ORAL ARGUMENT SCHEDULED FOR
FEBRUARY 18, 2005

UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

No. 04-1126

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

Petitioner,

v.

CANNELTON INDUSTRIES, INC.,

and

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION FOR REVIEW OF A DECISION
OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

REPLY BRIEF FOR THE SECRETARY OF LABOR

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Cannelton	Cannelton Industries, Inc.
Commission	Federal Mine Safety and Health Review Commission
J.A.	Joint Appendix
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Secretary	Secretary of Labor
Tr.	Transcript

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the bound Addendum to the Secretary's opening brief beginning at page A-1.

SUMMARY OF ARGUMENT

The plain language, the safety purpose, and the preamble discussion of 30 C.F.R. § 75.360 all indicate that the "pumpers' exception" set forth in Section 75.360 is limited to areas where pumpers are scheduled to work or travel. Nothing identified in Cannelton's brief precludes that interpretation or compels the Commission's and Cannelton's alternative interpretations. On the contrary, Cannelton's interpretation impermissibly attempts to read into Section 75.360 an additional exception, i.e., an exception Section 75.360 does not contain, and to substitute Cannelton's safety judgment for the Secretary's.

Cannelton's contention that it did not have adequate notice of the Secretary's interpretation of Section 75.360 is unconvincing. Cannelton had adequate notice, and indeed actual notice, of the Secretary's interpretation. Cannelton simply disagreed with the Secretary's interpretation.

ARGUMENT

I.

CANNELTON IDENTIFIES NOTHING THAT PRECLUDES THE SECRETARY'S INTERPRETATION OF 30 C.F.R. § 75.360 OR COMPELS THE COMMISSION'S OR CANNELTON'S INTERPRETATIONS

Section 75.360(a)(1) states:

> 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. * * *.

30 C.F.R. § 75.360(a)(1) (emphasis supplied). Section 75.360(a)(2) states:

> Preshift examination 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 the 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. * * *.

30 C.F.R. § 75.360(a)(2) (emphasis supplied). The quoted language plainly indicates that the preshift examination referred to in Section 75.360(a)(1), and described in detail in

Section 75.360(b), is required in all of the described areas with one exception -- and that that exception is limited to areas where pumpers are scheduled to work or travel. That reading is corroborated by the structure and wording of Section 75.360 as a whole, the safety-promoting purpose of Section 75.360, and the preamble discussion of Section 75.360. See Secretary's Opening Brief at 19-33. Nothing identified in Cannelton's brief precludes the Secretary's interpretation or compels the Commission's interpretation -- which is that, as a general matter, a "pumpers' examination" may be substituted for a preshift examination in areas beyond where pumpers are scheduled to work or travel.

In addition to arguing in support of the Commission's interpretation, Cannelton advances a slightly different interpretation -- that a "pumpers' examination" may be substituted for a preshift examination in areas beyond where pumpers are scheduled to work or travel when, as here, only pumpers are scheduled to enter the mine. Cannelton Brief at 13-20. It is well established, however, that when the drafter of a scheme explicitly included an exception to a requirement, a reviewing court should be reluctant to read into the scheme an additional exception. In re England, 375 F.3d 1169, 1177-78 (D.C. Cir. 2004), and cases there cited. In drafting

Section 75.360, the Secretary explicitly included one exception to the preshift examination requirement -- the exception that a "pumpers' examination" may be substituted for a preshift examination in areas where pumpers are scheduled to work or travel. Nothing in the regulatory language, and nothing in Cannelton's brief, supports the assertion that Section 75.360 should be read as including the additional exception that a "pumpers' exception" may be substituted for a preshift examination when only pumpers are scheduled to enter the mine.[1]

Cannelton argues that the Secretary's interpretation is impermissible because it reduces rather than improves safety. Cannelton Brief at 19-20. The Secretary, however, has concluded that, on balance, miner safety is better promoted by sending both pumpers and preshift examiners underground than by sending only pumpers underground. The Secretary has so concluded because she has made a judgment that, on balance, it is safer to have a preshift examiner attentively and thoroughly examine areas beyond where the pumpers are scheduled to be before the pumpers perform their functions than it is to have the pumpers perform their functions with no protection against conditions

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[1] In addition to violating the interpretive principle set forth above, Cannelton's assertion violates the principle that when a remedial statute or regulation contains an exception, the exception should be interpreted narrowly. See Secretary's Opening Brief at 19.

that may originate in areas beyond where they are but result in a hazard where they are. See Secretary's Opening Brief at 27 n.15. Under the Mine Act, the balancing of safety considerations and the choosing among safety alternatives is entrusted to the Secretary and not to the Commission or the courts. Consolidation Coal Co. v. FMSHRC, 136 F.3d 819, 823 (D.C. Cir. 1998); Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 463-64 (D.C. Cir. 1994). See also Oklahoma v. Arkansas, 503 U.S. 91, 112-14 (1992) (under the Clean Water Act, policy choices are entrusted to EPA).[2] The safety choice made by the Secretary here is, at the least, permissible -- that is, it does not produce a result the Secretary could not have intended when she drafted Section 75.360. See Detweiler v. Pena, 38 F.3d 591, 595-96 (D.C. Cir. 1994) (disagreement with certain reasoning does not establish that the result would be absurd, and therefore justify departure from a provision's plain meaning).

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[2] It should be noted that, in this case, the Commission majority did not find that the Secretary's interpretation reduces safety. On the contrary, the Commission majority stated that it was "sympathetic" to the Secretary's safety concerns, and rejected the Secretary's interpretation on the ground that it was precluded by the plain meaning of Section 75.360. 26 FMSHRC at 151-54 (J.A. 87-90).

