

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

BRIEF FOR THE SECRETARY OF LABOR

HOWARD M. RADZELY
Solicitor of Labor

JERALD S. FEINGOLD
Attorney

EDWARD P. CLAIR
Associate Solicitor

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard
Suite 2200

W. CHRISTIAN SCHUMANN
Counsel, Appellate
Litigation

Arlington, Virginia 22209-2296
Telephone: (202) 693-9335

CERTIFICATE AS TO PARTIES, RULINGS,
AND RELATED CASES

(A) Parties and Amici. The parties who appeared before the Federal Mine Safety and Health Review Commission ("the Commission") are the Secretary of Labor and Cannelton Industries, Inc. The parties in this Court are the Secretary of Labor, Cannelton Industries, Inc., and the Commission. No amici appeared before the Commission, and there are no amici in this Court.

(B) Rulings Under Review. The Secretary of Labor seeks review of the decision of the Commission issued on March 12, 2004, in Cannelton Industries, Inc., FMSHRC Docket Nos. WEVA 2002-111-R and WEVA 2002-112-R, and reported at 26 FMSHRC 146 (March 2004).

(C) Related Cases. This case was not previously before this Court or any other court. Counsel is unaware of any related cases pending in this Court or any other court.

TABLE OF CONTENTS

| | <u>Page</u> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES | |
| TABLE OF CONTENTS | i |
| TABLE OF AUTHORITIES | iii |
| GLOSSARY OF ABBREVIATIONS AND ACRONYMS | vii |
| STATEMENT REGARDING JURISDICTION | 1 |
| STATEMENT OF THE ISSUE PRESENTED | 2 |
| PERTINENT STATUTES AND REGULATIONS | 2 |
| STATEMENT OF THE CASE | 2 |
| A. Nature of the Case | 2 |
| B. Course of Proceedings and Disposition Below | 6 |
| STATEMENT OF FACTS | 10 |
| SUMMARY OF ARGUMENT | 12 |
| ARGUMENT | |
| THE COMMISSION ERRED IN HOLDING THAT THE MANDATORY SAFETY STANDARDS AT 30 C.F.R. §§ 75.360(a)(1), 75.360(a)(2), AND 75.360(b) PERMIT A "PUMPERS' EXAMINATION" TO BE SUBSTITUTED FOR A PRESHIFT EXAMINATION OF AREAS OF THE MINE CONTAINING ENERGIZED TROLLEY WIRES AND LOCATED BEYOND WHERE PUMPERS WORK OR TRAVEL | 15 |
| A. Introduction | 15 |
| B. Applicable Principles and Standard of Review | 17 |
| C. The Commission Ignored the Plain Meaning of the Applicable Standards | 19 |

D. In Any Event, the Secretary's Reading of the
Applicable Standards Is Entitled to Acceptance
Because It Is Reasonable 33

CONCLUSION 34

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

| <u>CASES</u> | <u>Page</u> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------|
| <u>Akzo Nobel Salt, Inc. v. FMSHRC,</u> 212 F.3d 1301 (D.C. Cir. 2000) | 18 |
| <u>Bailey v. United States,</u> 516 U.S. 137 (1995) | 29 |
| <u>Bell Atlantic Telephone Companies v.</u> <u>FCC,</u> 131 F.3d 1044 (D.C. Cir. 1997) | 17, 29 |
| <u>Brennan v. OSHRC,</u> 491 F.2d 1340 (2d Cir. 1974) | 19 |
| <u>City of Tacoma, Washington v. FERC,</u> 331 F.3d 106 (D.C. Cir. 2003) | 17 |
| <u>Chao v. Double JJ Resort Ranch,</u> 375 F.3d 393 (6th Cir. 2004) | 19 |
| * <u>Cold Spring Granite Co. v. FMSHRC,</u> 98 F.3d 1376 (D.C. Cir. 1996) | 18 |
| <u>Donovan on behalf of Anderson v.</u> <u>Stafford Construction Co.,</u> 732 F.2d 954 (D.C. Cir. 1984) | 19 |
| * <u>Energy West Mining Co. v. FMSHRC,</u> 40 F.3d 457 (D.C. Cir. 1994) | 18 |
| <u>ExxonMobil Gas Marketing Co. v. FERC,</u> 297 F.3d 1071 (D.C. Cir. 2002), <u>cert. denied,</u> ___ U.S. ___, 124 S.Ct. 48, 157 L.Ed.2d 249 (2003) | 32 |
| <u>Exportal LTDA v. United States,</u> 902 F.2d 45 (D.C. Cir. 1990) | 17 |
| * <u>Halverson v. Slater,</u> 129 F.3d 180 (D.C. Cir. 1997) | 17 |

* Authorities upon which we chiefly rely are marked with asterisks.

| | |
|--------------------------------------------------------------------------------------------------------------------------------------------|--------|
| <u>Independent Bankers Ass'n of America v. Farm Credit Administration,</u> 164 F.3d 661 (D.C. Cir. 1999) | 32 |
| <u>Local Union 7107, UMWA v. Clinchfield Coal Co.,</u> 124 F.3d 639 (4th Cir. 1997), <u>cert. denied,</u> 523 U.S. 1006 (1998) | 19 |
| * <u>Martin v. OSHRC,</u> 499 U.S. 144 (1991) | 18 |
| <u>Motion Picture Ass'n of America, Inc. v. FCC,</u> 309 F.3d 796 (D.C. Cir. 2002) | 30 |
| <u>Natural Resources Defense Council, Inc. v. EPA,</u> 907 F.2d 1146 (D.C. Cir. 1990) | 27 |
| <u>O'Toole v. United States,</u> 295 F.3d 1029 (9th Cir. 2002) | 19 |
| <u>Pfizer, Inc. v. Heckler,</u> 735 F.2d 1502 (D.C. Cir. 1984) | 17 |
| <u>RAG Cumberland Resources LP v. FMSHRC,</u> 272 F.3d 590 (D.C. Cir. 2001) | 18 |
| * <u>Russello v. United States,</u> 464 U.S. 16 (1983) | 23 |
| <u>Secretary of Labor on behalf of Bushnell v. Cannelton Industries,</u> 867 F.2d 1432 (D.C. Cir. 1989) | 17, 19 |
| * <u>Secretary of Labor v. Excel Mining, LLC,</u> 334 F.3d 1 (D.C. Cir. 2003) | 18 |
| * <u>Secretary of Labor v. Ohio Valley Coal Co.,</u> 359 F.3d 531 (D.C. Cir. 2004) | 18, 33 |
| <u>Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc.,</u> 80 F.3d 110 (4th Cir. 1996) | 4 |

* Authorities upon which we chiefly rely are marked with asterisks.

| | |
|----------------------------------------------------------------------------------------------------------------|--------|
| <u>Thunder Basin Coal Co. v. Reich,</u> 510 U.S. 200 (1994) | 4 |
| <u>Udall v. Tallman,</u> 380 U.S. 1 (1965) | 17, 18 |
| <u>United States v. Campos,</u> 217 F.3d 707 (9th Cir.), <u>cert. denied</u> , 531 U.S. 952 (2000) | 33 |
| <u>U.S. Telecom Ass'n v. FCC,</u> 227 F.3d 450 (D.C. Cir. 2000) | 22 |

STATUTES AND CODES

| | |
|-------------------------------------------------------------------------------------|-------------------|
| Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, <u>et seq.</u> (1977) | |
| Section 2, 30 U.S.C. § 801 | 2 |
| Section 2(c), 30 U.S.C. § 801(c) | 2 |
| *Section 101, 30 U.S.C. § 811 | 3 |
| Section 101(a)(9), 30 U.S.C. § 811(a)(9) | 26 |
| Section 103, 30 U.S.C. § 813 | 3 |
| Section 103(a), 30 U.S.C. § 813(a) | 3 |
| Section 104, 30 U.S.C. § 814 | 3 |
| Section 104(a), 30 U.S.C. § 814(a) | 3 |
| Section 104(d), 30 U.S.C. § 814(d) | 3 |
| Section 105, 30 U.S.C. § 815 | 4 |
| Section 105(a), 30 U.S.C. § 815(a) | 3 |
| Section 105(d), 30 U.S.C. § 815(d) | 1 |
| Section 106, 30 U.S.C. § 816 | 1 |
| Section 106(a), 30 U.S.C. § 816(a) | 4 |
| Section 106(b), 30 U.S.C. § 816(b) | 1, 4 |
| Section 110(a), 30 U.S.C. § 820(a) | 3 |
| Section 113, 30 U.S.C. § 823 | 4 |
| Section 113(d), 30 U.S.C. § 823(d) | 1 |
| Section 113(d)(2)(A), 30 U.S.C. § 823(d)(2)(A) | 1 |
| 30 C.F.R. Part 75 | 15 |
| 30 C.F.R. § 75.2 | 15 |
| *30 C.F.R. § 75.360 | 14, <u>passim</u> |

* Authorities upon which we chiefly rely are marked with asterisks.

| | |
|-----------------------------------|------------------|
| * 30 C.F.R. § 75.360(a) (1) | 2, <u>passim</u> |
| * 30 C.F.R. § 75.360(a) (2) | 2, <u>passim</u> |
| * 30 C.F.R. § 75.360(b) | 4, <u>passim</u> |
| 30 C.F.R. § 75.360(b) (1) | 5, 21 |
| 30 C.F.R. § 75.360(b) (2) | 5, 21 |
| 30 C.F.R. § 75.360(b) (3) | 5, 21 |
| 30 C.F.R. § 75.360(b) (4) | 5, 22 |
| 30 C.F.R. § 75.360(b) (5) | 5, 22 |
| 30 C.F.R. § 75.360(b) (6) | 5, 22 |
| * 30 C.F.R. § 75.360(b) (7) | 5, 9, 12, 22, 23 |
| 30 C.F.R. § 75.360(b) (8) | 5, 21 |
| 30 C.F.R. § 75.360(b) (9) | 5, 22, 23 |
| 30 C.F.R. § 75.360(b) (10) | 5, 21 |
| 30 C.F.R. § 75.361 | 30 |
| 30 C.F.R. § 75.364 | 10 |
| 30 C.F.R. § 75.364(b) | 12 |
| 30 C.F.R. § 100.3 | 3 |

FEDERAL REGISTER

| | |
|--------------------------------------------|-------------------|
| * 61 Fed. Reg. 9764 (March 11, 1996) | 16, <u>passim</u> |
|--------------------------------------------|-------------------|

* Authorities upon which we chiefly rely are marked with asterisks.

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 |

STATEMENT REGARDING JURISDICTION

The Court has jurisdiction over this proceeding for review of a decision of the Federal Mine Safety and Health Review Commission ("the Commission") under Section 106 of the Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act"), 30 U.S.C. § 816. The Commission had jurisdiction over the matter under Sections 105(d) and 113(d) of the Mine Act, 30 U.S.C. §§ 815(d) and 823(d).

The decision of the administrative law judge in this case was issued on July 10, 2002. Pursuant to Section 113(d)(2)(A) of the Mine Act, 30 U.S.C. § 823(d)(2)(A), the Secretary of Labor ("the Secretary") filed a timely petition for discretionary review of the judge's decision with the Commission on August 9, 2002. The Commission granted the petition for discretionary review on August 15, 2002. The Commission issued its decision on March 12, 2004. The Secretary filed a timely petition for review of the Commission's decision with the Court on April 12, 2004.

The Secretary has standing to appeal the Commission's decision under Section 106(b) of the Mine Act, 30 U.S.C. § 816(b). The Commission's decision represents a final Commission order that disposes of all of the parties' claims.

STATEMENT OF THE ISSUE PRESENTED

Whether the Commission erred in holding that the mandatory safety standards at 30 C.F.R. §§ 75.360(a)(1), 75.360(a)(2), and 75.360(b) permit a "pumpers' examination" to be substituted for a preshift examination of areas of the mine containing energized trolley wires and located beyond where pumpers work or travel.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the bound Addendum to this brief beginning at page A-1.

STATEMENT OF THE CASE

A. Nature of the Case

The Mine Act was enacted to improve safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that there was "an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's * * * mines * * * in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines[.]" 30 U.S.C. § 801(c).

Sections 101 and 103 of the Mine Act authorize the Secretary, acting through the Mine Safety and Health Administration ("MSHA"), to promulgate mandatory safety and health standards for the Nation's mines and to conduct regular

inspections of those mines. 30 U.S.C. §§ 811 and 813. MSHA inspectors regularly inspect mines to assure compliance with the Mine Act and MSHA standards. 30 U.S.C. § 813(a).

Section 104 of the Mine Act provides for the issuance of citations and orders for violations of the Mine Act or MSHA standards. 30 U.S.C. § 814. If an MSHA inspector discovers a violation of the Mine Act or a standard during an inspection or an investigation, he must issue a citation or an order pursuant to Section 104(a) or 104(d) of the Mine Act. 30 U.S.C. §§ 814(a) and 814(d). If the inspector finds that the violation is "significant and substantial" or the result of the mine operator's "unwarrantable failure to comply," he must include such findings in the citation. 30 U.S.C. § 814(d).¹ Sections 105(a) and 110(a) of the Mine Act provide for the proposal and assessment of civil penalties for violations of the Mine Act or MSHA standards. 30 U.S.C. §§ 815(a) and 820(a).

The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings and appellate review in cases arising

¹ A violation is "significant and substantial" if it is "of such nature as could significantly and substantially contribute to the cause and effect of a * * * mine safety or health hazard * * *." 30 U.S.C. § 814(d). If a violation is "significant and substantial," it may be subject to proposal of an increased civil penalty (see 30 C.F.R. § 100.3) and may, if followed by similar violations, lead to issuance of a withdrawal order. 30 U.S.C. § 814(d).

under the Mine Act. 30 U.S.C. § 823. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994); Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc., 80 F.3d 110, 113-14 (4th Cir. 1996). A mine operator may contest a citation, order, or proposed civil penalty before a Commission administrative law judge. 30 U.S.C. §§ 815 and 823. Any person adversely affected or aggrieved by an administrative law judge's decision may seek review by filing a petition for discretionary review with the Commission. 30 U.S.C. § 823. Whether to direct review is committed to the Commission's discretion. Ibid. Any person adversely affected or aggrieved by a Commission decision, including the Secretary, may obtain review by filing a petition for review with an appropriate court of appeals. 30 U.S.C. § 816(a) and (b).

The mandatory safety standards at issue in this case are 30 C.F.R. §§ 75.360(a)(1), 75.360(a)(2), and 75.360(b).

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). Section 75.360(a)(2) states:

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 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). The subsections of Section 75.360(b) specifically describe the areas of the mine in which a preshift examination must be conducted. Some of the areas that must be examined are described as areas in which miners are scheduled to work or travel (see Sections 75.360(b)(1)-(b)(3), (b)(8), and (b)(10)); others are not (see Sections 75.360(b)(4)-(b)(7) and (b)(9)).² Section 75.360(b)(7) states that an examination must be conducted in "[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).

² For example, Section 75.360(b)(1) states that an examination must be conducted in roadways, travelways, and track haulageways "where persons are scheduled * * * to work or travel" during the oncoming shift. Section 75.360(b)(4) states that an examination must be conducted in specified intake air course areas if the intake air is used to ventilate working sections "where anyone is scheduled to work" during the oncoming shift. Section 75.360(b)(9) states that an examination must be conducted of specified electrical installations if the installations will be energized during the oncoming shift.

The issue in this case is whether the "pumpers' exception" to the preshift requirement set forth in Section 75.360(a)(2) relieves the operator from having to conduct a preshift examination under Section 75.360(a)(1) of areas where miners who conduct maintenance on remotely located pumps ("pumpers") are not scheduled to work or travel but which contain energized trolley wires.

B. Course of Proceedings and Disposition Below

This case arose when MSHA issued Cannelton Industries, Inc. ("Cannelton") a citation for violating a mandatory safety standard requiring that a preshift examination be conducted before miners work or travel underground. Ex. G-1 (J.A. 5). The operator contested the citation, and the case was assigned to an administrative law judge of the Commission.

In his decision of July 10, 2002, the judge vacated the citation alleging that Cannelton violated 30 C.F.R. § 75.360(a)(1) when its pumpers performed their work without the mine having been subjected to a preshift examination. 24 FMSHRC at 708-10 (J.A. 77-79). The judge concluded that, under the "pumpers' exception" set forth in 30 C.F.R. § 75.360(a)(2), Cannelton was not required to conduct a preshift examination of the mine as long as the pumpers conducted a "pumpers' examination" of the area where they worked and traveled.

24 FMSHRC at 709-10 (J.A. 78-79). Noting that "the pumper is the only [person] going into the mine" and that Section 75.360(a)(2) requires the pumper to examine "the area where he travels and works," and finding that "from a practical standpoint, it makes little sense to double the exposure to possible hazards in the mine by requiring another examiner to [conduct a] preshift [examination of] those areas where the pumper is going to travel and work," the judge concluded that the "pumpers' exception" provides the same "safeguards that a preshift examination would provide." 24 FMSHRC at 709-10 (J.A. 78-79). On that basis, the judge vacated the citation. The Secretary appealed the judge's decision to the Commission.

In its decision of March 12, 2004, the Commission, by a three-member majority,³ affirmed the decision of the administrative law judge that the "pumpers' exception" to the preshift examination requirement applies when only certified pumpers enter the mine and conduct examinations where they work or travel, regardless of the fact that there may be unexamined hazards originating in areas of the mine where the pumpers do not work or travel. 26 FMSHRC 146 (J.A. 82). The majority held that the "plain meaning" of 30 C.F.R. § 75.360(a)(2) is that the

³ One member of the five-member Commission recused himself. 26 FMSHRC at 146 n.1 (J.A. 82).

preshift examinations required under 30 C.F.R. § 75.360(b) "do not apply to certified pumpers" because certified pumpers "expressly do not have to conduct preshift examinations." 26 FMSHRC at 151-52 (J.A. 87-88).

