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**Examinations of Work Areas in Underground Coal Mines for
Violations of Mandatory Health or Safety Standards**

The attached comments are submitted by:

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§ 75.360 Preshift examination at fixed intervals.

(a) * * *

(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 and violations of mandatory health or safety standards, 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.

Comment: The 1992 Safety Standards for Underground Coal Mine Ventilation; Rule RIN 1219-AA11 (1992 Vent Rule), Page 20894 third column states "However, as proposed, the final rule does not include a provision for authorizing expansion of the preshift examination to include examination for violations of mandatory standards. Most 'hazards' are violations of mandatory standards. MSHA believes that authorizing the district manager to require the preshift examination to include examination for other hazards ensures that preshift examinations are tailored to provide the necessary protection for the miners. Also requiring the preshift examiner to look for all violations regardless of whether they involve a hazard could distract the examiner from the more important aspects of the examination. The preshift examination is designed to concentrate the examiners efforts in those areas where they are most suitably applied."

The 1992 Vent Rule removed the requirement for preshift examiners to look for violations of the mandatory standards for good reason. The aim of the preshift examination for pumpers is

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to look for hazards before the pumper begins work. Requiring the pumper to look for violations distracts the pumper from looking for hazards. Some violations are technical in nature and not hazards.

The pumper is not the Safety and Health Department for the mine. His or her job should not be compliance assistance. Pumping is his or her job and checking for hazards in the area where he or she works or travels is required and necessary. Requiring the pumper to check for violations puts him or her in a "gotcha situation." If the pumper fails to catch a violation he or she could be considered negligent in the duties assigned by the regulation. The examiner does not need to be in that position but needs to concentrate on finding hazards before beginning work and reporting those hazards.

The 1996 Rule, Safety Standards for Underground Coal Mines, RIN 1219-AA11 (1996 Vent Rule), page 9792 third column states "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, require excessive judgment and discretion by examiners, and require examiners to make predictions. After considering all the 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." The objections raised by the commenters on the 1996 Vent Rule are still valid today. Additionally, the current proposed rule requires checking for all violations of the mandatory standards not just standards that could result in a hazardous condition.

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The examination of the area must be completed before the pumper performs any other work. A record of all hazardous conditions and violations of mandatory health or safety standards found by the pumper shall be made and retained in accordance with § 75.363 of this part.

Comment: The aim of the preshift examination is to look for hazards before the pumper begins work. Requiring the pumper to look for violations distracts the pumper from looking for hazards. The additional requirement of recording violations that are not hazards creates more work and causes the § 75.363 record books to contain more information. The new information will distract from the record of actual hazards. Some violations are technical in nature and are not hazards.

The pumper is not the Safety and Health Department for the mine. His or her job should not be compliance assistance. Checking for hazards is the focus of the examination. Requiring the pumper to check for and record violations puts him or her in a "gotcha situation." If the pumper fails to catch a violation he or she could be considered negligent in the duties assigned by the regulation. The pumper does not need to be in that position but needs to concentrate on finding and reporting hazards.

Black Panther Mining LLC (Black Panther) estimates that it will take an additional hour to look for violations as a pumper making his or her own preshift examination. Pumpers are constantly moving from area to area to check and service pumps. Therefore, the preshift examination goes on throughout the shift. Since a pumper works a whole shift, an additional pumper will be needed because the pumpers who work not will lose an hour a day because of the additional requirements of the examination.

(b) The person conducting the preshift examination shall examine for hazardous conditions and violations of mandatory health or safety standards, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction at the following locations:

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Comment: The 1992 Safety Standards for Underground Coal Mine Ventilation; Rule (1992 Vent Rule) Page 20894 third column states "However, as proposed, the final rule does not include a provision for authorizing expansion of the preshift examination to include examination for violations of mandatory standards. Most 'hazards' are violations of mandatory standards. MSHA believes that authorizing the district manager to require the preshift examination to include examination for other hazards ensures that preshift examinations are tailored to provide the necessary protection for the miners. Also requiring the preshift examiner to look for all violations regardless of whether they involve a hazard could distract the examiner from the more important aspects of the examination. The preshift examination is designed to concentrate the examiners efforts in those areas where they are most suitably applied."

