CCASE:
MSHA V. UNITED MINE WORKERS
DDATE:
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TTEXT:
FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 15, 1983
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. PENN 81-96-R

and

UNITED MINE WORKERS OF
AMERICA

v.

JONES & LAUGHLIN STEEL CORP.

DECISION

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp. V 1981), and involves the interpretation of the mandatory safety standard contained in section 303(d)(1) of the Act, 30 U.S.C. $ 863(d)(1)(1976), and the identical implementing standard, 30 C.F.R. $ 75.303. 1/ For the reasons that

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1/ Section 303(d)(1) of the Mine Act, and 30 C.F.R. $ 75.303, provide in part:

[1] Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. [2] Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active

roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. [3] Belt conveyors on which coal is carried shall he examined after each coal-producing shift has begun. [Sentence numbers added.]

(footnote 1 continued)

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follow, we affirm the administrative law judge's holding that coal-carrying conveyor belts are specifically excepted from this mandatory standard's requirements for pre-shift examination. 2/ We emphasize at the outset, however, that we are not deciding whether all entries around belt conveyors are "active workings," and subject to some form of inspection under the first sentence of the standard, because that issue was not litigated below.

On February 17, 1981, Jones & Laughlin Steel Corporation was issued a citation under section 104(d)(1) of the Mine Act alleging that it had violated 30 C.F.R. $ 75.303 by not pre-shift examining certain coal-carrying conveyor belt "flights" that is, sections of the conveyor beltline system. See Bureau of Mines, U.S. Dept. of the Interior, A Dictionary of Mining Mineral, and Related Terms 440 (1968). On February 19, 1981, an order of withdrawal was issued under section 104(d)(1) for another alleged failure to pre-shift coal-carrying conveyor belt flights. On both occasions miners had entered the area where the beltlines were located and begun working before an examination of the beltline had been conducted. Jones & Laughlin's Vesta No. 5 Mine, where the citation and order were issued, is an underground coal mine in which coal haulage is accomplished largely by a conveyor belt system.

Jones & Laughlin contested the citation and order and a hearing was held before a Commission administrative law judge. At the hearing, Jones & Laughlin and the Secretary of Labor stipulated that the belts in question carried coal, not persons, and that coal was produced on the shifts during which the citation and order were written. The parties also agreed that an examination "of the nature specified in 30 C.F.R. $ 75.303" was made, but was not conducted within three hours preceding the beginning of the shift, or before miners entered and began to work in the areas cited. The belt conveyors were stipulated to be in "good condition" at the

time of the citation and withdrawal order. 3/

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footnote 1 cont'd.

Further, section 318(g) of the Mine Act and the Secretary's standards identically define key terms used in section 303(d)(1): "[W]orking section" means all areas of the coal mine from the loading point of the section to and including the working faces, "active workings" means any place in a coal mine where miners are normally required to work or travel. 30 U.S.C. $ 878(g)(3) and (4); 30 C.F.R. $ 75.2(g)(3) and (4).

2/ The judge's decision is reported at 3 FMSHRC 1721 (July 1981)(ALJ).

3/ The United Mine Workers of America ("UMWA") intervened after the hearing.

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We granted petitions of the Secretary and the UMWA for discretionary review of the judge's decision. 4/ On review the UMWA asserts that the coal-carrying conveyor belts are "active workings" and must be pre-shift examined under the first sentence of the standard, and that the third sentence requires a separate on-shift examination. The UMWA further asserts that these two examinations cannot be combined. As discussed below, we reject the UMWA's position that the conveyor belt equipment at issue is, in and of itself, an active working. Given our disposition of this case, we need not address the UMWA's other assertions.

The Secretary's position is more involved. He does not argue that coal-carrying beltlines are "active workings." Further, he concludes, as we do, that there is no requirement that coal-carrying belt equipment be pre-shift inspected. Br. 10-13. He argues, however, that section 303(d)(1) docs require a pre-shift examination of all areas in coal-carrying conveyor belt entries where miners will be assigned to work on the upcoming shift. The Secretary asserts that, when examining belts on-shift, both the entry and the belt must he examined if the entry has not been pre-shift inspected. The Secretary would allow these two inspections to be merged in certain circumstances.

