

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 9, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket No. WEVA 99-13-R
	:	
RAWL SALES & PROCESSING	:	
COMPANY	:	

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). At issue is a citation issued by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) charging Rawl Sales & Processing Company (“Rawl”) with violating 30 C.F.R. § 75.362(b)¹ for failing to conduct an examination of the belt haulageway in the Rocky Hollow mine between 3:30 p.m. and 11:30 p.m. when the belt conveyor was carrying coal through the mine but no miners were present. Administrative Law Judge Jerold Feldman granted Rawl’s motion for summary decision and vacated the citation. 21 FMSHRC 219, 228 (Feb. 1999) (ALJ). The Commission granted the Secretary’s petition for discretionary review challenging the judge’s decision.

The Commission’s vote in this case is evenly split. Commissioners Riley and Verheggen would affirm the judge’s decision. Chairman Jordan and Commissioner Beatty would reverse

¹ 30 C.F.R. § 75.362(b) provides:

During each shift that coal is produced, a certified person shall examine for hazardous conditions along each belt conveyor haulageway where a belt conveyor is operated. This examination may be conducted at the same time as the preshift examination of belt conveyors and belt conveyor haulageways, if the examination is conducted within three hours before the on-coming shift.

the judge's decision and remand to the judge for assessment of penalty. For the reasons set forth in *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's decision to stand as if affirmed.

I.

Factual and Procedural Background

Rocky Hollow is an underground coal mine, categorized under MSHA's guidelines as "active-nonproducing," and is owned and operated by Rawl. 21 FMSHRC at 221. A belt conveyor runs through Rocky Hollow carrying coal for approximately 5.5 miles from an adjacent underground mine, Sycamore Fuels ("Sycamore"), to the Sprouse Creek Preparation Plant ("Preparation Plant"), which is also owned and operated by Rawl. *Id.* The coal from Sycamore is brought to the surface by belt line once again, and is then transported approximately 3/4 of a mile on the surface. It then goes underground and travels through the Rocky Hollow mine. *Id.* Upon surfacing from Rocky Hollow, the belt line runs approximately 100 feet to the Preparation Plant. *Id.* at 220. Sycamore is located about 8 miles by road from the Preparation Plant. *Id.* at 221. Coal is extracted from Sycamore on two shifts — 7 a.m. to 4 p.m. and 4 p.m. to 12 a.m. *Id.* at 222. The belt conveyor carries coal from Sycamore from 7:30 a.m. to 11:30 p.m., and a maintenance shift is conducted at Sycamore from 12 a.m. to 7 a.m. *Id.* at 221-22.

Miners are underground in Rocky Hollow from 7:30 a.m. to 3:30 p.m., performing various tasks, including the examination, cleaning, and maintenance of the belt line and related areas of the mine. Rawl Mot. for Summ. Dec. at 4-5, Stip. 11 (hereinafter cited as "Stip."). Also during that shift, an on-shift examination is conducted. Stip. 12. The belt conveyor in Rocky Hollow continues transporting coal from 3:30 p.m. to 11:30 p.m., when there are no miners underground. 21 FMSHRC at 220. From 3:30 a.m. to 7:30 a.m., three miners conduct a preshift examination in the Rocky Hollow mine. *Id.* at 220, 222; Stip. 12. Rocky Hollow is equipped with an automatic fire warning system which is active 24 hours-a-day, and the belt conveyors are flame-resistant. 21 FMSHRC at 222. There are four portals through which intake air enters the mine, and a mine fan which operates 24 hours per day and is examined daily. *Id.*

On October 1, 1998, MSHA Inspector Gary Collins issued Citation No. 7175284 to Rawl alleging a violation of section 75.362(b). *Id.* The citation stated: "Coal is being transported through the [Rocky Hollow] mine, from Sycamore Fuels to the Sprouse Creek Preparation Plant, on the 1530 to 2330 shift, an on-shift examination is not being conducted on this shift." *Id.* at 220. The inspector found moderate negligence and the Secretary proposed a \$55 penalty.