The 1992 Vent Rule removed the requirement for preshift examiners to look for violations of the mandatory standards for good reason. The aim of the preshift examination is to look for hazards for the oncoming shift. Requiring the preshift examiner to look for violations distracts the examiner from looking for hazards. Some violations are technical in nature and not hazards. For example, checking the tags on chemical fire extinguishers to make sure that the extinguisher has the date of the last examination and that the examination is within the last six months is not a hazard. The lack of a tag or an outdated tag is however, a violation of § 75.1100-3. This is but one example of violations that the examiner would be required to look for yet it is not a hazard.

The preshift examiner is not the Safety and Health Department for the mine. His or her job should not be compliance assistance. Checking for hazards is the focus of the job. Requiring the preshift examiner to check for violations puts him or her in a "gotcha situation." If the examiner fails to catch a violation he or she could be considered negligent in the duties assigned by the regulation. The examiner does not need to be in that position but needs to concentrate on finding and reporting hazards.

The 1996 Rule, Safety Standards for Underground Coal Mines, RIN 1219-AA11 (1996 Vent Rule), page 9793 first column states "A number of commenters recommended the deletion of the requirement

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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; 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."

. . .

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

The objections raised by the commenters on the 1996 Vent Rule are still valid today. Additionally, the current proposed rule requires checking for all violations of the mandatory standards not just standards that could result in a hazardous condition.

Black Panther Mining LLC (Black Panther) estimates that it will take an additional 30 minutes to do a preshift examination per working section. Since the preshift examination must be done within a three-hour period additional examiners will be needed. Black Panther has three working sections at its Oaktown Fuels Mine No. 1. Therefore, Black Panther will need to use one additional preshift examiner per shift for the three working sections.

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The proposed rule also uses 30 minutes for the extended length of the preshift examination. However, Oaktown Fuels Mine No. 1 has three working sections and not two as the proposed rule estimates. The mine is relatively new and travel distances and belt lengths now are short. As the mine develops additional time will be needed to do the preshift examinations because of the time to examine the roadways and the belt entries. Black Panther works three shifts per day six days per week. The proposed rule stated that the average preshift examination takes three hours for a large mine. If the average preshift is three hours adding requirements to the examination will lengthen the examination requiring more examiners. The cost of the proposed requirements are more than the proposed rule cost analysis shows.

The Proposed Rule, Page 81167 middle column states "MSHA does not intend that the proposal would significantly change the general scope of examinations under the existing standards. Examiners would not be required to perform additional tests, take additional measurements, or open and examine equipment or boxes." Though the preamble states that examiners would not be required to examine equipment or open boxes it is not stated in the rule. This must be stated in the rule. However, it is recommended that the rule not be modified to require examiners to look for violations of the mandatory standards. The preamble does not carry the weight of the rule and it is sometimes forgotten or ignored.

Black Panther Mining LLC (Black Panther) estimates that if permissibility on all electric equipment and diesel-powered equipment is checked for violations of the mandatory standards then it will take an additional 12 hours of examination time to do a preshift examination per working section. Section 75.512-2 requires that electric equipment be checked for safe operating condition and permissibility at least weekly. Section 75.512-2 should not be overridden by the preshift examination regulation. This should be so stated in the revised regulation if the revised regulation requires examination for violations of the mandatory standards. If the preshift regulation requires permissibility checks and since the preshift examination must be done within a three-hour period, four additional examiners would be needed. Also the continuous miners would be lost for production for the last three hours of the shift. Other

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equipment would be lost for the time it takes to make the check, about one half hour per machine for shuttle cars, scoops etc. Black Panther has three working sections at its Oaktown Fuels Mine No. 1. Therefore, Black Panther would need to use three additional preshift examiners per shift for the three working sections if permissibility and equipment checks must be done. At a minimum, three hours production would be lost on each unit for at least one shift per day. Oaktown Fuels works three shifts per day six days per week. Doing permissibility on a preshift basis is not needed. Checking equipment on a preshift basis is not needed.

Five Star Mining Inc. (Five Star) estimates that it will take an additional 30 minutes to do a preshift examination per working section. Since the preshift examination must be done within a three-hour period additional examiners will be needed. Five Star has three working sections at its Prosperity Mine. Therefore, Five Star will need to use one additional preshift examiner per shift for the three working sections. In addition, the distance to the working sections at Prosperity Mine is such that it takes an average of about 50 minutes to drive to the working sections. An additional examiner will be needed to make a preshift examination of the roadways to the working sections to examine for violations. Thus to comply with this proposed rule, Five Star will need to employ two additional examiners per shift. Five Star works three shifts per day six days per week.

