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MSHA & UMWA V. JONES & LAUGHLIN STEEL  
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FMSHRC-WDC  
JULY 31, 1986

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

and

UNITED MINE WORKERS OF AMERICA  
(UMWA)

v. Docket No. PENN 81-96-R

JONES AND LAUGHLIN STEEL  
CORPORATION

and

VESTA MINING COMPANY

BEFORE: Backley, Doyle, Lastowka and Nelson, Commissioners

### DECISION

BY THE COMMISSION:

This case is before us on remand from the U.S. Court of Appeals for the District of Columbia Circuit, "for a determination of whether [30] U.S.C. § 863(d)(1) ... and 30 C.F.R. § 75.303 (1983) require coal mine operators to conduct pre-shift examinations of coal-carrying conveyor belt entries where miners are normally required to work or travel." *International Union, UMWA v. FMSHRC and Vesta Mining Co.*, No. 83-1867, slip op. at 3 (D.C. Cir. March 9, 1984); 731 F.2d 995 (D.C. Cir. 1984) (table). 1/ For the reasons explained below, we find that the coal-

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1/ 30 U.S.C. § 836(d)(1), section 303(d)(1) of the Federal Mine

Safety and Health Act of 1977, and the identical implementing mandatory safety standard, 30 C.F.R. § 75.303, provide in part:

[1] Within 3 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

(Footnote continued)

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carrying belt conveyor entries that are the subject of this proceeding are entries in which miners are normally required to work or travel, and, as such, are subject to the pre-shift examination requirements of section 303(d)(1) of the Act and of 30 C.F.R. § 75.303.

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Footnote 1/ continued

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 be examined after each coal-producing shift has begun. Such mine examiner shall place his initials and the date and time at all places he examines. [Sentence numbers added.]

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).

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The case arose when Jones and Laughlin Steel Corporation ("J&L") was issued a citation and withdrawal order by an inspector of the Department of Labor's Mine Safety and Health Administration ("MSHA") pursuant to section 104(d)(1) of the Mine Act. The citation and withdrawal order alleged that J&L violated 30 C.F.R. § 75.303 by failing to pre-shift examine certain coal-carrying belt conveyor "flights" before miners entered areas along the flights and began work. <sup>2/</sup> The citation and withdrawal order also alleged that the violations of 30 C.F.R. § 75.303 were significant and substantial and were caused by the unwarrantable failure of J&L to comply with the mandatory standard. 30 U.S.C. § 814(d)(1).

J&L contested the citation and withdrawal order and a hearing was held before a Commission administrative law judge. At the hearing the parties stipulated that the belt conveyors in question transported coal only, that both violations were cited on coal-producing shifts, and that on both occasions an examination of the nature specified in 30 C.F.R. § 75.303 had not been made within three hours preceding the beginning of the shift, or before miners entered and began to work in the areas along the cited belt flights. <sup>3</sup> FMSHRC at 1723-24. <sup>3/</sup>

The history of this matter is fully set forth in our previous decision (5 FMSHRC 1209 (July 1983)) and need not be repeated in full here. The judge found that the Secretary had not proved a violation of section 75.303. The judge concluded that the Secretary had cited J&L for failing to pre-shift examine the equipment, i.e. the coal carrying belt conveyors, and that MSHA had failed to establish that the standard and the Act require coal-carrying belt conveyors to be pre-shift examined. <sup>3</sup> FMSHRC at 1734. Therefore, the judge vacated the citation and withdrawal order. <sup>3</sup> FMSHRC 1721, 1734 (July 1981)(ALJ).

The Commission granted petitions for discretionary review filed by the Secretary and the UMWA..<sup>4/</sup> The Secretary argued on review that J&L violated section 303(d)(1) of the Act and 30 C.F.R. § 75.303 because no pre-shift examination was made of areas in the coal-carrying belt conveyor entries where miners were working. <sup>5/</sup> J&L responded that in

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<sup>2/</sup> As used here the term "flight" refers to one conveyor belt in a connected tandem series of belts. See Bureau of Mines, U.S. Dept. of the Interior, Dictionary of Mining, Mineral, and Related Terms 440 (1981).

<sup>3/</sup> Following the hearing, the motion of the United Mine Workers of

America ("UMWA") to intervene and file a brief was granted.

