FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 4, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. WEST 99-342-R
	:	WEST 99-384-R
RAG SHOSHONE COAL CORPORATION	:	WEST 2000-349

BEFORE: Duffy, Chairman; Jordan, Suboleski and Young, Commissioners[1]

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

This consolidated contest and civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (the "Mine Act"), involves the validity of enforcement action taken by the Department of Labor's Mine Safety and Health Administration ("MSHA") against RAG Shoshone Coal Corporation ("Shoshone") based on the change of the designated occupation at Shoshone's mine.[2] Administrative Law Judge August Cetti affirmed the citations. 23 FMSHRC 407, 421-22 (Apr. 2001) (ALJ). Shoshone filed a petition for discretionary review, challenging the judge's decision, which the Commission granted. In addition, the Commission granted leave to participate as amicus curiae to ten operators ("industry amici").[3] The Commission also heard oral argument in the matter. For the reasons that follow, we reverse the judge's decision.

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[1] Commissioner Beatty recused himself in this matter and took no part in its consideration.

[2] The designated occupation is "the occupation on a mechanized mining unit that has been determined . . . to have the greatest respirable dust concentration." 30 C.F.R. § 70.2(f).

[3] Those operators include Canyon Fuel Co., LLC; CONSOL Energy Inc.; Eastern Associated Coal Corporation; Energy West Mining Company; Genwal Resources, Inc.; Mettiki Coal, LLC; Mingo Logan Coal Company; Mountain Coal Company, LLC; Peabody Coal Company; and West Ridge Resources, Inc.

I.

Factual and Procedural Background

Shoshone operates the Shoshone No. 1 mine, an underground coal mine in Hanna, Wyoming. Stip. 1. Shoshone produces coal at MMU 008-0 through longwall mining.[4] Stip. 7; 23 FMSHRC at 407. The longwall shearer cuts coal in two passes. Tr. 29-31. The "main-cut pass" occurs when the longwall shearer makes its initial pass, moving from the tailgate to the headgate, and cutting the full diameter of the shearer's drums, which is approximately seven feet of the ten-foot coal seam. Tr. 29-30. The "cleanup pass" occurs when the shearer reverses direction, moving from the headgate to the tailgate, and cuts the remaining three feet of coal. Tr. 30-31, 331. As the shearer cuts coal from the face, shields extending from the intake along the entire face advance. Tr. 22. The face conveyor or pan line takes the coal that has been cut and transfers it to the stageloader. Tr. 22. A crusher at the stageloader crushes large pieces of coal, and the stageloader transfers the coal to a belt. Tr. 21-22.

On MMU 008-0, approximately nine miners worked at the face. Tr. 285. Those miners generally included five jacksetters (who advanced the shields), the tailgate-side longwall operator, the headgate-side longwall operator, the headgate operator, the foreman and, occasionally, a mechanic. Tr. 25, 27, 264, 285; Gov't Ex. 12.

In accordance with the provisions of section 70.207(a), Shoshone is required to "take five valid respirable dust samples from the designated occupation in each mechanized mining unit during each bimonthly period." 30 C.F.R. § 70.207(a); 23 FMSHRC at 408. Since at least October 11, 1983, Shoshone had sampled the tailgate-side longwall operator (code number 044) as the designated occupation on MMU 008-0. 23 FMSHRC at 409.

MSHA inspectors also sample other occupations on the MMU in addition to the designated occupation. *Id.*; Stip. 18. MSHA inspectors compare the results of the different occupations in those sampling surveys in order to determine which occupation should be selected as the designated occupation. Tr. 72.

In April 1988, Jerry Spicer, MSHA's Administrator for Coal Mine Safety and Health, sent a memorandum to district managers introducing the 060 code for the "Longwall Return-Side Face Worker." Gov't Ex. C to S. Mot. for Summ. Dec., at 3-4 (the "Spicer memorandum"). In the memorandum, Spicer stated that when the 060 designated occupation is sampled, the sampling device must remain with the miner working nearest the return air side of the longwall face at all times. *Id.* at 4.

[4] The term "MMU" refers to a "mechanized mining unit," or a "unit of mining equipment including hand loading equipment used for the production of material." 30 C.F.R. § 70.2(h).

On April 9, 1999, John Kuzar, District Manager for Coal Mine Safety and Health District 9, notified Shoshone that the designated occupation for MMU 008-0 would be changed from the tailgate-side longwall operator (044) to "the miner who works nearest the return air side of the longwall working face" (060), effective during the May – June 1999 bimonthly sampling period. Gov't Ex. 12 at 1, 2. In the letter, District Manager Kuzar noted that sampling results showed that several other occupations were exposed to significantly higher concentrations of respirable dust than the then-designated occupation. *Id.* at 1. However, Kuzar did not direct the designation of any of these positions. Thus, while the sample results referred to by Kuzar revealed that the position of jacksetter had been exposed to the highest concentrations of respirable dust, Gov't Ex. 12, the notification instructed that, when collecting samples from designated occupation 060, "the sampling device shall remain at all times on the miner who works nearest the return air side of the longwall face." *Id.* at 2 (emphasis omitted). The letter also provided that the failure to sample in such a manner would result in invalid samples. *Id.*

Shoshone wished to challenge the requirement that it sample the 060 designated occupation. 23 FMSHRC at 410. Accordingly, during the May – June 1999 bimonthly sampling period, it sampled the designated occupation of the tailgate shearer operator (044) rather than the 060 occupation. *Id.*

On July 8, 1999, MSHA issued Citation No. 9895049 to Shoshone which alleged a violation of section 70.207(a). *Id.* The citation stated that MSHA had not received five valid respirable dust samples of the 060 designated occupation. *Id.* On July 16, 1999, District Manager Kuzar subsequently sent a letter to Shoshone stating that its ventilation plan would not be approved because the designated occupation in the plan had not been changed to reflect the 060 occupation code. Gov't Ex. 14, at 1. The letter provided that Shoshone should make the appropriate revisions to its plan and submit a suitable plan amendment by July 23, 1999. *Id.* On July 26, MSHA sent a second letter, extending the period for submitting a revised plan until July 30. *Id.* at 2. On August 2, 1999, MSHA sent a third letter stating that because it had not received a response to the first two letters, MSHA was rescinding Shoshone's ventilation plan. *Id.* at 3. On August 3, 1999, MSHA issued Citation No. 4073211 alleging a significant and substantial ("S&S") violation of section 75.370(a)(1)[5] because Shoshone was operating without an approved ventilation plan. 23 FMSHRC at 407; Tr. 194, 204.