Because of the arguments stated above, Five Star estimates that if permissibility on all electric equipment is checked and diesel-powered equipment is checked then it will take an additional 12 hours of examination time to do a preshift examination per working section.

* * * * *

(e) The district manager may require the certified person to examine other areas of the mine or examine for other hazards and violations of mandatory health or safety standards during the preshift examination.

Comment: This regulation permits the District Manager to have broad powers to dictate additional areas to be examined, other hazards to be examined for, or violations to be examined for.

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This can place a huge burden on the mine operator and the mine operator has little recourse but to examine the mandated areas or look for the hazards specified. Areas where miners normally do not work or travel could be required to be examined. This would be outside the scope of the preshift examination and place a big financial burden on the mine operator without offering safety benefits. Adding in the requirement to examine for violations further expands this regulation and could permit the District Manager to greatly expand the preshift examination. Looking for violations that are not hazards detracts from the purpose of the regulation. Estimating the cost to the mine operator is difficult because it is impossible to know when the District Manager might dictate expansion of the preshift examination to look for violations of the regulations. The practice of expanding the rule when the district manager wants additional areas to be examined, other hazards to be examined for, or violations to be examined for can change the rule without going through proper rule making procedures. This regulation should be eliminated. It should be noted that MSHA did not estimate any costs for this proposed regulation.

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(g) *Recordkeeping.* A record of the results of each preshift examination, including a record of hazardous conditions and violations of mandatory health or safety standards 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 and violations of mandatory health or safety standards 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

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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.

Comment: The aim of the preshift examination is to look for hazards for the oncoming shift. Requiring the preshift examiner to look for violations distracts the examiner from looking for hazards. The additional requirement of recording violations that are not hazards creates more work and causes the preshift record books to contain more information. The new information will distract from the record of actual hazards. Some violations are technical in nature and are not hazards.

The preshift examiner is not the Safety and Health Department for the mine. His or her job should not be compliance assistance. Checking for hazards is the focus of the examination. Requiring the preshift examiner to check for and record violations puts him or her in a "gotcha situation." If the examiner fails to catch a violation he or she could be considered negligent in the duties assigned by the regulation. The examiner does not need to be in that position but needs to concentrate on finding and reporting hazards.

* * * * *

3. Paragraph (a) of § 75.361 is revised to read as follows:

§ 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 and violations of mandatory health or safety standards, determine whether the air is traveling in its proper direction and at its normal volume, and test for methane and oxygen deficiency.

Comment: The 1992 Safety Standards for Underground Coal Mine Ventilation; Rule (1992 Vent Rule) Page 20894 third column

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states "However, as proposed, the final rule does not include a provision for authorizing expansion of the preshift examination to include examination for violations of mandatory standards. Most 'hazards' are violations of mandatory standards. MSHA believes that authorizing the district manager to require the preshift examination to include examination for other hazards ensures that preshift examinations are tailored to provide the necessary protection for the miners. Also requiring the preshift examiner to look for all violations regardless of whether they involve a hazard could distract the examiner from the more important aspects of the examination. The preshift examination is designed to concentrate the examiners efforts in those areas where they are most suitably applied."

The 1992 Vent Rule removed the requirement for preshift examiners to look for violations of the mandatory standards for good reason. The same reason applies to a supplemental examination that is done when miners must enter an area that was not examined during the preshift examination. The aim of the supplemental examination is to look for hazards for the miners entering the area. Requiring the examiner to look for violations distracts the examiner from looking for hazards. Some violations are technical in nature and not hazards.

The examiner is not the Safety and Health Department for the mine. His or her job should not be compliance assistance. Checking for hazards is his or her job. Requiring the examiner to check for violations puts him or her in a "gotcha situation." If the examiner fails to catch a violation he or she could be considered negligent in the duties assigned by the regulation. The examiner does not need to be in that position but needs to concentrate on finding and reporting hazards.

Black Panther Mining LLC (Black Panther) estimates that it will take the examiner an additional 30 minutes to look for violations of the mandatory standards as a supplemental examiner making an examination. Supplemental examinations are made where work was not scheduled before the start of the preshift examination for the eight-hour period but where work is to be done. Generally, when an examiner is making a supplemental examination the crew is waiting for the examiner to complete the examination. The cost analysis in the proposed rule failed to count the cost of those miners waiting for the supplemental

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examination to be completed. Black Panther crews number 14 miners. The examiners at Oaktown Fuels Mine No. 1 are supervisory personnel. Black Panther agrees with the cost analysis that a supplemental examination would happen about twice per month or 24 times per year.