In addition, the majority quoted the sentence in 30 C.F.R. § 75.360(a)(1) that 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." (Emphasis by the Commission majority). The majority reasoned that that sentence means that "a certified pumper does not need a preshift examination to enter or remain in the mine." 26 FMSHRC at 152 (J.A. 88).

Finally, the majority, quoting language from the preamble to the rule, observed that "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." 26 FMSHRC at 152 (J.A. 88).

In a dissenting opinion, Commissioner Jordan stated that "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." 26 FMSHRC

at 156-57 (J.A. 92-93).⁴ Commissioner Jordan concluded that the requirement of a preshift examination of areas containing energized trolley wires set forth in 30 C.F.R. § 75.360(b)(7) remained in effect in the areas where the pumpers were not scheduled to work or travel because that requirement (unlike several other preshift examination requirements under Section 75.360(b)) applies regardless of whether miners are scheduled to work or travel in the area in question. 26 FMSHRC at 157 (J.A. 93).

Commissioner Jordan also dissented from the majority's interpretation of the quoted language from 30 C.F.R. § 75.360(a)(1). She stated that the majority's interpretation "creates a wholesale exception to the preshift requirement as it applies to certified mine examiners" and that, if that interpretation were accurate, "there would be no need for a pumpers' exception." 26 FMSHRC at 158-59 (J.A. 94-95). She concluded that the quoted language of Section 75.360(a)(1) "simply permits certified examiners to go underground to perform their preshift exams." 26 FMSHRC at 159 (J.A. 95).

⁴ Commissioner Jordan stated that, even if the language of the "pumpers' exception" were ambiguous -- and she found that it is not -- "the Commission should defer to the Secretary's reasonable interpretation of the rule." 26 FMSHRC at 160 (J.A. 96).

Finally, noting the record evidence of the hazards inherent in energized trolley wires and the safety concerns underlying the Secretary's preshift requirements, Commissioner Jordan found that "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." 26 FMSHRC at 159-60 (J.A. 95-96).

On March 22, 2004, the Secretary filed a petition for reconsideration of the Commission's decision. The Commission majority denied the petition for reconsideration on April 2, 2004. On April 12, 2004, the Secretary filed a petition for review of the Commission's decision with this Court.

STATEMENT OF FACTS

Cannelton operates the Shadrick (a/k/a Stockton) Mine, an underground coal mine in West Virginia. Tr. 438 (J.A. 68). On May 3, 2002, Cannelton idled the mine because its coal stockpiles had grown too large, placed the mine in a non-producing status, and laid off all rank-and-file miners.

Tr. 422 (J.A. 65). At that time, Cannelton stopped conducting preshift and weekly examinations⁵ at the mine.⁶

⁵ "Weekly examinations" are required of unsealed worked-out areas of a mine and of its bleeder (return ventilation) system. 30 C.F.R. § 75.364.

To keep the mine from flooding, approximately 70 to 80 electric pumps were kept running and maintained. Tr. 107 (J.A. 24). The mine's electrical system, including a network of 300-volt trolley wires running a distance of three to four miles throughout the mine, was kept energized. Tr. 43, 44, 46, 88, 256-57, 453-54 (J.A. 13, 14, 20, 39, 71).⁷

On May 6, 2002, Cannelton began sending pumpers⁸ (all of whom were certified foremen and electricians) underground to examine the pumps and the power centers (including some power centers not associated with any pumps). Tr. 56-60, 63-64, 146-47 (J.A. 15-16, 17, 30). On May 13 and 14, Cannelton's safety manager, Jack Hatfield, Jr., sent two pumpers, Jeffrey Styers and Dan Baker (both of whom were certified foremen and electricians) into the mine; neither preshift nor weekly examinations were conducted by those pumpers or by any other miner before the pumpers engaged in pumper activities. Tr. 35, 38, 41, 48, 106, 340, 342-43, 349-50, 443-44 (J.A. 11, 12, 1424,

⁶ The mine was of such a size that it typically took three certified examiners on non-producing shifts to conduct a complete preshift examination. Tr. 90, 327-28, 414 (J.A. 21, 52, 63).

⁷ The working sections were deenergized and the face equipment tagged out when the mine was idled. Tr. 108, 452-53 (J.A. 24, 71).

⁸ A "pumper" maintains and repairs the pumps and assures that they are working to prevent flooding in the mine.

54, 55, 56-57, 69). The pumpers were instructed to look for hazardous conditions in areas where they traveled. Tr. 445 (J.A. 69). Areas containing energized trolley wires beyond where the pumpers were scheduled to work or travel were not examined either before the pumpers were sent underground or during their work or travel. Tr. 375-76, 399, 445 (J.A. 59, 62, 69).

On May 15, 2002, MSHA issued Cannelton two Section 104(a) citations alleging "significant and substantial" violations of 30 C.F.R. §§ 75.360(a)(1) (failure to perform a preshift examination) and 75.364(b) (failure to perform a weekly examination) at the mine. Tr. 165-66 (J.A. 32-33); Exs. G-1, G-2 (J.A. 5, 6).⁹

SUMMARY OF ARGUMENT

The issue in this case is whether MSHA properly cited Cannelton under Section 30 C.F.R. § 75.360(a)(1) for failing to conduct a preshift examination of the areas of the mine containing energized trolley wires in accordance with 30 C.F.R. § 75.360(b)(7) before allowing pumpers to proceed underground.

The plain meaning of the "pumpers' exception" set forth in Section 75.360(a)(2), read both individually and in conjunction

⁹ The judge affirmed the "weekly examination" violation under Section 75.364(b). The judge's findings regarding that violation were not appealed to the Commission by Cannelton and are not before the Court.

with related standards, compels the conclusion that although a "pumpers' examination" may be substituted for a preshift examination in areas where pumpers are scheduled to work or travel, the "pumpers' exception" does not relieve the mine operator of the obligation to conduct a complete preshift examination of other areas of the mine before pumpers enter the mine. The plain meaning reading of the standard is supported by the discussion of the "pumpers' exception" in the preamble to Section 75.360, which also indicates that the exception is limited to areas where pumpers are scheduled to work or travel. Fundamental principles of mine safety also support the plain meaning reading of the standard because that reading protects pumpers from hazards, such as fires triggered by energized trolley wires, that can originate in areas beyond where the pumpers are scheduled to work or travel but affect the pumpers where they work and travel.

The Commission majority erred in its "plain reading" of the "pumpers' exception." The majority failed to appreciate that the fact that certified pumpers only have to examine those areas where they work or travel does not mean that someone else does not have to examine other areas of the mine for certain specified hazards that can affect the pumpers where they work and travel.

The Commission majority also erred in focusing on language in Section 75.360(a)(1) that permits certified examiners to enter the mine in order to conduct a preshift examination prior to a preshift examination having been conducted. The majority read the language out of context and in a manner that is both illogical and safety-defeating.

Finally, the Commission majority misread the preamble to Section 75.360 to support its reading of the "pumpers' exception" to the preshift requirement. The majority ignored the language in the preamble setting forth the geographical limitation on the "pumpers' exception" as it ignored the same language in Section 75.360(a)(2) itself.

In any event, even if the Secretary's plain meaning reading of the "pumpers' exception" is not accepted and the controlling standards are determined to be ambiguous, the Secretary's interpretation should be accepted because it is an eminently reasonable and safety-promoting interpretation.

ARGUMENT

THE COMMISSION ERRED IN HOLDING THAT THE MANDATORY SAFETY STANDARDS AT 30 C.F.R. §§ 75.360(a)(1), 75.360(a)(2), AND 75.360(b) PERMIT A "PUMPERS' EXAMINATION" TO BE SUBSTITUTED FOR A PRESHIFT EXAMINATION OF AREAS OF THE MINE CONTAINING ENERGIZED TROLLEY WIRES AND LOCATED BEYOND WHERE PUMPERS WORK OR TRAVEL

A. Introduction

The issue in this case is whether a preshift examination must be conducted in areas of an underground coal mine in which pumpers are not scheduled to work or travel but which contain energized trolley wires -- areas that normally must be examined before miners may enter the mine regardless of whether miners are scheduled to work or travel in those areas. The "pumpers' exception" is intended primarily to free preshift examiners (typically, section foremen) during periods of active mining from having to examine certain remote areas of the mine in which certified pumpers¹⁰ are scheduled to work or travel but which, were it not for the presence of the pumpers, would not need to be examined in the course of a preshift examination.

Tr. 318-19, 331-32 (J.A. 50, 53). As dissenting Commissioner

¹⁰ A "certified person" is any person who is certified by the state in which the mine is located to perform the duties prescribed in 30 C.F.R. Part 75, including the duty to conduct preshift examinations. See 30 C.F.R. § 75.2. A "certified pumper" is simply a pumper who also happens to be a "certified person."

Jordan recognized, the rationale of the "pumpers' exception" is to enable certified pumpers to conduct examinations in the remote areas where they are scheduled to work or travel instead of diverting the preshift examiner from his many safety responsibilities to conduct examinations in those areas before the pumpers can begin their work. See 26 FMSHRC at 160 (J.A. 96); 61 Fed. Reg. 9764, 9792 (March 11, 1996). In a typical scenario, the question of whether remote energized trolley wires would need to be examined by the pumper would not arise; the trolley wires would already have been examined by the preshift examiner during the course of his preshift examination.

The circumstances of this case differ from the typical scenario. Because the mine in this case had been idled, no preshift examination of the mine had been conducted before the pumpers entered the mine. In failing to appreciate the need for the energized trolley wires to be examined before the pumpers could perform work in the mine under these circumstances, the Commission majority failed to recognize that the "pumpers' exception" set forth in 30 C.F.R. § 75.360(a)(2) is geographically limited to those areas where pumpers "are scheduled to work or travel," and that a "pumpers' examination" may not be substituted for the preshift examinations otherwise

required by 30 C.F.R. §§ 75.360(a)(1) and 75.360(b) in other areas of the mine.

B. Applicable Principles and Standard of Review

If a regulation's meaning is plain, the regulation cannot be interpreted to mean something different from that plain meaning.

Exportal LTDA v. United States, 902 F.2d 45, 50 (D.C. Cir. 1990); Pfizer, Inc. v. Heckler, 735 F.2d 1502, 1509 (D.C. Cir. 1984) (citing Udall v. Tallman, 380 U.S. 1, 16 (1965)). In determining whether a regulation's or a statute's meaning is plain, a court should apply all the traditional tools of construction, including both the particular regulatory language at issue and the language and design of the regulatory scheme as a whole. See City of Tacoma, Washington v. FERC, 331 F.3d 106, 114 (D.C. Cir. 2003), and Halverson v. Slater, 129 F.3d 180, 184 (D.C. Cir. 1997) (both involving construction of statutes). See also Secretary of Labor on behalf of Bushnell v. Cannelton Industries, Inc., 867 F.2d 1432, 1435 (D.C. Cir. 1989) (Courts must "give effect to the unambiguously expressed intent of Congress") (citation and internal quotation marks omitted). Plain meaning is to be determined, not by reading specific words in isolation, but by reading specific words in the context of related provisions. Bell Atlantic Telephone Companies v. FCC, 131 F.3d 1044, 1047 (D.C. Cir. 1997).

If a regulation's meaning is not plain, a reviewing court should give deference to the interpretation of the agency entrusted with administering the regulation. Martin v. OSHRC, 499 U.S. 144, 148-49 (1991); Udall, 380 U.S. at 16-17; Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 5-6 (D.C. Cir. 2003); Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 460-61 (D.C. Cir. 1994). More specifically, as this Court has repeatedly held, when the Secretary's and the Commission's interpretations of the Mine Act or an MSHA standard diverge, the Secretary's interpretation, not the Commission's, is entitled to deference from a reviewing court. Secretary of Labor v. Ohio Valley Coal Co., 359 F.3d 531, 534 (D.C. Cir. 2004); Excel Mining, 334 F.3d at 5-6; RAG Cumberland Resources LP v. FMSHRC, 272 F.3d 590, 596 (D.C. Cir. 2001); Akzo Nobel Salt, Inc. v. FMSHRC, 212 F.3d 1301, 1304 (D.C. Cir. 2000); Energy West, 40 F.3d at 463. A court must accept the Secretary's interpretation of a standard unless it "is plainly erroneous or inconsistent with the [standard]" (Excel Mining, 334 F.3d at 5-6 (quoting Akzo Nobel Salt, 212 F.3d at 1303)) -- that is, as long as it "fits * * * within the terms of [the standard] and is compatible with its purpose." Cold Spring Granite Co. v. FMSHRC, 98 F.3d 1376, 1378 (D.C. Cir. 1996). Accord Martin, 499 U.S. at 150-51 (an agency's interpretation must be given effect as long as it

"sensibly conforms to the purpose and wording of the regulation[]") (citation and internal quotation marks omitted.)

Finally, it is well established that a statute or regulation that is intended to protect the safety or health of individuals must be interpreted in a broad manner to actually achieve that goal. Cannelton Industries, 867 F.2d at 1435, and Donovan on behalf of Anderson v. Stafford Construction Co., 732 F.2d 954, 959-960 (D.C. Cir. 1984) (both stating that a safety and health statute must be interpreted broadly); Brennan v. OSHRC, 491 F.2d 1340, 1344 (2d Cir. 1974) (stating that a safety or health regulation must be interpreted broadly). The converse is equally true: when a remedial statute or regulation contains an exception, the exception must be interpreted narrowly. Chao v. Double JJ Resort Ranch, 375 F.3d 393, 396 (6th Cir. 2004); O'Toole v. United States, 295 F.3d 1029, 1037 (9th Cir. 2002); Local Union 7107, UMWA v. Clinchfield Coal Co., 124 F.3d 639, 640-41 (4th Cir. 1997), cert. denied, 523 U.S. 1006 (1998).

C. The Commission Ignored the Plain Meaning of the Applicable Standards

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).¹¹ 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 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 exception is limited to areas where pumpers are scheduled to work or travel.

¹¹ A "preshift examination" is required before an oncoming shift of miners may proceed underground. It is

a critically important and fundamental safety practice in the industry. It is the primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations and bad roof.

61 Fed. Reg. 9764, 9790 (March 11, 1996).

The "pumpers' exception" recognizes that "pumpers travel to remote areas of the mine to check on water levels and the status of pumps, making regular preshift examinations impractical." 61 Fed. Reg. 9764, 9792 (March 11, 1996). "[R]ather 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." 26 FMSHRC at 160 (Commissioner Jordan, dissenting). "It is important to note that the pumper is conducting an examination in a limited area only for himself or herself." 61 Fed. Reg. at 9792.

It is also important to note that Sections 75.360(a)(1) and 75.360(a)(2) must be read in conjunction with Section 75.360(b). Read as a whole, Section 75.360(b) describes three categories of areas in which preshift examinations must be conducted. Some areas must be examined only if persons are scheduled to work or travel in those areas (see Sections 75.360(b)(1)-(b)(3), (b)(8),¹² and (b)(10)); some areas must be examined without regard to whether persons are scheduled to work or travel in those areas if persons are scheduled to work or travel in other

¹² Although equipment (such as mobile equipment) is often operated in the presence of persons working underground, there are times when equipment (such as conveyor belts) may be operated when no persons are present. See 61 Fed. Reg. 9795 (March 11, 1996). Under the latter circumstances, Section 75.360(b)(8) would fall into the third category set forth here.

specified areas that may be affected by conditions in those areas (see Sections 75.360(b)(4)-(b)(6)); some areas must be examined without regard to where persons are scheduled to work or travel (see Sections 75.360(b)(7) and (b)(9)). The purpose of requiring preshift examinations of certain areas where persons are not scheduled to work or travel is to protect other areas of the mine where persons are scheduled to work or travel (the second and third categories, above) from hazards originating in areas where persons are not scheduled to work or travel. See, e.g., Tr. 176-78, 224-25, 328 (J.A. 34-35, 38, 52).

Under established principles of construction, it must be presumed that the creation of differently described categories of areas in the scheme of Section 75.360 was intentional. In drafting the carefully worded regulatory scheme, the Secretary intended that areas described as areas where persons are scheduled to work or travel be limited to such areas, and that areas not described as areas where persons are scheduled to work or travel not be limited to areas where persons are scheduled to work or travel. The area in which the "pumpers' examination" may be substituted for the preshift examination is so limited; the area in which energized trolley wires must be examined is not. See U.S. Telecom Ass'n v. FCC, 227 F.3d 450, 458

(D.C. Cir. 2000) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting Russello v. United States, 464 U.S. 16, 23 (1983)) (internal quotation marks omitted).

When only pumpers are scheduled to work or travel underground, as in this case, the "pumpers' examination" cannot be substituted for the preshift examinations mandated by Section 75.360(b) in areas that are described without reference to the presence of any persons, such as Sections 75.360(b)(7) and (b)(9). The specific preshift examination provision involved in this case -- Section 75.360(b)(7) -- requires a preshift examination of "[a]reas where trolley wires or trolley feeder wires are to be or will remain energized during the oncoming shift." Section 75.360(b)(7) contains no exceptions or limitations.