Shoshone abated the citations by sampling the 060 designated occupation and incorporating that designated occupation into its ventilation plan. Tr. 172, 195. Shoshone then filed notices of contests of the citations. The matter went to hearing before Judge Cetti.

The judge concluded that Shoshone had violated sections 70.207(a) and 75.370(a)(1), and that the violation of section 75.370(a)(1) was not S&S. 23 FMSHRC at 424. He reasoned that in mandating the change in the designated occupation, MSHA acted within its authority and in

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[5] 30 C.F.R. § 75.370(a)(1) provides in part that "[t]he operator shall develop and follow a ventilation plan approved by the district manager."

compliance with the procedures set forth in section 70.207. *Id.* at 421. The judge rejected Shoshone's argument that the Secretary's adoption of the 060 designated occupation required notice and comment rulemaking. *Id.* at 421-22. He determined that MSHA acted reasonably and carried out the intent of Congress that miners are to be protected from excessive concentrations of respirable dust. *Id.* at 422. Because the judge determined that imposition of the 060 designated occupation was valid, he concluded that Shoshone had violated section 70.207(a) by failing to submit samples of that designated occupation, and that it had violated section 75.370(a)(1) by operating without an approved ventilation plan, incorporating the designated occupation. *Id.* at 422-23. The judge further concluded that the violation of section 75.370(a)(1) was not S&S because the citation had been issued as a technical violation resulting from an impasse between the parties in negotiating the ventilation plan, and because there was not a reasonable likelihood of injury. *Id.* at 423.

The Secretary subsequently proposed a civil penalty of $55 for each violation. S. Br. at 7 n.4. The civil penalty proceeding was consolidated with the contest proceedings.

II.

Disposition

Shoshone argues that the judge erred in affirming the citations. It submits in part that imposition of the 060 code is inconsistent with sections 70.207 and 70.2(f), and the purpose of designated occupation samples. Sh. Br. at 8-20. Shoshone explains that the 060 code does not sample a designated occupation because it is not taken in the environment of a selected occupation on an MMU but, rather, samples an amalgam of occupations. *Id.* at 16-17. It further submits that because imposition of the 060 code as a "designated occupation" represents a substantive regulatory change, the Secretary was required to engage in notice and comment rulemaking before imposing the code.[6] *Id.* at 8-24, 33-34; Sh. Reply Br. at 8-10.

The Secretary responds that the judge correctly affirmed the citations. She submits that her interpretation of section 70.207 is entitled to acceptance in part because it is consistent with the language of that regulation and its purpose, and section 70.2(f). S. Br. at 7-20. The Secretary explains that, when sampling the 060 occupation, the sampling device must be transferred from miner to miner so that it will always be on the miner who is working nearest the return air side of the longwall face at any particular time. *Id.* at 10. She states that, in effect, the 060 code measures the respirable dust of a "hypothetical miner" in a fixed location. Oral Arg. Tr. at 37. The Secretary contends that rulemaking was not required for imposition of the 060 code because it does not reflect a change in interpretation of section 70.207(e), and that her position is an "interpretative rule" which is exempt from the requirement of notice and comment rulemaking. S. Br. at 31-32 & n.15.

[6] The industry amici filed a brief supporting Shoshone's position. Amici Br. at 1-3.

A. Regulatory Interpretation

Section 70.207 provides for the bimonthly designated occupational sampling of mechanized units in the following manner:

> (a) Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit. . . .
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> * * * *
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> (e) Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling device as follows:
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> * * * *
>
> (7) Longwall section. On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner. . . .

30 C.F.R. § 70.207 (emphasis omitted). Part 70 further defines "designated occupation" as "the occupation on a mechanized mining unit that has been determined by results of respirable dust samples to have the greatest respirable dust concentration." 30 C.F.R. § 70.2(f). "Miner" is defined in the Mine Act as "any individual working in a coal or other mine." 30 U.S.C. § 802(g) (emphasis added).

We begin, as we must, with the terms of the regulations. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)) ("The language of a regulation . . . is the starting point for its interpretation."). By the terms of sections 70.207 and 70.2(f), the Secretary has clearly tied her sampling program of the designated occupation on an MMU in a longwall section to the miner who works nearest the return air side of the face and is exposed to the greatest respirable dust concentration.

We conclude that the Secretary's imposition of the 060 code at Shoshone's mine ignores the specific requirements of the regulations. Section 70.207(e)(7) requires sampling "[o]n *the miner*" in a designated occupation in a mechanized mining unit. 30 C.F.R. § 70.207(e)(7) (emphasis added). However, the 060 code requires dust sampling from a *progression of miners* who, at any time during a shift, are nearest the return air side of the longwall face. Gov't Ex. 12, at 2. Indeed, during one 8-hour shift, use of the 060 code at Shoshone resulted in the transfer of the dust pump forty times, with one miner having the pump for 2 minutes and a non-employee, the MSHA inspector at the mine, having the pump for 34 minutes. Sh. Ex. 6.

Furthermore, while sections 70.2(f) and 70.207(a) and the prefatory language of section 70.207(e) require the sampling of the designated occupation, the 060 code does not sample an "occupation." The 060 code is not connected to any specific job, or even to an area associated with the work position of any miner. Tr. 335, 370, 471-72. In addition, the 060 code does not reflect sampling of the miner assigned to the occupation that is shown by respirable dust samples to be exposed to the highest concentration of dust. The record in this proceeding indicates that MSHA conducted respirable dust surveys between August 1997 and February 1999 that revealed that the jacksetter (code 041) rather than the tailgate-side longwall operator (code 044) was exposed to the most respirable dust during the sampling periods. Gov't Ex. 12, at 4. Notwithstanding those results, MSHA required Shoshone to change its designated occupation to the 060 code rather than to the jacksetter code. *Id.* at 1-2.

