FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 12, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos.	WEVA 2002-111-R
	:		WEVA 2002-112-R
v.	:		
CANNELTON INDUSTRIES, INC.	:		

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

DECISION

BY: Duffy, Chairman; Suboleski and Young, Commissioners

In this contest proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), the Secretary of Labor petitioned for review of Administrative Law Judge T. Todd Hodgdon's determination that Cannelton Industries, Inc. ("Cannelton") did not violate 30 C.F.R. § 75.360(a)(1) because the "pumpers' exception" to the preshift requirements set forth in section 75.360(a)(2) applied.[2] 24 FMSHRC

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

[2] 30 C.F.R. § 75.360 provides in pertinent part:

> (a)(1) Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval . . . .
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> (2) Preshift examinations of areas where pumpers are scheduled to work or travel shall not be required prior to the pumper entering the areas if the pumper is a certified person and

707 (July 2002) (ALJ). For the reasons discussed below, we affirm the judge's determination.

I.

Factual and Procedural Background

Cannelton operated the Shadrick Mine (also referred to as the "Stockton" mine) an underground coal mine in Kanawha County, West Virginia. 24 FMSHRC at 707. On May 3, 2002, the mine was idled and put into non-producing status because it was unable to sell its coal and its stockpiles were growing too large. *Id*. Most of the miners were laid off. *Id*. All power was de-energized at the faces, and all face equipment was tagged out. Tr. 108, 452-53. Cannelton planned to reactivate the mine in the event coal sales improved. 24 FMSHRC at 708. To prevent the mine from flooding while it was idle, Cannelton kept approximately 70 to 80 electric pumps running. *Id*.; Tr. 107. On May 6 or 7, the company began sending certified personnel, mostly management employees, into the mine during each shift to check the pumps. 24 FMSHRC at 708. No preshift examinations were performed prior to the entry of these personnel. Tr. 38.

On May 13 and 14, Jeffrey Styers, a certified electrician and fireboss, accompanied by Daniel Baker, a certified mine foreman and electrician, traveled throughout the mine checking the pumps and the permissibility of the power centers. 24 FMSHRC at 708; Tr. 35, 41, 67-68, 340, 348, 350-51. At all times, Styers and Baker carried an MX-250 gas detector, which detects methane and sounds an alarm when oxygen in the mine atmosphere falls below a safe level. Tr.

> the pumper conducts an examination for hazardous conditions, tests for methane and oxygen deficiency and determines if the air is moving in its proper direction in the area where the pumper works or travels. The examination of the area must be completed before the pumper performs any other work. A record of all hazardous conditions found by the pumper shall be made and retained in accordance with § 75.363.
>
> (b) The person conducting the preshift examination shall examine for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:
>
> . . . .
>
> (7) Areas where trolley wires or trolley feeder wires are to be or will remain energized during the oncoming shift.

100-03. They also were provided with an anemometer[3] and smoke tubes to monitor airflow. Tr. 103-04, 130, 338, 343-44. From time to time, they took readings for methane and oxygen and checked air movement. Tr. 67, 347-48. Styers and Baker did not examine areas where energized trolley wires were located beyond where they worked or traveled. Tr. 375-76.

On May 15, 2002, Inspector Gilbert Young from the Department of Labor's Mine Safety and Health Administration ("MSHA") went to the Stockton mine to investigate a complaint that the mine was not conducting required weekly examinations. 24 FMSHRC at 708. After talking to Cannelton personnel and examining the company's preshift and on-shift examination books, Young issued two citations. *Id*. The first citation, No. 7191145, alleged a significant and substantial ("S&S")[4] violation of section 75.360(a)(1). *Id*. The second citation, No. 7191146, which is not at issue in the current appeal, charged an S&S violation of section 75.364(b), which requires weekly examinations when miners have been working. *Id*. at 708, 710. Cannelton contested the citations and requested an expedited hearing on the matter. *Id*. at 708.

