

CCASE:  
JONES STEEL v. SOL (MSHA)  
DDATE:  
198107  
TTEXT:

~1721

Federal Mine Safety and Health Review Commission  
Office of Administrative Law Judges

JONES & LAUGHLIN STEEL  
CORPORATION,  
  
CONTESTANT  
  
v.

Contest of Citation and Order  
  
Docket No. PENN 81-96-R

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

Vesta No. 5 Mine

UNITED MINE WORKERS  
OF AMERICA,  
  
INTERVENOR

DECISION

Appearances: Henry McC. Ingram, Esq., Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, Pittsburgh, Pennsylvania and J. R. Haggerty, Esq., Jones & Laughlin Steel Corporation; R. Henry Moore, Esq., and Thomas C. Reed, Rose, Schmidt, Dixon, Hasley, Whyte and Hardesty, Pittsburgh, Pennsylvania on the Briefs for Contestant.  
Lawrence W. Moon, Jr., Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia; Thomas A. Mascolino, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia on the Briefs for Respondent.  
Kurt Kobelt, Esq., United Mine Workers of America, Washington, D.C. on the Brief for Intervenor.

Before: Judge James A. Laurenson

This proceeding was filed by Jones & Laughlin Steel Corporation (hereinafter "J & L") pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(d) (hereinafter "the Act") to contest the validity of a citation and order issued by the Secretary of Labor, Mine Safety and Health Administration (hereinafter "MSHA"). Citation No. 1046974, issued on February 17, 1981, pursuant to section 104(d)(1) of the Act, alleged a violation of the mandatory safety standard at 30 C.F.R. 75.303. Order No. 1046866, issued on February 19, 1981, alleged a violation of the same standard and was issued pursuant to section 104(d)(1) of the Act. The violation charged in both documents was the failure of J & L to conduct a preshift examination of coal-carrying conveyor belts.

~1722

J & L's Motion to Expedite the proceeding was granted and a hearing was held in Pittsburgh, Pennsylvania on April 1, 1981. Inspection Supervisor Eugene Beck and Supervisory Mining Engineer Alex O'Rourke testified for MSHA. J & L's witnesses were its employees as follows: Stephen J. Hajdu, assistant safety inspector; Daniel L. Ashcraft, manager of mines; and George Pizoli, manager of mines.

On May 5, 1981, the United Mine Workers of America (hereinafter "UMWA") moved for leave to intervene in this proceeding. The motion was granted and the UMWA filed a brief. J & L and MSHA also filed briefs.

#### ISSUE

Whether J & L violated the Act or regulations as charged by MSHA.

#### APPLICABLE LAW

30 C.F.R. 75.303 provides, in pertinent part, as follows:

(a) Within 3 hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified persons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. Each such examiner shall examine every working section in such workings and shall make tests in each such working section for accumulations of methane with means approved by the Secretary for detecting methane, and shall make tests for oxygen deficiency with a permissible flame safety lamp or other means approved by the Secretary; examine seals and doors to determine whether they are functioning properly; examine and test the roof, face, and rib conditions in such working section; examine active roadways, travelways, and belt conveyors on which men are carried, approaches to abandoned areas, and accessible falls in such section for hazards; test by means of an anemometer or other device approved by the Secretary to determine whether the air in each split is traveling in its proper course and in normal volume and velocity; and examine for such other hazards and violations of the mandatory health or safety standards, as an authorized representative of the Secretary may from time to time require. Belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun.

30 C.F.R. 75.2(g) contains the following definitions:

"(3) 'Working section' means all areas of the coal mine from the loading point of the section to and including the working faces.

(4) 'Active workings' means any place in a coal mine where miners are normally required to work or travel."

STIPULATIONS

J & L and MSHA stipulated the following:

1. J & L is engaged in mining and selling bituminous coal in the United States, and its mining operations affect interstate commerce.