Five Star Mining, Inc. (Five Star) estimates that it will take the examiner an additional 30 minutes to look for violations of the mandatory standards as a supplemental examiner making an examination. Supplemental examinations are made where work was not scheduled before the start of the preshift examination for the eight-hour period but where work is to be done. Generally, when an examiner is making a supplemental examination the crew is waiting for the examiner to complete the examination. The cost analysis in the proposed rule failed to count the cost of those miners waiting for the supplemental examination to be completed. Five Star crews number 14 miners. The examiners at Prosperity Mine are supervisory personnel. Five Star agrees with the cost analysis that a supplemental examination would happen about twice per month or 24 times per year.

* * * * *

4. Paragraphs (a)(1) and (b) of § 75.362 are revised to read as follows:

§ 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 and violations of mandatory health or safety standards, test for methane and oxygen deficiency, and determine if the air is moving in its proper direction.

Comment: Requiring the on-shift examiner to look for all violations regardless of whether they involve a hazard or not could distract the examiner from the more important aspects of the examination. The on-shift examination is designed to

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concentrate the examiners efforts in those areas where they are most suitably applied.

The on-shift examiner is not the Safety and Health Department for the mine. His or her job should not be compliance assistance. Checking for hazards is his or her job. Requiring the on-shift examiner to check for violations puts him or her in a "gotcha situation." If the examiner fails to catch a violation he or she could be considered negligent in the duties assigned by the regulation. The examiner does not need to be in that position but needs to concentrate on finding and reporting hazards.

Black Panther Mining LLC (Black Panther) estimates that it will take an additional 30 minutes to do an on-shift examination on each working section. Black Panther will need to use one additional on-shift examiner per shift for the three working sections. Section supervisors currently make the on-shift examinations on the working sections but cannot spend another 30 minutes making an on-shift examination because of their supervisory duties. Oaktown Fuels Mine No. 1 works three shifts per day six days per week.

Five Star Mining Inc. (Five Star) estimates that it will take an additional 30 minutes to do an on-shift examination per working section. Section supervisors currently make the on-shift examinations on the working sections but cannot spend another 30 minutes making an on-shift examination because of their supervisory duties. Five Star has three working sections at its Prosperity Mine. Therefore, Five Star will need to use one additional on-shift examiner per shift for the three working sections. Five Star works three shifts per day six days per week.

* * * * *

(b) During each shift that coal is produced, a certified person shall examine for hazardous conditions and violations of mandatory health or safety standards 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

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belt conveyors and belt conveyor haulageways, if the examination is conducted within 3 hours before the oncoming shift.

Comment: The current preshift regulation states "(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." The last sentence of proposed Paragraph (b) states "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." The "on-coming shift" is not correct because the preshift regulation requires the preshift examination to be conducted before "any 8-hour interval." Eight-hour intervals can start mid shift. This problem exists in the current on-shift regulation and needs to be corrected.

However, the preshift regulation needs to go back to requiring a preshift examination to be conducted before the shift starts as the name implies. Whether the length of the shift is eight hours, nine hours, ten hours, or some other length, the preshift will afford better protection if it is done in the three-hour period before the start of the shift. Even if a mine works two twelve-hour shifts and only two preshift examinations are done per day, it would still offer more protection than is currently offered under the 8-hour period requirement. Preshift examinations can now be done mid shift therefore it does not provide the protection of what a preshift examination is meant to offer. On-shift examinations occur during the shift so preshift examinations that are done mid shift amount to no more than on-shift examinations. It is recommended that the preshift examination requirements go back to a true preshift examination.

Requiring the on-shift examiner to look for all violations regardless of whether they involve a hazard could distract the examiner from the more important aspects of the examination.

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The on-shift examination is designed to concentrate the examiner's efforts in those areas where they are most suitably applied.

The on-shift examiner is not the Safety and Health Department for the mine. His or her job should not be compliance assistance. Checking for hazards is his or her job. Requiring the on-shift examiner to check for violations puts him or her in a "gotcha situation." If the examiner fails to catch a violation he or she could be considered negligent in the duties assigned by the regulation. The examiner does not need to be in that position but needs to concentrate on finding and reporting hazards.