The judge found that the "pumpers' exception" in section 75.360(a)(2) applied and vacated the preshift citation. *Id*. at 708-10. His reasoning was based on the preamble to section 75.360, which states "[u]nder the final rule, *either* a preshift examination must be made in accordance with paragraph (a)(1) before a pumper enters an area, *or* certified pumpers must conduct an examination under paragraph (a)(2)." *Id*. at 709 (emphasis in original) (citations omitted). The judge concluded that where a pumper is the only person entering an idle mine and he examines the areas where he works and travels, the pumpers' exception provides the safeguards that a preshift examination would provide. *Id*. at 710. The judge further noted that it made little sense to double the exposure to possible hazards in the mine by requiring another examiner to preshift those areas where the pumper is going to travel and work. *Id*.

The Secretary filed a petition for discretionary review ("PDR"), challenging the judge's vacation of the preshift citation, which the Commission granted. Cannelton subsequently filed a motion to dismiss the PDR.

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[3] An anemometer is an instrument for measuring air velocity. Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 19 (2d ed. 1997).

[4] The S&S terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

II.

Disposition

A. Motion to Dismiss PDR

As a preliminary matter, we address Cannelton's motion to dismiss the Secretary's PDR. Cannelton argues that when the PDR was granted, the Commission, which then consisted of only two Commissioners, lacked the authority to grant the Secretary's PDR. C. Mot. at 1. Cannelton relies primarily on Mine Act section 113(c), 30 U.S.C. § 823(c), which provides that the Commission may delegate to any group of three members all of the powers of the Commission and that two members shall constitute a quorum for a panel of three Commissioners. *Id*. at 2. It further asserts that Mine Act section 113(d)(2)(A)(iii), 30 U.S.C. § 823(d)(2)(A)(iii), does not alter Congress' limitation on the Commission's authority to conduct business but merely provides that two members must vote in favor of a petition. *Id*. at 2-3.

The Secretary opposes the motion to dismiss and contends that Cannelton's argument is at odds with the plain meaning of Mine Act section 113(d)(2)(A)(iii) and Commission Rule 29 C.F.R. § 2700.70(b). S. Opp'n. at 2. According to the Secretary, those provisions clearly state that only two Commissioners need be present and voting to grant review of a judge's decision. *Id*.

Although section 113(c) provides that "[t]he Commission is authorized to delegate to any group of three or more members any or all of the powers of the Commission, except that two members shall constitute a quorum of any group designated pursuant to this paragraph," this language does not answer the question of whether the Commission was authorized to grant the PDR here. 30 U.S.C. § 823(i). Mine Act section 113(d)(2)(A)(iii) directly addresses the question at issue. It states: "Review by the Commission shall be granted only by affirmative vote of two of the Commissioners present and voting." 30 U.S.C. § 823(d)(2)(A)(iii). The Commission's procedural rules also require that "[r]eview by the Commission shall be granted only by affirmative vote of at least two of the Commissioners present and voting." 29 C.F.R. § 2700.70(b).

The first inquiry in statutory construction is "whether Congress has directly spoken to the precise question at issue." *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co*., 18 FMSHRC 582, 584 (Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *See Chevron*, 467 U.S. at 842-43; *accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). The clear and unambiguous terms of Mine Act section 113(d)(2)(A)(iii) require two Commissioners to be present and to vote in favor of a petition for discretionary review for it to be successfully granted. Cannelton's assertion that the general language contained in section 113(c) overrides section 113(d)(2)A)(iii) is not convincing. It is a rule of statutory construction that "[h]owever inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment.'" *Clifford F. MacEvoy Co. v. United States*, 322 U.S. 102, 107 (1944) (citation omitted). Moreover, if Congress had intended the interpretation

that Cannelton advocates, it would have had no reason to adopt section 113(d)(2)(A)(iii). *Accord* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06, at 181 (6th ed. 2000) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.").

Cannelton's other arguments similarly lack merit. The legislative history of the Mine Act does state, as Cannelton urges, that the Commission may delegate its powers to any group of three but it also clearly explains that review is granted on the vote of two Commissioners present. *See, e.g.*, S. Rep. No. 95-461, at 60 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 1338 (1978) ("*Legislative History*"). Nor is Cannelton's reliance on the National Labor Relations Act ("NLRA") persuasive. Although the Commission is patterned, in part, after the National Labor Relations Board ("NLRB") (*Legislative History* at 635-36), which must act with three members (29 U.S.C. § 153(b)), there is simply no parallel because the NLRA, unlike the Mine Act, contains no provision for discretionary review – an appeal from an administrative law judge is automatic upon filing. Moreover, permitting two Commissioners to vote on petitions when a quorum is not present does not result in delay, as Cannelton suggests. Rather, section 113(d)(2)(A)(iii) allows the business of the Commission to continue so that meritorious cases may proceed to briefing during the infrequent instances where there are only two sitting Commissioners.