The Secretary thus asks us to decide whether the areas surrounding the coal-carrying belt equipment must be pre-shift inspected under the first sentence of the standard, which refers to "active workings." After careful examination of the record, we are satisfied that the Secretary did not present to the judge this complex argument distinguishing between the belt equipment and the entries in which the equipment is located. Further, the citation and order in this case both refer to "conveyor belt flights"--as noted above, specific sections of conveyor belt equipment. In

short, the Secretary failed to litigate below the argument he now asks us to review. As a result, we have an incomplete and unsatisfactory record on this important question. Similarly, the judge did not decide this issue, and his opinion does not contain any discussion of a distinction between belt

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4/ The American Mining Congress, Bituminous Coal Operators Association, and Keystone Bituminous Coal Association filed briefs as amicus curiae. Keystone Bituminous Coal Association in its amicus brief requested that the Commission issue a declaratory order to the Secretary requiring him to publish his interpretive and policy memoranda regarding 30 C.F.R. • 75.303 in the Federal Register. An amicus curiae cannot control the course of litigation and, generally, may not request relief. See, for example, Ring v. Roadway Express, Inc., 485 F.2d 441, 452 (5th Cir. 1973); 1B J. Moore, T. Currier, Moore's Federal Practice •0.411[6] (2d ed. 1982). Keystone lacks standing to make this request, and therefore it is denied. Further, no request for a declaratory judgment was presented to the administrative law judge, or in the petitions for discretionary review and, thus, such a request is not properly before us. 30 U.S.C. • 823(d)(2)(A)(iii) and B.

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equipment and the entries in which the equipment is located. Absent a showing of good cause, section 113(d)(2)(A)(iii) of the Mine Act precludes our review of questions of law and fact not presented to the judge. 30 U.S.C. $ 823(d)(2)(A)(iii). Such good cause has not been demonstrated. 5/

Under these circumstances, our decision concerns only coal-carrying belt equipment, which is specifically treated in the third sentence of section 303(d)(1), and which the Secretary agrees need not be pre-shifted. We interpret the judge's decision as referring to belt equipment only, and reject any reading to the contrary. If the Secretary wishes to litigate the question of whether coal-carrying beltline entries must be pre-shifted, he should in a future case issue a citation and file pleadings and briefs clearly raising that issue. We now turn to the narrow question before us.

The inspection requirements imposed by section 303(d)(1) are to be determined by reading that section as a whole. Elementary principles of statutory construction require that the individual inspection requirements be read in an harmonious and consistent manner. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). Se 2A Sands, Sutherland Statutory Construction $ 46.05 (4th ed. 1973). The first sentence of section 303(d)(1), which requires pre-shift inspection of "active workings," is the most general of the three

sentences. Thereafter, Congress proceeded to impose more particular inspection requirements. In the second sentence of that section, Congress required pre-shift examination of "working sections," a less inclusive area than "active workings." In the second sentence, Congress also specifically mandated inspections of particular areas and objects in underground mines, e.g., seals and doors, roofs, faces, and ribs, and active roadways, travelways, "and belt conveyors on which men are carried ..." (Emphasis added.) Finally, in the third sentence Congress specifically directed, "Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun." (Emphasis added.)

Based on the structure of section 303(d)(1), as well as on the definition of "active workings" in section 318(g)(3)(quoted in n. 1 above), we first conclude, in agreement with the Secretary, that coal-carrying equipment per se is not an active working. Active

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5/ Indeed, we note that the Secretary's position has evolved through several stages. The judge held below that the Secretary had no "consistent or coherent construction of the section in controversy" and was "unable to cite any written policy or procedure" describing his interpretation of the standard at issue. 3 FMSHRC at 1733. The Secretary's current position was not refined and clarified until his reply brief to us in this case and was not announced to the public until 3 months after we granted review in this case. Further, there are discrepancies between his present position and relevant material in the inspector's manual in effect at the time of the judge's decision.

workings generally are areas or places in a mine, not equipment. 6/ As we have emphasized above, we do not decide here whether the entries or areas surrounding the belt equipment are active workings.