Rawl filed a notice of contest, and the parties filed cross-motions for summary decision. In his decision, the judge found that although the language of section 75.362(b) was plain, the meaning advanced by the Secretary was contrary to legislative intent under the Mine Act when applied to Rocky Hollow, and therefore, an on-shift inspection of the belt conveyor haulageway was not required, because no miners were underground between 3:30 p.m. and 11:30 p.m. *Id.* at

219, 223. As an alternative ground for his decision, the judge found that the Secretary's interpretation was not entitled to deference because she failed "to advance any consistent, convincing policy concerns that justify interpreting the pertinent statutory and regulatory provisions in a way that prohibits unattended operation of the Rocky Hollow beltline," or to identify any miners who were particularly at risk. *Id.* at 227. Finding that it would be more desirable to have miners above ground, the judge concluded that there was no justification for the exposure of on-shift examiners to the danger of an operational belt line. *Id.* at 226-27. The judge granted Rawl's motion for summary decision and vacated the citation. *Id.* at 228.

II.

Disposition

The Secretary argues that the plain language of section 75.362(b), its regulatory history, and the purpose of the standard support the Secretary's position that an on-shift examination of the Rocky Hollow belt line is required between 3:30 p.m. and 11:30 p.m. S. Br. at 12-20. The Secretary contends that section 75.362(b) is applicable, although no miners are underground, because the transportation of coal is within the regulatory definition of coal production. *Id.* at 16-19. Alternatively, the Secretary argues that coal production at Sycamore may be considered for purposes of satisfying the standard. S. Reply Br. at 3-4. The Secretary also contends that the judge's conclusion is erroneous because he failed to address the Secretary's arguments and evidence in support of her position, while applying irrelevant Mine Act provisions in his plain meaning analysis. S. Br. at 20-22. In addition, the Secretary argues that, if the regulation is ambiguous, then the judge erred by concluding that the Secretary was not entitled to deference, by applying the wrong standard for deference, substituting his judgment in place of the Secretary's, and failing to consider and analyze the entire record. *Id.* at 23-30. Finally, the Secretary replies that no notice problem exists because section 75.362(b) is not impermissibly vague. S. Reply Br. at 9-11.

Rawl responds that section 75.362(b) is inapplicable to the Rocky Hollow mine because there is no "shift," "active workings," or "working sections," because there are no miners working and no coal produced from 3:30 p.m. to 11:30 p.m., while the belt is in operation. R. Br. at 7-10. Rawl contends that the plain language of the standard, in addition to the regulatory and statutory histories, supports its reading of the regulation. *Id.* at 10-17. Finally, Rawl argues that the Secretary is not entitled to deference because her interpretation reduces rather than promotes the safety of miners and is not reasonable. *Id.* at 17-23. Alternatively, Rawl asserts that, even if the Secretary's interpretation were reasonable, the result would be the same because it did not have notice of the Secretary's interpretation. *Id.* at 23-25.

III.

Separate Opinions of the Commissioners

Commissioner Riley, in favor of affirming the decision of the judge:

The Chairman and Commissioner Beatty conclude that the language of section 75.362(b) is plain and applicable to Rocky Hollow, even when no miners are present. Slip op. at 11, 13. Because an essential element of the inspection requirement under section 75.362(b) is the presence of miners who must be protected from hazardous conditions during their work shift, I conclude that Rocky Hollow is not required to perform an “on-shift” examination when no miners are working or present. I therefore affirm the judge’s decision finding no violation.

In a free market system, government regulation is not an end in itself, but rather interference, albeit necessary, in what is otherwise a self-regulating economic system. Such intervention, especially where it imposes additional burdens on a regulated entity, is to be undertaken reluctantly, carefully, and only to achieve a higher public purpose, such as protecting miners from a cognizable threat to their life or health. Since I cannot discern what mining danger threatens miners at home in their beds, I will not support the Secretary’s gratuitous demand that Rawl order miners underground for several hours, who would otherwise be at home, to conduct an “on-shift” examination to protect nobody from anything.