Black Panther Mining LLC (Black Panther) estimates that it will take an additional 60 minutes to do an on-shift examination of the belt conveyor haulageway if the examiner is required to examine for violations. Black Panther will need to use one additional on-shift examiner per shift to examine the belts. Oaktown Fuels Mine No. 1 works two and sometimes three production shifts per day six days per week.

Five Star Mining Inc. (Five Star) estimates that it will take an additional 120 minutes to do an on-shift examination of the belt conveyor haulageway if the examiner is required to examine for violations. The main belt entry in Prosperity Mine is several miles long. Five Star will need to use two additional on-shift examiners per shift to examine the belts. Prosperity Mine works two and sometimes three production shifts per day six days per week.

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5. In § 75.363, new paragraph (e) is added, and the section heading and paragraphs (a) and (b) are revised to read as follows:

§ 75.363 Hazardous conditions and violations of mandatory health or safety standards; posting, correcting, and recording.

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(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. Any violation of a mandatory health or safety standard found during a preshift examination, a supplemental examination, an on-shift examination, or a weekly examination shall be corrected.

Comment: Declaring "Any violation of a mandatory health or safety standard found during the preshift examination, a supplemental examination, an on-shift examination, or a weekly examination shall be corrected" subjects the mine operator to two citations. The standard violated can be cited and then this regulation could be cited for not correcting the violation. This is double jeopardy. It is obvious that an operator must correct a violation. A regulation does not need to be created that requires a violation be corrected.

(b) A record shall be made of any hazardous condition and any violation of a mandatory health or safety standard 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 or violation of a mandatory health or safety standard is found and shall include the nature and location of the hazardous condition or violation of the mandatory health or safety standard and the corrective action taken. This record shall not be required for shifts when no hazardous conditions or violations of mandatory health or safety standards are found, or for hazardous conditions and violations of mandatory health or safety standards found during the preshift or weekly examinations inasmuch as these examinations have separate recordkeeping requirements.

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Comment: The aim of the supplemental and on-shift examinations is to look for hazards. Requiring the supplemental and on-shift examiners to look for violations distracts the examiners from looking for hazards. The additional requirement of recording violations that are not hazards creates more work and causes the record books to contain more information. The new information will distract from the record of actual hazards. Some violations are technical in nature and not hazards.

The examiners are not the Safety and Health Department for the mine. Their job should not be compliance assistance. Checking for hazards is their job. Requiring the examiners to check for and record violations puts them in a "gotcha situation." If an examiner fails to catch a violation he or she could be considered negligent in the duties assigned by the regulation. The examiners do not need to be in that position but need to concentrate on finding and reporting hazards.

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(e) Review of citations and orders. The mine operator shall review with mine examiners on a quarterly basis citations and orders issued in areas where preshift, supplemental, on-shift, and weekly examinations are required.

Comment: Since preshift examinations, supplemental examinations, and on-shift examinations, cover the areas where persons normally work or travel almost every Part 70 and Part 75 violation cited would come under this requirement. Add in the fact that the weekly examination covers such things as air courses, escapeways, travelways, pumps, seals, and worked-out areas little chance exists that a citation or order could be issued for violation in an area that was not examined. Therefore, every citation and order would have to be reviewed with the examiners each quarter.

Miners who do examinations generally do certain types of examinations. Examiners who do weekly examinations might have never gone onto the working sections in the previous quarter. Therefore, when a review is done of the violations that were

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cited on a working section the examiner would get little useful information that he or she could use in the performance of his or her duties. Reviewing permissibility violations might not provide any useful information to most examiners. Requiring all examiners to participate in a review of all citations and orders issued is not an effective use of time. Black Panther and Five Star disagree with the assumption in the cost analysis that 80 percent of the underground mine operators discuss the citations and order with the examiners. Black Panther and Five Star believe it would be necessary to review all citations and orders with all examiners.

Black Panther estimates it would require a clerk about two hours to research the citations and orders to give a report to the management person preparing the review each quarter. Black Panther estimates it would require a management person about four hours to prepare the review presentation. Black Panther estimates it would require a clerk about two hours to prepare and reproduce the reports for the presentation made by the management person. Black Panther estimates about 25 persons would have had examination duties during a quarter and would need to take the review session. Since most examiners are key management personnel such as face bosses, outby bosses, and shift managers, the mine would have to have these presentations either after or before their shift and pay overtime for the time spent in the review session. Since examiners work on all three shifts it would require that this review be presented three times each quarter so that all shifts receive the review. Black Panther estimates that a review would require one hour per session, three sessions per quarter. Black Panther estimates that a management person would put on the three one-hour review sessions and need a half hour each time for setup and preparation of the room and to record participation in the review session. This totals 33.5 management scale hours per quarter of which a minimum of 28.5 hours would be overtime hours. The clerk would have four hours of time spent. Black Panther estimates that \$100 of materials, computer time, copier costs, etc. would be used each quarter.