4/ The American Mining Congress ("AMC"), the Bituminous Coal Operators Association, and Keystone Bituminous Coal Association filed briefs as amici curiae.

5/ This argument, which distinguished between belt conveyor entries and the belt conveyors themselves, represented a new position for the Secretary. It was not refined and clarified until the Secretary's reply brief to the Commission on review and was not announced to the public until three months after the Commission granted review.

5 FMSHRC at 1212, n. 5; see also MSHA Policy Memorandum No. 82-76 (March 3, 1982).

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distinguishing between the belt flights themselves and the entries in which that belt conveyor equipment was located, the Secretary was arguing a position not raised before the judge below. The Commission agreed that the Secretary was improperly attempting to litigate an issue not raised below. 30 U.S.C. § 823(d)(A)(iii). Accordingly, the Commission left the issue of whether the statute and the regulation require the pre-shift examination of coal-carrying belt conveyor entries for a case in which it was properly raised. 5 FMSHRC at 1211-12. The Commission concluded, however, that section 303(d)(1) of the Act and 30 C.F.R. § 75.303 do not require the pre-shift examination of coal-carrying belt conveyors themselves.

The Commission's decision was appealed to the U.S. Court of Appeals for the District of Columbia Circuit by the UMWA. Prior to the appeal Vesta Mining Co. ("Vesta") purchased the mine in question. Vesta then intervened and filed a brief on appeal. (The Secretary and the AMC, participating as amici curiae, also filed briefs.) Before the court, Vesta altered the position taken by its predecessor, J&L, and argued that the question of whether belt conveyor entries had to be pre-shift examined had been properly before the Commission on review. The court conceded that "the distinction between coal-carrying [belt conveyor] equipment and the entries was perhaps not carefully articulated below." Slip op. at 3. Nevertheless, the court reversed the Commission's decision "to the extent that it holds that the parties did not present to the ALJ the question of whether entries in which coal-carrying belts are located are subject to a mandatory pre-shift inspection." Slip op. at 3. The court further stated:

Given that the statute and regulation require a preshift examination of 'the active workings of a coal mine' and that coal-carrying conveyor belt entries in which miners are normally required to work or travel clearly fall within the definition of 'active workings,' the statute and regulation appear to require coal mine operators to conduct a preshift examination of such entries. It would be anomalous if the mere addition of coal-carrying conveyor belts to an entry had the effect of removing the entry from the scope of the preshift examination requirement.

Slip op. at 3. Recognizing, however, that there might be "other considerations not apparent to this Court that bear on the proper interpretation of the statute and regulation," the court remanded the matter to the Commission. Slip op. at 3.



On remand the parties have filed new briefs presenting their positions and arguments on the issue of whether the statute and the standard require pre-shift examinations of coal-carrying conveyor belt entries where miners are normally required to work or travel. The parties present three very different interpretations of how the statute and the standard apply to this case. Vesta argues that the subject areas along the coal-carrying belt conveyor flights are not required to be pre-shift examined for either of two reasons. First, Vesta asserts that the record establishes they are not "active workings," that is, they are not areas where "miners are normally required to work or travel." Second, assuming that the areas are "active workings," Vesta asserts that they are specifically exempted by the third sentence of section 303(d)(1) and the standard. ("Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun.") The UMWA draws a contrary conclusion. The UMWA asserts that because the third sentence of section 303(d)(1) itself requires the on-shift examination of belt conveyors on which coal is carried, miners are "normally required to work or travel" in the entries. Thus, according to the UMWA, all coal-carrying belt conveyors are active workings and must be pre-shift examined. The Secretary argues that the sole consideration in determining whether a pre-shift examination is required in a coal-carrying belt conveyor entry is whether a particular area in an entry is an "active working" The Secretary asserts that the evidence in this case establishes that "miners are normally required to work or travel" in the cited areas of the coal-carrying belt conveyor flights at issue.

In a succession of federal mine safety and health acts, Congress has demonstrated increasing concern that coal miners be assured of entering underground work areas that provide as safe and healthy an environment as possible. Section 209(d) of the Federal Coal Mine Safety Act of 1952, 30 U.S.C. § 471 et seq. (1955), required pre-shift examinations to be conducted in "every active working place" of the underground areas of a gassy coal mine within four hours immediately preceding the beginning of a coal-producing shift. The first sentence of section 303(d)(1) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976), adopted without change by the 1977 Mine Act, required that pre-shift examinations be performed within three hours immediately preceding the beginning of any shift and throughout all active workings of every coal mine.