We must also consider the regulations in context.[7] *See Morton Internat'l, Inc.*, 18 FMSHRC 533, 536 (Apr. 1996) ("[R]egulations should be read as a whole, giving comprehensive, harmonious meaning to all provisions."). Section 70.207(e)(7) is part of a comprehensive regulatory scheme designed to ensure that the level of respirable dust in the mine atmosphere "to which each miner in the active workings of such mine is exposed" is at or below 2 milligrams per cubic meter of air ("mg/m^3"). 30 C.F.R. § 70.100(a); *see also* 30 U.S.C. § 842(b)(2). In order to accomplish the goal of ensuring that the level of dust in the mine atmosphere to which each miner is exposed is below the permissible level, the Secretary designed a two-part sampling program that relies on designated occupational sampling, 30 C.F.R. § 70.207, and designated area sampling, 30 C.F.R. § 70.208. Designated occupational samples measure the dust of the "occupation on a mechanized mining unit" determined to have the greatest respirable dust concentration, while designated area samples measure dust associated with "dust generation sources in the active workings" of the mine. 30 C.F.R. §§ 70.2(f), 70.208(e). It would have been difficult for the drafters to express the delineation between the two sampling programs, and the distinct purpose of each, more clearly.

Designated occupation samples are taken in the face area, while designated area samples are taken in locations upwind, or outby, the face. Tr. 48, 50-51, 139; 45 Fed. Reg. 23990, 23991, 23998 (Apr. 8, 1980). The differences between the two types of samples are reflected throughout the regulatory scheme, which, for instance, sets forth different sampling schedules and different definitions of what constitutes a production shift for sampling purposes. *Compare* 30 C.F.R. § 70.207(a) *with* § 70.208(a) (setting forth different sampling schedules) and § 70.2(l) *with*

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[7] We do not dispute our dissenting colleague's statement that the plain meaning of a standard governs unless such a meaning would lead to an absurd result or be at odds with the purpose of the underlying statute. Slip op. at 14. However, in order to discern a standard's plain meaning, the standard must be read in context. *See Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 45 (D.C. Cir. 1990) ("If the first rule of . . . construction is 'Read,' the second rule is 'Read on!'"); *Borgner v. Brooks*, 284 F.3d 1204, 1208 (11th Cir. 2002), *cert. denied sub nom. Borgner v. Florida Bd. of Dentistry*, 537 U.S. 1080 (2002) (stating that in discerning a statutory provision's plain meaning, court must construe the statute in its entirety).

§ 70.2(k) (setting forth different definitions of production shift). Thus, the complementary requirements of the designated occupational and area sampling programs serve distinct purposes, and each type of sampling has been treated in a different manner by MSHA.[8]

The Secretary's imposition of the 060 code effectively nullifies this distinction between designated occupation and designated area sampling. By regulatory definition, a designated occupational sample is distinct from a designated area sample in that the sample is tied to the occupation of a miner, and not to a location. *Cf.* 30 C.F.R. §§ 70.2(f), 70.208(e). The Commission has previously noted the connection between a designated occupation and a miner's work position, stating that a "designated occupation is the *work position* determined to have the greatest respirable dust concentration." *Keystone Coal Mining Corp.*, 16 FMSHRC 6, 10 n.6 (Jan. 1994) (emphasis added). Similarly, the D.C. Circuit has stated with respect to designated occupation samples:

> One occupation on each mechanized mining unit is designated as most hazardous in terms of exposure to respirable dust. The samples are collected by having *the miner who performs the designated occupation wear the sampling device or by placing the sampling device near that miner's normal work position*.

Consolidation Coal Co. v. FMSHRC, 824 F.2d 1071, 1075 (D.C. Cir. 1987) ("*Consol*") (emphasis added). The 060 code abrogates the distinction between occupation and area sampling in that it is only associated with a location, which is not tied to the occupation of a miner.

Furthermore, while the Secretary's imposition of the 060 code eradicates the distinction between designated occupation and designated area sampling, it does not serve the purpose of either sampling scheme. Imposition of the 060 code does not focus on the primary concern of the designated occupation sampling program because the 060 code does not measure the average mine atmosphere to which each miner is exposed by selecting and measuring the miner exposed to the greatest concentration of respirable dust.[9] Nor does the 060 code advance the objective of designated area sampling: the identification and control of dust generation sources. 45 Fed. Reg. at 23991 (providing that designated area samples measure dust generation sources). It is

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[8] Both the Secretary and our dissenting colleague state that occupation sampling is simply area sampling. S. Br. at 22-23; slip op. at 19-20. While it may be argued that occupation sampling is a type of area sample, it does not follow that any form of area sampling may therefore be utilized when conducting occupation sampling. While all A may be B, it does not follow that all B are A.

[9] Sampling of the designated occupation is a continuation of the sampling program in effect prior to the promulgation of section 70.207, in which the miner in the "high risk occupation" was sampled. Tr. 48-51; *see* 45 Fed. Reg. at 23998; *AMC v. Marshall*, 671 F.2d 1251, 1254 & n.3 (10th Cir. 1982).

undisputed that dust from multiple dust generation sources, such as the stage loader, crusher, face conveyor, shields, and shearer, accumulates at the area where the 060 samples are taken as air flows from the headgate to the tailgate. Tr. 67-68, 159, 230. Thus, an elevated reading of the 060 code would not identify the area along the 800 or more feet of Shoshone's longwall that requires stricter respirable dust control.

Contrary to the Secretary's argument (S. Br. at 15-16), the Federal Register preamble accompanying the publication of section 70.207 does not support her use of the 060 occupation code. In addressing the substance of the final rule, the Secretary discussed the "two different types" of samples to be taken by operators under sections 70.207 and 70.208, recognizing that designated occupational samples are taken on a mechanized mining unit while designated area samples are taken in outby locations, and that operators have separate obligations for those two types of samples. 45 Fed. Reg. at 23991.

It is also clear from the regulatory history that while the Secretary may not have known which job title to name as the designated occupation on the longwall at the time of the promulgation of section 70.207,[10] she intended that the position be filled by an actual miner working in an assigned occupation and not by a hypothetical miner. The preamble provides, "The rule allows designated occupation samples to be taken by having the miner in the designated occupation wear the sampling device or by placing the sampling device at specified locations near the miner's normal work position." *Id.* Nowhere is there a suggestion that the Secretary would impose through the designated occupation sampling regime the 060 code with the attendant obligation to transfer the dust pump 40 times in an eight-hour shift among a succession of miners (including an MSHA inspector) in numerous occupations. *See* Sh. Ex. 6.