Generally, 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 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)); *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)); *Consolidation Coal Co.*, 15 FMSHRC 1555, 1557 (Aug. 1993). Section 75.362(b) requires an inspection for hazardous conditions along each belt conveyor haulageway while the belt is operating during each coal-producing shift. However, to apply the regulation to a non-producing mine when no miners are present leads to an absurd result and in no way furthers the purposes of the Mine Act.¹

¹ It is well established that even if the language of a statutory or regulatory provision appears to be plain, one must not read that language in a way that produces absurd results. *Cardenas-Urriarte v. INS*, 227 F.3d 1132, 1137 (9th Cir. 2000) (“We adhere to plain meaning ‘unless that meaning would lead to absurd results.’”) (citing *Reno v. NTSB*, 45 F.3d 1375, 1379 (9th Cir. 1995)); *Tanimura & Antle, Inc. v. Packed Fresh Produce, Inc.*, 222 F.3d 132 (3d Cir. 2000) (refusing to read the plain language of the Perishable Agriculture Commodities Act in such a way that would produce an absurd result and defeat Congress’ intent); *In re Lehman*, 205 F.3d 1255, 1256 (11th Cir. 2000) (“Although statutory interpretation begins with the language of the statute itself, . . . a court may look beyond the plain language of a statute if applying the plain

The belt conveyor at issue operates from 7:30 a.m. to 11:30 p.m. 21 FMSHRC at 220. Miners work a single (day) shift, from 7:30 a.m. to 3:30 p.m. *Id.* Thus, for the remainder of the time during which the belt is operating in Rocky Hollow, from 3:30 p.m. to 11:30 p.m., the belt passes through an empty mine. *Id.* The purpose of the inspection requirement in section 75.362(b) is to protect miners from hazards as they work or travel along the haulageway. Applying the standard when no miners are underground at Rocky Hollow clearly does not further the statutory purpose of the Mine Act, protecting miners from occupational hazards. *See Emery Mining Corp. v. Sec'y of Labor*, 744 F.2d 1411, 1414 (10th Cir. 1984). In short, I agree with the judge that, in the absence of any miners at Rocky Hollow, the record in this case demonstrates absolutely no enhancement to miner safety in applying the regulation's inspection requirement to Rocky Hollow. 21 FMSHRC at 225-26.

I am well aware of the hazards associated with belt conveyors noted by my colleagues. Slip op. at 12 n.2. However, I have found no Commission case involving a belt conveyor in which a violation was found in a mine empty of miners. Thus, the Secretary has presented the Commission with a unique situation involving a regulation in search of a hazard from which miners must be protected *in futuro*. I agree with the judge's well-reasoned analysis on this point:

In essence, the Secretary asserts that it is safer to expose beltline examiners to the hazards of underground mining in an attempt to prevent a belt malfunction and possible fire. However, the Secretary has failed to identify any miners who would be exposed to any hazard if a fire occurred because the beltline was not routinely examined after 3:30 p.m. A fire or other smoke hazard could occur at any time, anywhere along this 5½ mile belt, with or without the presence of belt examiners. In such event, it is more desirable to have personnel on the surface rather than underground.

...

Finally, the Secretary contends the failure to on-shift the beltline may contribute to a fire which would pose a hazard to firefighters. The potential hazard to victims trapped underground in the event of a fire, far outweighs the potential hazard to firefighters who would enter the mine from the surface fully prepared to extinguish a fire.

21 FMSHRC at 226-27.

language would produce an absurd result.”) (citations omitted).

The language and purpose of the underlying provisions of the Mine Act, which section 75.362(b) implements, further support this common-sense application. As the judge explained in his decision, the Secretary’s regulations regarding pre-shift and on-shift examinations, found in 30 C.F.R. §§ 75.360² and 75.362, implement statutory requirements for inspections set forth in sections 303(d)(1) and (e) of the Mine Act, 30 U.S.C. §§ 863(d)(1) and (e).³ 21 FMSHRC at 224. These statutory provisions require inspections only in active workings and working sections of a mine.⁴ *Id.* Limiting the requirement for inspections (either “pre-shift” or “on-shift”) to active workings and working sections imposes the burden of inspection only when it enhances the safety of miners who will soon be or are already working or traveling in such areas of the mine. If there are no miners present, there is obviously no one to protect from hazards. Similarly, during periods when no miners are assigned to work anywhere in the mine, there is no “shift,” a prerequisite to any obligation to inspect.⁵

² Section 75.360 requires a pre-shift inspection “within three hours preceding the beginning of any shift during which any person is scheduled to work or travel underground.”

³ Section 303(d)(1), in pertinent part, provides:

Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the *active workings* of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. . . . Belt conveyors on which coal is carried shall be examined after each coal producing shift has begun.

30 U.S.C. § 863(d)(1) (emphasis added). Section 303(e) provides in pertinent part, “At least once during each coal producing shift, or more often if necessary for safety, each *working section* shall be examined for hazardous conditions by certified persons designated by the operator to do so.” 30 U.S.C. § 863(e) (emphasis added).