2. J & L is the owner and operator of the Vesta No. 5 Mine, MSHA ID No. 3600962.

3. The Vesta No. 5 Mine is subject to the Act, and the jurisdiction of the Mine Safety and Health Administration.

4. Operator's Exhibit 0-1 is a copy of the map of the underground workings of the Vesta No. 5 Mine, and depicts the A, B and C conveyor belt flights of 44 face, as that area of the mine existed on February 17, 1981, and the 1 face A and B belt haulage flights as that area existed on February 19, 1981, and Exhibit 0-1 is admitted into evidence in this proceeding.

5. Operator's Exhibit 0-2 is a collective exhibit, comprised of copies of portions of the fireboss book for the Vesta No. 5 Mine, in which certified persons employed by J & L recorded reports of examinations for hazardous conditions, including those conducted pursuant to 30 C.F.R. section 75.303, on February 17, 1981 and February 19, 1981, in the areas of the Vesta No. 5 Mine referred to in Citation No. 1046974 and Order No. 1046866, and Exhibit 0-2 is admitted into evidence in this proceeding.

6. J & L made an examination of the nature specified in 30 C.F.R. 75.303 of the area referred to in Citation No. 1046974 during the midnight shift (shift beginning at 12:01 a.m.) on February 17, 1981, except that such examination was not made during the last three hours of the shift.

7. J & L made an examination of the nature specified in 30 C.F.R. 75.303 of the area referred to in Citation No. 1046974 on the daylight shift (shift beginning at 8:00 o'clock a.m.) on February 17, 1981, except that no such examination was made within the three hours preceding the beginning of the shift, or before men entered and began to work in the area referred to in the citation, on such shift.

8. J & L made an examination of the nature specified in 30 C.F.R. 75.303 of the area referred to in Order No. 1046866, during the midnight shift on February 19, 1981, except that such examination was not made during the last three hours of the shift.

9. J & L made an examination of the nature specified in 30 C.F.R. 75.303 of the area referred to in Order No. 1046866 on the daylight shift on February 19, 1981, except that no such examination was made within the three hours preceding the beginning of the shift, or before men entered and began to work

in the area referred to in the order, on such shift.

~1724

10. The belt conveyors referred to in the citation and order are used by J & L to carry coal, and men are not transported on such belt conveyors.

11. J & L was producing coal on the shifts on which the citation and order were issued.

12. At the time the citation was issued, the belt conveyors referred to therein were in good condition, and no hazards were observed.

13. At the time the order was issued, the belt conveyors referred to therein were in good condition, except for two citations that were issued by Inspector Calvert for alleged violations.

14. There was no inspection of the entire mine between February 17, 1981 and February 19, 1981.

15. MSHA's Coal Mine Inspection Manual, March 1978, contains a policy for inspection under 30 C.F.R. 75.303, which provides: "The examination of belt conveyors on which men are not transported shall be started without delay after each coal producing shift has begun."

16. There exists in the Vesta No. 5 Mine approximately 18 miles of active conveyor belts.

#### SUMMARY OF THE EVIDENCE

The facts underlying the contested citation and order are not in dispute. On February 17, 1981, an MSHA inspector issued Citation No. 1046974 pursuant to section 104(d)(1) of the Act. The citation alleged that a significant and substantial violation of 30 C.F.R. 75.303 had occurred and that the alleged violation was caused by the unwarrantable failure of J & L to comply with the mandatory standard. The condition or practice was described as follows:

Evidence indicated that A, B, and C conveyor belt flights of 44 Face had not been preshift examined for the day shift. An entry was not in the mine examiner's report or at the date board along the belt flights indicating that an examination was made before workmen of the day shift entered the area along each belt flight.

On February 19, 1981, another MSHA inspector issued Order of Withdrawal No. 1046866, pursuant to section 104(d)(1) of the Act, for a condition he observed in the 1 Face A and B belt haulage flights of the Vesta No. 5 Mine. The order alleged that a significant and substantial violation of 30 C.F.R. 75.303 had occurred and that the alleged violation was caused by the unwarrantable failure of the operator to comply with the mandatory standard. The condition or practice was described as follows:

Evidence indicated that a preshift examination was not made of the 1 Face A and B belt haulage flights where persons were observed working the day shift, an entry was not in the mine examiner's book or at the date boards along the belt haulage.