As explained by MSHA Inspector and Accident Investigator Gilbert Young, the reason for Section 75.360(b)(7)'s requirement is that trolley wires, unlike other wires carrying electricity underground, are uninsulated and, if they become dislodged, can readily create electrical arcs that result in a fire or explosion. Tr. 176-78, 224-25 (J.A. 33-34, 38). Inspector

Young testified:

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 (J.A. 34). See also Tr. 280-81 (J.A. 44). Those hazards exist for any miner underground, including pumpers, regardless of where the energized trolley wires are located. Tr. 176-78, 224-25 (J.A. 33-34, 38).

MSHA Ventilation Specialist Jerry Richards agreed that all areas containing energized trolley wires must be subjected to a preshift examination before any miner is sent underground.

Tr. 298 (J.A. 47). Richards testified:

You could have top [roof] to move, break up, you could have trolley wire coming out of the hangers. You could have the top begin to converge and pull the trolley wire out of the [insulating] valves or the valve go to ground and result in a fire. * * *. They have to be examined. That would result in a mine fire or something like that.

Tr. 298-299 (J.A. 47). Specialist Richards concluded:

The preshift is not only for the general laborers. It's for Mr. Baker and Mr. Styers [the certified pumpers] also. You could have something happen in another part of the mine that was removed from them, not [necessarily] remote but removed from them. You could have a trolley wire fire or anything that would affect that.

Tr. 328 (J.A. 52).

Aggravating the hazards associated with the energized trolley wires running throughout the Shadrick Mine is the fact that the mine has a history of roof falls and roof conditions. Tr. 177, 187 (J.A. 34, 36). Roof falls make it more likely that energized trolley wires will be pulled down and produce a fire. Tr. 187, 223 (J.A. 36, 38).¹³ Because the toxic byproducts of a mine fire can endanger miners working anywhere in the mine, these concerns apply with equal weight to all persons working or traveling underground -- including pumpers. Tr. 176-78, 224-25, 328 (J.A. 34, 38, 52).

The plain meaning reading of Section 75.360 set forth above is supported by the preamble to Section 75.360. The "pumpers' exception" was promulgated in the 1996 amendments to the Secretary's ventilation standards for underground coal mines.

The preamble explains:

Paragraph (a)(2) of the final rule provides that preshift examinations of areas where pumpers are scheduled to work or travel are not required prior to the pumper entering the areas, if the pumper is a certified person and the pumper conducts the specified examinations. This standard recognizes that pumpers travel to remote areas of the mine

¹³ The likelihood of roof falls not only increases the likelihood that trolley wires will be pulled down, it also increases the likelihood that ventilation in escapeways and return airways will be impeded. Tr. 187, 220 (J.A. 36, 37). Such blockages can increase the accumulation of methane, further enhancing the likelihood of fire. Tr. 224 (J.A. 38).

to check on water levels and the status of pumps, making regular preshift examinations impractical. The examinations required by pumpers include an examination for hazardous conditions, tests for methane and oxygen deficiency, and a determination of whether 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.

61 Fed Reg. at 9792. The preamble explicitly and repeatedly indicates that the effect of the "pumpers' exception" is limited to "areas where pumpers are scheduled to work or travel." Ibid. The preamble stresses that "the pumper is conducting an examination in a limited area * * *." Ibid.

In emphasizing that the newly-promulgated "pumpers' exception" "maintains the existing level of safety" (61 Fed. Reg. at 9792),¹⁴ the Secretary indicated that before beginning their work, pumpers, like all other miners, must be given the advantage of having had the mine examined for all

¹⁴ The "pumpers' exception," like any standard promulgated under the Mine Act, must comply with Section 101(a)(9) of the Mine Act, 30 U.S.C. § 811(a)(9), which states: "No mandatory health or safety standard promulgated under this title shall reduce the protection afforded miners by an existing mandatory health or safety standard." Because the preshift examination requirement predating the "pumpers' exception" made no distinction between the protection afforded pumpers and that afforded other miners, the current rule may not provide pumpers any less protection than is provided to other miners. If, on the other hand, the "pumpers' exception" meant what the Commission majority said it means, the provision would violate Section 101(a)(9).

enumerated hazards -- including those originating beyond the areas where the pumpers are scheduled to work or travel.¹⁵ It would have been anomalous if, in promulgating the "pumpers' exception," the Secretary intended that hazards originating in areas of the mine where pumpers do not work or travel (hazards for which preshift examinations are explicitly required under other provisions of Section 75.360) could go entirely unexamined while pumpers work or travel underground. The Secretary did not intend to treat pumpers as deserving less protection than other miners under the Mine Act. See Natural Resources Defense Council, Inc. v. EPA, 907 F.2d 1146, 1156 (D.C. Cir. 1990)

¹⁵ The reason for sending a certified examiner underground before other miners are sent underground is that the examiner is focused by the nature of his role on identifying and correcting all recognized hazards throughout the mine before they can result in injury to any miner. Tr. 327-29 (J.A. 52). While performing pumper work in a remote area of the mine, a pumper who is unaware of developing hazards in areas of the mine beyond his work or travel is more likely to be injured (or worse) from a resulting accident than is the preshift examiner who is focused on such hazards. The presence of the preshift examiner -- far from unnecessarily exposing a second miner to hazards -- protects both the examiner and the pumper from hazards originating beyond where the pumper is scheduled to work or travel. Tr. 327-28 (J.A. 52). Although sending preshift examiners underground when only pumpers are scheduled to work or travel underground exposes the preshift examiners to hazards to which they would not otherwise be exposed, that exposure is reduced by the fact that, in going underground, the preshift examiners, unlike the pumpers, are focused entirely on detecting and correcting hazards as they proceed through the mine. See Tr. 327-29 (J.A. 52).

(rejecting as an "anomaly" an interpretation treating similar hazards differently).

In short, the plain meaning reading of Section 75.360 set forth above makes sense from a safety standpoint. The Commission majority did not find otherwise; indeed, the Commission majority stated that it was "sympathetic" to the safety concern expressed by the Secretary. 26 FMSHRC at 154 (J.A. 90). Instead, the majority rejected the Secretary's reading of Section 75.360 essentially on the ground that the plain meaning of Section 75.360 precludes that reading. However, the Commission majority's plain meaning reading of Section 75.360(a)'s language and design is illogical, incomplete, and unpersuasive.

The Commission majority began its analysis by stating that, "[u]nder 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." 26 FMSHRC at 152 (J.A. 88). The majority's statement is a non sequitur. The fact that preshift examinations do not have to be conducted by pumpers does not mean that preshift examinations do not have to be conducted by someone else, in specified areas beyond where pumpers are scheduled to work or travel, in order to protect pumpers where they are scheduled to work or travel.

The fact that preshift examinations do not have to be conducted by pumpers does not mean that preshift examinations do not have to be conducted for pumpers (and for any other miners scheduled to enter or remain in the mine).¹⁶

In addition, the Commission majority stated that, "[u]nder 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" because that section states 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." 26 FMSHRC at 152 (J.A. 88)

(emphasis by the Commission majority). The sentence quoted by the Commission majority is "taken out of context," and therefore "cannot provide conclusive proof" of the Secretary's intent. Bell Atlantic, 131 F.3d at 1047 ("Textual analysis is a language game played on a field known as 'context.' * * *. '[T]he meaning of statutory language, plain or not, depends on context.'") (quoting Bailey v. United States, 516 U.S. 137, 145 (1995)).

¹⁶ Contrary to the majority's analysis, the "pumpers' exception" is formulated in terms of "who" and "where," not just "who." The Secretary could have promulgated a rule stating: "Preshift examinations shall not be required prior to certified pumpers entering the mine if they perform a pumpers' examination in the areas where they work or travel." She did not do so.

The quoted sentence comes immediately after the sentence in Section 75.360(a)(1) that states that, except for the "pumpers' exception" set forth in Section 75.360(a)(2), "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." Read in context with the sentence that immediately precedes it, the quoted sentence merely means that a certified person may enter the mine before a preshift examination is conducted in order to conduct a preshift examination. The quoted sentence merely reflects the need to avoid a "Catch 22" situation in which a certified person could not enter the mine to conduct a preshift examination because a preshift examination had not yet been conducted. See 26 FMSHRC at 159 (J.A. 95) (Commissioner Jordan, dissenting).¹⁷ If the

¹⁷ The standard immediately following Section 75.360 -- 30 C.F.R. § 75.361, which sets forth the requirement for a "supplemental examination" -- is even more explicit in indicating that the certified person referred to is the person conducting the examination. Section 75.361 begins: "Except for certified persons conducting examinations required by this subpart, * * *." The "certified examiners" referred to in the second sentence of Section 75.360(a)(1) and the "certified persons conducting examinations" referred to in Section 75.361 perform similar functions -- examining specified areas before other miners enter them -- and the two provisions referring to "certified persons" should be interpreted to have similar meanings. See Motion Picture Ass'n of America, Inc. v. FCC,

majority's reading of the quoted sentence were correct, any certified person could enter and remain in the mine for any purpose -- for example, to work a regular shift mining coal -- without a preshift examination having been conducted. See *ibid.* Indeed, if the majority's reading of the quoted sentence were correct, the Secretary would have had no need to create the "pumpers' exception." See *ibid.*

Moving beyond its plain meaning analysis, the Commission majority stated that that analysis was supported by the fact that "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." 26 FMSHRC at 152 (J.A. 88) (citing 61 Fed. Reg. at 9791-92). The majority's reading of the preamble, like its reading of the standard, is incomplete. Read properly, the preamble explicitly and repeatedly indicates that the "pumpers' examination" may be substituted for a preshift examination in areas where pumpers are scheduled to work or travel. The majority read that limitation out of the preamble just as it read that limitation out of the standard.

Finally, the Commission majority relied on the preamble statement that "areas where persons are not scheduled to work or

309 F.3d 796, 801-02 (D.C. Cir. 2002), and cases there cited ("Statutory provisions in pari materia normally are construed together to discern their meaning").

travel are not required to be examined under the final rule * * *." 26 FMSHRC at 152 (J.A. 88) (citing 61 Fed. Reg. at 9791-92). The quoted statement was made in response to a suggestion that the rule not require a preshift examination for non-producing shifts when persons are to work in or near the shaft, slope, or drift; the statement was not made in connection with the "pumpers' exception." To the extent the quoted statement can be construed as suggesting that no preshift examination is required beyond where pumpers are scheduled to work or travel when pumpers are working during a non-producing shift, the statement is incorrect because it is irreconcilable both with the plain meaning of the standard and with the rest of the preamble. Such a questionable and safety-defeating construction is insufficient to overcome the plain meaning of the standard. See ExxonMobil Gas Marketing Co. v. FERC, 297 F.3d 1071, 1088 (D.C. Cir. 2002) ("[S]nippets of legislative history do not a law make. '[Meaning is] derived from statutory provisions, not from loosely worded fragments extracted from congressional reports and speeches.'" (citations omitted), cert. denied, ___ U.S. ___, 124 S.Ct. 48, 157 L.Ed.2d 249 (2003); Independent Bankers Ass'n of America v. Farm Credit Administration, 164 F.3d 661, 668 (D.C. Cir. 1999) ("Given the clear language of the statute, selected and arguably ambiguous

snippets of the legislative history are insufficient to undermine that language").

In sum, the Commission majority read an explicitly stated limitation on an exception out of the exception, and thereby read the exception in a way that "swallowed the rule." United States v. Campos, 217 F.3d 707, 720 (9th Cir.), cert. denied, 531 U.S. 952 (2000). See 26 FMSHRC at 158 (Commissioner Jordan, dissenting). The Commission majority's reading should therefore be rejected.

D. In Any Event, the Secretary's Reading of the Applicable Standards Is Entitled to Acceptance Because It Is Reasonable

If the Court finds that the Secretary's standards do not have the plain meaning set forth above -- that is, if it finds that the standards are ambiguous -- it should accept the Secretary's reading because that reading is permissible. The Secretary's reading is consistent with the regulatory language, and is "eminently reasonable" (Ohio Valley, 359 F.3d at 536) because it protects pumpers from being hurt or killed by hazards, such as fires triggered by energized trolley wires, that can originate in areas beyond where pumpers are scheduled to work or travel but spread to areas where pumpers work and travel.

CONCLUSION

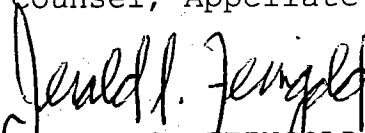
For the reasons stated above, the Secretary requests that the Court reverse the decision of the Commission finding that there was no violation of 30 C.F.R. § 75.360(a)(1) and remand the case to determine whether the violation was "significant and substantial" and assess an appropriate civil penalty.

Respectfully submitted,

HOWARD M. RADZELY
Solicitor of Labor

EDWARD P. CLAIR
Associate Solicitor

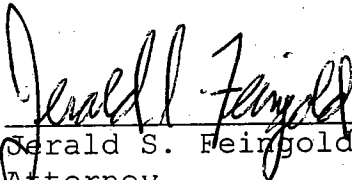
W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation


JERALD S. FEINGOLD
Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard
Suite 2200
Arlington, VA 22209-2296
Telephone: (202) 693-9335

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 brief for the Secretary of Labor contains 7,527 words as determined by Word, the processing system used to prepare the brief.



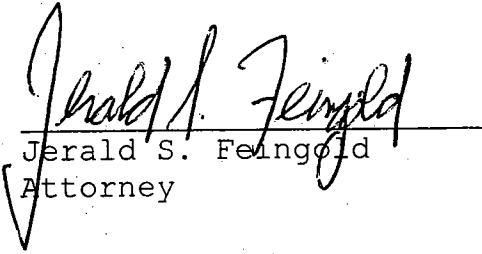
Gerald S. Feingold
Attorney

CERTIFICATE OF SERVICE

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

David J. Hardy, Esq.
Spilman, Thomas & Battle
P.O. Box 273
Charleston, WV 25321

Thomas Stock, General Counsel
Federal Mine Safety and Health
Review Commission
601 New Jersey Ave., Suite 9500
Washington, DC 20001



Jerald S. Feingold
Attorney

ADDENDUM

ADDENDUM TABLE OF CONTENTS

AUTHORITY

ADDENDUM PAGE NO.

Statutes

Section 101(a) (9), 30 U.S.C. 811(a) (9) A-1
Section 104(d), 30 U.S.C. 814(d) A-2

Regulations

30 C.F.R. 75.2 A-4
30 C.F.R. 75.360 A-7
30 C.F.R. 75.361 A-8
30 C.F.R. 75.364 A-10

Federal Register

61 Fed. Reg. 9764 (March 11, 1996) A-13

whether such material or agent is potentially toxic at the concentrations in which it is used or found in a mine. The Secretary of Health and Human Services shall submit such determinations with respect to such toxic substances or harmful physical agents to the Secretary. Thereafter, the Secretary of Health and Human Services shall submit to the Secretary all pertinent criteria regarding any such substances determined to be toxic or any such harmful agents as such criteria are developed. Within 60 days after receiving any criteria in accordance with the preceding sentence relating to a toxic material or harmful physical agent which is not adequately covered by a mandatory health or safety standard promulgated under this section, the Secretary shall either appoint an advisory committee to make recommendations with respect to a mandatory health or safety standard covering such material or agent in accordance with paragraph (1), or publish a proposed rule promulgating such a mandatory health or safety standard in accordance with paragraph (2), or shall publish his determination not to do so.

(7) Any mandatory health or safety standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that miners are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such mandatory standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring miner exposure at such locations and intervals, and in such manner so as to assure the maximum protection of miners. In addition, where appropriate, any such mandatory standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the operator at his cost, to miners exposed to such hazards in order to most effectively determine whether the health of such miners is adversely affected by such exposure. Where appropriate, the mandatory standard shall provide that where a determination is made that a miner may suffer material impairment of health or functional capacity by reason of exposure to the hazard covered by such mandatory standard, that miner shall be removed from such exposure and reassigned. Any miner transferred as a result of such exposure shall continue to receive compensation for such work at no less than the regular rate of pay for miners in the classification such miner held immediately prior to his transfer. In the event of the transfer of a miner pursuant to the preceding sentence, increases in wages of the transferred miner shall be based upon the new work classification. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of examinations or tests made pursuant to the preceding sentence shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the miner, to his designated physician.

(8) The Secretary shall, to the extent practicable, promulgate separate mandatory health or safety standards applicable to mine construction activity on the surface.

(9) No mandatory health or safety standard promulgated under this subchapter shall reduce the protection afforded miners by an existing mandatory health or safety standard.

30 § 813

MINERAL LANDS AND MINING Ch. 22

Note 17

to accompany federal mine inspector. *Monte-rey Coal Co. v. Federal Mine Safety and Health Review, C.A.7, 1984, 743 F.2d 589.*

Mine safety official's memorandum, which was written after start of coal miner strike and which called for spot inspections on week before and week after strike ended did not modify provisions of section 813 of this title requiring regular inspections of mines and did not preclude issuance of citations for violations of safety standards found during such regular inspection. *Sewell Coal Co. v. Federal Mine Safety & Health Review Com'n, C.A.4, 1982, 686 F.2d 1066.*

18. Safety orders

Under this section providing that in the event of an accident occurring in a coal mine, representative of Secretary of the Interior may issue appropriate orders to insure safety of any person in mine, mine may be closed upon the occurrence of an accident if such is

deemed appropriate under circumstances. *CF&I Steel Corp. v. Morton, C.A.10, 1975, 516 F.2d 868.*

19. Accident reports

To extent that civil penalties imposed administratively were based on grand jury proceedings, plaintiff industry and its foreman had no opportunity to contest basis of administrative citation, which exposed them to substantial civil penalties with prospect of further findings of unwarranted failure to comply with safety and health standards which might result in termination of operations on premises, and there was prospect of irreparable harm, for purposes of injunctive relief, and same was true of prospect of defendants' publication of accident report based on information from grand jury's secret proceedings. *Kocher Coal Co. v. Marshall, D.C.Pa.1980, 497 F.Supp. 73.*

§ 814. Citations and orders

(a) Issuance and form of citations; prompt issuance

If, upon inspection or investigation, the Secretary or his authorized representative believes that an operator of a coal or other mine subject to this chapter has violated this chapter, or any mandatory health or safety standard, rule, order, or regulation promulgated pursuant to this chapter, he shall, with reasonable promptness, issue a citation to the operator. Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the chapter, standard, rule, regulation, or order alleged to have been violated. In addition, the citation shall fix a reasonable time for the abatement of the violation. The requirement for the issuance of a citation with reasonable promptness shall not be a jurisdictional prerequisite to the enforcement of any provision of this chapter.