⁴ Both the Mine Act and the Secretary’s regulations define active workings as “any place in a coal mine where miners are normally required to work or travel” (30 U.S.C. § 878(g)(4); 30 C.F.R. § 75.2), and working section as “all areas of the coal mine from the loading point of the section to and including the working faces” (30 U.S.C. § 878(g)(3); 30 C.F.R. § 75.2).

⁵ Of particular importance in this case, “words should never be given a meaning that produces a stunningly counterintuitive result – at least if those words, read without undue straining, will bear another, less jarring meaning.” *United States v. O’Neil*, 11 F.3d 292, 297 (1st Cir. 1993). Laws “must be interpreted in light of the spirit in which they were written and the reason for their enactment.” *Gen. Serv. Employees Union Local No. 73 v. NLRB*, 578 F.2d 361, 366 (D.C. Cir. 1978).

Indeed, the legislative history of the Mine Act is clear regarding the link between “hazards involved with . . . mining” and “the need to provide for the health and safety of the nation’s miners.” S. Rep. No. 95-181, at 1 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 589 (1978). Therefore, the Secretary’s interpretation and application of section 75.360(b) to require an on-shift inspection during a time when no miners are present would not serve any safety-promoting purpose of the Act. If the Secretary is permitted to impose her present interpretation, the result will be counter to the Mine Act’s entire regulatory scheme. The Mine Act was enacted to protect miners, not mines. Here the Secretary seeks to interfere in the normal operations of a mine, requiring miners to be on-site, underground and exposed to hazards in order to monitor the operation of an automated overland conveyor system in an otherwise closed mine.

I also find unpersuasive the Secretary’s resort to the use of miners in the adjacent Sycamore Fuels mine and Sprouse Creek Processing Preparation Plant to argue that section 75.362(b) imposes an obligation for an “on-shift” inspection of Rocky Hollow when no miners are working any shift that would otherwise impose such an obligation. PDR at 18-19; S. Br. at 19-20, 26-27, 29. The judge rejected the Secretary’s contention that the presence of miners in nearby facilities triggered the standard’s inspection requirement. 21 FMSHRC at 225. The Secretary has presented no evidence to suggest that Rocky Hollow or Sycamore Fuels are under common ownership or management, share a workforce or in any other way constitute a unitary operator, responsible jointly for the safety of all miners employed by any of its constituent parts. *Compare, e.g., Berwind Natural Res. Corp.*, 21 FMSHRC 1284, 1317 (Dec. 1999). Nor is there any record support for the Secretary’s contention that hazards which may develop at Rocky Hollow could somehow travel to the surface and migrate to Sycamore or the Preparation Plant, thus putting at risk miners who do not work in Rocky Hollow. Consequently, the Secretary’s importation of risk from Rocky Hollow to Sycamore or the Preparation Plant is without factual foundation.

Under the facts of this case, I conclude that section 75.362(b) does not require an inspection of the belt conveyor in the Rocky Hollow mine while the belt is operating from 3:30 p.m. to 11:30 p.m., because no hazardous conditions can conceivably threaten miners who are not present in the mine. 21 FMSHRC at 224-25. Moreover, miners are not scheduled to enter Rocky Hollow until 3:30 a.m. the following morning, when a pre-shift inspection is conducted before the next scheduled work shift begins at 7:30 a.m. *Id.* at 220. The only purpose that an examination between 3:30 p.m. to 11:30 p.m. could possibly serve is to enhance protection for pre-shift examiners on the next shift, i.e., preshifting the preshift, an obligation heretofore never imposed on any operator.⁶

⁶ Moreover, in attempting to examine the belt for the benefit of the pre-shift examiners, the on-shift examiners themselves would be traveling the belt without the benefit of a pre-shift examination, since the Secretary conceded that a pre-shift examination of the mine prior to the 3:30 p.m. “shift” was not required under section 75.360. 21 FMSHRC at 226 n.3. As the judge

Based on the foregoing, I thus would affirm the judge's decision dismissing the violation in this proceeding. To do otherwise merely encourages unnecessary bureaucratic muscle flexing with no salutary purpose. The Secretary's illogical insistence that an "on-shift" examination is required to protect "off-shift" miners when "no shift" is present is not only an unfortunate case of regulatory excess, but a perfect example of regulation for regulation's sake.