Accordingly, we deny Cannelton's motion to dismiss.

B. The Pumpers' Exception to the Preshift Examination Requirement

The Secretary argues that the judge ignored the plain meaning of sections 75.360(a)(1), 75.360(a)(2) and 75.360(b), which, when read together, require that a preshift examination be performed in areas where pumpers do not work or travel. PDR at 7-11; S. Br. at 7-14; S. Reply Br. at 1-6.[5] Cannelton responds that the Secretary's interpretation ignores the "pumpers' exception" to the preshift examination, which is intended to provide an alternative examination to the more common preshift examination in limited circumstances, such as those in the mine at issue. C. Br. at 1-2, 7-13.

The "language of a regulation . . . is the starting point for its interpretation." *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)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation*

[5] On November 5, 2002, the Secretary filed an unopposed motion for a two-week extension of time to file her reply brief. The Commission was unable to decide the motion at that time because it lacked a quorum. The Secretary then filed the reply brief on the date specified in the motion. We hereby grant the motion for extension of time and accept the reply brief.

Coal Co., 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)); *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) ("Deference . . . is not in order if the rule's meaning is clear on its face.") (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984)).

"In determining the meaning of regulations, the Commission . . . utilizes 'traditional tools of . . . construction,' including an examination of the text and the intent of the drafters." *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union*, 917 F.2d at 44-46). In a plain meaning analysis, a provision at issue must be considered in the context of the language and design of the Secretary's regulations as a whole. *New Warwick Mining Co.*, 18 FMSHRC 1365, 1368 (Aug. 1996); *see Meredith v. FMSHRC*, 177 F.3d 1042, 1053-54 (D.C. Cir. 1999) (stating that reading the plain words of a provision *literally* can carry a different meaning than intended; meaning of the language, plain or not, depends on the context). The Secretary's regulations should be interpreted to give comprehensive, harmonious meaning to all provisions. *New Warwick,* 18 FMSHRC at 1368. Additionally, "a regulation must be interpreted so as to harmonize with and not to conflict with the objective of the statute it implements." *Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984) (citations omitted); *see also Canterbury Coal Co.*, 20 FMSHRC 718, 721-22 (July 1998) (referring to both Mine Act and regulatory history in plain meaning analysis).

This case presents a matter of first impression and hinges on whether the language in section 75.360(a) allows pumpers' examinations in lieu of preshift examinations. The Secretary contends that energized trolley wires in areas where certified pumpers do not work or travel must be preshifted when the certified pumpers perform examinations in areas where they work and travel pursuant to section 75.360(a)(2). Although she acknowledges that the pumpers' exception in section 75.360(a)(2) does not address the question of whether other areas of the mine – areas where certified pumpers do not work or travel – are required to be preshifted, the Secretary asserts that sections 75.360(a)(1) & (2) and 75.360(b), when read together, clearly require that the hazards set forth in section 75.360(b)(1)-(10) be examined in those areas where pumpers do not work or travel. S. Br. at 9-11. A reading of those sections fails to support her assertion.[6]

Section (a)(1) recites that "[e]xcept as provided in paragraph (a)(2) . . . , a certified person designated by the operator must make a preshift examination." 30 C.F.R. § 75.360(a)(1). Section (a)(2), which is the exception, states that "[p]reshift examinations . . . shall not be required" for areas where certified pumpers work or travel. 30 C.F.R. § 75.360(a)(2). Section (b) states that "[t]he person conducting the preshift examination shall examine for" a number of

[6] While the Secretary enumerates the locations in section 75.360(b)(1)-(10), her brief focuses on section 75.360(b)(7), the provision involving examinations where energized trolley lines are located.

listed hazards. 30 C.F.R. § 75.360(b). Under a plain reading, the examinations required under section (b) do not apply to certified pumpers because they expressly do not have to conduct preshift examinations. In addition, section (a)(1) states: "No person *other than certified examiners* may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval." 30 C.F.R. §75.360(a)(1) (emphasis added). All of the pumpers that entered the Cannelton mine were certified examiners. Tr. 65, 340. Thus, under the express terms of section 75.360(a)(1), a certified pumper does not need a preshift examination to enter or remain in the mine.