B. Rulemaking

We also conclude that the imposition of the 060 code amounts to a "substantive rule," and not an interpretive rule as the Secretary claims. S. Br. at 30-33. Section 553 of the Administrative Procedure Act, 5 U.S.C. § 551 et seq. (1994) ("APA"), requires agencies to provide notice of proposed rulemaking and an opportunity for public comment prior to a rule's promulgation, modification, amendment, or repeal. 5 U.S.C. § 553. Under the APA, a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . . " 5 U.S.C. § 551(4). Substantive rules are subject to the APA's notice and comment requirements, while interpretive

[10] Shoshone states that section 70.207(e)(7) does not specify a job position because at the time of the rule's promulgation, job titles on longwalls were not well established and the Secretary needed flexibility to select the appropriate job title as the designated occupation. Sh. Reply Br. at 6. The record does not reflect any change in technology or circumstances at Shoshone's mine that justified the change in designated occupation from the tailgate-side longwall operator to the 060. Oral Arg. Tr. at 21.

rules are not. 5 U.S.C. § 553(b)(3)(A).

A substantive rule is distinguishable from an interpretive rule in that it carries "the force and effect of law." *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 587-88 (D.C. Cir. 1997), *quoting AMC v. MSHA*, 995 F.2d 1106, 1109-10 (D.C. Cir. 1993). An "agency may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation." *Appalachian Power v. EPA*, 208 F.3d 1015, 1024 (D.C. Cir. 2000) (citations omitted). Thus, we "'look to whether the interpretation itself carries the force and effect of law.'" *Id.* (citations omitted). A purported interpretive rule has "legal effect" if, in the absence of the rule, there would not be an adequate legislative basis for the enforcement action taken, or if the rule effectively amends a prior legislative rule. *AMC v. MSHA*, 995 F.2d at 1112. "When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment." *Alaska Prof'l Hunters Ass'n, Inc. v. FAA*, 177 F.3d 1030, 1034 (D.C. Cir. 1999). Thus, although the Secretary may be seeking to achieve the laudable goal of reducing miners' exposure to respirable dust by imposing the 060 code, she must do so through proper means. *See Michigan v. EPA*, 268 F.3d 1075, 1084 (D.C. Cir. 2001) (stating that agency does not have "a roving commission to achieve . . . [any] laudable goal" without complying with authorized procedure).

We conclude that the Secretary was required to engage in notice and comment rulemaking before imposing the 060 code.[11] Tr. 107. First, the imposition of the 060 code has legal effect in that, in the absence of the code, there would not be an adequate legislative basis for the Secretary's issuance of the subject citations. *AMC v. MSHA*, 995 F.2d at 1112 (stating that purported interpretative rule has legislative effect if, in the absence of the rule, there was not an adequate legislative basis for enforcement action). The parties do not dispute that the "position" of "Longwall Return-Side Face Worker" does not exist on the longwall face. Tr. 67-68; Oral Arg. Tr. 6, 23, 37. Because the 060 code does not represent an actual miner – an "individual," to use the statutory definition of miner – it has no significance in and of itself. 30 U.S.C. § 802(g). In fact, the 060 code is meaningless without reference to MSHA's list of position codes, which

[11] We note that the Secretary has treated the 060 code as being a generally applicable requirement. It is undisputed that at the time of the hearing, approximately 85% of the nation's longwalls were required to sample the 060 code as their designated occupation. Tr. 107. The seriatim imposition of the 060 code at a vast majority of mines throughout the country implicates the Commission's holding in *Carbon County Coal Co.*, that the Secretary commits an abuse of discretion by imposing a plan provision "as a general rule applicable to all mines" without consideration of particular circumstances at a mine outside the mandatory standard promulgation process. 7 FMSHRC 1367, 1375 (Sept. 1985); *see also Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 407 (D.C. Cir. 1976) (reasoning that plans are not "to be used to impose general requirements of a variety well-suited to all or nearly all coal mines, but rather to assure that there is a comprehensive scheme for realization of the statutory goals in the particular instance of each mine").

describes the code as the "Longwall Return-Side Face Worker."[12] *See* Stip. Ex. A. In order to obtain further understanding of the 060 code, one must refer to yet another document, either the Spicer memorandum or the letter sent by District Manager Kuzar to Shoshone in April 1999. Gov't Ex. C. to S. Mot. for Summ. Dec., at 3-4; Gov't Ex. 12, at 1-2. Instead of a description of duties for the "occupation," the Spicer memorandum imposes a procedure requiring the sampling pump to be transferred from miner to miner to ensure that the pump remains at all times with the miner working nearest the return air side of the longwall face. Gov't Ex. C. to S. Mot. for Summ. Dec., at 4. Failure to adhere to this *procedure* is the basis of the citations issued in this case.

Second, the imposition of the 060 code has legal effect in that it effectively amends sections 70.207(e) and 70.2(f) and reveals a departure from the Secretary's previous interpretations. *AMC v. MSHA*, 995 F.2d at 1112 (stating that a purported interpretive rule has legal effect if it effectively amends a prior legislative rule); *see also Paralyzed Veterans*, 117 F.3d at 586 (stating that allowing an agency to fundamentally change an interpretation of a substantive regulation without notice and comment would undermine those APA requirements). Prior to the imposition of the 060 code, MSHA had applied section 70.207(e)(7) to require bimonthly sampling of the miner assigned to the occupation that was exposed to the highest concentration of respirable dust. Tr. 51-52, 79-80. From 1983 to 1999, MSHA required Shoshone to sample the tailgate-side longwall operator (044) as its designated occupation. 23 FMSHRC at 409. Based upon dust surveys that revealed that the jacksetter was exposed to higher dust concentrations than the tailgate-side longwall operator, the Secretary changed the designated occupation to the 060.[13] Gov't Ex. 12. By imposing the 060 code, the Secretary stopped requiring the sampling of a designated occupation, as the rule requires, and began sampling miners based upon their location alone. By so doing, the Secretary effectively redefined "designated occupation" from a selected occupation to a selected location. Thus, even

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[12] We note that the list of position codes relied upon by the Secretary includes an "occupation" code (061), which does not represent a miner at all, but is a bracket in a fixed location. Tr. 97-98, 338. In our view, this is not helpful to the Secretary's argument that these codes represent valid "occupations" as that term is commonly used.