James C. Riley, Commissioner

noted, if a pre-shift examination is not required for the 3:30 p.m. to 11:30 p.m. period because no one is underground, it makes little sense to require an on-shift examination for the same period. *Id.* at 226.

Commissioner Verheggen, in favor of affirming the decision of the judge:

I concur with the opinion of my colleague Commissioner Riley in its entirety, and join him in affirming the judge's decision finding no violation. I write separately to address points on which I respectfully disagree with the Chairman and Commissioner Beatty's opinion in which they would reverse the judge.

The Chairman and Commissioner Beatty assert that affirming the judge and finding no violation here "is contrary to the protective intent of the regulation," arguing that if a belt conveyor in an underground coal mine that is "idle and unattended" and experiences "an unanticipated and unchecked disruption in its normal functioning routine," the hazards of such a situation are self evident because of the "hazardous nature" of such conveyors. Slip op. at 14. I find it contrary to the overall safety objectives of the Mine Act, however, to require that the belt be attended simply to identify hazards for those who *might* have to enter the belt line in the event of a belt stoppage. In my view, any such requirement would needlessly expose miners to hazards.

I also note that the Chairman and Commissioner Beatty point to what they characterize as an "operator's practice" under which they allege that "any interruption in the belt conveyor system would completely halt production at the Sycamore mine on the 4 p.m. to 12 a.m. shift." Slip op. at 13. They further allege that "only a certified mine examiner would be permitted to enter the Rocky Hollow belt line to ascertain the nature of [a] conveyor belt disruption." *Id.* My colleagues, however, have gleaned this purported "operator's practice" from a statement made at oral argument by counsel for Rawl, who stated: "If the belt goes down . . . from 3:30 [p.m.] to 11:30 [p.m.], there has not been any experience where they've called people back out to get that taken care of. They've waited until the next morning." Oral Arg. Tr. 11. Referring to "general maintenance problems," counsel further explained that "the problem is more of a logistical issue. It requires a number of people, before going back in . . . to first pre-shift and then a number more . . . to do the work." Oral Arg. Tr. 12.

These unsworn statements by counsel regarding the practices of his client are part of an argument before the judge, not evidence, material or otherwise, of what Rawl does in a particular situation. In fact, these statements have no evidentiary basis whatsoever. But even if these statements could somehow be transformed into relevant evidence of an operator's practice, on their face, the statements do not foreclose Rawl from responding immediately to any situation or emergency that might arise along the Rocky Hollow belt line. As the Chairman and Commissioner Beatty point out, in the event of a belt disruption, "a certified mine examiner would be permitted to enter the Rocky Hollow belt line to ascertain the nature of the conveyor belt disruption" (slip op. at 13), and I certainly see no harm in that.

Finally, as for my colleagues' concern that "any interruption in the belt conveyor system would completely halt production at the Sycamore mine on the 4 p.m. to 12 a.m. shift" (*id.*), if the interruption is an emergency, even an "incipient" one (*see id.*), I reiterate the judge's point

that, in such an event, “it is more desirable to have personnel on the surface rather than underground.” 21 FMSHRC at 227. Production halts due to routine maintenance problems, on the other hand, are irrelevant and of no proper concern to this Commission — it is not for us to second guess Rawl’s apparent business decision to occasionally suffer such down time.

Ultimately, the choice here is whether to expose miners to the myriad hazards that exist in underground coal mines when there is no necessity for such exposure. To expose miners to risk gratuitously certainly thwarts “the first priority and concern of all in the coal . . . industry” to protect “the health and safety of its most precious resource — the miner.” 30 U.S.C. § 801(a). I agree with the judge that the Secretary “has failed to advance any consistent, convincing policy concerns that justify interpreting the pertinent statutory and regulatory provisions in a way that prohibits unattended operation of the Rocky Hollow beltline.” 21 FMSHRC at 227. I would thus affirm the judge’s decision dismissing the violation.

Theodore F. Verheggen, Commissioner

Chairman Jordan and Commissioner Beatty, in favor of reversing the judge's decision:

Based on the plain language of section 75.362(b), we find that the regulation requires an inspection of the Rocky Hollow mine during the 3:30 p.m. to 11:30 p.m. shift while the belt is operating. Therefore, we would reverse the judge and remand for assessment of penalty.

