC 956, 965-66 (2007) (citing *Peabody Coal* and *C.W. Mining*, along with

other Commission cases, in affirming that an ALJ reviews a plan dispute under the “arbitrary and capricious” standard).¹¹

Mach’s contention that Section 507 of the Mine Act (30 U.S.C. § 956) precludes application of the “arbitrary and capricious” standard codified in the APA’s judicial review provision (5 U.S.C. § 706(2)(A)) is wide of the mark. *See* Mach Br. at 21.

Section 507 renders the APA inapplicable under the Mine Act only as to the Act’s enforcement scheme, not as to the Secretary’s rule-making activities. *Oil, Chemical and Atomic Workers Int’l Union v. Zegeer*, 768 F.2d 1480, 1486-87 (D.C. Cir. 1985).

Because a District Manager’s approval or disapproval of a ventilation plan is more akin to the issuance of a mandatory standard than the issuance of a citation, order or penalty, Section 507 does not render the APA’s “arbitrary and capricious” review standard inapplicable to the Commission’s review of that approval or disapproval.

See Pattison Sand, 688 F.3d at 512-13 (the Commission reviews a Section 103(k) order under the “arbitrary and capricious” review standard of 5 U.S.C. § 706(2)(A)); *see also Peabody Coal Co.*, 1997 WL 159436 (affirming an ALJ’s decision sustaining a District Manager’s disapproval of an operator’s ventilation plan under the

“arbitrary and capricious” review standard of 5 U.S.C. § 706(2)(A)). Indeed, Mach itself, as a plaintiff in *Elk Run Coal Co.*, argued that a District Manager’s

¹¹ *Emerald Coal* involved an emergency response plan, a requirement added to the Mine Act in 2006. *See* 30 U.S.C. § 876(b)(2)(A). Mach’s attempt to distinguish an emergency response plan from a ventilation plan is irrelevant. *See* Mach Br. at 33-35. *Emerald Coal*, however, is relevant because -- as the first case to address an emergency response plan -- it discussed and applied case law developed in the context of ventilation and roof-plan dispute cases.

disapproval of a proposed ventilation plan was “final agency action” subject to review under the APA’s “arbitrary and capricious” standard. 804 F. Supp. 2d at 30-31.¹²

Even if Section 507 of the Mine Act applies, it does not preclude application of the “arbitrary and capricious” standard. The APA codified “the nature and attributes of judicial review.” *Speed Mining, Inc. v. FMSHRC*, 528 F.3d 310, 316 (4th Cir. 2008) (the APA’s “committed to agency discretion” exception to the presumption of judicial review applies under the Mine Act despite Section 507); *Sec’y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 159-60 (D.C. Cir. 2006) (same). Consequently, the principles underlying the APA, such as “arbitrary and capricious” review, apply even if the APA itself does not.

Mach also contends that the incorporated provisions of the APA required that the burden of proving the non-suitability of its ventilation plans be imposed on the Secretary because he proposed to change the *status quo*. Mach Br. at 19-22. On the contrary, Mach proposed a ventilation plan for longwall panel three; there was no previously-approved plan for panel three. The fact that Mach’s proposed plan for panel three was identical to those proposed for panels one and two did not convert

¹² In *Elk Run*, the plaintiffs elected not to pursue Commission review of their ventilation plan disputes, but rather sought (*inter alia*) APA review in federal district court. The court held that the plaintiffs failed to state a claim for relief under the APA because they failed to identify any specific District Manager’s determination. 804 F. Supp. 2d at 30-31. The court further held that permitting the plaintiffs to amend their complaint would be futile because such claims fall within the exclusive jurisdiction of the Commission, citing the D.C. Circuit’s decision in *Peabody Coal Co.* as an example. 804 F. Supp. 2d at 31-32.

the Secretary into the proponent of a change to the *status quo*.¹³ Rather, Mach was the proponent of a proposed ventilation plan for panel three. In any event, by the time Mach submitted its proposed plan for panel three to the District Manager, Mach's mining out of panels one and two had already altered the ventilation system by creating new open spaces and new airflow paths. AR 315; JA 168. Additionally, Mach itself had unilaterally altered the *status quo* by making panel three 1,000 feet longer than panels one and two, thus creating a "stair-step" in the bleeder entries, in violation of Section 75.370(d). *See Mach*, 31 FMSHRC at 714.¹⁴ Mach's attempt to portray the Secretary as the party seeking to alter the *status quo* is therefore both factually and legally incorrect.