The Secretary's intent in drafting this pumpers' exception is set forth in the preamble to the final rule and accords with this plain meaning analysis. The preamble explains that the "proposed rule . . . allow[s] pumpers to conduct an examination in lieu of the preshift examination." 61 Fed. Reg. 9764, 9791 (Mar. 11, 1996). The preamble further states:

> Under a previous standard replaced in 1992, persons such as pumpers, who were required to enter *idle* or abandoned areas on a regular basis in the performance of their duties, and who were trained and qualified, were authorized to make examinations for methane, oxygen deficiency and other dangerous conditions for themselves. Under the final rule, *either* a preshift examination must be made in accordance with paragraph (a)(1) before a pumper enters an area, *or* certified pumpers must conduct an examination under paragraph (a)(2).

Id. at 9792 (emphasis added). Indeed, the preamble states on at least four occasions that the pumpers' examination is an alternative to, or may be performed in lieu of, a preshift examination. *Id.* at 9765, 9791-92.

Moreover, the preamble is instructive regarding the trolley line issue. The preamble discusses the reason for excluding a revision to the proposed rule that would have explicitly permitted preshifting only the shaft and slope bottom area when this was the sole work being performed in an otherwise idle mine. In rejecting the revision, the preamble states "because areas where persons are not scheduled to work or travel are not required to be examined under the final rule, the change is unnecessary." *Id*. at 9791-92. According to the preamble, then, the Secretary did not intend for the entire mine, including areas where energized trolley lines are located, to be examined when only shaft bottom work is ongoing, even when the miners performing that work are not certified. From the perspective of mine safety, it follows that, when only certified examiners/pumpers are in the mine, the examination requirements should be lesser, not greater.

The Secretary urges that, in furtherance of the remedial purposes of the Mine Act, the regulation be interpreted broadly, while the pumpers' exception be read narrowly. S. Br. at 7. The Secretary submits that it would have been anomalous for her to have intended that hazards originating in areas of the mine where pumpers do not work or travel could go entirely

unexamined, while pumpers are working or traveling underground. PDR at 12; S. Br. at 11-12. Although it is true that the Mine Act must be construed broadly to achieve the goal of health and safety (*Sec'y of Labor v. Cannelton Indus., Inc.,* 867 F.2d 1432, 1437 (D.C. Cir. 1989)), and that exceptions to remedial legislation must be construed narrowly (*Local Union 7107, UMWA v. Clinchfield Coal. Co.*, 124 F.3d 639, 640-41 (4th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998)), it is not the role of the Commission to read into a regulation words that simply are not there. *Black Mesa Pipeline, Inc.*, 22 FMSHRC 708, 713 (June 2000); *Western Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989); *Phelps Dodge Corp. v. FMSHRC*, 681 F.2d 1189, 1193 (9th Cir. 1982). If the regulation required that a preshift examination be performed before pumpers enter a mine, as the Secretary asserts, there would have been no need to include a pumpers' exception in section 75.360(a)(2). *See* 2A *Sutherland Statutory Construction* at 181 (effect must be given to every word, clause and sentence of a provision). Similarly, the pumpers' exception could have provided that all the examinations listed under section (b) be performed.[7]

The preshift examination is based upon Mine Act sections 303(d)(1) & (2), 30 U.S.C. § 863(d)(1) & (2), and must be construed in light of those sections. *See Canterbury Coal*, 20 FMSHRC at 721-22. Section 303(d)(1) provides in pertinent part that:

> Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings[8] of a coal mine, certified persons . . . shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section . . . for accumulations of methane[,] . . . shall make tests for oxygen deficiency . . . ; . . . test . . . 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 . . . as . . . the Secretary may from time to time require.