Five Star estimates it would require a clerk about two hours to research the citations and orders to give to the management person preparing the review each quarter. Five Star estimates it would require a management person about four hours to prepare

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the review presentation. Five Star estimates it would require a clerk about two hours to prepare and reproduce the reports for the presentation made by the management person. Five Star estimates about 40 persons would have had examination duties during a quarter and would need to take the review session. Since most examiners are key management personnel such as face bosses, outby bosses, and shift managers, the mine would have to have these presentations either after or before their shift and pay overtime for the time spent in the review session. Since examiners work on all three shifts it would require that this review be presented three times each quarter so that all shifts receive the review. Five Star estimates that a review would require one hour per session, three sessions per quarter. Five Star estimates that a management person would put on the three one-hour review sessions and need a half hour each time for setup and preparation of the room and to record participation in the review session. This totals 48.5 management scale hours per quarter of which a minimum of 44.5 hours would be overtime hours. The clerk would have four hours of time spent. Five Star estimates that \$125 of materials, computer time, copier costs, etc. would be used each quarter.

Black Panther and Five Star recommend that MSHA put on these quarterly review sessions as part of the closeout for the regular inspection, E01, each quarter. MSHA is best prepared to make this type of presentation and the inspectors are trained on finding, describing, and reviewing violations. MSHA would need to put the review session on three times so that the examiners on each shift would be covered. This would lower the cost to the mine to just the hours spent by the examiners in the sessions. The MSHA inspectors have to give a closeout conference each quarter. This could be expanded so that they could talk about each citation and order issued and present it to all the examiners. Each inspector who participated in the Regular Inspection and each inspector who made a spot inspection, E02 or other spot inspections, and issued a citation or an order should participate in the review session.

6. The introductory text of paragraph (b) and paragraphs (d) and (h) of § 75.364 are revised to read as follows:

§ 75.364 Weekly examination.

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(b) Hazardous conditions and violations of mandatory health or safety standards. At least every 7 days, an examination for hazardous conditions and violations of mandatory health or safety standards at the following locations shall be made by a certified person designated by the operator:

Comment: The 1992 Safety Standards for Underground Coal Mine Ventilation; Rule (1992 Vent Rule) Page 20897 third column states "The final rule does not specifically indicate that this examination must verify compliance with mandatory health or safety standards as under the existing rule, but weekly examination for hazardous conditions conducted under the final rule inherently includes a determination of compliance with mandatory standards since ordinarily most hazardous conditions in a mine would result from a violation of a safety or health standard. Requiring the examiner to look for all violations regardless of whether they involve a hazard could distract the examiner from the more important aspects of the examination. This examination, like other examinations required by the final rule, is designed to concentrate the examiners efforts in those areas where they are most suitably applied."

The 1992 Vent Rule removed the requirement for weekly examiners to look for violations of the mandatory standards for good reason. The aim of the weekly examination is to look for hazards in the mine in those areas not covered by preshift, on-shift, or supplemental examinations. It also requires that the weekly examiner evaluate the ventilation of worked-out areas and make key measurements of the ventilation throughout the mine. Requiring the weekly examiner to look for violations distracts the examiner from looking for hazards and making the necessary measurements. Some violations are technical in nature and not hazards. For example, checking the tags on chemical fire extinguishers to make sure that the extinguisher has the date of the last examination and that the examination is within the last six months is not a hazard. The lack of a tag or an outdated tag is however, a violation of § 75.1100-3. This is but one example of violations that the examiner would be required to look for yet it is not a hazard.

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The weekly examiner is not the Safety and Health Department for the mine. His or her job should not be compliance assistance. Checking for hazards is the primary focus of the job. Requiring the weekly examiner to check for violations puts him or her in a "gotcha situation." If the examiner fails to catch a violation he or she could be considered negligent in the duties assigned by the regulation. The examiner does not need to be in that position but needs to concentrate on finding and reporting hazards.