It is well established that “[w]hen the meaning of the language of a statute or regulation is plain, the statute or regulation must be interpreted according to its terms, the ordinary meaning of its words prevails, and it cannot be expanded beyond its plain meaning.” *W. Fuels-Utah, Inc.*, 11 FMSHRC 278, 283 (Mar. 1989). If the regulation is plain on its face, effect should be given to the regulation's clear meaning. *Exportal Ltda. v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990).

In this case, the regulation expressly provides that during each shift in which coal is produced a certified person must examine each belt conveyor haulageway for hazardous conditions. Thus, the only prerequisite for a belt line inspection during a shift is that coal production occur. The undisputed evidence here shows that from 7:30 a.m. to 11:30 p.m. coal is cut from the face of the Sycamore Fuels mine, placed on a belt conveyor, transported over 6 miles (the majority of which is in the Rocky Hollow mine), and then unloaded at the Preparation Plant for further processing. Consequently, the operations at Sycamore and Rocky Hollow constitute coal production.

Moreover, the relationship between Rocky Hollow and Sycamore support the application of the standard to Rocky Hollow in this case. Sycamore and Rocky Hollow are involved in one continuous production process and are functionally integrated. A clear nexus exists between the extraction of coal in Sycamore and its immediate transportation through Rocky Hollow. Hence, there can be little doubt that the transportation of coal through Rocky Hollow on the belt conveyor is an integral part of coal production. *See e.g., Bulk Transp. Servs., Inc.*, 13 FMSHRC 1354, 1459 (Sept. 1991) (finding that a trucking company that hauled coal between mine and generating plant was an independent contractor operator under the Mine Act because coal hauling services were essential and closely related to the extraction process). Under these facts, section 75.362(b) clearly requires an inspection of the Rocky Hollow belt haulageway.

The standard's regulatory history supports a plain meaning approach. *See Consolidation Coal Co.*, 18 FMSHRC 1541, 1547-48 (Sept. 1996) (analyzing regulatory history of a plain regulation to determine whether the regulation's exemption applied to the facts). The regulatory history clearly states that the words “during each shift that coal is produced” includes the transportation of coal. In the preamble to the final rule implementing section 75.362(b), the Secretary explained that she intended the phrase “during each shift that coal is produced” to have the same meaning as “coal-producing shift,” as used in 30 C.F.R. §§ 75.303 and 75.304 (1991), predecessors to sections 75.360 and 75.362, regarding preshift and on-shift examinations. 57 Fed. Reg. 20,868, 20,896 (May 15, 1992). The term “coal-producing shift” was defined in section 75.304-1 (pertaining to on-shift examinations), as “any shift during which one or more of

the following operations are performed: cutting, blasting, or loading of coal, *or the hauling of coal* from the face areas, regardless of whether the coal is dumped at a tippel.” 30 C.F.R. § 75.304-1 (1991) (emphasis added). The Secretary has explained that this definition includes “activities performed in a working place that are related to the extraction and *transportation of coal* from the face.” 57 Fed. Reg. at 20,896 (emphasis added).

Here, coal is cut and extracted from the face in Sycamore where it is loaded directly onto a belt and immediately transported through Rocky Hollow. Carrying coal on the Rocky Hollow belt line is certainly “haulage” and “transportation” of coal from the face, as contemplated in the Secretary’s definition of coal production. *See* 30 C.F.R. § 75.304-1 (1991); 57 Fed. Reg. at 20,896. Thus, it is apparent that the Secretary intended the words “during a shift that coal is produced” to apply to Rocky Hollow from 3:30 p.m. to 11:30 p.m. while the belt is operating.¹

Furthermore, the plain meaning application of section 75.362(b) is also consistent with the underlying purpose of the Mine Act — to provide safe working conditions for miners. *See W. Fuels-Utah, Inc.*, 19 FMSHRC 994, 998-99 (June 1997) (considering the legislative history and purpose of the Mine Act to determine the meaning of a plain regulation). In the preamble to the final rule, the Secretary recognized the need to inspect operating belts, stating that “[e]xamination of belt conveyors reduces the potential hazards associated with operating belts.” 57 Fed. Reg. at 20,896. The Secretary clearly intended that belt haulageways through which belt conveyors continuously operate to transport coal be inspected during a coal-producing shift to prevent these hazards from arising.² Interpreting the regulation to require an inspection during any coal-producing shift while the belt is operating, regardless of whether miners are present, is consistent with the prophylactic purpose of this inspection requirement under the Secretary’s regulatory scheme and the protective purpose of the Mine Act. *See, e.g., Manalapan Mining Co.*, 18 FMSHRC 1375, 1396 (Aug. 1996) (Jordan and Marks, separate opinion) (recognizing the prophylactic purpose of preshift examinations).