30 U.S.C. § 863(d)(1). Mine Act section 303(d)(2) states that "[n]o person (*other than certified persons* designated under this subsection) shall enter any underground area, except during any shift, unless an examination of such area . . . has been made within eight hours immediately preceding his entrance into such area." 30 U.S.C. § 863(d)(2) (emphasis added). Although those sections do not address the unique circumstances involved here where the entire mine is idle, the pumpers' exception fulfills the intent of the statute in that it requires that all pumpers be certified

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[7] Section 75.364 requires weekly examinations of remote hazards, and the judge here ruled that Cannelton had to comply with that section. 24 FMSHRC at 710-11. Thus, the regulations contain additional safeguards, beyond the preshift examination, to detect hazards where pumpers do not work or travel.

[8] "Active workings" is defined as "[a]ny place in a coal mine where miners are normally required to work or travel." 30 C.F.R. § 75.2.

and that they examine for hazardous conditions, and test for methane, oxygen deficiency and proper air movement in all the areas where they work or travel.[9]

The Secretary asserts that allowing a pumpers' examination in lieu of a preshift examination may detract from safety because energized trolley lines located outside of the specific areas where the pumpers work or travel may go unexamined. While we are sympathetic to this concern, the regulations as currently written do not require a preshift examination of those trolley lines. It is, nonetheless, the Secretary's prerogative to change the regulation through notice and comment rulemaking.[10] It is also important to note that the examination performed by the certified pumper under section 75.360(a)(2) is not sufficient to meet the requirements of section 75.360(b) if other persons have been scheduled to enter the mine area. 61 Fed. Reg. at 9792.

Accordingly, we affirm the judge's determination that when only certified pumpers enter an idle mine and those certified pumpers perform examinations where they work and travel, no preshift examination is required.

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[9] There is no evidence, nor does the Secretary even allege, that the certified persons in this case failed to perform the required examination for hazardous areas prior to attending to the pumps in the mine. This case is therefore clearly distinguishable from *Buck Creek Coal Co.*, 17 FMSHRC 8 (Jan. 1995), relied on by the dissent (slip op. at 14), in which a preshift examination was underway while the offending miners were in the mine attending to other maintenance duties, without authorization under either the preshift examination requirement or the pumpers' exception.

[10] Notice and comment rulemaking would allow a thorough evaluation of alternative approaches before making a significant change in the regulations. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1024, 1028 (D.C. Cir. 2000) (setting aside agency action where policy varied from existing rule).

III.

Conclusion

For the foregoing reasons, we deny Cannelton's motion to dismiss and we affirm the judge's vacation of Citation No. 7191145.

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Michael F. Duffy, Chairman

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

Commissioner Jordan, dissenting:

The preshift requirement in 30 C.F.R. § 75.360 is modified by a "pumpers' exception" that on its face applies only to areas where pumpers are scheduled to work or travel. According to the plain language of the regulation, this exception is limited to those specified areas, and all other aspects of the preshift examination regulation remain in effect when this exception is invoked. I thus disagree with my colleagues that this exception relieves Cannelton of the duty to conduct a preshift examination of the areas at issue in this case — the energized trolley wires that are located beyond where the pumpers are scheduled to work or travel.

Section 75.360(a)(1) sets forth the overarching preshift examination requirement, calling for an examination no more than three hours before the start of an eight-hour shift when any person will work or travel underground.[1] Section (a)(2) creates a discrete exception to this requirement. It states that a preshift examination *of areas where pumpers are scheduled to work or travel* is not required if the pumper is a certified person and performs an examination.[2] This

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[1] Section 75.360(a)(1) provides:

> Except as provided in paragraph (a)(2) of this section, a certified person designated by the operator must make a preshift examination within 3 hours preceding the beginning of any 8-hour interval during which any person is scheduled to work or travel underground. No person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

30 C.F.R. § 75.360(a)(1).

[2] Section 75.360(a)(2) provides that:

> *Preshift examinations of areas where pumpers are scheduled to work or travel* shall not be required prior to the pumper entering the areas if the pumper is a certified person and the pumper conducts an examination for hazardous conditions, tests for methane and oxygen deficiency and determines if the air is moving in its proper direction in the area where the pumper works or travels. The examination of the area must be completed before the pumper performs any other work. A record of all hazardous

relatively narrow exception is carved out of the broader language of section (a)(1), leaving the remainder of (a)(1) intact. In other words, the distinct exception in section (a)(2), covering a particularized area (where pumpers work or travel), leaves the remaining mandate of section (a)(1) undisturbed.