The case law relied on by Mach is wide of the mark. Neither *Consolidation Coal Co.*, 11 FMSHRC 966 (1989), nor *Sec'y of Labor v. Kenny Richardson*, 3 FMSHRC 8 (1981), *aff'd on other grounds*, 689 F.2d 632 (6th Cir. 1982), involved a plan dispute; they were ordinary enforcement proceedings. So was this Court's decision in *Caterpillar Logistics Services, Inc. v. Solis*, 674 F.3d 705 (7th Cir. 2012), on which Mach heavily relies.

¹³ Mach argued below that the Secretary could not require it to submit a new ventilation plan for each successive panel to be mined, or to submit both base and site-specific ventilation plans. The ALJ rejected that argument and the Commission affirmed. JA 171; SA 21-23. Mach does not raise that issue before the Court.

¹⁴ As Mach argued below, the ALJ's subsequent, unpublished decision on the penalty proceeding in that same case found no evidence that Mach's unilateral alteration of the mine's ventilation system actually resulted in any safety or health risk. The ALJ's later findings, however, do not detract from the fact that Mach -- not the Secretary -- altered the *status quo*.

Similarly, Mach's reliance on *Concrete Pipe & Products v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993), and *Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994 (7th Cir. 1993), is misplaced. *See* Mach Br. at 29-30. Mach cites those cases for the proposition that the ALJ and the Commission here made the same "mistake" as Congress made in the statute at issue in those cases (the Multiemployer Pension Plan Amendments Act): conflating a standard of proof with a standard of review.¹⁵ On the contrary, Mach conflates an inspector's issuance of a citation or order with a District Manager's approval or disapproval of a ventilation plan. Moreover, in *Concrete Pipe* and *Schlitz*, the Courts struggled with statutory language that they characterized as "incoherent" and "incomprehensib[le]." 508 U.S. at 625; 3 F.3d at 998. In contrast, the relevant statutory language of Section 303(o) of the Mine Act -- *i.e.*, "approved by the Secretary" -- could hardly be clearer. Nor is there any inherent conflict in the fact that one agency may review another agency's action, especially where, as here, the reviewing agency's sole function is adjudication. *See Jeroski*, 697 F.3d at 652 (the Commission "is the equivalent of a court"); *Twentymile Coal Co.*, 456 F.3d at 161 (likening the Commission to a court). Review by one agency of another agency's action is inherent in the split-enforcement scheme that Mach acknowledges Congress established under the Mine Act. *See* Mach Br. at 35.

¹⁵ The statute stated that in a judicial proceeding to review or enforce an award of benefits, "there shall be a presumption, rebuttable only by a clear preponderance of the evidence, that the findings of fact made by the arbitrator were correct." *Schlitz*, 3 F.3d at 998 (quoting 29 U.S.C. § 1401(b)(3)). The Courts explained that Congress conflated the "preponderance of the evidence" standard of proof with the "clearly erroneous" standard of review, thus necessitating judicial interpretation.

Where Congress intends to provide for *de novo* review of agency action, it says so expressly. *United States Dep't of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 755 (1989) (“[u]nlike the review of other agency action that must be upheld if supported by substantial evidence and not arbitrary or capricious, the [Freedom of Information Act] expressly places the burden on the agency to sustain its action and directs the district courts to determine the matter *de novo*”) (internal quotes omitted); *Fells v. United States*, 627 F.3d 1250, 1253 (7th Cir. 2010) (statute expressly provided for “trial *de novo*” to determine the validity of the challenged agency action).

Mach’s contention that the Secretary’s position in *Elk Run Coal Co.* conflicts with the Secretary’s position here lacks merit. *See* Mach Br. at 37-38. The Secretary argued in *Elk Run* that the Commission possesses the specialized expertise necessary to evaluate ventilation plans. *Id.* There is no inconsistency in saying, on the one hand, that the Commission possesses the expertise necessary to adjudicate ventilation plan disputes and, on the other hand, that the Commission reviews a District Manager’s “suitability” determination under the “arbitrary and capricious” standard. Indeed, the Commission’s specialized expertise enhances its evaluation of whether a District Manager’s “suitability” determination is “arbitrary and capricious.”