Further, in section 303(d)(1), Congress distinguished between coal-carrying beltlines and those that carry miners. Congress in the second sentence of the standard required pre-shift inspection of man-carrying belts, and, in the third sentence, required on-shift inspection of coal-carrying belts. These discrete references to different belt functions, and clear differences in inspection requirements, demonstrate congressional knowledge of the operation and use of conveyor belt systems in coal mines. Given this evident congressional understanding and the specific inspection requirements imposed as to each type of conveyor belt system, we conclude that coal-carrying conveyor belts do not have to be pre-shifted.

Our construction of section 303(d)(1) is supported by the legislative history. Section 303(d)(1) of the Mine Act was adopted without change from the 1969 Coal Act, and the legislative history of the Mine Act does not discuss this section. Accordingly, we look to the legislative history of the 1969 Coal Act and the intent of the original promulgators of this section. Section 303(d)(1) of the 1969 Coal Act was a revision of a 1952 Coal Act inspection provision that did not expressly mention beltlines. See section 209(d)(7) of the 1952 Coal Act, 30 U.S.C. $ 471 et seq. (1964)(repealed 1969).

In the process of amending the provisions of the 1952 Act, the Senate passed a bill that provided in part that "all belt conveyors" shall be pre-shift examined. S. 2197, 91st Cong., 1st Sess. $ 204(d) (1)(1969) reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part 1 at 815-16 (1975) ("Legis. Hist."). The bill to amend the 1952 Act that passed the House required pre-shift examination of "all belt conveyors on which men are carried"; it also contained a sentence not found in the Senate version: "Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun." H.R. 13950 $ 303(d)(1), Legis. Hist, Part 1 at 1417.

The Conference Committee adopted neither all of the Senate version nor all of the House version. Instead, a hybrid provision appearing in the Conference Report was enacted as section 303(d)(1) of the Coal Act, and was re-enacted as section 303(d)(1) of in the Mine Act. Legis. Hist., Part I at 1470-71; section 303(d)(1) of the Mine Act (quoted above, n. 1). The statutory standard enacted by Congress adopted the House language requiring pre-shift examination of conveyor belts that carry

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6/ To the extent that the judge's decision might be read as holding that the belt equipment involved in this case is an "active working," we disagree. We agree with the judge, however, that these belt conveyors are not within the definition of "working section" in the Mine Act. Section 318(g)(3)(quoted in n. 1 above).

persons, and examination of coal-carrying belts "after each coal-producing shift has begun." Thus, Congress rejected the proposed requirement for pre-shift examination of all belt conveyors. We agree with the judge that this factor is important in determining congressional intent. 3 FMSHRC at 1732-33. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 199-200 (1974). 7/

For the foregoing reasons. we hold that section 303(d)(1) does

not require pre-shift inspection of coal-carrying beltlines. Rather, that belt equipment must be examined, pursuant to the third sentence of section 303(d)(1), "after each coal producing shift has begun." We leave for another day the question of whether entries in which coal-carrying beltlines are located must be pre-shift inspected. 8/

Accordingly, on the bases explained above the judge's decision is affirmed and the citation and withdrawal order are vacated.

L. Clair Nelson, Commissioner

7/ Further evidence of congressional intent is found in the section-by-section analysis and explanation presented by/Senator Williams, a conferee and manager of the bill, to the Senate on its debate on the bill that became the 1969 Coal Act. Concerning section 303(d), this analysis states:

> Subsection (d) sets forth requirements that the operator must follow for preshift examinations. This [sic] provisions are similar to the 1952 act provisions, ... except for several additional requirements including ... an examination of belt conveyors on which men are carried before each shift, [and] an examination of coal carrying belt conveyors after each shift begins....

Legis. Hist., Part I at 1610 (emphasis added). This explanation by a key conferee also clearly indicates that Congress distinguished between conveyor belts that carry persons and those that carry coal, and that Congress intended that inspections of coal-carrying belts occur after coal-producing shifts begin.