The order referred to the citation as being the underlying initial action.

The relevant facts leading to the citation and order are the same. In both instances, the involved areas were coal-carrying conveyor belts which were not used to transport miners. In both cases the conveyor belts had been examined by J & L during the preceding shift but not within 3 hours of the commencement of the shift on which the citation and order were issued. In other words, J & L did not conduct a preshift examination of the coal-carrying conveyor belts. At the time the citation and order were issued, miners were working along the conveyor belts.

MSHA and the UMWA contend that the regulation in controversy requires J & L to conduct a preshift examination of the coal-carrying conveyor belts. J & L asserts that the regulation does not require a preshift examination of the belts.

At hearing, MSHA's policy concerning its interpretation of the regulation leading to the controversy was stated by its employees: Eugene Beck, Inspection Supervisor, and Alex O'Rourke, Supervisory Mining Engineer. Mr. Beck stated,

"[B]elt lines ... where coal is being hauled, carried, no persons along that belt line, must be examined during, after the shift is started, and if there was men working or assigned to be working anyplace in them areas, along that belt line, it had to be pre-shifted within 3 hours preceding the beginning of the shift." (Tr. 40).

Mr. O'Rourke stated that no preshift examination of conveyor belts was required under this regulation "where men were not required, were planned to be working in that area during that shift." (Tr. 82). Mr. O'Rourke went on to state that the requirements of the regulation concerning a preshift examination and an examination during the shift could be merged into a single examination following the initial preshift examination. (Tr. 83). MSHA's witnesses conceded that the Coal Mine Inspection Manual (hereinafter "the Manual") states that the examination of conveyor belts on which men are not transported shall be started without delay after each coal producing shift has begun. The Manual says nothing about a preshift examination of such belts.

On February 14, 1980, MSHA issued a citation to the same mine for the same violation. That citation alleged a failure to conduct a preshift examination of coal-carrying conveyor belts where men were normally required to work or travel in the area (Ex. C-1). J & L did not contest that citation.

~1726

In December, 1980, and January, 1981, discussions took place between MSHA supervisory personnel and J & L management. During these discussions, MSHA told J & L that a preshift examination of certain coal-carrying conveyor belts was required. J & L disputed that interpretation of the regulation. MSHA suggested that J & L file a petition to modify the application of the mandatory standard pursuant to section 101(c) of the Act. J & L elected not to file such a petition because it believed that such filing would concede MSHA's interpretation of the regulation.

Inspection Supervisor Beck testified that, in his opinion, the hazards surrounding conveyor belts were at least twice as great at the end of the shift as they were at the beginning of the shift. He identified such hazards as accumulations of float coal, hot rollers, and roof problems. Supervisory Mining Engineer O'Rourke testified that although he was familiar with MSHA's policy concerning the preshift examination requirement of coal-carrying conveyor belts, he could not say what the actual practice has been by inspectors except that he had seen other citations in MSHA District 2 for the same violation alleged here. He could not be specific as to the number of such citations.

Stephen Hajdu, J & L's assistant safety inspector for this mine, testified that after the February 14, 1980 citation and before the citation contested here, it was J & L's practice to conduct a preshift examination of coal carrying conveyor belts "where you normally have men regularly employed in those areas, or has to work normally in those areas." (Tr. 106). He was unable to state whether the men working along the conveyor belts on February 19, 1981, were regularly assigned to that area. He conceded that, "anytime during any shift there is possibly a man or two somewhere along the belt lines." (Tr. 95).

Daniel Ashcraft, manager of mines for J & L, testified that the Vesta No. 5 Mine is not under his jurisdiction. He testified that in his 33 years of coal mine employment he had never heard of a citation being issued for failure to conduct a preshift examination of coal-carrying conveyor belts. He admitted, however, that if he knew that miners were going to be assigned for a specific job along such belts, "that area was preshifted at that time." (Tr. 116).