In the instant case, that remaining mandate is limited to an examination of the "[a]reas where trolley wires or trolley feeder wires are to be or will remain energized during the oncoming shift." 30 C.F.R. § 75.360(b)(7). This is because the other mine areas subject to the preshift regulation are only required to be examined if persons are scheduled to work or travel there or equipment will be energized or operated at the specified locations. 30 C.F.R. § 75.360(b)(1)-(10). Because Cannelton's mine is idled, no preshift examination is required in these other areas. It follows, however, that because section 75.360(a)(1) mandates a preshift examination (as described in section (b)) except in areas where a pumper is scheduled to work or travel, that the specific requirements of section (b)(7) still must be met in this case, as there are energized trolley wires in areas of Cannelton's Shadrick mine that would not be visited by the pumpers as they carried out their duties.

In short, the regulation requires a preshift examination, creates one exception to this requirement, and continues to require a preshift examination in circumstances not explicitly covered by that exception. The clear language of the regulation compels this interpretation. Where the language of a regulatory provision is clear, its terms must be enforced as they are written unless the regulator intended the words to have a different meaning or unless such a meaning would lead to absurd results. *Lodestar Energy, Inc.*, 24 FMSHRC 689, 692 (July 2002).

My colleagues contend that this case "hinges on whether the language in section 75.360(a) allows pumpers' examinations in lieu of preshift examinations." Slip op. at 6. This misstates the issue. There is no dispute that section 75.360(a) allows pumpers' examinations in place of a preshift examination, *but* (and here is what this case actually hinges on) the pumpers' examination can substitute for the preshift inspection only in "areas where pumpers are scheduled to work or travel." 30 C.F.R. § 75.360(a)(2). The majority ignores this limitation contained in the pumpers' exception.

Exceptions to remedial legislation must be narrowly construed. *Local Union 7107, UMWA v. Clinchfield Coal. Co.,* 124 F.3d 639, 640-41 (4th Cir. 1997), *cert. denied*, 523 U.S. 1006 (1998). In addition, the Mine Act should be broadly interpreted to achieve its goal of protecting the health and safety of miners. *Sec'y of Labor v. Cannelton Indus., Inc.*, 867 F.2d 1432, 1437 (D.C. Cir. 1989).

> conditions found by the pumper shall be made and retained in accordance with § 75.363.

30 C.F.R. § 75.360(a)(2) (emphasis added).

Moreover, when there is an express exception, it is the only limitation on the operation of a statute[3] and no other exception will be implied. 2A *Sutherland Statutory Construction*, § 47.11, at 250. *See also Klinger v. Dep't of Corrections*, 107 F.3d 609, 614 n.5 (8th Cir. 1997) (acknowledging that "[w]hen a statute lists specific exemptions, other exemptions are not to be judicially implied" (citation omitted)). "Under the principle of *expressio unius est exclusio alterius*, the enumeration of specific exclusions from the operation of a statute is an indication that the statute should apply to all cases not specifically excluded." *United States v. Newman*, 982 F.2d 665, 673 (1st Cir. 1992) (citations omitted). Accordingly, where a general provision in a statute has certain limited exceptions, all doubts should be resolved in favor of the general provision rather than the exceptions. 2A *Sutherland Statutory Construction,* § 47.11 at 250-51. *See also*, *Keeley v. Loomis Fargo & Co.*, 183 F.3d 257, 265-66 (3d Cir. 1999), *cert denied*, 528 U.S. 1138 (2000) (holding that under the well-established principle of *expressio unius est exclusio alterius*, the legislature's explicit expression of one thing — here, certain exceptions to the overtime requirement — indicates its intention to exclude other exceptions from the broad coverage of the overtime requirement); S*unland Constr. Co.,* 309 N.L.R.B. 1224, 1226 (1992) (holding that only enumerated classifications were excluded from the statutory definition of employee and accordingly, full-time, paid union organizers, who did not appear in these exclusions, were "employees" within the ordinary meaning of this provision); *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883, 891-92 (1984) (holding that since undocumented aliens were not among the few groups of workers expressly exempted from the National Labor Relations Act by Congress, they plainly come within the broad statutory definition of "employee").