Black Panther Mining LLC (Black Panther) estimates that it will take an additional five hours per week to do a weekly examination of the Oaktown Fuels Mine No. 1 to examine for violations of the mandatory standards.

Five Star Mining, Inc. (Five Star) estimates that it will take an additional 20 hours per week to do a weekly examination of the Prosperity Mine to examine for violations of the mandatory standards.

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(d) Hazardous conditions shall be corrected immediately. 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. Any violation of a mandatory health or safety standard found during a weekly examination shall be corrected.

Comment: The first statement in Paragraph (d) states "Hazardous conditions shall be corrected immediately." Current § 75.363(a) and proposed § 75.363(a) states "A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected." Hazardous conditions found during the preshift, on-shift examination, or supplemental examination can be corrected immediately or the area can be posted until the hazardous condition is corrected.

Hazardous conditions found during the weekly examination must be "corrected immediately." The hazardous condition found during the weekly examination that could have existed for up to a week

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must be corrected immediately. Yet, a hazardous condition found during a preshift, on-shift, or supplemental examination that could only have existed for a shift can remain posted. Areas made on a weekly examination might not be visited for another week have to be corrected immediately but areas made on a preshift examination that persons will work or travel near can just be posted. This is a contradiction. Hazardous conditions found during the weekly examination should be permitted to be posted if it does not have an immediate effect on miners.

Declaring "Any violation of a mandatory health or safety standard found during a weekly examination shall be corrected" subjects the mine operator to two citations. The standard violated can be cited and then this regulation could be cited for not correcting the violation. This is double jeopardy. It is obvious that an operator must correct a violation. A regulation does not need to be created that requires a violation be corrected. Since the requirement to correct also exist under the proposed § 75.363 an operator could be cited three times for the same violation.

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(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 and violations of mandatory health or safety standards 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 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

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computer system so as to be secure and not susceptible to alteration.

Comment: The aim of the weekly examination is to look for hazards in the mine. Requiring the weekly examiner to look for violations distracts the examiner from looking for hazards. The additional requirement of recording violations that are not hazards creates more work and causes the weekly record books to contain more information and the new information that will distract from the record of actual hazards. Some violations are technical in nature and are not hazards.

The weekly examiner is not the Safety and Health Department for the mine. His or her job should not be compliance assistance. Checking for hazards is the focus of the examination. Requiring the weekly examiner to check for and record violations puts him or her in a "gotcha situation." If the examiner fails to catch a violation he or she could be considered negligent in the duties assigned by the regulation. The examiner does not need to be in that position but needs to concentrate on finding and reporting hazards.

The Proposed Rule, Page 81168 first column states "MSHA reviewed all of the accident investigation reports involving fatalities from 2005 through 2009 where an inadequate examination of the underground work area was determined to have contributed to the accident. In addition, the agency reviewed citations and orders for non-fatal accidents for the same period where an inadequate examination of the underground work area contributed to the accident. MSHA determined that in 20 of these accidents, although the examiner did not identify a hazardous condition, the conditions involved a violation of a mandatory standard. Had the examiner identified these violations and corrected the conditions, the accident could have been prevented." First, when MSHA investigates an accident where someone is fatally injured or seriously injured MSHA tends to cite a violation stating that an inadequate examination was done. The thought process here is an accident occurred therefore the condition or practice that caused the accident should have been caught in the examination. This is often not the case. Examinations are done and conditions change. The person or persons injured might not have been in the area when the examination was done. This is especially true for preshift and supplemental examinations.

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Additionally, MSHA generally cites the condition or practice that caused the accident because something went wrong. It is easy to point the finger after an accident occurred. To conclude that if the violation would have been identified by the examiner the accident would not have happened is not sound logic.

The Proposed Rule, Page 81168 middle column states "MSHA solicits comments on other alternatives for assuring that the operators examine for violations of the mandatory standards." MSHA personnel should accompany each examiner in the course of the examiner's duties once each quarter. The MSHA inspector should be in a "compliance assistance" mode and teach the examiner to identify violations of the mandatory standards and not cite them. Who better than MSHA personnel could teach examiners to identify violations of the mandatory standards? Currently, MSHA inspectors travel almost exclusively with safety department personnel and infrequently travel with examiners. When they do travel with examiners they are in an inspection mode and the examiner is afraid to ask for help. The examiner thinks that he is being inspected and does not ask questions or seek guidance.