George Pizoli, J & L's manager of mines, testified that the Vesta No. 5 Mine has been under his jurisdiction since October 1, 1980. He testified that during the 6 years, prior to October 1, 1980 as an employee with other coal mine operators, all coal-carrying conveyor belts had been examined only during the shift and no citations had ever been issued. After the issuance of the order herein, he increased the number of preshift examiners at this mine from 13 to 20 to achieve compliance. Additionally, he directed his employees to conduct a preshift examination of all 18 miles of coal-carrying conveyor belts at this mine because "it is reasonable to assume that you are going to have to dispatch people to any portion of that belt line at any time ...." (Tr. 130-31).

DISCUSSION

Contentions of the Parties

J & L asserts that the language of 30 C.F.R. 75.303 clearly does not require belt conveyors, not used to transport miners, to be examined within 3 hours prior to the start of the shift. It further contends that the principles of statutory construction and the legislative history of the Act establish that it was not the intent of Congress to require such belt conveyors to be examined prior to the commencement of the shift.

At the hearing, MSHA's supervisors testified that the requirement of a preshift examination of coal-carrying conveyor belts applies only to such belts where men are required or assigned to work during that shift. However, MSHA argues that the coal-carrying conveyor belts herein are "active workings" of the mine and, hence, must be examined within 3 hours preceding the beginning of each shift. MSHA further asserts that the additional provision of the regulation, requiring that such belts be examined after the shift has begun, does not require more than one examination per shift because, after the initial preshift examination, the examination during the shift and the preshift exam for the next shift can be merged. MSHA's brief sets forth its position as follows:

It is completely within the Secretary's interpretation for J&L to inspect, during the preshift exam, only those areas of the conveyor belt entries where men are to work or travel, such as the areas of the belt drive units, leaving the remaining areas of the belt entries to be covered during the shift (Tr. 144-145). In the alternative, as MSHA witnesses testified, J&L can delay the required onshift exam until the end of a shift, accomplishing it within three hours of the succeeding shift, and thereby qualify that one examination to satisfy both the preshift and onshift examination requirements of 30 CFR 75.303. This example, of course, assumes that the "two for one" exam will be sufficiently broad and thorough. MSHA accepts such an examination and does not deem it to be violative of MSHA policy.

MSHA Brief at 10-11.

The UMWA agrees with MSHA that coal-carrying conveyor belts are "active workings" of the mine and must be examined within 3 hours preceding the beginning of each shift. However, the UMWA contends that because all coal-carrying conveyor belts constitute "active workings" of the mine, all such belts must be subjected to preshift examination whether or not men are assigned to work in the area. The UMWA also asserts that the regulation requires two separate examinations applicable to each shift: A preshift examination and an examination during the shift. The UMWA contends that these examinations may not be merged into a single examination.

The language of the regulation in controversy, 30 C.F.R. 75.303, is the same as section 303(d)(1) of the Act. The principles of statutory construction apply. The cardinal principle of statutory construction was stated by the U.S. Supreme Court as follows: "the meaning of a statute must, in the first instance, be sought in the language in which the Act is framed, and if that is plain, ... the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). The application of this principle to the regulation here must be based upon an analysis of the first three sentences of the regulation.

The first sentence of the regulation provides that the operator must perform a preshift examination of "the active workings of a coal mine." At the hearing, J & L did not contend that the belts in question were not active workings. However, in its brief it states: "It is arguable that the belt conveyors here are not part of the active workings." J & L Brief at 9.