[13] Our dissenting colleague states that we have implied that the jacksetter occupation would be a preferable designated occupation, and that keeping the sampling device with the "appropriate jacksetter under that interpretation" could result in more swapping of the device than with the 060 code. Slip op. at 20. However, our colleague relies upon a purely hypothetical scenario which assumes, for the sake of argument, that the pump would be repeatedly swapped between the five jacksetters on the longwall. Tr. 393-94. It is not clear from the record whether and to what extent swapping among the five jacksetters would be required if the designated occupation were changed to the jacksetter code. *See, e.g.,* Tr. 99, 116, 167-68, 237, 244, 383, 393. Moreover, the number of swaps by the jacksetter occupation referred to in the dissent is based on a ten-hour shift, while the sampling shift is only eight hours. Tr. 414. In any event, we do not intimate which job position is most suitable as the designated occupation.

assuming that the Secretary could have initially interpreted section 70.207(e)(7) to support imposition of the 060 code, this change in her interpretation requires notice and comment. *See Alaska Prof'l Hunters Ass'n*, 177 F.3d at 1034.

The Secretary's effective redefinition of designated occupation is further exposed by a careful comparison of MSHA's Program Policy Manual ("PPM") to the procedure mandated by the Spicer memorandum. In the PPM, the Secretary interpreted section 70.207(e) as requiring the sampling device to remain on or at the designated occupation if "the operator's mining procedures result in the *changing of miners from one occupation to another* during a production shift." V MSHA, U.S. Dep't of Labor, Program Policy Manual, Part 70, at 8 (1988) (emphasis added). As the PPM further notes, this section was designed to address the practice of an operator's relieving a miner in the designated occupation by alternating the duties of the occupation with another miner. *Id.* To avoid removing the sampling device from the designated occupation for a portion of the shift, the PPM requires that the sampling device stay with the miner performing the duties associated with the designated occupation. *Id.* The 060 code, in contrast to the procedure addressed in the PPM, mandates the transfer of the dust pump among numerous miners, without regard to occupation, resulting in the sort of artificial reading that the PPM guidance was designed to prevent.

In addition, the Secretary's imposition of the 060 code effectively amends the procedure for sampling a designated occupation set forth in section 70.207(e). Default locations for sampling the designated occupation on a working face are specified in the subparagraphs of section 70.207(e). Nonetheless, by the language of section 70.207(e), the District Manager has discretion to direct placement of the sampling device at locations tied to a designated occupation other than those so specified.[14] 30 C.F.R. § 70.207(e). The imposition of the 060 code subverts the active role contemplated for the District Manager in reviewing respirable dust samples and ventilation plans. Instead of selecting and validating or redirecting a designated occupation, the Secretary has required the sampling of an area that is not tied to an occupation, and which has not been shown to have been exposed to the highest dust concentration.

Finally, we consider the imposition of the 060 code especially appropriate for the APA's notice and comment procedures because the issues implicated would benefit from a "full ventilation" demonstrating that MSHA considered relevant factors and alternatives and that the "choice it made based on that consideration was a reasonable one." *AMC v. Marshall*, 671 F.2d at 1255. In a rulemaking proceeding, interested persons would have had the opportunity to address such issues as whether the repeated passing of the sampling device among a progression of miners during a shift would adversely affect the accuracy of the sample or could act as a

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[14] Our dissenting colleague suggests that the beginning language of section 70.207(e) ("Unless otherwise directed by the District Manager . . . .") grants MSHA unfettered discretion in determining where to conduct dust sampling. Slip op. at 17 & n.5. However, the Secretary does not rely on this language of the regulation as the basis for the imposition of the 060 code in this case. S. Br. at 11; *see also* Oral Arg. Tr. 26.

distraction that has a negative impact on miner safety. The operator in this case also has raised questions pertaining to the accuracy of the 060 code as a predictor of miner exposure to respirable dust. Sh. Br. at 27-29. In addition, one could conclude that the 060 code effects a change in the statutory respirable dust limit because the averaging of peak respirable dust exposures would, on average, produce a sample showing a higher level of dust exposure than the averaging of a single occupation over a shift.[15]

The failure of the Secretary to submit the revised sampling procedure to the public for review and comment has circumvented the thorough evaluation of the 060 code and the rationale for departing from the sampling program promulgated in 1981.[16] This is a critical distinction between the instant case and *AMC v. Marshall*. In that case, the petitioner challenged the designated area sampling regulations, arguing in part that the regime would effectively lower the statutory dust limit, and that the sampling scheme was not reasonably calculated to prevent miners' exposure to respirable dust. 671 F.2d at 1255-56. The court upheld the regulations, reasoning in part that area sampling allows for the identification and control of dust generation sources. *Id.* at 1257. However, the court was reviewing a substantive rule promulgated after notice and comment during which there was a full ventilation of the issues. *Id.* at 1255.

AMC v. Marshall therefore does not relieve the Secretary from the requirement to engage in notice and comment rulemaking before adopting the 060 code. The Secretary's arguments to the contrary disregard both the administrative posture of that case, in which the area sampling program had proceeded through notice and comment rulemaking, and the distinct purposes and design of the designated area and occupational sampling regulations. The same concerns raised in *AMC v. Marshall* are thus implicated by the imposition of the 060 code without either the safeguards provided by rulemaking or the clear foundation grounded on the fundamental bases of the area sampling regulations at issue there. Accordingly, the judge's decision is reversed.

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[15] The 060 code aggregates peak exposures, effectively eliminating from the sample the lower exposures experienced by miners. Tr. 157. Thus, although every miner on an MMU may be exposed to less than 2.0 mg/m^3 of dust, the mine could nonetheless still be found in violation. Sh. Ex. 12.

[16] We also are troubled by the fact that the failure to impose the 060 code and its attendant requirements through rulemaking creates an untenable situation in which a mandatory, generally applicable procedure, having been created by administrative fiat, may be similarly removed or simply ignored unilaterally by the agency without public notice and comment.

III.

Conclusion

For the foregoing reasons, we reverse the judge's decision and vacate Citation Nos. 9895049 and 4073211.

Michael F. Duffy, Chairman

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

I would affirm the judge and uphold the citations under review based on the plain meaning of 30 C.F.R. § 70.207(e)(7). The enforcement policy at issue here is the Secretary's requirement that RAG Shoshone Coal Corporation ("Shoshone") measure the respirable dust on its longwall mining section by passing the dust sampler to whichever miner happens to be working nearest the return air side of the longwall face. The Secretary's enforcement approach is completely congruent with the requirement contained in section 70.207(e)(7), which provides that on longwall mining sections respirable dust should be measured by placing the sampling device "[o]n the miner who works nearest the return air side of the longwall working face. . . ." 30 C.F.R. § 70.207(e)(7). Here, the Secretary's enforcement action stems not so much from her interpretation of section 70.207(e)(7) as it does from an application of that standard in accordance with its literal terms. Such an enforcement approach based on the regulation's plain meaning should be upheld unless it leads to an absurd result or one at odds with the purpose of the underlying statute. *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987); *Central Sand and Gravel Co.*, 23 FMSHRC 250, 253-54 (Mar. 2001).