Moreover, the context in *Elk Run* was very different than the context here. The plaintiffs in that case sought adjudication of ventilation plan disputes in federal district court, claiming that the Mine Act made no provision for the adjudication of

such disputes. The issue was whether the Commission or the district court had jurisdiction to adjudicate ventilation plan disputes. It was in that context that the Secretary pointed to the Commission's expertise.¹⁶ In contrast, here the issue is not subject-matter jurisdiction, but rather the Secretary's burden of proof in litigating an alleged violation of Section 75.370(d). In view of the different contexts, there is no inconsistency between the Secretary's position in *Elk Run* and his position in this case.

In sum, the ALJ correctly found that the "arbitrary and capricious" standard applied to her review of the District Manager's determinations that Mach's proposed ventilation plans were not "suitable" and that MSHA's alternative plans were "suitable." Accordingly, the Court should affirm the Commission's holding that the ALJ correctly found the "arbitrary and capricious" standard to apply.

C. The ALJ Acted Within Her Discretion in Excluding Certain Evidence and Expert Witness Testimony

Mach contends that because the ALJ erroneously applied the "arbitrary and capricious" standard, she improperly excluded or discounted evidence that was not presented to the District Manager. Mach Br. at 38-43. Initially, although the ALJ did exclude certain evidence as a result of her finding that the "arbitrary and capricious" standard applied, she did not "discount" any evidence on that basis. Contrary to Mach's contention, the ALJ considered and discussed on the merits the evidence of Mach's that she admitted. *See* JA 159, 162-65, 169. Further, because the

¹⁶ The Secretary made abundantly clear in his motion to dismiss in *Elk Run* (AR 1447-1512) his position that the Commission reviews a District Manager's approval or disapproval of a ventilation plan under the "arbitrary and capricious" standard.

ALJ correctly applied the “arbitrary and capricious” standard (as discussed above), the Court need not address Mach’s evidentiary arguments. In any event, Mach’s evidentiary arguments fare no better than its standard-of-review argument.

Citing 5 U.S.C. § 556(d), Mach claims that the APA entitled it to “present any evidence or testimony on subject matter relevant to the question of the suitability of its ventilation plan.” Mach Br. at 39.¹⁷ The “suitability” of Mach’s ventilation plans, however, was not the issue before the ALJ. The issue was whether the District Manager’s suitability determinations were “arbitrary and capricious.” Consistent with Section 556(d)’s requirement that “irrelevant, immaterial, or unduly repetitious evidence” be excluded, evidence that was not submitted to the District Manager was irrelevant to whether the District Manager’s determination was “arbitrary and capricious.”

Mach offers no reason for its failure to present its evidence to the District Manager. Instead, Mach offers an excuse: its “lack of prescience of the full range of disagreements MSHA would have with its ventilation for panel 3 -- and its consequent failure to hire a fleet of experts and present a complete technical case to the MSHA [D]istrict [M]anager prior to even knowing that its plan would be denied.” Mach Br. at 42. Mach professes surprise, claiming that nothing in the Commission’s case law indicated that an operator must marshal and submit its

¹⁷ Section 556(d) (which is referenced in 5 U.S.C. § 554(c)(2)) states that “[a]ny oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence,” and that “[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d).

evidence to the District Manager. Mach Br. at 40-42. On the contrary, as discussed above, the Commission's decision here broke no new ground. Mach is entitled to advocate its interpretation of Commission precedent, but it ignored other interpretations -- especially interpretations explicitly articulated in the Commission's case law -- at its peril. *See Twentymile Coal Co.*, 30 FMSHRC at 764-66, 778-79 (the Commission split 2-2 on whether an ALJ adjudicating an emergency response plan dispute acted within his discretion in granting Secretary's motion *in limine* to exclude the plans of other mines). Nor can Mach's surprise be attributed to the District Manager's failure to "fully articulate[]" his rationale for disapproving the plans. *See Mach Br.* at 42. The District Manager did not disapprove Mach's proposed plans until after Mach had its opportunity to submit evidence to him. When he did disapprove Mach's plans, the District Manager fully articulated his rationale for doing so in two detailed "deficiency letters" issued to Mach. *See JA* 129-32, 133-42.