30 C.F.R. 75.2(g)(4) and section 318(g)(4) of the Act provide as follows: "'Active workings' means any place in a coal mine where miners are normally required to work or travel." The term, "active workings," has been broadly construed by the Interior Board of Mine Operation Appeals (hereinafter "The Board") and the Federal Mine Safety and Health Review Commission (hereinafter "the Commission"). In *Mid-Continent Coal and Coke Co.*, 1 IBMA 250, 257 (1972) the Board held that even though only one miner was required to regularly inspect an entry containing a high-voltage cable, that was enough to constitute an "active working." In *Kaiser Steel Corp.*, 3 IBMA 489, 510 (1974) the Board held that an air return which was inspected twice a day and rock dusted twice a week constituted an "active working" of the mine. In *Secretary of Labor v. Old Ben Coal Company*, 3 FMSHRC 608, 609 (1981) the Commission noted the two previously cited decisions of the Board and stated, "the cited area was required to be inspected at least once a week, was traveled as an escape route, and was rock-dusted periodically. We find that these uses meet the work and travel requirements of an active working under the standard." Although all the above cases decided by the Board and Commission involved 30 C.F.R. 75.400, no reason exists for applying a different definition of "active working" to 30 C.F.R.

75.303. Even J & L concedes that the conveyor belts in question must be examined during each shift and that, at the time of the issuance of the citation and order, miners were assigned to work in the areas of the conveyor belts. I find that the conveyor belts in the cited areas constitute "active workings" of the coal mine. Hence, the first sentence of the regulation appears to require that they be examined "within 3 hours immediately preceding the beginning of any shift."

Turning to the second sentence of the regulation, it specifies that the "examiner shall examine every working section ... seals and doors ... the roof, face, and rib conditions in such working sections; examine active roadways, travelways, and belt

conveyors on which men are carried ...." 30 C.F.R. 75.2(g)(3) and section 318(g)(3) of the Act provides as follows: "Working section' means all areas of the coal mine from the loading point

~1729

of the section to and including the working faces." The "loading point" referred to in the above definition is the point at which coal is placed onto the conveyor belt. Thus, the conveyor belts in the cited areas here are not within the definition of "working section" as that term is used in the second sentence of the regulation. J & L asserts that "the areas of the active workings to be examined prior to the shift are only those areas of the working section outlined in the second sentence of the regulation." J & L Brief at 9. Although MSHA asserts that "statutes must be read in such a way as to give all parts meaning," and that the first sentence is "inclusive and paramount, and the sentences which follow [are] illustrative but not exceptive," MSHA Brief at 19 and 16, it does not comment further on the second sentence of the regulation. The UMWA commented on the construction of the second sentence of the regulation as follows:

[T]he reference to "working section" in the second sentence should be construed liberally, and harmoniously with the first sentence as a means of ensuing [sic] that the pre-shift examination requirement is applied to working sections, as well as to active roadways, travelways and belt conveyors on which men are carried, due to the particular severity of the hazards associated with these areas ... [and] ... the first two sentences define and elaborate the pre-shift examination ....

UMWA brief at 9 and 12. Upon considering all the arguments, suffice it to say that the areas which are required to be examined within 3 hours before the beginning of any shift in the second sentence of the regulation do not include all "active workings" of the mine which are included in the first sentence of the regulation.

Following the first two sentences of the regulation, which describe the areas of a coal mine required to be examined prior to the beginning of a shift, the third sentence states, "belt conveyors on which coal is carried shall be examined after each coal-producing shift has begun." J & L argues that, "the third sentence of the standard specifically exempts such belt conveyors from examination prior to the shift by authorizing examination to occur during the shift." J & L Brief at 10. MSHA contends that the third sentence is not an exception to the first sentence but rather calls for an examination during the shift which can be delayed "until the end of a shift, accomplishing it within 3 hours of the succeeding shift, and thereby qualify that one examination to satisfy both the preshift and onshift examination requirements of 30 C.F.R. 75.303." MSHA Brief at 11. Thus, MSHA concludes that the third sentence requires an examination of coal-carrying conveyor belts after the beginning of the shift in addition to the examination specified in the first sentence. The UMWA's position concerning the first sentence is as follows: "The on-shift inspection of the coal carrying belts required by the third sentence of 30 C.F.R. 75.303 was not intended to be a restriction on the general pre-shift inspection provisions

established in the first sentence. Rather, it was intended to promote mine safety by requiring that a separate and additional inspection be performed on coal carrying belts." UMWA Brief at 13-14.