II.

CANNELTON HAD ADEQUATE NOTICE, AND INDEED ACTUAL NOTICE, OF THE SECRETARY'S INTERPRETATION

Cannelton contends that the Secretary may not enforce Section 75.360 in accordance with her interpretation of it because Cannelton did not have adequate notice of that interpretation. Cannelton Brief at 21-23. Cannelton's contention is unconvincing. Cannelton had adequate notice, and indeed actual notice, of the Secretary's interpretation.

The courts have held that to satisfy constitutional due process requirements, regulations must be sufficiently specific to give regulated parties adequate notice of the conduct they require or prohibit. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972); Freeman United Coal Mining Co. v. FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997). The courts have also recognized, however, that "specific regulations cannot begin to cover all of the infinite variety of * * * conditions which employees must face," and that "[b]y requiring regulations to be too specific [courts] would be opening up large loopholes allowing conduct which should be regulated to escape regulation." Freeman United, 108 F.3d at 362 (citation and internal quotation marks omitted). Accord Grayned, 408 U.S. at 110 (indicating that regulations need not achieve "mathematical certainty" or "meticulous specificity," and may instead embody "flexibility

and reasonable breadth * * *") (citation and internal quotation marks omitted). Accordingly, the courts have found regulations to satisfy due process as long as they are sufficiently specific that a reasonably prudent person, familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve, would have fair warning of what the regulations require. Grayned, 408 U.S. at 108-10; Freeman United, 108 F.3d at 362.

The Commission has applied a similar test in evaluating the specificity of Mine Act standards and, recognizing that safety standards may have to be drafted in general terms to be broadly adaptable to the myriad of circumstances which arise in mining, has held that a safety standard is not unenforceably vague as long as a reasonably prudent person, familiar with the realities of the mining industry and the protective purpose of the standard, would recognize the hazardous condition the standard seeks to prevent. Ideal Cement Co., 11 FMSHRC 2409, 2415-16 (1990). See also Walker Stone Co. v. Secretary of Labor, 156 F.3d 1076, 1083-84 (10th Cir. 1998); Stillwater Mining Co. v. FMSHRC, 142 F.3d 1179, 1182 (9th Cir. 1998).

In this case, Cannelton had adequate notice of what Section 75.360 required. Any reasonably prudent mine operator, familiar with the wording and the purpose of Section 75.360, would have

recognized that, before sending pumpers underground, it was required to conduct a preshift examination of areas described in Section 75.360(b) and located beyond where the pumpers were scheduled to work or travel -- including areas containing energized trolley wires capable of triggering a fire or explosion that could injure or kill the pumpers. See Freeman United, 108 F.3d at 362 (holding that the plain language of the standard provided adequate notice of what it required in the circumstances).

In addition, Cannelton had actual notice of the Secretary's interpretation of Section 75.360 in this case. By definition, actual notice satisfies the requirement of adequate notice. See Darrell Andrews Trucking, Inc. v. FMCSA, 296 F.3d 1120, 1130-32 (D.C. Cir. 2002); General Electric Co. v. EPA, 53 F.3d 1324, 1329 (D.C. Cir. 1995). See also Target Industries, Inc., 23 FMSHRC 945, 954 (2001); Consolidation Coal Co., 18 FMSHRC 1903, 1907 (1996).

Cannelton acknowledges that its "[m]anagement personnel contacted MSHA on or about May 6 and 7[, 2002] to inform the agency that the mine had been idled and to confirm the company's reading of the regulations about the type of examinations required under these circumstances." Cannelton Brief at 22 n.5. Cannelton fails to acknowledge, however, that, in response, MSHA

informed Cannelton that its reading of Section 75.360 was incorrect and that it was required to conduct a preshift examination in the circumstances described. MSHA Ventilation Specialist Jerry Richards testified without contradiction that he was contacted by Cannelton Safety Manager Jack Hatfield, Jr. Hatfield "wanted to know what examinations I thought would be required. And I told him that if he done any work, that he would have to do all the examinations, the preshift and the weekly." Tr. 307-08, 434 (J.A. 48, 67). Hatfield replied, "Well, I don't agree." Tr. 309 (J.A. 48). See also Tr. 460-61 (J.A. 73) (Hatfield's testimony). Two or three days later, Richards also discussed the matter with Cannelton Safety Engineer James Nottingham. Nottingham "basically asked the same question as Mr. Hatfield, and he went through these people are all certified and [were] just going to a pump * * * and I told him the same thing, if you turn the breakers on, you change these pumps out * * *, you're doing work. You got to do all the examinations." Tr. 310-11 (J.A. 49).

In sum, Cannelton knew perfectly well what the Secretary's interpretation was; it simply disagreed with that interpretation. When a regulation's language and agency warnings "fairly and clearly" tell a party what it is required to do, disagreement with the agency's interpretation, however

"deeply felt," does not demonstrate unconstitutional vagueness. United States v. Thomas, 864 F.2d 188, 199-200 (D.C. Cir. 1988).

CONCLUSION

For the reasons stated above and in the Secretary's opening brief, the Secretary requests that the Court reverse the decision of the Commission finding that there was no violation of 30 C.F.R. § 75.360(a)(1) and remand the case to determine whether the violation was "significant and substantial" and to assess an appropriate civil penalty.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(B), (C) and D.C. Cir. Rules 28(d) and 32(a)(2), I hereby certify that this Reply Brief for the Secretary of Labor contains 1,983 words as determined by Word, the processing system used to prepare the brief.

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CERTIFICATE OF SERVICE

I certify that two copies of the foregoing Reply Brief for the Secretary of Labor was mailed this 14th day of December, 2004, to:

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