Mach's excuse contains two implications that are not fully articulated. First, implicit in Mach's excuse is the suggestion that the District Manager did not negotiate in good faith -- an implication that is contrary to the ALJ's unchallenged finding that the parties did negotiate in good faith. *See JA* 156. Second, implicit in Mach's reference to "hir[ing] a fleet of experts" in order to "present a complete technical case" to the District Manager is an aversion to a full-blown evidentiary hearing before the District Manager. The Secretary does not suggest such. The ventilation plan approval process, which is not subject to the APA, is an informal

one. The District Manager is not an adjudicator conducting an evidentiary hearing, but rather an administrator making an executive decision.

The safety and health of miners would be ill-served if “suitable” ventilation plans were disapproved based on evidentiary technicalities. That is one reason why the ventilation plan approval process is informal. Even when good-faith negotiations yield an impasse, there is nothing to prevent an operator from presenting new evidence to the District Manager for reconsideration. Mach could have done so here -- even while litigating this case. Instead, Mach chose to present its evidence to the Commission, in the hopes that the Commission’s judgment regarding suitability would be more favorable than the District Manager’s. The Commission and its ALJ properly declined to substitute their judgment for the District Manager’s.

Mach’s claim that the point of conducting discovery and having an ALJ-hearing was defeated by excluding its evidence is similarly flawed. *See* Mach Br. at 42. The ALJ hearing served the important purpose of compiling a formal administrative record of the informal proceeding before the District Manager. *See, e.g., McCarthy v. Madigan*, 503 U.S. 140, 145 (1992) (exhaustion of administrative remedies serves the purpose of creating a record that is adequate for judicial review). Commission proceedings in plan dispute cases also generally serve the other main purpose of the exhaustion requirement: to promote efficiency by having an agency resolve a dispute without resort to a court. *See id.* Although such agency resolution did not

occur here, this is only the second plan dispute case to reach a court of appeals in the thirty-five year history of the Mine Act.¹⁸

Finally, Mach's contentions regarding the ALJ's exclusion of some of the proffered testimony of former MSHA District Manager Michael Lawless lack substantive merit. *See* Mach Br. at 41-44. Lawless' proffered testimony concerning MSHA's ventilation approval process and "what makes a ventilation plan suitable at a given mine," *id.*, would have been a legal opinion. As such, the ALJ properly excluded it. *See Roundy's, Inc.*, 674 F.3d at 648. Further, as the ALJ properly found, Lawless did not have the same information before him that the District Manager did -- and even if he did, different District Managers may rationally reach different conclusions based on the same information. JA at 172; *see, e.g., United States v. Williams*, 81 F.3d 1434, 1437 (7th Cir. 1996) ("implicit in the concept of a discretionary judgment" is the possibility that "two judges, confronted with [an] identical record, [] come to opposite conclusions and . . . the appellate court . . . affirm[s] both").

Accordingly, the ALJ acted within her discretion in excluding evidence that was not submitted to the District Manager. *See, e.g., Highway J Citizens Group v. Mineta*, 349 F.3d 938, 958 (7th Cir. 2003) ("arbitrary and capricious" review is "focused on the full administrative record that was before the Secretary *at the time he made his decision*") (internal quote omitted).

¹⁸ The only previous one was *Peabody Coal Co.*, 1997 WL 159436 (discussed above).

D. Substantial Evidence Supports the ALJ's Finding That the District Manager's "Suitability" Determinations Were Not "Arbitrary and Capricious"

Mach does not challenge the ALJ's finding that the District Manager's suitability determinations were not "arbitrary and capricious." Instead, Mach discusses two of the disputed plan provisions in order to "illustrate the error and unjust consequences" of applying the "arbitrary and capricious" standard. Mach Br. at 44. Mach's discussion of the evidence, however, adds nothing to its argument that the "arbitrary and capricious" standard does not apply.

Mach summarizes the evidence that was before the ALJ, *see* Mach Br. at 46-49, then concludes that Mach could have prevailed if the ALJ had applied the standard that Mach advocated. *See* Mach Br. at 46 ("the outcome likely could have been different had the ALJ properly weighed the relevant competing evidence"). Mach does not explain, however, how a different outcome under another standard illustrates that applying the "arbitrary and capricious" standard was erroneous.