~1730

I have considered the contentions of all the parties that the language of the regulation is plain and does not need interpretation. However, I note that the purportedly "plain" language relating to the examination of coal carrying conveyor belts has been construed by these parties in three different ways as follows: (1) J & L - only an examination after the shift has begun; (2) MSHA - a preshift examination only of belts where men are assigned or planned to work or travel and an examination of all coal-carrying conveyor belts after the shift has begun, but if the latter examination is conducted during the last 3 hours of the shift, one such examination will satisfy both requirements of the regulation; and (3) UMWA - all coal-carrying belts must be examined before each shift and examined again after the start of the shift and such examinations may not be merged.

The first sentence of the regulation, as defined and interpreted by the Board and the Commission, purports to require a preshift examination of the areas cited here. The second sentence purports to specify a more narrow area of the mine to be preshifted including, inter alia, working sections and belt conveyors on which men are carried. Obviously, all areas identified in the second sentence are included within the definition of "active workings" in the first sentence. MSHA contends that the second and third sentences are "illustrative but not exceptive." J & L claims that the second and third sentences create "an exception to the requirement of examination prior to the shift." J & L Brief at 11. If the first sentence requires the preshift examination of all conveyor belts, what is the purpose of the second sentence which requires preshift examination of only conveyor belts on which men are carried? I find that the language used in the three sentences of this regulation is not plain or unambiguous. Therefore, the legislative history of the Act must be examined to determine the intent of Congress in enacting this law.

#### Legislative History

An examination of the legislative history leading to the enactment of the provision in controversy begins with the Federal Coal Mine Safety Act of 1952, P.L. 532, 82d. Cong. Ch. 877, 2d Sess. (1952) (hereinafter "1952 Coal Act"). The parties agree that the 1952 Coal Act did not require a preshift examination of any conveyor belts.

In 1969, the Senate and House of Representatives passed different bills concerning the duty to examine conveyor belts. The House Bill, HR 13950, section 303(d)(1), added the following: (1) a specific requirement in the second sentence that required a preshift examination of all belt conveyors on which men are carried; and (2) the third sentence which provided that conveyors on which coal is carried shall be examined after each coal-producing shift has begun. The House Report concerning this provision is silent. Legislative History of the Federal Mine Health and Safety Act of 1969 (Public Law 91-173 (August 1975) (hereinafter "Legislative History") at 1031, et seq. The Senate Bill, S. 2917, added the phrase "and all belt conveyors" to the

second sentence which specified areas of a coal mine subject to preshift examination. The Senate Report concerning this change is as follows:

This section sets forth requirements that the operator must follow for preshift examinations. The provisions are similar to the 1952 act provisions, except that they apply to all underground coal mines and except for four additional requirements. These are: (1) An anemometer or other acceptable device capable of measuring the velocity of an air current is required, (2) an examination of belt conveyors is required, (3) the preshift examination is to be made 3 hours prior to a coal-producing shift instead of 4 hours, and (4) the inspector may require that the preshift examination include examinations for hazards and standards violations not specified in the section. No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected. The reason for these changes are:

1. The preshift examiner cannot possibly determine the velocity of an air current without a device capable of measuring the velocity;
2. Many mine fires occur along belt conveyors as a result of defective electric wiring, overheated bearings, and friction; therefore, an examination of the belt conveyors is necessary; and
3. The hour for beginning of the preshift examination was changed to insure an examination as near as possible to the beginning of the shift. Changes occur so rapidly in the mines that it is imperative the examinations be made as near as possible to the time the workmen enter the mine. The 3-hour time was recommended as far back as 1944; and
4. A careful preshift examination may disclose hazards other than those caused by lack of proper ventilation and thereby prevent loss of life and injury.