8/ Our resolution of this case makes it unnecessary to decide whether pre-shift and on-shift inspections may be combined in some circumstances, a question on which the Secretary and the UMWA differ.

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Commissioner Lawson dissenting:

Plato observed that "The life which is unexamined is not worth living." Bartlett's Familiar Quotations 93 (14th ed. 1968). The mine which is unexamined, however, may snuff the life and moot its examination. Progress in the two millennia since Plato has been hard won, but one would hope we have advanced beyond requiring helots to face the perils of an uninspected mine.

The majority nevertheless is determined to avoid deciding whether the uninspected entries in which these miners were working, and in which these coal carrying conveyor belts were located, are active workings, and therefore subject to preshift inspection. I find this misdirected diligence to be extraordinary given the operator's concession that these are active workings 1/ and since this is the

central issue before us, on which the Secretary's and UMW's appeals are premised.

The situation here presented is one of frequent, indeed, daily repetition, at virtually every coal mine in the nation, and my colleagues' decision fails to provide future guidance for the industry, the miners, and the Secretary.

The assertion that the question of "...whether the areas surrounding the coal carrying belt equipment must be preshift inspected..." was not presented by the Secretary to the judge below is simply wrong. Slip op. at 3. Contrary to the majority's determination, the language of the citation, withdrawal order, and action to terminate was directed towards this operator's failure to preshift examine the mine entry or area in which the equipment was located. 2/ Indeed, in my view, a violation is established whether or not the citation was of the area, or the area with the equipment therein, so long as the mine entry or area was part of the cited locale. Here, of course, there is no dispute that this area was not preshift examined. Tr. 7.

The citation stated:

Evidence indicated that the A, B, and C conveyor belt flights of 44 Face had not been preshift examined for the day shift. An entry was not in the mine examiner's report or at the date board along the belt flights indicating that an examination was made before workmen of the day shift entered the area along each belt flight. [Emphasis added.]

1/ J&L admitted the cited areas were active workings before this Commission. Tr. oral arg. 33-35. See also Tr. 18 19.

2/ "Entry" is defined as: a. In coal mining a haulage road, gangway or airway to the surface. b. An underground passage used for haulage or ventilation, or as a manway.... c. A coal heading. Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Mineral and Related Terms, at 389 (1968).

Similarly, in the withdrawal order, alleging a violation of the same standard and issued two days after the citation, the inspector wrote, in describing the "Area or Equipment":

The area not preshifted was the 1 Face conveyor belt haulage A and B flights. [Emphasis added.]

Further, the Secretary's Opposition to J&L's application for temporary relief--filed by the Secretary on March 19, 1981, following the citation (February 17, 1981) and order (February 19, 1981) contained the following statements:

b. MSHA not only can cite an explicit requirement

of 30 CFR 75.303 which mandates preshift examinations of conveyor belt (and other) entries regardless of the transportation of men, it can show that this requirement was the basis for the issuance of the subject citation and order.
c. The holding of the Consol case specifically dealt with on-shift examination, and therefore is not advisory precedent for this case where the material issue centers upon preshift examinations of areas where miners are required to work or travel.
[Emphasis added.]
See also Tr. 40, 47 (testimony of Inspector Beck).
The issue of failing to preshift the areas cited where miners were observed working along coal carrying belts was also presented to the administrative law judge by the Secretary. In his post hearing brief to the judge, the Secretary argued:
At the outset, the Secretary reiterates that "the material issue centers on preshift examinations of an area where miners are required to work or travel" (Tr. 30)..
Secretary's post hearing brief at 8.
J & L urges this proposition while admitting that the areas involved in the citation and order were not only in belt entries, but were also active workings (Tr. 18-19).
Id. at 9.
The construction urged by J&L would ascribe to Congress the untenable, illogical intent that all miners except those working in the coal carrying belt conveyor entries should receive the benefit of having a preshift examination of their work place.
Id. at 17.
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On the basis of common sense, experience, legislative history, sound statutory construction and case authority, the Secretary urges that all places where miners are normally required to work or travel be examined within three hours preceding the beginning of any shift and before any miners in such shift enter these areas.
Id. at 22.
Beyond these obvious, forceful and repeated assertions, the Secretary petitioned this Commission to review the ALJ's failure to find a violation for the operator's failure to preshift the area here involved. That petition was granted in its entirety. In his petition, the Secretary left no doubt that he was citing the area, not

the coal-carrying belts when he concluded:

The preshift examiner is not required to test the Conveyor belts itself.