(b) Follow-up inspections; findings

If, upon any follow-up inspection of a coal or other mine, an authorized representative of the Secretary finds (1) that a violation described in a citation issued pursuant to subsection (a) of this section has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall determine the extent of the area affected by the violation and shall promptly issue an order requiring the operator of such mine or his agent to immediately cause all persons, except those persons referred to in subsection (c) of this section, to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(c) Exempt persons

The following persons shall not be required to be withdrawn from, or prohibited from entering, any area of the coal or other mine subject to an order issued under this section:

(1) any person whose presence in such area is necessary, in the judgment of the operator or an authorized representative of the Secretary, to eliminate the condition described in the order;

(2) any public official whose official duties require him to enter such area;

(3) any representative of the miners in such mine who is, in the judgment of the operator or an authorized representative of the Secretary, qualified to make such mine examinations or who is accompanied by such a person and whose presence in such area is necessary for the investigation of the conditions described in the order; and

(4) any consultant to any of the foregoing.

(d) Findings of violations; withdrawal order

(1) If, upon any inspection of a coal or other mine, an authorized representative of the Secretary finds that there has been a violation of any mandatory health or safety standard, and if he also finds that, while the conditions created by such violation do not cause imminent danger, such violation is of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, and if he finds such violation to be caused by an unwarrantable failure of such operator to comply with such mandatory health or safety standards, he shall include such finding in any citation given to the operator under this chapter. If, during the same inspection or any subsequent inspection of such mine within 90 days after the issuance of such citation, an authorized representative of the Secretary finds another violation of any mandatory health or safety standard and finds such violation to be also caused by an unwarrantable failure of such operator to so comply, he shall forthwith issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons referred to in subsection (c) of this section to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such violation has been abated.

(2) If a withdrawal order with respect to any area in a coal or other mine has been issued pursuant to paragraph (1), a withdrawal order shall promptly be issued by an authorized representative of the Secretary who finds upon any subsequent inspection the existence in such mine of violations similar to those that resulted in the issuance of the withdrawal order under paragraph (1) until such time as an inspection of such mine discloses no similar violations. Following an inspection of such mine which discloses no similar violations, the provisions of paragraph (1) shall again be applicable to that mine.

(e) Pattern of violations; abatement; termination of pattern

(1) If an operator has a pattern of violations of mandatory health or safety standards in the coal or other mine which are of such nature as could have significantly and substantially contributed to the cause and effect of coal or other mine health or safety hazards, he shall be given written notice that such pattern exists. If, upon any inspection within 90 days after the issuance of such notice, an authorized representative of the Secretary finds any violation of a mandatory health or safety standard which could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard, the authorized representative shall issue an order requiring the operator to cause all persons in the area affected by such violation, except those persons re-

§75.1

- 75.1716-4 Issuance of permits.
- 75.1717 Exemptions.
- 75.1718 Drinking water.
- 75.1718-1 Drinking water; quality.
- 75.1719 Illumination; purpose and scope of §§75.1719 through 75.1719-4; time for compliance.
- 75.1719-1 Illumination in working places.
- 75.1719-2 Lighting fixtures; requirements.
- 75.1719-3 Methods of measurement; light measuring instruments.
- 75.1719-4 Mining machines, cap lamps; requirements.
- 75.1720 Protective clothing; requirements.
- 75.1720-1 Distinctively colored hard hats, or hard caps; identification for newly employed, inexperienced miners.
- 75.1721 Opening of new underground coal mines, or reopening and reactivating of abandoned or deactivated coal mines; notification by the operator; requirements.
- 75.1722 Mechanical equipment guards.
- 75.1723 Stationary grinding machines; protective devices.
- 75.1724 Hand-held power tools; safety devices.
- 75.1725 Machinery and equipment; operation and maintenance.
- 75.1726 Performing work from a raised position; safeguards.
- 75.1727 Drive belts.
- 75.1728 Power-driven pulleys.
- 75.1729 Welding operations.
- 75.1730 Compressed air; general; compressed air systems.

Subpart S [Reserved]

Subpart T—Diesel-Powered Equipment

- 75.1900 Definitions.
- 75.1901 Diesel fuel requirements.
- 75.1902 Underground diesel fuel storage—general requirements.
- 75.1903 Underground diesel fuel storage facilities and areas; construction and safety precautions.
- 75.1904 Underground diesel fuel tanks and safety cans.
- 75.1905 Dispensing of diesel fuel.
- 75.1905-1 Diesel fuel piping systems.
- 75.1906 Transport of diesel fuel.
- 75.1907 Diesel-powered equipment intended for use in underground coal mines.
- 75.1908 Nonpermissible diesel-powered equipment; categories.
- 75.1909 Nonpermissible diesel-powered equipment; design and performance requirements.
- 75.1910 Nonpermissible diesel-powered equipment; electrical system design and performance requirements.
- 75.1911 Fire suppression systems for diesel-powered equipment and diesel fuel transportation units.

30 CFR Ch. I (7-1-03 Edition)

- 75.1912 Fire suppression systems for permanent underground diesel fuel storage facilities.
- 75.1913 Starting aids.
- 75.1914 Maintenance of diesel-powered equipment.
- 75.1915 Training and qualification of persons working on diesel-powered equipment.
- 75.1916 Operation of diesel-powered equipment.

AUTHORITY: 30 U.S.C. 811.

SOURCE: 35 FR 17890, Nov. 20, 1970, unless otherwise noted.

EDITORIAL NOTE: The provisions of this part marked [Statutory Provision] appear in Title III of the Federal Coal Mine Health and Safety Act of 1969.

Subpart A—General

§75.1 Scope.

This part 75 sets forth safety standards compliance with which is mandatory in each underground coal mine subject to the Federal Mine Safety and Health Act of 1977. Some standards also are applicable to surface operations. Regulations and criteria supplementary to these standards also are set forth in this part.

[35 FR 17890, Nov. 20, 1970, as amended at 43 FR 12319, Mar. 24, 1978]

§75.2 Definitions.

The following definitions apply in this part.

Act. The Federal Mine Safety and Health Act of 1977.

Active workings. Any place in a coal mine where miners are normally required to work or travel.

Adequate interrupting capacity. The ability of an electrical protective device, based upon its required and intended application, to safely interrupt values of current in excess of its trip setting or melting point.

Anthracite. Coals with a volatile ratio equal to 0.12 or less. The volatile ratio is the volatile matter content divided by the volatile matter plus the fixed carbon.

Approval documentation. Formal papers issued by the Mine Safety and Health Administration which describe and illustrate the complete assembly of electrical machinery or accessories which have met the applicable requirements of 30 CFR part 18.

Certified or registered. As applied to any person, a person certified or registered by the State in which the coal mine is located to perform duties prescribed by this part 75, except that in a State where no program of certification or registration is provided or where the program does not meet at least minimum Federal standards established by the Secretary, such certification or registration shall be by the Secretary.

Circuit-interrupting device. A device designed to open and close a circuit by nonautomatic means and to open the circuit automatically at a predetermined overcurrent value without damage to the device when operated within its rating.

Coal mine. Includes areas of adjoining mines connected underground.

Filter Self-Rescuer (FSR). A type of gas mask approved by MSHA and NIOSH under 42 CFR part 84 for escape only from underground mines and which provides at least 1 hour of protection against carbon monoxide.

Ground fault or grounded phase. An unintentional connection between an electric circuit and the grounding system.

Low voltage. Up to and including 660 volts, medium voltage means voltages from 661 to 1,000 volts; and high voltage means more than 1,000 volts.

Motor-starter enclosure. An enclosure containing motor starting circuits and equipment.

Nominal voltage. The phase-to-phase or line-to-line root-mean-square value assigned to a circuit or system for designation of its voltage class, such as 480 or 4,160 volts. Actual voltage at which the circuit or system operates may vary from the nominal voltage within a range that permits satisfactory operation of equipment.

Permissible. (1) As applied to electric face equipment, all electrically operated equipment taken into or used in by the last open crosscut of an entry or a room of any coal mine the electrical parts of which, including, but not limited to, associated electrical equipment, components, and accessories, are designed, constructed, and installed, in accordance with the specifications of the Secretary, to assure that such equipment will not cause a mine explo-

sion or mine fire, and the other features of which are designed and constructed, in accordance with the specifications of the Secretary, to prevent, to the greatest extent possible, other accidents in the use of such equipment. The regulations of the Secretary or the Director of the Bureau of Mines in effect on March 30, 1970, relating to the requirements for investigation, testing, approval, certification, and acceptance of such equipment as permissible shall continue in effect until modified or superseded by the Secretary, except that the Secretary shall provide procedures, including, where feasible, testing, approval, certification, and acceptance in the field by an authorized representative of the Secretary, to facilitate compliance by an operator with the requirements of § 75.500 within the periods prescribed in § 75.500.

(2) As applied to equipment other than permissible electric face equipment: (i) Equipment used in the operation of a coal mine to which an approval plate, label, or other device is attached as authorized by the Secretary and which meets specifications which are prescribed by the Secretary for the construction and maintenance of such equipment and are designed to assure that such equipment will not cause a mine explosion or a mine fire. (ii) The manner of use of equipment means the manner of use prescribed by the Secretary.

Qualified person. As the context requires:

(1) An individual deemed qualified by the Secretary and designated by the operator to make tests and examinations required by this part 75; and

(2) An individual deemed, in accordance with minimum requirements to be established by the Secretary, qualified by training, education, and experience, to perform electrical work, to maintain electrical equipment, and to conduct examinations and tests of all electrical equipment.

Respirable dust. Dust collected with a sampling device approved by the Secretary and the Secretary of Health and Human Services in accordance with part 74—Coal Mine Dust Personal Sampler Units of this title. Sampling device approvals issued by the Secretary of the Interior and Secretary of Health,

Education, and Welfare are continued in effect.

Rock dust. Pulverized limestone, dolomite, gypsum, anhydrite, shale, adobe, or other inert material, preferably light colored, 100 percent of which will pass through a sieve having 20 meshes per linear inch and 70 percent or more of which will pass through a sieve having 200 meshes per linear inch; the particles of which when wetted and dried will not cohere to form a cake which will not be dispersed into separate particles by a light blast of air; and which does not contain more than 5 percent combustible matter or more than a total of 4 percent free and combined silica (SiO₂); or, where the Secretary finds that such silica concentrations are not available, which does not contain more than 5 percent of free and combined silica.

Secretary. The Secretary of Labor or the Secretary's delegate.

Self-Contained Self-Rescuer (SCSR). A type of closed-circuit, self-contained breathing apparatus approved by MSHA and NIOSH under 42 CFR part 84 for escape only from underground mines.

Short circuit. An abnormal connection of relatively low impedance, whether made accidentally or intentionally, between two points of different potential.

Working face. Any place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle.

Working place. The area of a coal mine in by the last open crosscut.

Working section. All areas of the coal mine from the loading point of the section to and including the working faces.

[57 FR 20913, May 15, 1992, as amended at 60 FR 30401, June 8, 1995; 67 FR 11001, Mar. 11, 2002]

Subpart B—Qualified and Certified Persons

§ 75.100 Certified person.

(a) The provisions of Subpart D—Ventilation of this part 75 require that certain examinations and tests be made by a certified person. A certified person within the meaning of those provisions is a person who has been certified as a mine foreman (mine man-

ager), an assistant mine foreman (section foreman), or a preshift examiner (mine examiner). A person who has been so certified is also a qualified person within the meaning of those provisions of subpart D of this part which require that certain tests be made by a qualified person and within the meaning of § 75.1106.

(b) A person who is certified as a mine foreman, an assistant mine foreman, or a preshift examiner by the State in which the coal mine is located is, to the extent of the State's certification, a certified person within the meaning of the provisions of subpart D of this part and § 75.1106 referred to in paragraph (a) of this section.

(c)(1) The Secretary may certify persons in the categories of mine foreman, assistant mine foreman, and preshift examiner whenever the State in which persons are presently employed in these categories does not provide for such certification. A person's initial certification by MSHA is valid for as long as the person continues to satisfy the requirements necessary to obtain the certification and is employed at the same coal mine or by the same independent contractor. The mine operator or independent contractor shall make an application which satisfactorily shows that each such person has had at least 2 years underground experience in a coal mine, and has held the position of mine foreman, assistant mine foreman, or preshift examiner for a period of 6 months immediately preceding the filing of the application, and is qualified to test for methane and for oxygen deficiency. Applications for Secretarial certification should be submitted in writing to the Health and Safety Activity, Mine Safety and Health Administration, Certification and Qualification Center, P.O. Box 25367, Denver Federal Center, Denver, Colorado 80225.

(2) A person certified by the Secretary under this paragraph will be a certified person, within the meaning of the provisions for subpart D of this part and § 75.1106 referred to in paragraph (a) of this section, as long as that person continues to satisfy the requirements for qualification or certification and is employed at the same

(i) *Retention period.* Records shall be retained for at least 1 year at a surface location at the mine and made available for inspection by authorized representatives of the Secretary and representatives of miners.

§ 75.352 Return air courses.

Entries used as return air courses shall be separated from belt haulage entries by permanent ventilation controls.

§ 75.360 Preshift examination at fixed intervals.

(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. The operator must establish 8-hour intervals of time subject to the required preshift examinations.

(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 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:

(1) Roadways, travelways and track haulageways where persons are scheduled, prior to the beginning of the preshift examination, to work or travel during the oncoming shift.

(2) Belt conveyors that will be used to transport persons during the oncom-

ing shift and the entries in which these belt conveyors are located.

(3) Working sections and areas where mechanized mining equipment is being installed or removed, if anyone is scheduled to work on the section or in the area during the oncoming shift. The scope of the examination shall include the working places, approaches to worked-out areas and ventilation controls on these sections and in these areas, and the examination shall include tests of the roof, face and rib conditions on these sections and in these areas.

(4) Approaches to worked-out areas along intake air courses and at the entries used to carry air into worked-out areas if the intake air passing the approaches is used to ventilate working sections where anyone is scheduled to work during the oncoming shift. The examination of the approaches to the worked-out areas shall be made in the intake air course immediately inby and outby each entry used to carry air into the worked-out area. An examination of the entries used to carry air into the worked-out areas shall be conducted at a point immediately inby the intersection of each entry with the intake air course.

(5) Seals along intake air courses where intake air passes by a seal to ventilate working sections where anyone is scheduled to work during the oncoming shift.

(6)(i) Entries and rooms developed after November 15, 1992, and developed more than 2 crosscuts off an intake air course without permanent ventilation controls where intake air passes through or by these entries or rooms to reach a working section where anyone is scheduled to work during the oncoming shift; and,

(ii) Entries and rooms developed after November 15, 1992, and driven more than 20 feet off an intake air course without a crosscut and without permanent ventilation controls where intake air passes through or by these entries or rooms to reach a working section where anyone is scheduled to work during the oncoming shift.

(7) Areas where trolley wires or trolley feeder wires are to be or will remain energized during the oncoming shift.

(8) High spots along intake air courses where methane is likely to accumulate, if equipment will be operated in the area during the shift.

(9) Underground electrical installations referred to in § 75.340(a), except those pumps listed in § 75.340 (b)(2) through (b)(6), and areas where compressors subject to § 75.344 are installed if the electrical installation or compressor is or will be energized during the shift.

(10) Other areas where work or travel during the oncoming shift is scheduled prior to the beginning of the preshift examination.

(c) The person conducting the preshift examination shall determine the volume of air entering each of the following areas if anyone is scheduled to work in the areas during the oncoming shift:

(1) In the last open crosscut of each set of entries or rooms on each working section and areas where mechanized mining equipment is being installed or removed. The last open crosscut is the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses.

(2) On each longwall or shortwall in the intake entry or entries at the intake end of the longwall or shortwall face immediately outby the face and the velocity of air at each end of the face at the locations specified in the approved ventilation plan.

(3) At the intake end of any pillar line—

(i) If a single split of air is used, in the intake entry furthest from the return air course, immediately outby the first open crosscut outby the line of pillars being mined; or

(ii) If a split system is used, in the intake entries of each split immediately inby the split point.

(d) The district manager may require the certified person to examine other areas of the mine or examine for other hazards during the preshift examination.

(e) *Certification.* At each working place examined, the person doing the preshift examination shall certify by initials, date, and the time, that the examination was made. In areas required to be examined outby a working

section, the certified person shall certify by initials, date, and the time at enough locations to show that the entire area has been examined.

(f) *Recordkeeping.* A record of the results of each preshift examination, including a record of hazardous conditions and their locations found by the examiner during each examination and of the results and locations of air and methane measurements, shall be made on the surface before any persons, other than certified persons conducting examinations required by this subpart, enter any underground area of the mine. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The record shall be made by the certified person who made the examination or by a person designated by the operator. If the record is made by someone other than the examiner, the examiner shall verify the record by initials and date by or at the end of the shift for which the examination was made. A record shall also be made by a certified person of the action taken to correct hazardous conditions found during the preshift examination. All preshift and corrective action records shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The records required by this section shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

(g) *Retention period.* Records shall be retained at a surface location at the mine for at least 1 year and shall be made available for inspection by authorized representatives of the Secretary and the representative of miners.