#### Legislative History at 183.

In essence, the House-Senate Conference Committee adopted the House version and the Conference Report states as follows:

Subsection (d) sets forth requirements that the operator must follow for preshift examinations. These provisions are similar to the 1952 act provisions, except that they apply to all underground coal mines before all shifts, not just production shifts, and except for several additional requirements including (1) an anemometer or other acceptable device

capable of measuring the velocity of an air current is required, (2) an examination of belt conveyors on which men are carried before each shift, (3) an examination of coal carrying belt conveyors after each shift begins, (4) a preshift examination 3 hours prior to a shift instead of 4 hours, and (5) an examination of such other hazards and violations of standards, as an inspector may require. No miner may enter the underground portion of a mine until the preshift examination is completed, the examiner's report is transmitted to the surface and actually recorded, and until hazardous conditions or standards violations are corrected.

Legislative History at 1610. (Emphasis supplied.)

Curiously, the House-Senate Conference Committee changed the language of the first sentence of this section. In both the House and Senate versions, that sentence provided that "before any workmen in such shift enter the underground areas of the mine, certified persons designated by the operator of the mine shall examine a definite underground area of the mine." (Emphasis supplied). The Conference Committee changed the term "underground areas" and "definite underground area of the mine" to "active workings." The Conference Committee Report is silent about this change.

The issue is whether Congress intended to include coal-carrying conveyor belts within the area designated for preshift examination. I conclude that it did not. The 1952 Coal Act did not require a preshift examination of any conveyor belts. The Senate version of the 1969 Act clearly and specifically required preshift examination of all conveyor belts. I find that the House version required a preshift examination of conveyor belts on which men were carried and an examination of coal carrying conveyors belts after the shift began. I find that the House-Senate Conference Committee, by rejecting the Senate version requiring a preshift examination of all conveyor belts, indicated a Congressional intent to limit the preshift examination of conveyor belts to those belts on which men are carried. This principle of statutory construction has been articulated as follows:

That Congress adopted the House version of the bill, specifically rejecting the Senate's conflicting version, is of course an extremely significant factor in determining what was Congress' intention with respect to the matters in issue. See, e.g., *First Nat'l Bank of Logan, Utah v. Walker Bank*, 385 U.S. 252, 258, 87 S.Ct. 492, 17 L.Ed.2d 343 (1966).

*Pan American World Airways, Inc. v. C.A.B.*, 380 F.2d 770, 781 (6th Cir. 1967), *aff'd sub nom, World Airways, Inc. v. Pan American World Airways, Inc.*, 391 U.S. 461 (1968). Moreover, the position of MSHA and the UMWA in this matter would require that the Commission find that Congress intended a result that it expressly declined to enact. See *Gulf Oil Corp. v. Copp Paving*

Co., 419 U.S. 186, 199-200 (1974). Although I am mindful that mine safety laws are remedial legislation which should be construed broadly to effectuate

~1733

their purpose, it appears beyond question from the legislative history supra, that Congress intended to require a preshift examination only of conveyor belts on which men are carried and an examination of coal-carrying conveyor belts after the shift has begun.

The general language of the first sentence of this regulation requiring preshift examination of all "active workings" of the coal mine is insufficient to require a preshift examination of coal carrying conveyor belts in light of the specific language of the second and third sentences. If the first sentence were construed to require preshift examination of coal-carrying conveyor belts, the second sentence requiring a preshift examination of "belt conveyors on which men are carried," would be redundant and superfluous. It must be presumed that Congress did not use superfluous words. I find that the broad interpretation applied to the term "active workings" pursuant to 30 C.F.R. 75.400 by the Board and Commission is limited by the clear Congressional intent that coal-carrying conveyor belts only to be examined after the shift has begun.