Far from leading to an absurd result, the dust sampling procedure at issue in this case directly promotes the protective goal stated in Title II of the Federal Mine Safety and Health Act, 30 U.S.C. § 801 et seq. (1994) (the "Mine Act"), which is to "permit each miner the opportunity to work underground during the period of his entire adult working life without incurring any disability from pneumoconiosis or any other occupation-related disease during or at the end of such period." 30 U.S.C. § 841(b).[1] To accomplish this goal, the statute requires that the average concentration of respirable dust in the mine atmosphere not exceed 2 milligrams per cubic meter of air. 30 U.S.C. § 842(b)(2).

To monitor compliance with the 2 milligram standard, Congress has directed operators to sample the amount of respirable dust in the mine atmosphere "by any device approved by the Secretary. . . and in accordance with such methods, at such locations, at such intervals, *and in such manner as the Secretar[y] shall prescribe.*" 30 U.S.C. § 842(a) (emphasis added).

The Secretary has implemented regulations regarding the placement and submission of dust sampling devices. The regulation pertaining specifically to longwall sections is located at 30 C.F.R. § 70.207(e)(7) and requires the dust sampler to be placed as follows:

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[1] This language in the Mine Act was originally articulated in the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C §§ 801, 841 (1976). S. Rep. No. 95-181, at 78, 126-29 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 666, 714-17 (1978). Its current significance was emphasized in testimony at trial stating that in 1996 the National Institute of Occupational Safety and Health reported that there were still approximately 300 cases of coal workers' pneumoconiosis annually. Tr. 227.

> *Longwall section.* On the miner who works nearest the return air side of the longwall working face or along the working face on the return side within 48 inches of the corner.

The return air side of the longwall is the most downwind location on that mining section. Tr. 35, 230-31. As the majority notes, the return air side is subject to the cumulative effect of several dust sources and is undisputably the area on a longwall section that has the greatest concentration of respirable dust. Slip op. at 7-8; Tr. 35, 95, 122, 230-1. The Secretary has determined that sampling the dustiest work area on the longwall section is the most reliable way of protecting all the miners on that section from impermissibly high dust levels. Tr. 48-51, 70. By requiring the work area that is downwind and affected by several dust sources to be in compliance with the statutory limit, the Secretary believes the operator will effectively protect the miners working upwind from overexposure to respirable dust. S. Br. at 17-18; Tr. 51, 70. As discussed below, the Tenth Circuit upheld this enforcement approach when considering the regulations which required operators to measure respirable dust at known dust generating sources that were away from ("outby") the working face, calling the program one that was "reasonably calculated to achieve the statutory objective." *AMC v. Marshall*, 671 F.2d 1251, 1257 (10th Cir. 1982).

The citations under review are the result of the Secretary enforcing section 70.207(e)(7) according to its explicit terms. She requires the sampling device to be transferred from miner to miner so that it will always be on the miner who is positioned "nearest the return air side of the longwall working face" at any particular time. S. Br. at 10. The aspect of the Secretary's approach that has given rise to this challenge is her insistence that the sampling device be transferred from miner to miner, without regard to a miner's job title. Shoshone contends that the Secretary can only require the dust sampling device to be passed among miners who hold the same "designated occupation." Sh. Br. at 11, 15-16. Shoshone's argument, which my colleagues have accepted, is that the Secretary is constrained by the reference to "designated occupation" in the prefatory language of section 70.207(a) ("Each operator shall take five valid respirable dust samples from the designated occupation in each mechanized mining unit. . . .") and the reference to that phrase in the introductory language of section 70.207(e) ("Unless otherwise directed by the District Manager, the designated occupation samples shall be taken by placing the sampling device as follows. . . ."). 30 C.F.R. §§ 70.207(a) and (e).

The relevant standard, however, is located at section 70.207(e)(7). This regulation, which contains a very specific directive regarding the placement of the dust sampling device on a longwall section, is devoid of any reference to a miner's occupation. Indeed, the sole focus of this regulation is the miner's proximity to the return air side of the longwall. Ignoring the regulation's plain meaning, however, and citing the need to "harmonize" the dust sampling regulations, my colleagues conclude that the Secretary must construe section 70.207(e)(7) as though it too required

placement of the dust sampler on the basis of a miner's job title, rather than the miner's proximity to the return air side of the longwall. Slip op. at 6. Remarkably, although the underlying issue in this case concerns the location of the dust sampling device on a longwall section, the majority has determined that the Secretary cannot rely on the regulation she drafted to address that very issue. By giving precedence to the general introductory language contained in sections 70.207(a) and (e) over the explicit directive pertaining to longwall mining contained in subsection (e)(7), my colleagues ignore the oft-cited canon of construction that specific provisions govern more general ones, not the other way around. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) (citation omitted); *Lyons v. Ohio Adult Parole Auth.*, 105 F.3d 1063, 1070 (6th Cir. 1997), *cert. denied*, 520 U.S. 1224 (1997).

My colleagues conclude that the Secretary can require sampling to be carried out on longwall sections only in the same manner that she requires it to be done on other mining sections. Slip op. at 5-6. Specifically, they insist the Secretary must select a single job title to be the "designated occupation" and require operator sampling only from employees in that job category.[2] *Id.* What my colleagues fail to discuss, however, is that in each of the other mining methods specified in section 70.207(e)(1)-(10), the operator is specifically directed to place the respirable dust sampler on the individual holding a particular job title (i.e., "loading machine operator," "continuous mining machine operator"). Only with respect to longwall mining is there the much more general reference to "miner," and the identification of the miner who is to wear the sampling device is based not on the miner's occupation but on the miner's proximity to a designated area — "the return air side of the longwall face." When certain language is used in one part of a statute and different language in another part, it is assumed that different meanings were intended. 2A N. Singer, Statutes and Statutory Construction § 46.06 (6th ed. 2000); *see also U.S. v. Maria*, 186 F.3d 65, 71 (2d Cir. 1999) (use of different words in same context strongly suggests different meanings were intended) (citations omitted).[3]

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[2] The majority emphasizes the use of the singular form "miner" in section 70.207(e)(7) in voicing its objection to the Secretary requiring dust sampling from "a progression of miners." Slip op. at 5 (emphasis omitted). The use of the singular form of miner is consistent with and indeed is the grammatically correct way to express the method of sampling the Secretary is requiring Shoshone to implement since only one miner can be working "nearest the return air side of the longwall face" at a time.