[61 FR 9829, Mar. 11, 1996, as amended at 61 FR 55527, Oct. 25, 1996; 62 FR 35085, June 30, 1997; 64 FR 45170, Aug. 19, 1999]

§ 75.361 Supplemental examination.

(a) Except for certified persons conducting examinations required by this subpart, within 3 hours before anyone enters an area in which a preshift examination has not been made for that shift, a certified person shall examine

the area for hazardous conditions, determine whether the air is traveling in its proper direction and at its normal volume, and test for methane and oxygen deficiency.

(b) *Certification.* At each working place examined, the person making the supplemental examination shall certify by initials, date, and the time, that the examination was made. In areas required to be examined outby a working section, the certified person shall certify by initials, date, and the time at enough locations to show that the entire area has been examined.

§ 75.362 On-shift examination.

(a) (1) At least once during each shift, or more often if necessary for safety, a certified person designated by the operator shall conduct an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The certified person shall check for hazardous conditions, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

(2) A person designated by the operator shall conduct an examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan. In those instances when a shift change is accomplished without an interruption in production on a section, the examination shall be made anytime within 1 hour of the shift change. In those instances when there is an interruption in production during the shift change, the examination shall be made before production begins on a section. Deficiencies in dust controls shall be corrected before production begins or resumes. The examination shall include air quantities and velocities, water pressures and flow rates, excessive leakage in the water delivery system, water spray numbers and orientations, section ventilation and control device placement, and any other dust suppression measures required by the ventilation plan. Measurements of the air velocity and quantity, water pressure and flow rates are not required if continuous monitoring of these controls is used and in-

dicates that the dust controls are functioning properly.

(b) 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 3 hours before the oncoming shift.

(c) Persons conducting the on-shift examination shall determine at the following locations:

(1) The volume of air in the last open crosscut of each set of entries or rooms on each section and areas where mechanized mining equipment is being installed or removed. The last open crosscut is the crosscut in the line of pillars containing the permanent stoppings that separate the intake air courses and the return air courses.

(2) The volume of air on a longwall or shortwall, including areas where longwall or shortwall equipment is being installed or removed, in the intake entry or entries at the intake end of the longwall or shortwall.

(3) The velocity of air at each end of the longwall or shortwall face at the locations specified in the approved ventilation plan.

(4) The volume of air at the intake end of any pillar line—

(i) Where a single split of air is used in the intake entry furthest from the return air course immediately outby the first open crosscut outby the line of pillars being mined; or

(ii) Where a split system is used in the intake entries of each split immediately inby the split point.

(d) (1) A qualified person shall make tests for methane—

(i) At the start of each shift at each working place before electrically operated equipment is energized; and

(ii) Immediately before equipment is energized, taken into, or operated in a working place; and

(iii) At 20-minute intervals, or more often if required in the approved ventilation plan at specific locations, during the operation of equipment in the working place.

(2) These methane tests shall be made at the face from under permanent

roof support, using extendable probes or other acceptable means. When longwall or shortwall mining systems are used, these methane tests shall be made at the shearer, the plow, or the cutting head. When mining has been stopped for more than 20 minutes, methane tests shall be conducted prior to the start up of equipment.

(e) If auxiliary fans and tubing are used, they shall be inspected frequently.

(f) During each shift that coal is produced and at intervals not exceeding 4 hours, tests for methane shall be made by a certified person or by an atmospheric monitoring system (AMS) in each return split of air from each working section between the last working place, or longwall or shortwall face, ventilated by that split of air and the junction of the return air split with another air split, seal, or worked-out area. If auxiliary fans and tubing are used, the tests shall be made at a location outby the auxiliary fan discharge.

(g) *Certification.* (1) The person conducting the on-shift examination in belt haulage entries shall certify by initials, date, and time that the examination was made. The certified person shall certify by initials, date, and the time at enough locations to show that the entire area has been examined.

(2) The certified person directing the on-shift examination to assure compliance with the respirable dust control parameters specified in the mine ventilation plan shall certify by initials, date, and time that the examination was made.

[61 FR 9829, Mar. 11, 1996; 61 FR 26442, May 28, 1996]

§ 75.363 Hazardous conditions; posting, correcting and recording.

(a) Any hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected. If the

condition creates an imminent danger, everyone except those persons referred to in section 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected. Only persons designated by the operator to correct or evaluate the condition may enter the posted area.

(b) A record shall be made of any hazardous condition found. This record shall be kept in a book maintained for this purpose on the surface at the mine. The record shall be made by the completion of the shift on which the hazardous condition is found and shall include the nature and location of the hazardous condition and the corrective action taken. This record shall not be required for shifts when no hazardous conditions are found or for hazardous conditions found during the preshift or weekly examinations inasmuch as these examinations have separate recordkeeping requirements.

(c) The record shall be made by the certified person who conducted the examination or a person designated by the operator. If made by a person other than the certified person, the certified person shall verify the record by initials and date by or at the end of the shift for which the examination was made. Records shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The record shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

(d) *Retention period.* Records shall be retained at a surface location at the mine for at least 1 year and shall be made available for inspection by authorized representatives of the Secretary and the representative of miners.

[61 FR 9829, Mar. 11, 1996; 61 FR 26442, May 28, 1996]

§ 75.364 Weekly examination.

(a) *Worked-out areas.* (1) At least every 7 days, a certified person shall examine unsealed worked-out areas where no pillars have been recovered

by traveling to the area of deepest penetration; measuring methane and oxygen concentrations and air quantities and making tests to determine if the air is moving in the proper direction in the area. The locations of measurement points where tests and measurements will be performed shall be included in the mine ventilation plan and shall be adequate in number and location to assure ventilation and air quality in the area. Air quantity measurements shall also be made where the air enters and leaves the worked-out area. An alternative method of evaluating the ventilation of the area may be approved in the ventilation plan.

(2) At least every 7 days, a certified person shall evaluate the effectiveness of bleeder systems required by § 75.334 as follows:

(i) Measurements of methane and oxygen concentrations and air quantity and a test to determine if the air is moving in its proper direction shall be made where air enters the worked-out area.

(ii) Measurements of methane and oxygen concentrations and air quantity and a test to determine if the air is moving in the proper direction shall be made immediately before the air enters a return split of air.

(iii) At least one entry of each set of bleeder entries used as part of a bleeder system under § 75.334 shall be traveled in its entirety. Measurements of methane and oxygen concentrations and air quantities and a test to determine if the air is moving in the proper direction shall be made at the measurement point locations specified in the mine ventilation plan to determine the effectiveness of the bleeder system.

(iv) In lieu of the requirements of paragraphs (a)(2)(i) and (iii) of this section, an alternative method of evaluation may be specified in the ventilation plan provided the alternative method results in proper evaluation of the effectiveness of the bleeder system.

(b) *Hazardous conditions.* At least every 7 days, an examination for hazardous conditions at the following locations shall be made by a certified person designated by the operator:

(1) In at least one entry of each intake air course, in its entirety, so that the entire air course is traveled.

(2) In at least one entry of each return air course, in its entirety, so that the entire air course is traveled.

(3) In each longwall or shortwall travelway in its entirety, so that the entire travelway is traveled.

(4) At each seal along return and bleeder air courses and at each seal along intake air courses not examined under § 75.360(b)(5).

(5) In each escapeway so that the entire escapeway is traveled.

(6) On each working section not examined under § 75.360(b)(3) during the previous 7 days.

(7) At each water pump not examined during a preshift examination conducted during the previous 7 days.

(c) *Measurements and tests.* At least every 7 days, a certified person shall—

(1) Determine the volume of air entering the main intakes and in each intake split;

(2) Determine the volume of air and test for methane in the last open crosscut in any pair or set of developing entries or rooms, in the return of each split of air immediately before it enters the main returns, and where the air leaves the main returns; and

(3) Test for methane in the return entry nearest each set of seals immediately after the air passes the seals.

(d) Hazardous conditions shall be corrected immediately. If the condition creates an imminent danger, everyone except those persons referred to in § 104(c) of the Act shall be withdrawn from the area affected to a safe area until the hazardous condition is corrected.

(e) The weekly examination may be conducted at the same time as the preshift or on-shift examinations.

(f) (1) The weekly examination is not required during any 7 day period in which no one enters any underground area of the mine.

(2) Except for certified persons required to make examinations, no one shall enter any underground area of the mine if a weekly examination has not been completed within the previous 7 days.

(g) *Certification.* The person making the weekly examinations shall certify by initials, date, and the time that the examination was made. Certifications

and times shall appear at enough locations to show that the entire area has been examined.

(h) *Recordkeeping.* At the completion of any shift during which a portion of a weekly examination is conducted, a record of the results of each weekly examination, including a record of hazardous conditions found during each examination and their locations, the corrective action taken, and the results and location of air and methane measurements, shall be made. The results of methane tests shall be recorded as the percentage of methane measured by the examiner. The record shall be made by the person making the examination or a person designated by the operator. If made by a person other than the examiner, the examiner shall verify the record by the initials and date by or at the end of the shift for which the examination was made. The record shall be countersigned by the mine foreman or equivalent mine official by the end of the mine foreman's or equivalent mine official's next regularly scheduled working shift. The records required by this section shall be made in a secure book that is not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration.

(i) *Retention period.* Records shall be retained at a surface location at the mine for at least 1 year and shall be made available for inspection by authorized representatives of the Secretary and the representative of miners.

§ 75.370 Mine ventilation plan; submission and approval.

(a) (1) The operator shall develop and follow a ventilation plan approved by the district manager. The plan shall be designed to control methane and respirable dust and shall be suitable to the conditions and mining system at the mine. The ventilation plan shall consist of two parts, the plan content as prescribed in §75.371 and the ventilation map with information as prescribed in §75.372. Only that portion of the map which contains information required under §75.371 will be subject to approval by the district manager.

(2) The proposed ventilation plan and any revision to the plan shall be submitted in writing to the district manager. When revisions to a ventilation plan are proposed, only the revised pages, maps, or sketches of the plan need to be submitted. When required in writing by the district manager, the operator shall submit a fully revised plan by consolidating the plan and all revisions in an orderly manner and by deleting all outdated material.

(3) (i) The mine operator shall notify the representative of miners at least 5 days prior to submission of a mine ventilation plan and any revision to a mine ventilation plan. If requested, the mine operator shall provide a copy to the representative of miners at the time of notification. In the event of a situation requiring immediate action on a plan revision, notification of the revision shall be given, and if requested, a copy of the revision shall be provided, to the representative of miners by the operator at the time of submittal;

(ii) A copy of the proposed ventilation plan, and a copy of any proposed revision, submitted for approval shall be made available for inspection by the representative of miners; and

(iii) A copy of the proposed ventilation plan, and a copy of any proposed revision, submitted for approval shall be posted on the mine bulletin board at the time of submittal. The proposed plan or proposed revision shall remain posted until it is approved, withdrawn or denied.

(b) Following receipt of the proposed plan or proposed revision, the representative of miners may submit timely comments to the district manager, in writing, for consideration during the review process. A copy of these comments shall also be provided to the operator by the district manager upon request.

(c) (1) The district manager will notify the operator in writing of the approval or denial of approval of a proposed ventilation plan or proposed revision. A copy of this notification will be sent to the representative of miners by the district manager.

(2) If the district manager denies approval of a proposed plan or revision, the deficiencies of the plan or revision

DEPARTMENT OF LABOR

Mine Safety and Health Administration

30 CFR Part 75

RIN 1219-AA11

Safety Standards for Underground Coal Mine Ventilation

AGENCY: Mine Safety and Health Administration, (MSHA) Labor.

ACTION: Final rule.

SUMMARY: This final rule revises the Mine Safety and Health Administration's (MSHA's) existing safety standards for ventilation of underground coal mines. After publication of the existing standards, the U.S. Court of Appeals in the D.C. Circuit stayed the application of one standard and MSHA stayed two standards. The rule revises these stayed provisions, revises or clarifies other provisions in the rule and includes some new provisions. The provisions of the final rule are expected to decrease the potential for fatalities, particularly accidents which can result in multiple deaths, and to reduce the risk of injuries and illnesses in underground coal mines. For the convenience of the reader, MSHA has published the full text of the ventilation standards for underground coal mines in this document.

EFFECTIVE DATE: The final rule is effective June 10, 1996.

FOR FURTHER INFORMATION CONTACT: Patricia W. Silvey, Director, Office of Standards, Regulations and Variances, MSHA, phone 703/ 235-1910; fax 703/ 235-5551.

SUPPLEMENTARY INFORMATION:

I. Background

The mining of coal underground has historically been recognized as one of the more hazardous occupations in the world. It is a universally recognized principle of underground coal mine safety that there must be proper ventilation of the mine. Indeed, no aspect of safety in underground coal mining is more fundamental than proper ventilation. A basic tenet of mining safety states that ventilation must be sufficient: (1) To dilute, render harmless and carry away the hazardous components of mine air, such as potentially explosive methane; and (2) to provide necessary levels of oxygen to the miners' working environment. Ventilation safety programs are designed around this philosophy. The history of mining is replete with tragic incidents where one aspect or another of

a necessary ventilation safety protection was either not in place or not followed, with disastrous results. Examples include the explosion at the Monogah mine in 1907 in which 362 miners perished, the worst mining disaster in the history of the United States. Other more recent examples include the Farmington disaster in 1968 in which 78 miners died, the Scotia mine in 1976 where 26 died, Grundy No. 17 in 1981 where 13 died, Wilberg in 1984 where 27 died, Pyro in 1989 with 10 deaths and Southmountain in 1992 where 8 miners died. In 1969 and again in 1977, Congress recognized the hazards of improper ventilation and established a role for the government in addressing ventilation hazards. MSHA, with the cooperation of labor and industry, has met with a large measure of success in reducing the accidents, injuries and fatalities that have resulted from poor ventilation practices. For example, explosions and fires in a 29 year period from 1940 to 1968 resulted in the deaths of 491 miners. Since the passage of the Federal Coal Mine Health and Safety Act of 1969, 178 explosion and fire related deaths have occurred. While MSHA recognizes that this number is still unacceptable, the significant reduction in loss of life cannot be ignored. To a great extent, the framework for this success has been the implementation of effective ventilation standards.

Preventing recurrence of disasters like those of the past remains the top priority of MSHA. MSHA believes that a serious commitment by management, labor, and government is necessary to develop effective, yet reasonable and practical regulations that protect the safety and health of our nation's miners. MSHA anticipates that this rulemaking, which revises portions of the comprehensive ventilation rule published in 1992 (57 FR 20868, May 15, 1992) and adds new provisions, will bring the coal mining industry closer to that objective.

The comprehensive 1992 ventilation rulemaking was closely followed by interested industry and labor groups, who frequently expressed divergent views on approaches to resolving ventilation issues. Certain commenters exercised their right to challenge the rule and the U.S. Court of Appeals for the D.C. Circuit Court stayed one provision relating to oxygen and carbon dioxide in the bleeder entries. MSHA held a series of informational meetings around the country during which it explained the application of the rule. In so doing, MSHA listened to many questions about the implementation of the rule. MSHA was sensitive to the

views expressed at these meetings and gave serious consideration to these issues. Some of these comments became the basis for portions of this rulemaking. Internal discussions of MSHA's experience with the implementation of the rule led MSHA to include still other issues in this rulemaking. In fact, MSHA stayed the application of two additional provisions in response to potential problems pointed out by interested parties. These stayed provisions relate to actions following the stoppage of the main mine fan with persons underground and to a potential fire hazard from the enclosure of compressors in a noncombustible structure. MSHA addresses these issues in the rulemaking. Once MSHA decided that it was going to proceed with a rulemaking to address these issues, it added other provisions to the package to allow all parties an opportunity to comment where they expressed the view that they had insufficient opportunity to comment on the existing rule (The comprehensive rule that was published in the Federal Register on May 15, 1992). The rule MSHA proposed also included issues raised by parties in litigation challenging the existing rule. MSHA anticipates that the final rule should resolve matters included in the challenge raised by the litigation of the existing rule. Finally, in an effort to address confusion that seemed to exist with certain provisions of the existing ventilation rule promulgated in May of 1992, MSHA either proposed clarifications to the existing rule or discussed the affected provisions in the preambles to the proposed and final rules in an effort to clarify them.

The issues in the rulemaking are complex and highly technical. Comments to the proposal (published on May 19, 1994, 59 FR 26536) and comments following the public hearings (held in September and October 1994, in Price, Utah, Logan, West Virginia, and Washington, Pennsylvania) were extensive. One party alone submitted over two thousand pages of written comments and over 275 exhibits. Not only were the safety issues involved complex, but in many cases, MSHA's task was made more difficult by hearing diametrically opposed viewpoints.

Major Improvements in the Final Rule

The final rule provides a number of significant improvements to the existing ventilation regulations. For example, the final rule provides for the electronic storage of records. A major portion of the mining industry has this capability at the present time through computer technology at the mine site. Electronic

record retention can reduce the cost of storage and maintenance of records and provide for ease in access and transfer of information without reducing the protection afforded miners. Additionally, having records electronically stored can facilitate trend analysis, allowing for earlier detection and correction of potential hazards.