In any event, Mach's "substantial evidence" contentions lack merit. Mach contends that there was no evidence that its ventilation plan was ineffective, and that MSHA therefore lacked authority to seek changes to Mach's previously-approved plan. *See* Mach Br. at 47-48. Initially, Mach's contention is based on the incorrect premise that the Secretary sought to alter a previously-approved ventilation plan. As discussed above, that premise is incorrect; Mach unilaterally altered the *status quo*. In any event, the Secretary did produce evidence that Mach's method of evaluating its bleeder system was ineffective. That was the conclusion reached in both of the

ventilation surveys conducted by MSHA's Technical Support Division for the District Manager. JA 100, 118.

Nor is there any requirement that the Secretary must produce evidence that an approved plan is ineffective before the Secretary may seek changes to that plan. The Commission rejected that argument in *Peabody Coal Co.*, 18 FMSHRC at 690.¹⁹ Instead, the Commission held that the Secretary need only identify a specific mine condition not addressed in the previously approved plan. *Id.* Even assuming that the Secretary here sought to change a previously-approved plan, any such requirement was easily satisfied by the fact that longwall panel three was 1,000 feet longer than longwall panels one and two, thus creating a stair-step in the bleeder system.

Mach further claims that the "only basis" for one of the disputed plan provisions was MSHA's concern for the possibility of a methane accumulation in certain areas of the mine -- and that such concern was "ironic" in light of MSHA's objection to admission of other mines' ventilation plans. Mach Br. at 49-50.²⁰ Ventilation plans, however, are mine-specific. *See Peabody Coal Co.*, 15 FMSHRC at 385-86. Because no two mines are identical, as the ALJ reasoned and the Commission affirmed,

¹⁹ In light of *Peabody Coal Co.* -- Commission case law directly on point -- Mach's citation of bankruptcy and unfair-labor-practice cases on this point are less than persuasive. *See Mach Br.* at 48.

²⁰ Similarly, Mach characterizes as "ironic" MSHA's concern that Mach's bleeder evaluation process was not like the evaluation processes for "typical" bleeder systems in light of MSHA's objection to Mach's proffer of ventilation plans at other mines. Mach Br. at 47-48. The fact that Mach's bleeder evaluation process was atypical, however, is logically consistent with the proposition that ventilation plans at other mines were irrelevant.

plans from other mines were not probative regarding the suitability of a particular provision at Mach's mine. JA 171-72; SA 24. In any event, what Mach's mine had in common with the other mines referred to by MSHA was its location in a coal seam that was classified as "gassy." JA 133. What Mach's mine did not have in common with those other mines was its ventilation system. Not only did the Commission characterize Mach's "push-pull" ventilation system as "somewhat novel," SA 24, Mach itself characterized its system as different from those of other mines. JA 36.

Regardless of MSHA's concern about methane based on its experience with nearby mines, the ventilation surveys performed by the MSHA Technical Support Division for the District Manager showed that Mach's mine liberated 2.2 million cubic feet of methane per day, JA 93; *see also* JA 114 -- more than twice the amount necessary to qualify as "excessive" and trigger MSHA spot-inspections at least once every five days under Section 103(i) of the Mine Act. 30 U.S.C. § 813(i). In view of these facts, the District Manager was not "arbitrary and capricious" in determining that methane accumulation was a possibility, and the ALJ acted within her discretion in excluding the ventilation plans of other mines.

Ultimately, Mach does not challenge the ALJ's finding that the District Manager's suitability determinations were not "arbitrary and capricious." Accordingly, the Court should summarily affirm the ALJ's finding. *See NLRB v. Midwestern Personnel Services, Inc.*, 508 F.3d 418, 422 (7th Cir. 2007) (summarily affirming findings unchallenged on appeal).

CONCLUSION

For all of the foregoing reasons, the Court should deny Mach's petition for review and affirm the Commission's decision.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in compliance with Fed. R. App. P. 32(a), as amended by this Court's order of October 5, 2012, enlarging the word limitation to 21,000 words, using Microsoft Word for Windows, in Century font, 12 point, and according to the word processing system's word count, there are 10,020 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I hereby certify that on March 6, 2013, I electronically filed the foregoing response brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System.

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