¹ Rawl argues that there is no coal production in Rocky Hollow because it is classified as “non-producing,” and indicates that an underground mine is “non-producing,” as defined in MSHA’s regulations, when “no material is being produced.” R. Br. at 10 (citing 30 C.F.R. § 70.220(b)(1)(ii)). Rawl’s argument is unpersuasive because this definition of “non-producing” is applicable only for purposes of respirable dust sampling procedures under Part 70 of the Secretary’s regulations and is not applicable here for purposes of mine inspections under Part 75, regarding mandatory safety standards in underground mines.

² The Secretary has promulgated several standards regulating belt conveyors, including 30 C.F.R. §§ 75.400 (accumulation of combustible materials around belt conveyors); 75.342 (methane monitors in belt haulageways); 75.1102 (slippage and sequence switches on belts); and 75.1100 (fire protection in belt haulageways). The heavily regulated nature of belt conveyor haulageways illustrates the Secretary’s recognition of the dangers associated with this area of the mine and the importance of inspections.

We disagree with Commissioner Riley that application of the standard during a time when no miners are present defeats the safety-promoting purpose of the Mine Act. *See slip op.* at 5. At the hearing, the Secretary presented examples of specific hazards that could arise from the unattended belt line – including coal accumulation, coal spillage, float dust, malfunctioning equipment, belt friction and slippage, which could contribute to explosions and fires – and poor roof and mine conditions. Tr. 9, 19-30; *see also* PDR at 19-20; S. Br. at 19-20, 26-29; Stips. 24-31 (citations issued to Rawl for coal accumulations, bad roof, and inoperative fire warning system in Rocky Hollow). The inspection of any conveyor belt transporting coal enhances the safety of miners who may enter the mine during that shift for emergency purposes or to conduct a preshift examination, as well as those who enter the mine at a later time.

In essence, under the operator’s practice, as explained by its counsel (Tr. 11-12),³ any interruption in the belt conveyor system would completely halt production at the Sycamore mine on the 4 p.m. to 12 a.m. shift. Under this scenario, only a certified mine examiner would be permitted to enter the Rocky Hollow belt line to ascertain the nature of the conveyor belt disruption. Simply stated, from a safety perspective, the situation causing the disruption in the conveyor system could linger for up to 12 to 16 hours before being detected.⁴ By contrast, applying the standard, consistent with its plain meaning, to require an inspection of the belt line during the afternoon shift would increase the likelihood that any incipient problem could be identified and addressed before it developed into a dangerous situation.⁵

In the legislative history of the Coal Act, Congress expressed its concern with coal-carrying belts and the potential hazards associated with belt lines, noting that “[m]any fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; and therefore, an examination of belt conveyors is necessary.” S. Rep. No. 91-411, at 57 (1969), *reprinted in* Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 183 (1975). Given these potential hazards, Congress deemed it necessary for operators to conduct an inspection of coal-

³ At the hearing, the operator’s counsel asserted that “[i]f the belt line goes down during the . . . period of time . . . from 3:30 to 11:30, there has not been any experience where they’ve called people back out to get that taken care of. They’ve waited until the next morning.” Tr. 11.

⁴ The on-shift examination could conceivably start at 7:30 a.m., and takes three to four hours. 21 FMSHRC at 221. It could thus be completed by 11:30 a.m., and the belt would not be inspected again until 3:30 a.m. the next day, as part of the preshift examination for the day shift.

⁵ Commissioner Verheggen asserts that the Commission need not be concerned with “[p]roduction halts due to routine maintenance problems.” Slip op. at 9-10. In fact, there is no way to identify the problem, routine maintenance or otherwise, if miners are not permitted to enter the belt line. We are concerned with non-routine problems that could give rise to serious and dangerous hazards that threaten the health and safety of miners.

carrying belts during each production shift these belts are in operation.⁶ The Secretary's concern with the hazards associated with belt conveyors led her to require operators to inspect belt haulageways during coal production to guard against those hazards.