The final rule also requires pressure recorders or an option of the use of a fan monitoring system on main mine fans at all mines. This represents a major step toward monitoring the mine fans controlling the ventilation at the mines and helps assure that the miners have uncontaminated air at all times. The final rule also provides for methane testing at the face during mining operations. This technology is especially useful for taking methane tests during extended cut mining operations. The methane testing evaluates air flow to the face to determine that methane is sufficiently diluted, rendered harmless, and carried away so as to reduce or eliminate the hazards associated with methane liberated during mining operations.

Other improvements in the rule include revisions to the three stayed provisions in the existing rule. Air quality levels for oxygen and carbon dioxide in bleeders are established to protect mine examiners who are required to travel to determine if the bleeders are functioning properly. A second stayed provision is revised to limit the use of transportation equipment during the withdrawal of miners after an unintentional fan stoppage. This revision to the existing rule reduces the likelihood of an ignition from methane that can accumulate during the fan stoppage. The third stayed provision is revised to allow the option of attending rather than housing compressors in a noncombustible enclosure. The hazards associated with the operation of compressors in underground mines were demonstrated at the Wilberg mine disaster, where 27 people lost their lives as a result of a compressor fire.

This final rule provides for an alert and alarm device to be located outside of noncombustible structures housing electrical installations. The alert and alarm assures that miners are made aware of a problem in time to extinguish a fire or safely evacuate an area or the mine as necessary for safety. Another change to the existing rule involves miners or their representatives in the mine ventilation plan approval process before the plan is submitted for approval. This provides for the opportunity for input from those having first hand knowledge in the particular

mining conditions and practices that impact the plan approval.

Other safety enhancements from the existing rule include: requiring the use of extendable probes to conduct methane tests at deep cuts; requiring on-shift examinations on other than coal producing shifts; and accepting a performance test to determine minimum dimensions at certain locations in escapeways.

Finally, the final rule clarifies existing regulations that were considered vague by some parties or were misunderstood. For example, the final rule provides that certified pumpers can conduct their own examination rather than requiring the examination to be conducted during the preshift segment of the mining operation.

To serve the interests of the mining community, MSHA has republished the full text of subpart D of 30 CFR part 75 as it will read upon promulgation of this rule.

II. Discussion of the Final Rule

A. General Discussion

In developing the final rule, MSHA has made every effort to address the comments received during the rulemaking, and to develop practical requirements for real safety problems. Both the costs and the benefits of each standard were also considered. In addition, each standard, as well as revisions and deletions, was carefully considered against the statutory requirement that nothing in the final rule shall reduce the protection afforded miners by an existing mandatory health or safety standard. Where appropriate, MSHA has provided for a phase in period to allow mine operators time to effectively plan and implement the necessary changes.

MSHA carefully analyzed the comments received and responded in many instances by revising the proposed requirements. For example, unlike the proposal, the final rule does not require the second level countersigning of records; allows the use of nonpermissible equipment when conducting an examination upon restart of a fan following unintentional fan stoppages, and requires pressure recording devices or an option of the use of a fan monitoring system to be used on all main mine fans.

Several commenters strongly urged MSHA to proceed in this rulemaking on the issue of using air coursed through the belt entries ("belt air") to ventilate the working face. MSHA has completed its consideration of the Report of the Secretary's Advisory Committee Report on Belt Air and has placed the issue of

using belt air to ventilate the working face on the rulemaking agenda for development of a proposed rule. Thus, "belt air" is not addressed in this rulemaking.

MSHA has also received comments and recommendations on a number of other issues that are outside the scope of this rulemaking. For example, much of the extensive testimony directed toward the use of atmospheric monitoring systems was beyond the issues dealt with in this rulemaking. Also, recommendations for the use of transparent or translucent material for check curtains exceed the scope of this rulemaking. The final rule, therefore, does not include these recommendations.

Commenters to the proposal frequently included a discussion of various accident reports, most written by MSHA. In addition, there were discussions of other documents related to specific incidents or mines, such as MSHA Internal Review Reports or specific mine plans. In some cases, the documents were submitted for inclusion in the record. In other cases, the documents were merely referenced.

MSHA is independently aware of the extensive history of ventilation related explosions, and has considered this information. Where appropriate, this information is discussed in the section-by-section analysis in the preamble of this rule. MSHA is aware that accidents can result from or be contributed to by the violation of one or more of the existing standards. In that context, MSHA has found that the solution is not necessarily to promulgate another standard. (The offender may be as likely to ignore it as well.) Instead, for demonstrated noncompliance with existing standards, the solution is often found in increased emphasis, training, or enforcement, rather than in the promulgation of additional rules.

Several sections of the final rule deal with requirements for sections and areas where mechanized mining equipment is being installed or removed. These provisions, which were included in the existing standard published in May 1992, were repropoed without change for the purpose of receiving additional comments from all interested parties. One commenter cited the William Station mine explosion as evidence of the need for these requirements. Other commenters reiterated an earlier objection that the standards were procedurally flawed. MSHA does not agree that these provisions are procedurally flawed and notes that each of these standards was repropoed and not simply restated as part of this rulemaking. Comments relative to the

technical merits of an individual standard are addressed in the section-by-section portion of this preamble.

Recordkeeping Requirements in the Final Rule

The final rule revises the recordkeeping requirements for several standards. The standards affected are § 75.310, Installation of main mine fans; § 75.312, Main mine fan examinations and records; § 75.342, Methane monitors; § 75.360, Preshift examination; § 75.362, On-shift examination; § 75.363, Hazardous conditions; posting, correcting and recording; § 75.364, Weekly examinations; and § 75.370, Mine ventilation plan; contents.

Generally, the final rule requires examiners to record the results of methane tests as a percent of methane detected; records must be made in a book that is secure and not susceptible to alteration, or electronically in such a manner as to be secure and not susceptible to alteration; and records must be countersigned by the mine foreman by the end of the mine foreman's next regularly scheduled working shift. These rules are intended to assure that examination results are maintained and made available, and that the appropriate level of mine management is made aware of conditions or problems requiring attention. The revisions also help assure the integrity of records and enable mine management to review the quality of the examinations. MSHA intends the term "secure and not susceptible to alteration" when applied to electronic storage to mean that the stored record cannot be modified. One example of acceptable storage would be a "write once, read many" drive.

Numerous comments were received both supporting and opposing the proposed recordkeeping requirements. MSHA reviewed and fully considered each of these comments. The proposal would have required that records be kept in either state-approved books or in bound books with sequential machine-numbered pages. Commenters argued that under the existing rule records may be falsified or altered. Commenters also stated that accident investigations have demonstrated the need for improved records. Other commenters asserted that the proposed requirement for bound books with sequential machine-numbered pages adds an economic burden for the majority of compliant operators and another way should be found, "to foil the very few who are recalcitrant." Other commenters stated that since all records currently include

dates and times, machine-numbered pages are unnecessary.

Some record books that are currently in use and acceptable under the existing standards are vulnerable to misuse or manipulation. For example, under the existing rule, records could be kept in a spiral notebook or even a loose leaf binder. The final rule addresses this issue by requiring that records be made in books that are secure and not susceptible to alteration. Examples of books that are considered by MSHA to be secure and not susceptible to alteration include, but are not limited to, record books that are currently approved by state mine safety agencies, and permanently bound books. Examples of books that would not be considered books that are secure and not susceptible to alteration include loose leaf binders and spiral note books.

Several commenters advocated the use of computers for the storage and retrieval of records. In support of this approach, the commenters cited computer records as being highly accurate, requiring less storage space and facilitating data retrieval. Other commenters expressed concern for the security of records stored electronically, and offered examples of breaches of security in record systems at banks and national security installations as evidence to support this concern.

Electronic storage of information and assessing it through computers is more and more a common business practice generally and in the mining industry. Recognizing this trend, the final rule permits the use of electronically stored records provided they are secure and not susceptible to alteration, are able to capture the information and signatures required, and are accessible to the representative of the miners and the representatives of the Secretary. Based on the rulemaking record, MSHA believes that electronic records meeting these criteria are practical and as reliable as traditional records.

In the preamble to the proposal, MSHA expressed its intent to require a hard copy printout of the information stored electronically to be available within 1 hour of a request, and to require backing up of the information within 24 hours. Commenters objected to making the records available within 1 hour as being too stringent and unnecessarily requiring a person to be on duty at all times. MSHA agrees that the requirement would be overly burdensome and has not included it in the final rule. Similarly, MSHA has not included a specific requirement for backing up the computer data. The final rule requires that the records be secure. This encompasses backing up the data

as appropriate to the conditions and electronic storage system used at the mine. Upon reconsideration, MSHA has concluded that an additional specific requirement would be an unnecessary burden and has not included it in the rule.

A variety of comments were received regarding the countersigning of certain records by the mine foreman, and the time frame permitted for countersigning. The final rule adopts the proposal that the mine foreman must countersign the record by the end of the mine foreman's next regularly scheduled working shift. The mine foreman is the person most responsible for the day-to-day operation of the mine. It is essential for the health and safety of the miners that the mine foreman be fully aware of the information contained in examination reports so as to be able to allocate resources to correct safety problems as they develop. Allowing until the end of the mine foreman's next regularly scheduled working shift to countersign the reports assures that the mine foreman is aware of the results of the examination in sufficient time to initiate corrective actions. In response to commenters, the final rule allows a mine official equivalent to a mine foreman to countersign the records.

Some commenters suggested that the time for countersigning is unnecessarily long, and that the final rule should restore a previous requirement that countersigning be completed "promptly." The term "promptly" involves a level of ambiguity that is eliminated by specifying the time for countersigning records. The record does not show that the time set by the final rule would expose miners to safety or health risks. Also, hazardous conditions are required to be corrected immediately.

Commenters suggested that the term "mine foreman" be replaced by a "certified person responsible for ventilation of the mine or his designee." Another commenter suggested that the record could be countersigned by the mine foreman or any other mine official responsible for the day-to-day operation of the mine. Commenters stated that some operations no longer use the terms "mine foreman", "mine manager," or "superintendent." To provide for alternative management titles, the final rule incorporates the phrase "or equivalent mine official."

Numerous comments were received regarding the requirement of the proposal for second level countersigning by the mine superintendent, mine manager, or other mine official to whom the mine foreman is directly accountable within 2 scheduled

remain within some specified distance. Rationale was solicited for any specific distances suggested. Several commenters supported the proposal, noting that adjustment is inherently provided for high mining heights and seam undulations since a low undulating seam would cause the attendant to remain closer to the compressor. Another commenter suggested that a maximum distance of 20 feet be specified. The commenter reasoned that a maximum distance of 20 feet would assure that the attendant could react to a fire quickly, noting that a compressor fire would propagate rapidly. The commenter also voiced a concern over travel time in low height mines and noted that distances over 20 feet might allow a fire to get out of control before the attendant could reach the machine.

Another commenter was concerned with the proposed requirement in (a)(1) that a person be able to see the compressor at all times. The commenter suggested that the term "close proximity" be adopted noting that a person could be in close proximity, e.g. in an adjacent crosscut, but not within sight. The commenter suggested that this should be acceptable since the person would still be able to activate the fire suppression system. MSHA disagrees. The suggested situation is not acceptable since a considerable delay could result before detection of a problem if the person were not within sight of the compressor. In such a case the person would be relying on the smell of smoke or some indirect means of detecting a problem. Because of the potential fire hazard associated with compressors, reaction time is critical. MSHA continues to believe that reaction time is appropriately minimized if the assigned person can see the compressor at all times, is capable of deenergizing the unit, and is capable of activating the fire suppression system. While agreeing that reaction time is critical and after considering all of the comments, MSHA finds the arguments for not specifying a set distance to be more persuasive. Therefore, the final rule permits compressors to be continuously attended by a person designated by the operator who can see the compressor at all times during its operation. Any designated person attending the compressor must be capable of activating the fire suppression system and deenergizing or shutting-off the compressor in the event of a fire.

If a compressor is not enclosed in accordance with (a)(2), the compressor can be operated only while it can be seen by a person designated by the operator according to (a)(1). In adopting

this approach, the proposed paragraph (a)(1) language was deleted. Commenters indicated confusion over the similarity of proposed paragraphs (a)(1) and (b)(1) of the existing rule. The final rule combines these two requirements in (a)(1). The final rule requires both that the person be able to see the compressor and be capable of activating the fire suppression system.

Paragraph (a)(2) of the final rule requires that compressors, if installed in a noncombustible structure or area, be ventilated by intake air coursed directly into a return air course or to the surface and be equipped with sensors to monitor for heat and for carbon monoxide or smoke. MSHA expects that an air quantity sufficient to cool the compressor will be provided through the enclosure. The manufacturer's operation manuals for compressors often specify an air quantity or a maximum ambient temperature. The sensors required by paragraph (a)(2) must deenergize power to the compressor, activate a visual and audible alarm located outside of and on the intake side of the enclosure, and activate doors to automatically enclose the noncombustible structure or area when either of the conditions in paragraph (a)(2)(i) or (ii) occurs. The visual alarm should be situated so that it can be seen by persons traveling in the intake entry immediately adjacent to the enclosure. The sensors must also deenergize or shut-off the compressor in addition to closing the doors of the enclosure.

Paragraph (a)(1)(ii) specifies that the sensors shall deenergize power to the compressor, activate a visual and audible alarm located outside of and on the intake side of the enclosure, and activate doors to automatically enclose the noncombustible structure or area when the carbon monoxide concentration reaches 10 parts per million above the ambient level for the area, or the optical density of smoke reaches 0.05 per meter. These levels are the same as required by the existing rule. As discussed in MSHA's opening statement at the ventilation rulemaking hearings, the value used for the optical density of smoke is based on information provided from the Bureau of Mines. MSHA pointed out that, based on comments received from the Bureau of Mines, this number is incorrect and should be divided by 2.303 to conform to the internationally accepted term of optical density. MSHA's remarks were made in reference to the requirement in § 75.340(a)(1)(iii)(B). The final rule also makes a conforming technical revision to § 75.344(a)(2)(ii).

Paragraph (e) of the final rule requires automatic deenergization or automatic shut off of the compressor if the fire suppression system of paragraph (b) is activated. A number of commenters suggested that compressors should have an automatic shutdown feature that deenergizes or shuts-off the compressor when the required fire suppression system is activated. MSHA agrees. MSHA recognizes that under § 75.1107-4 automatic deenergization is required if the automatic fire suppression system is activated on unattended electrically powered compressors.

Proposed paragraph (b)(2) has been omitted from the final rule. The paragraph was intended to provide additional flexibility for compressor installations located away from working sections and near a return air course where a substantial pressure differential exists. No comments were received in support of the proposed standard, while a number of comments were received in opposition. Commenters objecting to the standard raised concerns about overheating and stated that the revisions were made unnecessary in view of modified paragraph (a). MSHA agrees. Historically, when compressors that are on fire continue to operate, they often released oil into the environment, thus increasing the severity of the fire. For this reason, MSHA believes that safety is best served by requiring compressors to be deenergized or shut-off when the fire suppression system is activated. Commenters recommended deenergization in (a)(2) of the final rule. MSHA agrees and has included automatic deenergization in (a)(2). One commenter suggested that alarms be automatically given at the section and surface and that two-way communications be provided at each compressor installation. This recommendation has not been adopted since the rule provides the desired level of safety through venting to the return, automatic fire extinguishment and closure of doors, in addition to the alarms outside the enclosure.

Section 75.360 Preshift Examination

The preshift examination is a critically important and fundamental safety practice in the industry. It is a primary means of determining the effectiveness of the mine's ventilation system and of detecting developing hazards, such as methane accumulations, water accumulations, and bad roof.

A considerable number of comments were received representing a range of opinions on the changes MSHA proposed. After consideration of all comments received, the final rule

adopts certain modifications and clarifications to the existing standard to increase the effectiveness of the preshift examination. The final rule removes paragraph (e), redesignates existing paragraphs (f) through (h) as (e) through (g), revises paragraphs (a), (b), and (f) and adds new paragraphs (b)(8) through (b)(10).

Existing paragraph (a) is divided into paragraphs (a)(1) and (a)(2) in the final rule. Paragraph (a)(1) of the final rule contains the existing general requirement that preshift examinations are to be conducted by certified persons designated by the operator. Paragraph (a)(1) also modifies the existing and proposed language in response to comments, to provide for preshift examinations at 8-hour periods. Paragraph (a)(2) of the proposed rule would have allowed pumpers to conduct an examination in lieu of the preshift examination under certain conditions. The final rule adopts this approach with 2 changes. The final rule does not require the pumper to examine for noncompliance with mandatory safety and health standards that could result in a hazardous condition and does require that records be made and retained in accordance with § 75.363.

A number of commenters addressed the application of this standard at mines where extended, overlapping, or other novel working shifts are employed. MSHA agrees with commenters that evolution within the industry in shift scheduling has presented a number of questions and controversies regarding the standard which must be resolved to assure that proper preshift examinations are conducted within suitable time frames. Based on comments, the final rule adopts a modification to clarify and standardize the application of the preshift examination in recognition of the use of novel shifts while maintaining the protection of the existing standard.

Underground working schedules of three 8-hour shifts per day were virtually standard when the previous rule was implemented. Currently a substantial number of mining operations have work shifts of more than 8 hours. Other operations stagger or overlap shifts providing for continuous underground mining activities. Some mines that operate around the clock schedule persons to begin shifts at one- or two-hour intervals. In such cases, controversies and misunderstandings have developed regarding application of the current standard.