Permitting the "pumpers' exception" to swallow the preshift requirement of section 75.360, as my colleagues do, is inconsistent with these core principles. Pursuant to these concepts, the "pumpers' exception" in section 75.360(a)(2), clearly delineated as applying only to areas where pumpers work or travel, is limited to precisely those locations. Therefore, areas where pumpers do *not* work or travel are not encompassed by the exception and must be preshifted. No amount of interpretative legerdemain can alter this state of affairs.

In asserting that "a certified pumper does not need a preshift examination to enter or remain in the mine," my colleagues in the majority also rely on the language in section 75.360(a)(1) providing that "[n]o person other than certified examiners may enter or remain in any underground area unless a preshift examination has been completed for the established 8-hour interval." Slip op. at 6-7. This interpretation of section of 75.360(a)(1) in effect creates a wholesale exception to the preshift requirement as it applies to certified mine examiners. Under my colleagues' view, the preshift requirement in the regulation simply does not apply to anyone certified to examine a mine. Thus, according to the majority, if an individual is certified, he or she is entitled to work or travel anywhere in a mine — not necessarily only in the course of preshift examination duties — and the operator is under no obligation to have performed a

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[3] "When a regulation is legislative in character, rules of interpretation applicable to statutes should be used in determining its meaning." 1A Norman J. Singer, *Sutherland Statutory Construction* § 31.6, at 723-24 (6th ed. 2000).

preshift examination first. If this interpretation were accurate, there would be no need for a "pumpers' exception." Pumpers who qualify for the exception are certified examiners and would have free range to enter and work in a mine when no preshift examination had been performed. The opening clause of section 75.360(a)(1) ("[e]xcept as provided in paragraph (a)(2) of this section,") would therefore be superfluous.

The majority's interpretation is also inconsistent with the Commission's decision in *Buck Creek Coal Co.*, 7 FMSHRC 8 (Jan. 1995). That case involved a violation of section 75.360(a) when three miners entered a mine before the preshift examination had been completed and recorded at the surface. *Id*. at 9-10. The Commission affirmed the judge's determination that Buck Creek violated the regulation, and found that the violation was significant and substantial. *Id*. at 12, 14. We emphasized that even though two of the three miners were certified inspectors, the violation was still significant or substantial. *Id*. at 14. We noted that these miners "entered the mine to repair a mantrap, not to inspect the mine, and there is no evidence their attention was focused on mine conditions rather than on the mantrap." *Id.* Clearly the Commission recognized that the mere fact that a miner was a certified examiner did not abolish the preshift requirement as it applied to that miner. A more plausible explanation of the language relied on by the majority is that it simply permits certified examiners to go underground to perform their preshift exams. Without such language, it would be legally impossible for anyone to do so because every certified mine examiner would be barred from entering the mine until a preshift exam of the mine had been conducted. The language cited by my colleagues avoids this "Catch 22" situation.

Even if section 75.360(a)(1) could be read to exclude certified examiners from its coverage, the Secretary's interpretation of the regulation — that certified examiners assigned as pumpers to remote areas of the mine are nevertheless entitled to the protection afforded by applying the preshift requirement to the areas located beyond where they are assigned to work or travel — is reasonable and entitled to deference. If a regulatory standard is either silent or ambiguous on a particular issue, the Commission will defer to the Secretary's reasonable interpretation of the regulation. *Rock of Ages Corp.*, 20 FMSHRC 106, 111, 117 (Feb. 1998), *aff'd in part and rev'd in part*, 170 F.3d 148 (2d Cir. 1999). *See also Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6, 10 (D.C. Cir. 2003). We defer to the Secretary's interpretation of a regulation when it is "logically consistent with the language of the regulations[s] and . . . serves a permissible regulatory function." *Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (alteration in original) (citations omitted). As explained above, the Secretary's interpretation is not only consistent with the language of section 75.360, it inexorably follows from that language.