Moreover, the record reflects that pump swapping between miners was often required, even when the sampling was carried out by miners within one occupation. For example, if the operator assigns one miner to work in the shearer operator portion for the first half of the shift, the pump would be switched from the first miner to the second miner so as to have the pump remain with the shearer operator. Tr. 115-16, 290, 292, 351-52.

[3] The preamble to the regulations provides further support for the Secretary's contention that subsection (7) was intentionally drafted without specifying an occupation. It describes section 70.207(e) as "set[ting] forth the job position in *most* mining systems on which designated

The reference to "designated occupation" in section 70.207(e) does not preclude the Secretary from applying subsection (e)(7) according to that standard's express terms. Section 70.207(e) is an introductory paragraph that directs the reader to consult the appropriate subsection to determine the placement of the respirable dust sampling device, depending on the mining method used. The phrase "designated occupation samples" is logically viewed as applying only to those subsections in which an occupation is specifically referenced. The phrase does not limit the Secretary's ability to require sampling on a longwall to be carried out in accordance with the requirements of subsection (e)(7), the subsection which specifically addresses longwall mining. Moreover, in light of the express reservation of Secretarial discretion contained in section 70.207(e)'s introductory language, it seems all the more illogical to consider this provision as imposing a limitation on the Secretary's ability to construe subsection (e)(7) according to its plain meaning.[4]

Section 70.207(a), upon which the majority also relies, concerns the frequency and timing of an operator's submission of respirable dust samples. It does not discuss how the sampling should occur and therefore the reference to "designated occupation" contained in that regulation should not trump the language in section 70.207(e)(7), which specifies a method of sampling on longwall sections without regard to a miner's occupation.[5]

My colleagues have put forth several reasons why they feel sampling according to occupation is preferable to passing a dust pump among a progression of miners who have different job titles. Even if the majority's concerns were valid, they would not provide a basis for preventing the Secretary from requiring that sampling be conducted according to the method she has chosen. "The Secretary is not required to impose an arguably superior sampling method as long as the one [s]he imposes is reasonably calculated to prevent excessive exposure to respirable dust." *AMC v. Marshall,* 671 F.2d at 1256; *see also Sierra Club v. EPA*, 167 F.3d 658, 662 (D.C. Cir. 1999) (stating that courts will "generally defer to an agency's decision to proceed on the basis of imperfect scientific information, rather than to 'invest the resources to conduct the perfect study'") (citation omitted).

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occupation samples are required to be taken, unless otherwise directed by the District Manager." 45 Fed. Reg. 23990, 23991 (Apr. 8, 1980) (emphasis added).

[4] Section 70.207(e) provides that "*Unless otherwise directed by the District Manager*, the designated occupation samples shall be taken by placing the sampling device as follows . . . ." 30 C.F.R. § 70.207(e) (emphasis added).

[5] Even if one accepted my colleagues' approach as a plausible reading of the regulations, the Commission must nevertheless defer to the Secretary's interpretation "'unless it is plainly erroneous or inconsistent with the regulation.'" *Sec'y of Labor v. Excel Mining, LLC,* 334 F.3d 1, 6 (D.C. Cir. 2003) (citations omitted).

In point of fact, the record reflects that the procedure the Secretary is requiring Shoshone to implement is a superior method of assuring that miners on longwall sections are protected from overexposure to respirable dust. Under most mining methods, there is a particular occupation that equates to the dustiest environment on the section. *See* 30 C.F.R. §§ 70.207(e)(1)-(10) discussed supra. As longwall mining technology improved, however, the occupation that was exposed to the most dust changed. Tr. 79-82, 231-37. When longwalls used a single drum method, the Secretary determined that the headgate drum operator was consistently exposed to the highest concentration of respirable dust. Tr. 81- 82, 231. Operators were required to submit samples from this occupation and, for computer tracking purposes, these samples were identified with the 064 code. Tr. 81-82, 231. As longwall mining progressed to double drum shearers, the tailgate shearer operator became the position generally exposed to the greatest dust concentrations. Tr. 82, 232. The Secretary thereupon required operators to submit samples based on the exposure of this occupation and the samples were identified with an 044 code. Tr. 82, 232-33. Further developments, such as wider panel faces and alternative shield advancement, meant that miners were frequently in different locations during the shift, and were oftentimes further downwind than the shearer operator. Tr. 234-37.

The Secretary concluded that because no single job was consistently performed nearest the return air side of the longwall working face at Shoshone's mine, measuring the exposure of only one occupation would not provide adequate protection. S. Br. at 13; Tr. 234-44, 247. Requiring the sampler to be passed from miner to miner, so that it always remained with the miner nearest the return air side of the longwall face, without regard to the miner's occupation, was considered the best way of assuring that all miners on the longwall would be protected from excessive levels of respirable dust. Tr. 70-71, 95-96, 112-13, 121-22, 127. Samples collected in this manner are identified with an 060 code.[6] Tr. 95-96, 112-13, 122, 127.

Although the 060 code is referred to by the Secretary as a designated occupation code, it does not correlate to an actual job, as did the 064 code and the 044 code. It represents instead a hypothetical occupation. It hypothesizes that there is an occupation that requires a miner to be consistently stationed nearest the return air side of the longwall. The fact that there is, in actuality,

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[6] Another advantage of the 060 code is that it deters operators from manipulating the job duties of individual miners. The Secretary submitted testimony that when a particular occupation such as jacksetter was the designated occupation, some operators engaged in "artificial work practices" so that the jacksetter would not be required to work downwind of the shearer during the cutting of coal. Tr. 167-68, 237.