MSHA asserts that, since it is the agency charged with execution of this law, its interpretation should be followed. I find that MSHA has failed to establish that it has had any consistent or coherent construction of the section in controversy. Although this law has been in effect for almost 12 years, MSHA is unable to cite any written policy or procedure requiring a preshift examination of coal-carrying conveyor belts. Last year, Judge Merlin invalidated MSHA's policy of requiring the examination of coal-carrying conveyor belts without delay after the start of a production shift. Judge Merlin stated, "indeed there is no time requirement at all except that the examination occur during the shift. If the Secretary wished to require an immediate inspection within a specified time after the start of a shift, the regulation could have so provided." Consolidation Coal Co., 2 FMSHRC 1809, 1817 (July 11, 1980). MSHA did not petition the Commission for review of that decision. Nevertheless, as evidenced by the testimony in this case, MSHA has not changed its policy contained in the Manual. The Manual still purports to require that examination of coal-carrying conveyor belts be conducted without delay after the commencement of the shift. MSHA's failure to articulate a policy concerning the examination of coal-carrying conveyor belts lead an inspector to issue citations to U.S. Steel Corporation on February 2, 1981 and March 2, 1981, alleging a violation of 30 C.F.R. 75.303 in that the examination of the coal-carrying conveyor belts was not made without delay after the coal producing shift had begun. U.S. Steel Corporation, Docket No. WEVA 81-263-R, etc., 3 FMSHRC 1228 (May 6, 1981). MSHA vacated those citations on March 4, 1981 and March 9, 1981, respectively. At a hearing on the contest of those citations, counsel for MSHA stated:

I think there is no question that we feel that the operator here did conduct an adequate preshift examination of the coal-carrying belts which was

performed 3 hours before the beginning of the shift. A  
West Virginia law requires preshift examinations of  
coal-carrying belts 3 hours before the start of the  
shift and the operator is complying with

~1734

that. So, in view of that, we now feel that the operator is meeting the requirements of 30 C.F.R. 75.303 if he examines the belts at some time during the shift and if that examination is completed. (Emphasis supplied.)

U.S. Steel Corporation, *supra*, at 1233.

Judge Stewart stated in that case,

MSHA acknowledged that if the conveyor were preshifted within 3 hours of the start of the shift, the requirement to examine the belt immediately after the start of the shift would in effect require two examinations within 3 hours and that such a requirement might be harsh. MSHA stated that because of the 40 miles of belts, there would be people walking belts all day long because as soon as they finished their preshift examination they would have to start their onshift examination. MSHA conceded that the language on its face does not require the operator to begin his onshift examination immediately upon the start of the shift and that it was his option to conduct the onshift examination along with the State-required preshift examination. *Ibid*.

In U.S. Steel, *supra* footnote 6 at 1232, MSHA further stated:

Instructions in, the Coal Mine Inspection Manual, which indicates a different enforcement policy with regard to 30 C.F.R. 75.303, are not current. In fact, MSHA's enforcement policy with regard to 30 C.F.R. 75.303 is currently under review and once completed, new enforcement guidelines will be published and enforced.

In conclusion, I find that MSHA has failed to establish that it has any construction of this regulation. Hence, there is no obligation on the Commission or courts to follow MSHA's interpretation of the regulation in this matter.

It should also be noted that the first sentence of this regulation specifically permits MSHA to require preshift examination of "any other underground area of the mine designated by the Secretary or his authorized representative." Hence, MSHA has broad authority to promulgate a regulation requiring the preshift examination of coal-carrying conveyor belts. Perhaps MSHA's review of enforcement policy covering this regulation will lead to such a regulation. In the meantime, I conclude that MSHA has failed to establish a requirement of a preshift examination of coal-carrying conveyor belts. Therefore, the citation and order contested herein are vacated. Since the citation and order are vacated, I do not reach the other issues raised by J & L, to wit: (1) whether the violations were "significant and substantial"; (2) whether the violations were the result of an "unwarrantable failure to comply with the mandatory standard"; and (3) whether MSHA failed to comply with the Administrative Procedure Act.

~1735

ORDER

IT IS ORDERED that Citation No. 1046974 and Order No. 1046866 are VACATED and J & L's contest of the citation and order is SUSTAINED.

James A. Laurenson Judge