* * * *

In sum, under the standard, an operator must provide a pre-shift examination of those parts of the coal-carrying conveyor belt entries where miners normally work or travel. The examination must cover the items enumerated in the second sentence of the standard.

Petition for discretionary review at 9.

The Secretary supported this argument in his brief (br. at 9-14, 17, 22) and reply brief (r. br. at 3 & n. 1, 14, 16, 17) to the Commission.

Since it is undisputed that there was no preshift examination of these areas involved (Stip. #9, Tr. 7) where the inspector observed miners working along the belts (Tr. 109, 110), only one conclusion can be drawn--that a violation of 75.303 occurred.

The majority has, however, parsed the statutory language beyond the fondest desires of the most scrupulous grammarian. The issue presented is whether the mine operator is required by section 303(d)(1) to preshift active workings of mines along coal conveyor belts. By refusing to consider these cited areas as active workings even though this is not in serious dispute between any of the parties, and although miners were regularly assigned to work, and were observed working along this operator's coal carrying belt lines (Tr. 109, 110), the majority has denied these miners a preshift examination of their work area.

The statute in relevant part provides:

Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designate.i by the Secretary .... Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun. [Emphasis added.]

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The first sentence of section 303(d) thus requires a preshift examination of active workings "...before any miner in such shift enters the active workings." Section 303(d), supra. The judge found the cited areas to be active workings and the parties do not disagree with this finding. See n. 1, supra. As active workings, the cited areas are therefore required to be preshift examined, unless otherwise excluded or exempted by the statute. The last quoted sentence (supra), argues against any exclusion, and for the

requirement of a preshift examination of the area cited by the inspector in this case. The first sentence of section 303(d)(1) describes locales, i.e., "active workings." Section 318(g)(4) of the Act in turn defines "active workings" as "any place in a coal mine where miners are normally required to work or travel."

In 1969 Congress amended the preshift examination provisions of the 1952 Act. This became section 303(d)(1) of the 1969 Coal Act, now section 303(d)(1) of the 1977 Mine Act. The Senate Report accompanying the bill in 1969 stated the reason for requiring examinations of all belt conveyors:

> Many mine fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; therefore, an examination of the belt conveyors is necessary.

S. Rep. No. 411, 91st Cong., 1st Sess. 57 (1969), reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Legislative History of the Federal Coal Mine Health and Safety Act of 1969, Part I at 183 (1975).

Only a strained reading of the plain language of the Act could lead to the conclusion that by the 1969 amendments, or their 1977 reenactment, Congress intended to deny miners working along coal carrying belt conveyors the protection of preshift examination of their working places. Congress, as reflected in both the legislative history and the statutory language, was increasing, not decreasing examinations, and certainly never contemplated miners working in uninspected areas.

The majority's view of 75.303 and its sponsoring statutory provision, section 303(d)(1), would not improve or promote safety, but would reduce the protection afforded to miners. This apparently would deny preshift examinations of active workings along coal conveyor belts, and would certainly deny onshift examinations of coal conveyor belts. as in this case for 3-1/2 hours or until the operator performed such during the shift. It would also deny a miner working along a coal conveyor belt on a non coal-producing shift both a preshift and an onshift examination of his working place, and would eliminate all preshift examinations of an active working if the operator placed a coal conveyor belt in such workings. Such a construction is contrary to the intent of Congress as expressed literally in the standard and statute involved here. Instead, the Act should be construed liberally when improved health and safety for the miners will result, or when it will carry out the purpose of the Act. United States v. American Trucking Association, Inc., 310 U.S. 514. 543-544 (1940).

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The possibility of ignition, a fortiori in a "gassy" mine such as

the one here operated by J&L, presents the specter of a major calamity. 3/ To understate the case considerably, sending miners to work in uninspected areas of a gassy mine is not in accord with my understanding of the mandate of the Act.