In spite of this, Commissioner Riley contends that a plain meaning interpretation of 30 C.F.R. § 75.362 leads to "absurd results." Slip op. at 4. Given the hazardous nature of belt conveyors in underground coal mines, any interpretation of this regulation that creates a situation where a belt conveyor remains idle and unattended, in the face of an unanticipated and unchecked disruption in its normal functioning routine, is contrary to the protective intent of the regulation.

Finally, we reject Rawl's argument that the presence of miners is required to constitute a "shift." Unlike our colleague, we do not believe that the physical presence of miners is a prerequisite to the application of the inspection requirement under the plain language of the standard. Slip op. at 6-7. If the Secretary intended, by the use of the term "shift," to require the presence of miners in the belt haulageway, she would have explicitly said so as she has done in other provisions of Part 75. See 30 C.F.R. §§ 75.360(a)(1) ("any shift during which any person is scheduled to work or travel underground") and 75.362(a)(1) ("at least once during each shift, a certified person . . . shall conduct an on-shift examination of each section where anyone is assigned to work during the shift"). Section 75.362(b), unlike sections 75.360(a) and 75.362(a), does not specify or refer to the presence of miners in the belt haulageway area of the mine. Generally, the omission of particular language in one section of a provision found in another section of the same provision indicates that the drafter intentionally and purposefully acted in the disparate exclusion. See *Russello v. United States*, 464 U.S. 16, 23 (1983) (applying principle to statutory interpretation); see also *Morton Int'l Inc.*, 18 FMSHRC 533, 539 n.9 (Apr. 1996) (recognizing that the same rules of statutory construction apply to the construction of regulations). This is particularly true when, as is the case here, the differing sections were adopted at the same time. See 61 Fed. Reg. 9764, 9838-39 (Mar. 11, 1996). Because section 75.362(b) does not specify the presence of miners, there is no basis for reading such a requirement into the regulation.

Based on the above, we have no difficulty concluding that section 75.362(b) applies to Rocky Hollow, requiring an inspection of the belt conveyor haulageway during the second shift while the belt is in operation, but no miners are underground. Contrary to the judge's analysis, the statutory requirements for preshift and on-shift inspections in sections 303(d)(1) and (e) of the Mine Act, 30 U.S.C. § 863(d)(1) and (e), are not applicable to the regulation's requirement

⁶ There are numerous Commission cases illustrating the hazards associated with belt conveyors. See, e.g., *Cannelton Indus. Inc.*, 20 FMSHRC 726, 726-27 (July 1998) (finding a violation for failure to clean up coal accumulation under a conveyor belt) and *W. Fuels-Utah Inc.*, 19 FMSHRC at 994-96 (concerning slippage and sequence switches and dry chemical powder fire suppression system on belt conveyor and the failure of both to stop the belt at the time of an incident resulting in a fire).

for on-shift inspections of belt haulageways. The requirements that a preshift or on-shift examination take place in active workings or in working sections apply only to general preshift and on-shift inspections under section 303(d)(1) and clearly do not apply to on-shift belt haulageway inspections required under section 75.362(b).⁷

For the foregoing reasons, we would reverse the judge's decision and remand for assessment of penalty consistent with the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i).

Mary Lu Jordan, Chairman

Robert H. Beatty, Commissioner

⁷ The judge's reliance on *Jones & Laughlin Steel Corp.*, 5 FMSHRC 1209 (July 1983), remanded 8 FMSHRC 1058 (July 1986) is also misplaced. 21 FMSHRC at 225. First, *Jones & Laughlin* involved *preshift* inspections of *coal-carrying belts* under the first sentence of section 303(d)(1) and an identical implementing regulation, and not *on-shift* inspections of *belt haulageways* under section 75.362(b). 5 FMSHRC at 1209-10. Moreover, as noted above, the regulation at issue does not contain an explicit requirement for an active working, as did the regulation in *Jones & Laughlin*. Finally, in *Jones & Laughlin*, the Commission noted that despite the exemption of coal-carrying belts from preshift inspections under section 303(d)(1), coal-carrying belts were subject to on-shift inspections after the beginning of each coal-producing shift. 5 FMSHRC at 1212-14; 8 FMSHRC at 1063 n.7.

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