Starting approximately 15 years ago, the Secretary has implemented the 060 code on a mine-by-mine basis, after reviewing the conditions and sampling results at each mine. Tr. 103-04, 122-24, 166. At the time this case was argued on appeal, sampling in accordance with the 060 code had been implemented at every longwall mine with the exception of one, where the Secretary determined that, based on particular conditions at that mine, the 060 sampling code would not be appropriate. Oral Arg. Tr. 44.

no such occupation is viewed by my colleagues in the majority as fatal to the Secretary's position. Slip op. at 6-8. They object that this method of measuring dust abrogates the distinction between designated occupational samples and designated area samples. *Id.* at 7. Moreover, they view the method as inherently unfair because the sampling will measure only the peak exposure site and not the peaks and valleys of exposure to respirable dust that any individual miner would actually encounter as he or she went about his or her job. *Id.*

Concerns identical to those expressed by my colleagues were considered and rejected by the U.S. Court of Appeals for the Tenth Circuit. In *AMC v. Marshall,* mine operators challenged dust sampling requirements that sought to measure dust in areas outby the working faces. 671 F.2d at 1254. Studies showed that it was not just working faces which posed a hazard to miners in term of exposure to respirable dust, and the rules required operators to place dust sampling devices near known outby dust generation sources. *Id.* The court noted that the overall approach of this program was "analogous to" the program designed to measure the dust at the working faces, the operating principle of both programs being "if the atmosphere in the area of a known dust generation source is in compliance with the statutory standard, then it can be safely presumed that all miners are protected from overexposure." *Id*.

The Court then considered the argument that the designated area samples were invalid because they did not measure the concentration of dust within an individual's breathing zone. Like the samples collected in the instant case under the 060 code, the samples challenged in the *AMC* case measured the dust breathed by a "hypothetical miner" who was assumed to remain in the dustiest part of the area being measured for the entire shift. *Id.* at 1256 n.9. Similarly, like the petitioner in this case, the operators in the Tenth Circuit proceeding objected to the fact that under the challenged method "an operator might conceivably be cited for a violation of the 2 mg./m^3 standard on the basis of area samples even though no individual miner was exposed to more than 2mg./m^3 of respirable dust during a shift." *Id. at* 1256. Unlike the majority in this case, however, the Tenth Circuit found neither argument a reason to invalidate the sampling procedure under review.

My colleagues have attempted to distinguish the *AMC* case. They contend the Tenth Circuit's opinion is unpersuasive because it concerns "designated area" sampling of the outby sections of the mine, while the instant case involves "designated occupation" sampling at the working face. This is a distinction without a difference. The very terms of section 70.207(e)(7) already contradict the notion there is a bright line that separates occupational and area sampling, as the regulation provides that the sampling device need not be placed on a miner, but can instead be placed "along the working face on the return side within 48 inches of the corner." 30 C.F.R. § 70.207(e)(7). In fact, each of the 10 subsections of section 70.207(e) covering the different mining systems permit operators to use a similar "location" alternative as part of occupation sampling. 30 C.F.R. § 70.207(e)(1)-(10); Tr. 74. Designated occupation sampling is not carried out for the purpose of determining the exposure of an individual miner, or even the exposure of a particular occupation. Even when the sampling is carried out by a single miner, its purpose is to provide assurance that the mine atmosphere is safe for every miner working at the face. Tr. 70. It

was for this reason that the Tenth Circuit concluded that "[t]he designated occupation sampling program is itself an area sampling program." *AMC v. Marshall,* 671 F.2d. at 1256. The majority also ignores the fact that the Commission has likewise concluded that "the designated occupation sampling program contained in section 70.207(a) is an area sampling program, not a personal sampling program." *New Warwick Mining Co.,* 18 FMSHRC 1365, 1368 (Aug. 1996).[7]

The majority opinion argues that the Secretary's policy is burdensome, requiring the transfer of the dust pump possibly 40 times in an eight-hour shift. Slip op. at 8. It implies that perhaps designating the jacksetter occupation would be preferable, citing dust surveys that revealed that the jacksetter was exposed to higher dust concentrations than the tailgate side longwall operator. *Id*. at 10. Shoshone itself estimates, however, that keeping the device with the appropriate jacksetter under that interpretation of the regulation would result in six transfers of the device among the five MMU-008-0 jacksetters during each hour-long longwall cutting cycle, which would result in approximately 48 to 60 transfers during a normal 10-hour shift. Tr. 393-97, 414-15. Thus, the 060 code would result in fewer transfers per shift than the alternative interpretation of section 70.207(e)(7) adopted by the majority.[8]

Focusing on the Secretary's decision to label the challenged sampling method for computer tracking, my colleagues contend the Secretary must engage in notice and comment rulemaking before she can impose the 060 code. Slip op. at 8-12. As I have pointed out earlier, the manner in which the Secretary is requiring sampling to be conducted is consistent with a literal application of Section 70.207(e)(7).[9] That standard was promulgated pursuant to notice and comment rulemaking and provides an adequate legislative basis for the Secretary's issuance of the subject citation.

In fact, the allegation that the Secretary's interpretation of the regulation has changed at all is simply a red herring. Notwithstanding that contention, the Secretary's interpretation of section 70.207(e)(7) has remained constant. As I have discussed, supra at 18-19, changing technology and varying circumstances at different mines could affect who "the miner who works nearest the return air side of the longwall working face" may be. In such cases, the standard and its legal interpretation are not altered — the only difference is a change in mining conditions affecting

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[7] The preamble that accompanied the publication of the respirable dust rules indicated that the Secretary considered designated occupation sampling to be a "method of area sampling." 45 Fed. Reg. at 23998.

[8] Notably, Shoshone's longwall production supervisor stated he did not have a problem with sampling in accordance with the 060 code. Tr. 295. When asked what he would do if he had a choice between sampling 044 (tailgate operator) and 060 he responded "[w]ell actually, I wouldn't make the choice. I think sampling both locations would be good." Tr. 299.

[9] This puts the Secretary in the novel position of being ordered to go through notice and comment rulemaking to produce a result that would duplicate the rule already located at section 70.207(e)(7).

which miner meets the description in the regulatory language.

Thus, although Shoshone is now being required to pass the sampling pump among miners of different job titles, the Secretary's approach has not changed. She has always required the personal sampling device to be worn so it would measure the area of greatest concentration of respirable dust on the section, so that if that sample were in compliance, the Secretary could reasonably conclude that the rest of the miners on the section were working in an atmosphere that was within the 2 milligram standard. Tr. 50-51.

For the foregoing reasons, I respectfully dissent.

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Mary Lu Jordan, Commissioner

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