The policy concerns underlying the Secretary's position also demonstrate why her interpretation of the regulation is reasonable and serves a permissible regulatory function. Requiring a preshift of areas that may pose a hazard to the pumpers but that the pumpers will not examine (because they do not work or travel there) is consistent with the protective purposes of the Mine Act in promoting the health and safety of miners. Indeed, it would be incongruous if the Secretary had intended that hazards where pumpers work or travel would be discovered by the pumpers' examination, but that hazards in other parts of the mine, where pumpers do not go would remain unexamined and, in all likelihood, undetected.

The Secretary's witnesses explained that failing to preshift the energized trolley wires in areas where Cannelton's pumpers do not work or travel would expose them to hazards that could injure or kill them. *See* Tr. 176-79, 224-25, 327-28. The mine contains between three and four miles of 300-volt energized trolley wires. Tr. 42-43, 44-46, 88, 256-57; Ex. C-2 (map showing locations of trolley wires). Record evidence demonstrated that if a fire were to start inby where the pumpers worked, its smoky by-products would probably travel outby and reach the pumpers. Tr. 83-84, 126, 155-56.

MSHA Inspector/Accident Investigator Gilbert Young testified that trolley wires, unlike other wires underground that carry electricity, are not insulated and, if dislodged, can easily create electrical arcs which result in a fire or explosion. Tr. 176-78, 224-25. He detailed the potential dangers as follows:

> You've got energized trolley wire. You could have a fire, you know, roof could fall on the trolley wire, arc could fall on the ground, you could have arc catch the coal ribs on fire. . . . You could have smoke inhalation, burns.

Tr. 177; *see also* Tr. 280-81.

My colleagues also contend that if the regulation required a preshift examination to be performed before pumpers enter a mine, there would be no need for the exception in section 75.360(a)(2). Slip op. at 8. This ignores the rationale underlying the pumpers' exception: rather than requiring the preshift examiner to travel to a remote location in the mine where pumpers typically do their jobs, the exception permits the pumper to perform the examination there immediately prior to working. 61 Fed. Reg. 9764, 9792 (Mar. 11, 1996). Consequently, the preshift examiner is freed from having to travel to those areas. The exception is thus designed to eliminate lengthy additional trips for the preshift examiners, when the pumpers, who need to go to those far-reaching areas in any event to perform their jobs, may be certified to make the necessary examination.

In conclusion, the plain language of the regulation applies the pumpers' exception only to areas where pumpers work or travel. Even if this language were considered ambiguous, the Commission should defer to the Secretary's reasonable interpretation of the rule.[4]

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[4] Cannelton makes a general argument — providing no detailed factual basis whatsoever — that it did not receive notice that the regulation requires a preshift examination when only certified pumpers are in the mine. C. Br. at 16-17. This claim is unavailing. Of course, when the language in a regulation is clear, it follows that the standard provides fair notice. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1031 (June 1997). Even if the language were considered ambiguous, Cannelton's notice argument would fail, as a reasonably prudent person, familiar with the realities of the mining industry and the protective purpose of the

For the above reasons, I would vacate the judge's decision, affirm the violation alleged in citation No. 7191145, and remand the case to determine if the violation was significant and substantial and for the assessment of an appropriate penalty.[5]

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Mary Lu Jordan, Commissioner

standard, would recognize the hazardous condition the regulation seeks to prevent. *See Island Creek Coal Co.*, 20 FMSHRC 14, 24 (Jan. 1998). In addition, Cannelton had actual notice of the Secretary's interpretation of the regulation, and actual notice satisfies the notice requirement. *See Consolidation Coal Co.*, 18 FMSHRC 1903, 1907 (Nov. 1996). MSHA Ventilation Specialist Jerry Richards testified that he told the Cannelton safety manager "that if he done any work, that he would have to do all the examinations, the preshift and the weekly." Tr. 308; *see also* Tr. 434. He also testified that he told a safety engineer that "if you turn the breakers on . . . you're doing work. You got to do all the examination." Tr. 310-11. Cannelton offered no persuasive evidence to refute this testimony.

[5] I agree with the majority that Cannelton's motion to dismiss should be denied.

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