Commenters suggested that preshift examinations should be conducted for distinct 8-hour periods. Under this scenario a preshift examination for an 8-

hour period would be acceptable for the entire 8-hour period regardless of shift schedules. Other comments indicate that this suggested modification would be consistent with the original intent and language of section 303(d)(2) of the Mine Act, which provides that no person, other than certified persons designated to conduct the examination, is permitted to enter any underground area unless a preshift examination of such area has been made within 8 hours prior to their entering the area. A commenter stated that to allow preshifts at more than 8-hour periods reduces the protection envisioned by the drafters of the Mine Act. MSHA understands the concerns and the critical nature of the preshift examinations to monitor the constantly changing conditions underground and has revised the rule accordingly to provide for an examination at 8-hour intervals.

Under the final rule, operators will establish the 8-hour periods for which preshift examinations will be conducted. Persons may enter or leave the mine, regardless of their shift schedule during any established period for which a preshift examination has been conducted. However, another preshift examination must be completed prior to the next 8-hour period if any persons, other than examiners, remain in the mine. As always, no person other than examiners may enter any underground area prior to the completion of a preshift examination.

The final rule requires three preshift examinations where persons are underground for more than 16 hours per day. At mines with only one 8-hour shift per day only one preshift examination per day would be required. Mines working 10- or 12-hour shifts would conduct preshift examinations for each 8-hour period during which persons are underground. MSHA agrees with comments that the original legislation of the Mine Act envisioned that preshift examinations would be conducted for each 8-hour interval that persons worked underground. Similar to the existing requirement, the final rule does not require examinations for designated 8-hour periods when no one goes underground.

MSHA recognizes that the final rule may cause a limited number of mines to perform examinations that are not currently required. These affected mines do not operate 24 hours per day but work one or two shifts which exceed 8 hours. For example, the final rule requires two examinations per day at a mine operating one 12-hour shift per day. When a mine operates two 10-hour shifts per day the final rule requires three examinations per day. The Agency

has concluded that, considering the speed at which underground conditions can change, a reasonable period must be identified after which another examination is necessary. It is not MSHA's intent that the preshift be a continuous examination without a beginning or an end. Rather if the mine uses regular shifts that are longer than 8 hours in length, the preshift examination is good for an entire 8-hour interval. Those persons who start their work shift later than the normal shift start time do not need an additional preshift examination during the remainder of the 8-hour period. However, a preshift will be required if they are to stay in the area past the end of the 8-hour period. However, in accordance with longstanding practice, unplanned short excursions past the 8-hour period that occur infrequently will be accepted without an additional preshift. For example, miners required to stay an additional short period of time, such as 15 minutes to complete a mechanical repair, or due to a mantrip delay, would not need an additional preshift. The rule simplifies and clarifies the application of the standard at mines employing creative shift scheduling.

Comments were received suggesting that the regulation should stipulate 12:00 a.m., 8:00 a.m., and 4:00 p.m. as the beginning of the 8-hour periods for which preshift examinations would be required. This suggestion has not been adopted. There is no safety or health benefit to be gained through prohibiting operators from adopting other 8-hour intervals, e.g., 10:00 p.m., 6:00 a.m., and 2:00 p.m. Also, the standard is not intended to prevent operators from establishing their own work times. For example, an operator may elect a starting time of 11:00 a.m. for a weekend project provided the preshift is completed within the 3 hours prior to the beginning of the shift.

A commenter suggested that the final rule not require a preshift examination for non-coal producing shifts, where persons are to work in the shaft, slope, drift, or on the immediate shaft or slope bottom area. Under the commenter's suggestion, only that area immediately surrounding the bottom would need to be examined. The rationale given for the suggested change is that it is intended to bring the standard into conformity with "certain state regulatory programs". MSHA is not aware of state regulatory programs which would necessitate a change in the language of the final rule. Additionally, 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. Therefore, the suggestion of the commenter has not been adopted.

Paragraph (a)(2) of the final rule provides that preshift examinations of areas where pumpers are scheduled to work or travel are not required prior to the pumper entering the areas, if the pumper is a certified person and the pumper conducts the specified examinations. This standard recognizes that pumpers travel to remote areas of the mine to check on water levels and the status of pumps, making regular preshift examinations impractical. The examinations required by pumpers include an examination for hazardous conditions, tests for methane and oxygen deficiency, and a determination of whether 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 must be made and retained in accordance with § 75.363.

One commenter objected to the proposal stating that areas where pumpers work or travel should be preshift examined. The commenter stated that the proposed revision would weaken the protections provided under the existing standard, and that the rule would indirectly require that pumpers be certified. The commenter noted that most pumpers are not certified to perform examinations, and that it would be inappropriate to require "hourly employees" to obtain such certifications. The commenter further suggested that the proposed revision could infringe on the traditional relationship between labor and management wherein only management is required to be certified. The final rule does not require that pumpers be certified. Rather the final rule provides an option for pumpers to perform examinations for themselves if they are certified. Otherwise, areas where pumpers are scheduled to travel must be preshift examined by a certified person.

The final rule maintains the existing level of safety. A complete examination by a certified person is still required and the examination will be conducted closer to the time that work is performed in the area. As with other examination requirements, no one may accompany the pumper during the examination. It is important to note that the examination performed by the pumper under paragraph (a)(2) is not acceptable if other persons have been scheduled to enter the area. The pumper may only perform an examination in lieu of a preshift for himself or herself.

If, however, after the beginning of the preshift examination, persons are assigned to enter the area, the pumper may perform a supplemental examination for other persons in accordance with § 75.361, provided that the certified pumper is designated by the operator to conduct such examinations.

Commenters asserted that pumpers cannot conduct quality examinations and effectively perform their normal work duties. 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).

One commenter cited a 1984 incident at the Greenwich No. 1 mine where three miners were killed in an explosion while entering an idle area to work on a pump. The commenter suggested that an effective preshift examination would have prevented the accident and suggests that both a preshift examination and examinations by qualified pumpers should be required. An adequate preshift examination or supplemental examination as specified in the final rule, would prevent a similar result. One of these two examinations is always required under the final rule before persons enter any such idle area.

Also in addressing paragraph (a)(2), one commenter suggested that some certified persons who are pumpers may not conduct adequate examinations. According to the commenter, certified persons conducting examinations under paragraph (a)(2) cannot be expected to perform at the same level as preshift examiners conducting examinations under (a)(1). MSHA expects that all certified persons who are required to conduct examinations, including certified pumpers, will conduct the examinations in accordance with the standards.

Another commenter suggested that persons performing other jobs, such as rock dusters, should be permitted to perform examinations for themselves. Pumpers, unlike most other miners except mine examiners, travel in remote areas of the mine and normally work alone. Persons performing work such as rock dusting, however, normally work in newer areas of the mine where

mining has only recently been completed and normally work as a part of a crew. Therefore, MSHA does not consider the work assignments to be similar enough to merit the same consideration and has not included this recommendation in the final rule.

As proposed, paragraph (a)(2) would have required that the certified pumper examine for noncompliance with mandatory safety or health standards that could result in a hazardous condition, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction in the area to be worked or traveled by the pumper. A number of commenters recommended the deletion of the requirement that the certified pumper identify and record noncompliance with mandatory safety and health standards that could result in a hazardous condition. Commenters cited a number of objections: the requirement would detract from miner safety, would significantly and unnecessarily increase the burden on examiners, would diminish the quality of the examination, would require excessive judgment and discretion by the examiners, and require examiners to make predictions. After considering all submitted comments, MSHA concludes that these comments have merit and the final rule does not require certified pumpers to examine for violations of mandatory safety and health standards that could result in a hazardous condition.

Under paragraph (a)(2), a record of all hazardous conditions found by the pumper must be kept in accordance with § 75.363. One commenter objected in that all of the records resulting from a preshift examination would not be required of the pumper, such as the locations of air and methane measurements and the results of methane tests. The commenter suggested that the full preshift record should be produced just as if the examination were done according to paragraph (a)(1). In the case of the pumper-examined area, the records required under paragraph (a)(2) will assure that mine management is made aware of any condition which results in a hazardous condition and will facilitate corrective actions being taken. It is important to note that the pumper is conducting an examination in a limited area only for himself or herself. This is in contrast to the various areas addressed in paragraph (a)(1), where the examination is in anticipation of one or many other miners entering these areas usually on a regular basis, all of whom are relying on the examiner's findings. In these circumstances, it is important that a record is made which can be

utilized to spot ongoing problems and trends.

Paragraph (b) of the rule specifies the nature of the preshift examinations and the locations where a preshift examination is required. Proposed paragraph (b) would have required that the person conducting the preshift examination would examine for noncompliance with mandatory safety or health standards that could result in a hazardous condition. After considering all submitted comments, the final rule does not contain this requirement.

A number of commenters recommended the deletion of the requirement to identify and record noncompliance with mandatory safety and health standards that could result in a hazardous condition. Various commenters stated that the proposed requirement: would distract the examiner from the most important aspects of the preshift examination; would require predictions; would be an unrealistic expectation; and/or is designed only to facilitate enforcement actions. Commenters also suggested that the proposal would result in a shift in the focus of preshift examination from true hazards to noncompliance.

Other commenters objected that the proposed requirement to examine for noncompliance with mandatory safety or health standards that could result in a hazardous condition is so vague that it could detract from miner safety. One commenter suggested that the examiners would spend their time performing permissibility checks, torquing roof bolts, measuring roof bolt spacing, and similar tasks which represent a significant departure from the examiners traditional duties.

Another commenter expressed the opinion that paragraph (b) should require that all violations of mandatory safety or health standards be recorded and it should not be limited to those that could result in hazardous conditions. Preshift examinations assess the overall safety conditions in the mine; assure that critical areas are properly ventilated; assure that the mine is safe to be entered by miners on the oncoming shift; identify hazards, whether violations or not, for the protection of miners; and through this identification facilitate correction of hazardous conditions.

The preshift examination requirements in the final rule are intended to focus the attention of the examiner in critical areas. This approach is consistent with the fundamental purpose of preshift examinations which is to discover conditions that pose a hazard to miners.

MSHA is persuaded that to require examiners to look for violations that might become a hazard could distract examiners from their primary duties. The final rule, therefore, does not adopt this aspect of the proposal.

Paragraph (b)(1) of the final rule adopts the proposal and clarifies that preshift examinations are to include travelways in addition to roadways and track haulageways. During informational meetings, commenters indicated that the terms "roadways" and "track haulageways" are associated with areas where mobile powered equipment is operated. By including the term "travelways," the rule clarifies that areas where persons are scheduled to travel on foot are to be included, since hazards may also develop in these areas.

One commenter suggested that the proposal would greatly increase the area that must be preshift examined, even though the requirement is limited to only those travelways where miners are scheduled to work or travel. This commenter suggested that in large mines many more areas than would actually be used by miners would have to be preshift examined. The premise of the preshift examination is that all areas where miners will work or travel be examined for hazards. The final rule change concerning "travelways" is intended only to clarify that, when miners are scheduled to use these areas, they must be preshift examined first. The final rule, therefore, does not expand the existing scope to the preshift examination requirements.

The language of the existing paragraph (b)(1) referring to, " * * * other areas where persons are scheduled to work or travel during the oncoming shift" is transferred to a new paragraph (b)(10) with conforming changes, as proposed. MSHA received no comments on moving this provision to paragraph (b)(10). Commenters did respond to the phrase in proposed paragraph (b)(1) requiring preshift examinations of roadways, travelways and track haulageways where persons are " * * * scheduled, prior to the beginning of the preshift examination to work or travel during the oncoming shift." The purpose of this proposal, which is adopted in the final rule with only clarifying changes, is to permit work and mining personnel to be rescheduled after the start of a shift. Preshift examinations, by their nature, must be completed before the start of the shift. Changes in conditions, however, such as a breakdown of equipment, can alter planned work schedules. To accommodate these circumstances, the final rule requires mine operators to design preshift examinations around the

best information available at the time the preshift begins. If changes must be made, § 75.361 specifies that areas not preshift examined be covered by a supplemental examination performed by certified persons before miners enter the area.

One commenter objected that was confusing and should be modified. Other commenters foresaw possible abuses of the flexibility offered by the rule with some operators performing supplemental rather than preshift examinations, claiming that assignments were made after the preshift examination begins. After considering the comments, MSHA has retained the proposed flexibility to preshift examine areas where miners are scheduled to work or travel. To require more than this would be impractical.

Section 75.360(b)(3) of the final rule requires preshift examinations of working sections and areas where mechanized mining equipment is being installed or removed if anyone is scheduled to work on the section or in the area during the oncoming shift. A discussion of the reproposal of provisions concerning the installation and removal of mechanized mining equipment is presented in the General Discussion section of this preamble. As with the existing rule, the examination includes working places, approaches to worked-out areas, and ventilation controls on these sections or in these areas. The final rule, like the proposal, adds a new requirement that the examination also include a test of the roof, face and rib conditions on these sections or in these areas.

Proposed changes to paragraph (b)(3) not adopted in the final rule would have also required preshift examination of sections not scheduled to operate but capable of producing coal by simply energizing the equipment on the section. Also, proposed changes to paragraphs (c), (c)(1), and (c)(3) specifying where air volume measurements were to be taken on these sections have also not been adopted in the final rule.

The new requirement to test the roof, face and rib conditions is added because of the importance of this test to the safety of miners. In newly mined areas, checking roof, face and rib stability is most important to preventing injuries and death. Comments were received in support of the revision, citing accidents which might have been prevented had such tests been adequately performed during preshift examinations. One commenter, when suggesting new wording for paragraph (b)(3), indicated that the requirement to test the roof, face and rib conditions should be deleted but

did not offer any rationale for the suggested deletion. Another commenter suggested that the preshift examination should only require a visual examination of the roof, rather than a physical examination. Physical examinations of the roof, such as "sounding," have been a historically accepted method for examiners to test roof competency. Whenever an examiner has a question as to whether a section of roof is competent, such a test should be performed.

Comments were mixed on MSHA's proposed revision to include idle working sections as part of the preshift examination. The proposal is not retained in the final rule. Some commenters objected to the proposal as unnecessary, burdensome, or impractical. Commenters believed that the existing § 75.361 requirement for supplemental examinations prior to anyone entering into such an area was sufficient. Commenters also stated that a preshift examination in these areas could introduce a false sense of security and that the effect would be to divert preshift examiners from more important duties. One commenter stated that the proposed requirement would be inconsistent with and contradictory to the basic concept of preshift examinations. Another commenter objected to MSHA's statement in the preamble to the proposal that there is a reasonable likelihood that miners will at some point during a working shift enter sections that are set up to mine coal.

In support of the proposed requirement to preshift examine idle sections, one commenter cited explosions at the Red Ash Mine in 1973, the Scotia Mine in 1976, the P&P Mine in 1977, the Ferrell #17 in 1980, the Greenwich #1 Mine in 1984, and the 1994 explosion at the Day Branch No. 9 Mine in Kentucky. As the commenter pointed out, in each of these accidents miners were sent into an area that had not been preshift examined. However, none of these accidents were the result of miners entering areas that would have been covered by the proposal. In each instance, miners entered an area where mining had ceased, but could not be resumed by simply energizing equipment. Another common thread in each of these explosions was the failure of the operator to conduct the required supplemental examination prior to miners entering the area on an unscheduled basis.

Paragraph (b)(4) of the final rule requires preshift examinations to include approaches to worked-out areas along intake air courses and at the entries used to carry air into worked-out areas if the intake air passing the

approaches is used to ventilate working sections where anyone is scheduled to work during the oncoming shift. The examination of the approaches to the worked-out areas is to be made in the intake air course immediately inby and outby each entry used to carry air into the worked-out area. The examination of the entries used to carry air into the worked-out areas is to be at a point immediately inby the intersection of each entry with the intake air course. The standard is intended to assure that miners are not exposed to the hazards associated with ventilating working sections with contaminated air which has passed through a worked-out area. The requirement is consistent with the § 75.301 definition of "return air" and with § 75.332 which provides that working sections and other specified areas must be ventilated with intake air.

Commenters correctly noted that a clarification was needed in the first sentence of proposed paragraph (b)(4) to indicate that the examination at the specified points is only required if the intake air passing the approaches is used to ventilate working sections where anyone is scheduled to work during the oncoming shift. Commenters suggested that an examination should not be required if the intake air is not used to ventilate working sections or if no one is scheduled to work on the section. This was the result intended by the proposal and the final rule has been revised accordingly.

One commenter also suggested that the requirement in paragraph (b)(4) is unnecessary because the safeguards in the approved mine ventilation plan should prevent an air reversal in a worked-out area in which this air would enter the intake air course. The commenter offered the example of a worked-out area connected directly to a bleeder system. MSHA agrees that when proper safeguards are in place and operating as intended, air reversals are unlikely. However, roof falls and other obstructions in the worked-out area or in the bleeder can cause air reversals, permitting return air to enter the intake and be transported to the working section. Without a suitable examination, this condition would go undetected and could lead to disaster. While not exactly the same, the explosion at the Pyro Mine in 1989, which resulted in the deaths of 10 miners, was the result of a somewhat similar set of circumstances. A water blockage in the bleeder entry that combined with changes to certain ventilation controls led to methane migrating from the worked-out area onto the longwall face. MSHA's report of this accident concludes, in part, that changes that occurred during the mining

of the longwall panel and in the bleeder entries caused a fragile balance of air flows to exist in the ventilation system that permitted methane to migrate from the gob and to accumulate near the longwall headgate.

One commenter agreed with the proposal and discussed the need to assure that miners are not exposed to the hazards associated with ventilating working sections with return air.