As the Secretary has well stated:

> The construction urged by J&L would ascribe to Congress the untenable, illogical intent that all miners except those working in coal carrying belt conveyor entries should receive the benefit of having a preshift examination of their work place.

Secretary's post hearing brief at 17.

The statute, the legislative history and the majority's analysis fail to demonstrate how a requirement of an examination of "active workings" prior to the start of a shift, and an examination of coal carrying conveyor belts while the mining is underway on the shift, imposes a burden on the operator which outweighs the miner's need to be protected in an area in which he or she is to work. The language of the Act requires no less, and the preventive purpose and thrust of the statute, even if subjected to a balancing analysis, mandates in favor of such a requirement.

The problem with the majority's ignoring the failure to preshift the areas along the belts where miners were working is that, if there were no belts in an active working, the area would be subject to preshift examination. If, however, the operator installed a coal-carrying conveyor belt in such an area, then the requirement of preshift inspection for such active working vanishes. This makes no sense as a matter of either law or logic, and indeed turns enforcement on its head, since the additional potential hazard of adding belts to a mine entry, perversely under the majority's view, eliminates the preshift inspection of the area.

The judge below has drawn no distinction between entries with, or without, coal carrying belts, nor I suggest should we, since such is unnecessary to our decision. A more exact delineation of the inspection of conveyor belts in mine entries may well be more appropriately left to further clarification by the Secretary. Whether or not combined inspections are appropriate is also better left to the process of regulatory promulgation, particularly given the varying circumstances and ramifications of

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3/ The mine here involved is classified as "gassy", and therefore presents even more potential hazards than most. Tr. oral arg. 41-43; and see section 103(i) of the 1977 Act. Interestingly, too, J&L--all of whose mines are located in West Virginia and Pennsylvania--has concededly examined all of its mines, preshift, including coal carrying belts, since 1961, although allegedly only

before the first coal producing shift of each work week. Tr. oral arg. 42, 43.
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one, two or three shift operations, in which the hazard presented may be of markedly varying potential severity, and the time between inspections accordingly widely disparate. 4/ Finally, the issue of whether a preshift examination of coal-carrying belts is mandated for entries, when no miners are working along such belts, is not presented by this case.
In summary, as the ALJ found and the parties here conceded, these are active workings. They are thus required to be preshift examined pursuant to the first sentence of section 303(d)(1). The prophylactic purpose of the statute requires that such active workings be inspected, and that such inspection not be denied because of either the presence, or the absence, of coal-carrying conveyor belts in those entries.
Based on the clear language of section 303(d)(1) of the Act and its sponsored regulation (30 CFR $ 75.303), the legislative history, and in the interest of promoting safety for the miner, 5/ I would find that the statute and the standard involved require a preshift examination of those active workings along a coal conveyor belt, on any shift, before a miner enters his or her work place.
I therefore dissent from the majority's decision, would hold that this operator violated the Act as alleged in the citation and order, and would remand for further proceedings.

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4/ Whether or not all or only part of these coal-carrying conveyor belts must be examined preshift may bear further scrutiny, inasmuch as the Secretary has the authority to designate more precisely the underground areas of the mine to be examined. Section 303(d)(1). In any event, the promulgation of specific regulations, with all parties having the opportunity to comment thereon, appears obviously preferable to the enunciation of dicta in the instant case.
5/ If section 303(d)(1) is ambiguous, and I do not believe this to be the case, any ambiguity must be interpreted to promote safety and prevent death and injury to miners. Section 2(c) of the Act. District 6, United Mine Workers of America v. United States Dept. of the Interior, Board of Mine Operations Appeals, 562 F.2d 1260, 1265 (1977); UMWA v. Kleppe, 532 F.2d 1403, 1406 (1976), cert. denied 429 U.S. 858 (1976); Munsey v. Morton, 507 F.2d 1202, 1210 (1974), Reliable Coal Corp. v. Morton, 478 F.2d 257, 262 (1973); and Old Ben Coal Co., 1 FMSHRC 1954, 1957, 1958 (December 1979).
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