The first sentence of section 303(d)(1) sets forth the general pre-shift examination requirement followed by more particular inspection requirements. Thus, the second sentence of section



303(d)(1) contains the more specific requirements for the pre-shift examination of "working sections" and for the pre-shift examination of other specified areas in underground coal mines. The third sentence excepts coal-carrying belt conveyors from the general and particularized pre-shift examination mandates. Clearly, the intent of section 303(d)(1) is to make safer those areas where miners are normally required to work or to travel. We

agree with the court that to remove coal-carrying belt conveyor entries where men normally work or travel from the general pre-shift inspection mandate of the statute and the standard would be a deviation from the statutory pre-shift inspection scheme.

We next consider whether the areas of the coal-carrying belt conveyor entries at issue were "active workings." George Pizoli, mine manager for J&L, testified that on almost every shift at the Vesta No. 5 mine miners were assigned to work at places along the belt as the need arose. Tr. 131-32. Stephen Hajdu, J&L's assistant safety director, testified that anytime during any shift it was possible that miners would be working along coal-carrying belt conveyors and that it was "normal practice" at the Vesta No. 5 mine for men to work in belt entries without a pre-shift examination. Tr. 95-96. Thus, at the Vesta No. 5 mine, it was a normal practice to require miners to work at particular tasks as needed in areas of the coal-carrying belt conveyors, and we conclude that these areas were places where miners were "normally" required to work. Thus, once J&L assigned miners to work in particular areas along coal-carrying conveyor belts, J&L was required by section 303(d)(1) of the Mine Act and by 30 C.F.R. § 75.303 to pre-shift examine those specific areas.

Our conclusion is consistent with the Secretary's interpretation of the pre-shift examination requirements of the Act and the standard relating to the examination of coal-carrying belt conveyor entries. That interpretation requires the pre-shift examination of "[a]ny area of a coal mine in which miners are normally required to work or travel during the shift, including areas along conveyor belt lines in which miners are assigned to work or travel." The interpretation also states that it is the Secretary's policy to require the examination of areas along a belt entry "[w]hen miners are assigned duties." MSHA Policy Memorandum No. 82-7C at 1 (March 3, 1982). 6/ Thus, to comply with the pre-shift examination requirements imposed by the statute and the standard, an operator is not required to pre-shift examine all of the coal-carrying belt conveyor entries in its mine, but only those areas of the entries where miners are assigned duties requiring work or travel. 7/

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6/ We note that it is also the Secretary's policy to allow the operator to combine, under certain circumstances, the on-shift examination of belt conveyors on which only coal is carried with the pre-shift examination of the areas of coal-carrying belt conveyor entries in which miners are assigned duties. MSHA Policy Memorandum No. 82-7C (March 3, 1982) at 2; see also Sec. Br. on Remand 27-30. Under the facts of the present case the validity of this policy need

not be explored here.

7/ As we have stated previously, the inspection requirements imposed by section 303(d)(1) of the Mine Act must be determined by reading that section as a whole and in a harmonious and consistent manner. 5 FMSHRC at 1212. Consonant with this approach, and based upon the structure of section 303(d)(1) and the statutory and regulatory definition of "active workings," the Commission previously concluded that coal-carrying belt conveyors themselves are not subject to the pre-shift examination requirements of the statute and regulation but must be examined "after each coal producing shift has begun." 5 FMSHRC at 1212-14. These conclusions were not disturbed by the court.

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J&L assigned duties to miners requiring work in areas along the coal-carrying belt conveyor flights. J&L did not examine these areas prior to the miners entry into the areas. Accordingly, we reverse the judge and conclude that J&L violated the pre-shift examination requirements of section 303(d)(1) of the Act and mandatory safety standard 30 C.F.R. § 75.303.

Because the judge who heard the case originally is no longer with the Commission, we remand to the Chief Administrative Law Judge for assignment to another judge to determine whether, as alleged, the violations were of a significant and substantial nature and whether the violations were caused by J&L's unwarrantable failure to comply with the Act and the mandatory safety standard. 8/

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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8/ Chairman Ford did not participate in the consideration or disposition of this case.

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