Essentially, the final rule requires that at each applicable approach, three examinations must be made: immediately inby and outby the approach in the intake entry and in the approach itself immediately inby the intersection with the intake entry. Situations exist where multiple openings along an intake lead into a worked-out area. Under some conditions intake air enters the upstream openings, passes through the worked-out area, and then re-enters the intake. The examination required by paragraph (b)(4) is designed to assure that such a condition is detected. Also, the examination detects any change in ventilation entering the worked-out area which may warrant follow-up or corrective actions to assure that the worked-out area is ventilated.

Paragraph (b)(6) of the final rule adopts the proposal modifying the existing rule. No comments were received on this aspect of the proposal. The final rule in paragraph (b)(6)(i) requires preshift examinations to include entries and rooms developed after November 15, 1992 (the effective date of the existing rule), and developed more than 2 crosscuts off an intake air course without permanent ventilation controls where intake air passes through or by these entries or rooms to reach a working section where anyone is scheduled to work during the oncoming shift. Similarly, under (b)(6)(ii) the examination must include entries and rooms developed after November 15, 1992, and driven more than 20 feet off an intake air course without a crosscut and without permanent ventilation controls where intake air passes through or by these entries or rooms to reach a working section where anyone is scheduled to work during the oncoming shift.

Existing paragraph (b)(6) requires that a preshift examination be made in all entries and rooms driven more than 20 feet off an intake air course without a crosscut or more than 2 crosscuts off an intake air course without permanent ventilation controls where intake air passes through or by these entries or rooms to a working section where anyone is scheduled to work during the oncoming shift. MSHA proposed

modifications to existing paragraph (b)(6) based on concerns raised following publication of the existing rule on May 15, 1992. Commenters at that time indicated that extensive rehabilitation would be required at a number of mines to implement the standard in the rooms and entries described in the rule, causing diminished safety for miners performing the rehabilitation work. Commenters noted that some areas had been timbered heavily and cribbed because of adverse roof conditions and that rehabilitation would unnecessarily expose miners to roof falls and rib rolls while removing or repositioning roof support. In addition, roof conditions in some areas would remain hazardous even after rehabilitation. The commenters also noted that many such areas had been in existence for many years without incident and that any methane liberation had long since stopped due to the passage of time. They noted that some areas cannot be effectively sealed and that the risks associated with rehabilitation and subsequent physical examinations would greatly outweigh the safety benefit to be gained. MSHA recognizes the legitimate concerns raised by the commenters and the final rule requires preshift examination of entries and rooms developed after November 15, 1992 and driven more than 20 feet off an intake air course without a crosscut or more than 2 crosscuts off an intake air course without permanent ventilation controls where intake air passes through or by these entries or rooms to a working section where anyone is scheduled to work during the oncoming shift. MSHA believes, however, that the conditions addressed by paragraph (b)(6) are the result of improper mining practices in the past. These mining systems should be revised in the future to avoid poor conditions, or the areas affected should be fully and reliably ventilated and be examined. Also, the final rule applies only to entries and rooms developed after the effective date of the existing rule. As such, the mining industry was on notice of the shortcomings of mining practices that left entries and rooms of the type addressed by the standard.

Paragraph (b)(8) retains the proposal requiring preshift examinations to include high spots along intake air courses where methane is likely to accumulate, if equipment may be operated in the area during the shift. As noted in the proposal, it has long been recognized that methane can accumulate in high areas with no indications being detected in the lower

portions of the opening. As mobile equipment passes under these areas or a conveyor belt is put into operation, the methane is pulled down and mixed with the air in the entry and may be ignited. The final rule addresses the hazards of undetected accumulations of methane in high spots by requiring preshift examinations in such areas in intake air courses if equipment will be operated in the area during the shift.

Several commenters requested that MSHA clarify the term "high spots." One commenter stated that many hours would be necessary to examine every indentation in the roof of a large mine and stated the belief that the turbulence created by passing equipment would render harmless any of the small amounts of methane that might possibly accumulate. Another commenter believed the requirement was unnecessary because there has never been a problem with methane accumulating in intakes in quantities sufficient to cause an explosion. One commenter suggested that the requirement should only be applicable to mines with a demonstrated history of methane accumulations, noting that although mines are considered likely to liberate methane, it is not likely that all mines will accumulate methane in high spots.

Another commenter suggested that preshift examinations should be required in all high spots in intakes, returns, belt entries, and track haulage entries. The commenter also objected to limiting the examination in intakes only to areas where equipment may be operated during the shift. The commenter observed that methane can accumulate quickly in high spots and that it is critical to detect the methane before it creates a danger. The commenter notes several accidents involving methane accumulations in high spots, including: Meigs No. 31 Mine in 1993 where methane in a roof cavity was ignited by a torch; VP-5 Mine in 1992 when methane in a cavity was ignited by a torch; Ferrell No. 17 Mine in 1980 where, according to the commenter, methane may have accumulated in a cavity in the belt entry roof and may have been ignited by a trolley powered vehicle; and in the VP-6 in 1982 where methane in a high spot was ignited by a trolley powered vehicle traveling through the area. The commenter stated that accumulations of methane in high spots can be ignited by any number of sources.

A meaningful preshift examination requires that conditions which can lead to an explosion or ignition be detected and corrected before miners begin their work. In addition to the accidents cited

above attributed to methane accumulations in high spots, the Itmann No. 3 Mine explosion occurred when a trolley powered vehicle ignited methane in a high spot, resulting in the death of 5 miners and severe burns to 2 other miners. The phrase "high spots where methane is likely to accumulate" should be understood in the coal mining industry. Experienced miners, and in particular preshift examiners and certified persons, can readily recognize a high spot where methane is likely to accumulate. Also, MSHA for many years has considered preshift examinations to be inadequate where examinations did not include methane tests in these areas. An examination of "every indentation," as foreseen by one commenter is not expected nor intended by paragraph (b)(8), which specifies that preshift examinations be used to identify methane hazards by testing in the appropriate locations. The final rule does not adopt the suggestion that methane examinations be based on mine liberation history since significant methane liberation may begin or can greatly increase at any time. Also, the potential for a dangerous accumulation of methane in a high spot is influenced by mine ventilation, particularly the air velocity in the entry.

One commenter suggested that the rule require tests only in "unventilated high spots" along intake air courses. The final rule does not adopt this approach. The purpose of the preshift examination is to detect hazards, in this case accumulations of methane. Nominal ventilation in a high roof cavity may not be sufficient to sweep away methane and an accumulation could exist. The final rule directs an examiner's attention to such situations.

Proposed paragraph (b)(9) is modified in the final rule. Paragraph (b)(9) of the final rule requires preshift examinations at underground electrical installations referred to in § 75.340(a), except those water pumps listed in § 75.340(b)(2) through (b)(6), and areas where compressors subject to § 75.344 are installed if the electrical installation or compressor is or will be energized during the shift. The proposal would have exempted all water pumps from the requirements of paragraph (b)(9).

One commenter objected to the exemption for pumps and recommended that all pumps be examined pointing out that some pumps are large, high-horsepower units. The commenter noted a 1994 case in Virginia where a 200 horsepower pump exploded. Pumps of this type may be in locations or in applications that would not be examined by pumpers under paragraph (a)(2). The final rule responds

to this issue by requiring that all pumps should not be exempted from the standard. Paragraph (b)(9) requires preshift examinations of all pumps, except those specified in § 75.340(b)(2) through (b)(6). Pumps specified in § 75.340(b)(2) through (b)(6) and other pumps that operate automatically or that otherwise may be energized are generally in the more remote areas of the mine and are to be examined weekly in accordance with § 75.364.

Pumps which will be examined by certified pumpers in accordance with paragraph (a)(2) are not covered by the final rule because of the limited hazards they pose and because certified pumpers would themselves conduct examinations of this equipment in accordance with paragraph (a)(2). Examinations by pumpers at these locations will assure that methane has not accumulated and that the equipment is not in a condition to create a fire or ignition source.

A review of the accident history reveals a number of fires in equipment that, under the final rule, would be subject to preshift examinations. For example, the compressor that MSHA identified as the probable cause of the fire in the Wilberg Mine, which killed 28 miners, would have required a preshift examination under (b)(9) of the final rule. Additionally, MSHA has identified several fires associated with rectifiers and transformer installations in the mining industry. One of these transformer fires was discovered during a preshift examination.

One commenter supported proposed paragraph (b)(9) and noted a number of ignitions involving trolleys. The commenter also noted that history demonstrates that other electrical installations present ignition or fire hazards which should be examined before each shift.

One commenter incorrectly understood proposed paragraph (b)(9) to not require preshift examinations of areas where compressors subject to § 75.344 are installed if the compressor is or will be energized during the shift. The standard does require preshift examinations of such equipment, which includes all compressors except those which are components of equipment such as locomotives and rock dusting machines and are compressors of less than five horsepower.

Paragraph (b)(10) adopts the proposal that preshift examinations include other areas where work or travel during the oncoming shift is scheduled prior to the beginning of the preshift examination. This provision recognizes that work requirements and situations may change after the preshift examination has

begun. Often, once the examination has started it is not possible to contact the examiners to direct them to newly identified areas where miners will work. In these cases, a supplemental examination is required before persons work or travel in these areas. As discussed in the preamble to the proposal, paragraph (b)(1) requires preshift examinations of any underground area where persons are scheduled to work or travel during the oncoming shift. Under the existing rule, an operator did not have the flexibility to modify work assignments after the preshift examination had begun, unless it was possible to contact and redirect the examiners to perform a preshift examination before the beginning of the shift. Commenters in general supported the proposal. One commenter, however, while supporting the change expressed concern that the provision could be abused. MSHA does not anticipate abuse of the rule and believes it to be a reasonable approach to assuring that areas where persons work or travel are examined.

As discussed above, the final rule does not adopt the proposed revisions to paragraphs (c), (c)(1), and (c)(3) and instead retains the language of the existing standard. While commenters to proposed paragraphs (c), (c)(1), and (c)(3) objected to expanding air volume measurements made during preshift examinations to sections where coal could be mined by simply energizing the equipment, no comments were received objecting to retaining the requirement for areas where equipment is being installed or removed. An in-depth discussion of the reproposal of provisions concerning the installation and removal of mechanized mining equipment is presented in the General Discussion section of this preamble.

Paragraph (f) of the final rule sets out the requirements for recording and countersigning both the results of the preshift examination and actions taken to correct hazardous conditions found during the preshift examination. The final rule adopts the following proposed revisions to the existing rule: a record of the results of the preshift examination is required to be made; the results of methane tests are required to be made in terms of the percentage of methane found; and a certified person is required to record the actions taken to correct hazardous conditions found during the preshift examination.

Additionally, paragraph (f) of the proposal would have required countersigning by both the mine foreman and the superintendent or equivalent individual to whom the mine foreman reports. The final rule does not

require this second level countersigning. Also, the final rule allows an official equivalent to a mine foreman to sign the records. Finally, the final rule allows for secure storage of records in a way that is not susceptible to alteration and the records can be kept in a book or in a computer system.

Commenters suggested that the final rule only require the examiner to record uncorrected hazardous conditions and not those which were corrected by the end of the shift. Commenters characterized the reporting of corrected hazardous conditions as unnecessary and unjustified by the accident history.

MSHA did not adopt the proposal to record corrected defects found during the fan examination required by § 75.312. MSHA believes, however, that a record of all hazards found during the preshift examination, including those corrected, is necessary. The record serves as a history of the types of conditions that are being experienced in the mine. When the records are properly completed and reviewed, mine operators can use them to determine if the same hazardous conditions are occurring repeatedly and if the corrective action being taken is effective. Additionally, this record can permit mine management, the representative of miners, and the representative of the Secretary to better focus their attention during examinations and inspections. The safety value of a complete record is illustrated by the 1989 explosion at Pyro Mining Company's William Station Mine in which 10 miners were killed. MSHA's accident investigation report concludes that methane concentrations of up to 6.5 percent were detected in the explosion area prior to the explosion but reports by the mine foreman for the shift failed to record the presence of these dangerous accumulations of methane or show the action taken to correct the condition. The investigation further found that the failure to record these methane accumulations in the appropriate record books prevented management officials and other interested persons from learning of the hazardous condition and initiating corrective action. In light of the record, the final rule adopts the proposal and requires the examiner to record the results, whether corrected or not, of the preshift examination and the action taken to correct hazardous conditions found during the preshift examination. This would include hazardous conditions and their locations and the results of methane and air measurements required to be made elsewhere in § 75.360.

As with other records required by this rule, the records of preshift examinations may be kept either in secure books that are not susceptible to alteration or electronically in a computer system so as to be secure and not susceptible to alteration. A detailed discussion of record books and the use of computers to maintain records can be found in the General Discussion of this preamble.

A variety of comments were received regarding the countersigning of preshift records by the mine foreman, and the time permitted for countersigning. The final rule adopts the proposal that the mine foreman or equivalent mine official must countersign the record of the preshift examination by the end of the mine foreman's next regularly scheduled working shift. The mine foreman is in a position of responsibility for the day-to-day operation of the mine. It is essential for the health and safety of the miners that the mine foreman be fully aware of the information contained in the preshift examination reports so as to be able to allocate resources to address safety problems. Allowing until the end of the mine foreman's next regularly scheduled working shift to countersign the reports provides sufficient flexibility to make compliance practical while assuring that the mine foreman is aware of the results of the examination in a reasonably timely manner.

Some commenters suggested that the time for countersigning is unnecessarily long, and that the final rule should restore a previous requirement that countersigning be completed "promptly." The term "promptly" involves ambiguity that is eliminated by specifying the time for countersigning the preshift examination record. The rulemaking record does not show that the time set by the final rule would expose miners to safety or health risks. Commenters suggested that the term "mine foreman" be replaced by a "certified person responsible for ventilation of the mine or his designee." Another commenter suggested that the record could be countersigned by the mine foreman or any other mine official responsible for the day-to-day operation of the mine. Commenters stated that some operations no longer use the terms "mine foreman," "mine manager," or "superintendent". To provide for alternative management titles, the final rule incorporates the phrase "or equivalent mine official."

Numerous comments were received regarding the proposal for second level countersigning of the preshift examination record by the mine superintendent, mine manager, or other

mine official to whom the mine foreman is directly accountable, within 2 scheduled production days after the countersigning by the mine foreman. The final rule does not retain this proposed requirement. A detailed discussion of the subject of second level countersigning can be found in the General Discussion section of this preamble.

Paragraph (f) of the final rule also contains revisions to the existing rule to allow for electronic storage of records. Paragraph (g) requires that the records required by § 75.360 be maintained at a surface location at the mine for one year and be made available for inspection by authorized representatives of the Secretary and the representatives of miners. A discussion of comments concerning the use of computers to maintain records can be found in the General Discussion of this preamble.

Section 75.362 On-Shift Examination

Like the preshift examination, the on-shift examination of working sections is a long accepted safety practice in coal mining. As coal is extracted, conditions in the mine continually change and hazardous conditions can develop. Because the mining environment changes constantly during coal production, this examination identifies emerging hazards or verifies that hazards have not developed since the preshift examination. Generally, the on-shift examination includes tests for methane and oxygen deficiency, an examination for hazardous conditions, and air measurements at specified locations.

The final rule adopts proposed § 75.362 with the exception that revisions have been made to the proposed provisions dealing with an examination for compliance with the mine ventilation plan requirements for respirable dust control.

The final rule redesignates existing (d)(1)(i) and (ii) as (d)(1)(ii) and (iii), revises paragraphs (a)(1), (c)(1), (d)(1)(iii) and (d)(2), removes paragraph (a)(2), and adds new paragraphs (a)(2) and (d)(1)(i). Additionally, the requirements of existing paragraphs (g) and (h), recordkeeping and retention, are transferred to § 75.363, Hazardous conditions, posting, correcting, and recording. New paragraphs (g)(1) and (g)(2) are also added by the final rule.

The word "on-shift" has been added to the first sentence of paragraph (a)(1) for clarity and consistency with other paragraphs of § 75.362. MSHA did not receive any comments on this proposed revision. Paragraph (a)(1) is also revised as proposed to require a certified person designated by the operator to conduct

an on-shift examination of each section where anyone is assigned to work during the shift and any area where mechanized mining equipment is being installed or removed during the shift. The existing rule required that an on-shift examination be performed only on sections where coal is produced and areas where mechanized mining equipment is being installed or removed. Some commenters agreed that many of the same hazards exist on a section whether coal is being produced or not. Commenters gave several examples of activities that take place on non-coal producing sections including equipment repair and maintenance, cutting and welding, rockdusting, clean-up, and roof bolting. As indicated by these commenters, all of these activities present the potential for a serious accident. One commenter arguing against the proposed change stated that the preshift and supplemental examinations already address the safety concerns to which the proposal was directed. While MSHA considers the preshift and supplemental examinations to be of great importance in providing a safe work environment, these examinations are performed prior to workers on a shift entering the mine or, in the case of the supplemental examination, in an area of the mine that has not been preshift examined. The on-shift examination is intended to address hazards that develop during the shift. The concept of the on-shift examination is not new. On-shift examinations of coal producing sections have been required since the enactment of the Federal Coal Mine Health and Safety Act of 1969.

Another commenter arguing against expanding the on-shift examination requirement to non-coal producing sections stated that requiring on-shift examinations of areas other than working sections would detract from other required examinations. On-shift examinations on coal producing sections are normally conducted by section foremen who spend the vast majority of the shift on the section they are supervising. These individuals will not normally conduct the on-shift examinations in non-coal producing sections. These examinations will be conducted by certified persons assigned to work in these areas or other certified persons assigned to conduct these examinations. MSHA does not, therefore, foresee reduced attention to examinations in working sections.

Another commenter suggested that the requirements for on-shift examinations be expanded further than proposed. The commenter stated that many of the same types of activities that