



State of West Virginia
Office of the Attorney General

Patrick Morrissey
Attorney General

October 21, 2014

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Eugene White
Director
WV Office of Miners' Health, Safety & Training
#7 Players Club Road
Suite 2
Charleston, WV 25311

Dear Mr. White:

You have asked for an Opinion of the Attorney General regarding the requirement under West Virginia law to conduct pre-shift examinations of underground coal mines. This Opinion is being issued pursuant to West Virginia Code § 5-3-1, which provides that the Attorney General "shall give written opinions and advice upon questions of law . . . whenever required to do so, in writing, by . . . [a] state officer, board or commission." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

In your letter, you note that the Office of Miners' Health, Safety & Training ("OMHST") has interpreted West Virginia Code §§ 22A-2-1 *et seq.* not to require a pre-shift examination while an underground mine is idle, unless miners are scheduled to begin working underground within three hours. Underground coal mines, you explain, are idle for a number of reasons. "Some are idle on Saturdays or Sundays or both; some are idle for an entire week for miner vacations; and recently some are idle for extended periods of time due to the market conditions of coal." You further explain that OMHST has read West Virginia Code §§ 22A-2-13, -14, and -20 to require pre-shift examinations three hours prior to the beginning of any shift during which miners will be working underground, but that OMHST does not read the law to otherwise require such examinations during an idle period. It is our understanding that OMHST has consistently applied this interpretation for many years.

Your letter raises the following legal question:

Do West Virginia Code §§ 22A-2-1 et seq. require pre-shift examinations while an underground coal mine is idle, i.e., no miners are working underground?

After reviewing the relevant state law, we agree with OMHST's long-standing view that West Virginia Code §§ 22A-2-1 *et seq.* require pre-shift examinations three hours before miners are scheduled to begin working underground but do not otherwise require such examinations during an idle period. As you note in your letter, there are three statutory provisions that speak specifically to the requirement to conduct examinations prior to the beginning of a shift, *i.e.*, pre-shift. See W. Va. Code § 22A-2-13 ("The mine foreman, assistant mine foreman or fire boss shall visit and carefully examine each working place in which miners will be working at the *beginning of each shift* before any face equipment is energized" (emphasis added)); *id.* § 22A-2-14 ("It shall be the duty of the mine foreman, assistant mine foreman or fire boss to examine each mine within three hours prior to the *beginning of a shift* and before any miner in such shift enters the active workings of the mine." (emphasis added)); *id.* § 22A-2-20 (requiring a "fire boss" or "certified person acting as such" to use certain signals in the course of conducting an examination "to indicate that [a] mine is safe in order that employees *going on shift* may begin work" (emphasis added)).* We believe that the provisions clearly require that a beginning-of-shift examination must occur "within three hours prior to the beginning of a shift," *id.* § 22A-2-14, but do not otherwise suggest an on-going requirement to perform pre-shift examinations while an underground mine is idle. Indeed, such an on-going requirement would be inconsistent with the very idea of a *beginning-of-shift* examination. See *Itmann Coal Co. v. Miller*, 166 W. Va. 84, 86, 272 S.E.2d 668, 670 (1980) (distinguishing pre-shift examinations, which must be performed three hours prior to the beginning of a shift, from other mine-safety examinations).

To the extent there is any ambiguity in the statutes, we believe that the courts would defer to OMHST's interpretation. As the Supreme Court of Appeals has often reiterated, "[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous." Syl. Pt. 4, *Sec. Nat. Bank & Trust Co. v. First W. Va. Bancorp., Inc.*, 166 W. Va. 775, 277 S.E.2d 613 (1981). Moreover, "[a] contemporary exposition of a statute, uncertain in its meaning, recognized and acquiesced in, for a long period of time, by the officers charged with the duty of enforcing it, the courts, the Legislature and the people, will be adopted unless it is manifestly wrong." Syl. Pt. 4, *State ex rel. Ballard v. Vest*, 136 W. Va. 80, 65 S.E.2d 649 (1951). There is nothing clearly or manifestly wrong with OMHST's interpretation, which tracks the plain text of the statutes. At worst, OMHST's interpretation is not entitled to deference because the statutes are clear on their face. See *Algoma Coal & Coke Co. v.*

* Another provision of state law speaks to the permissible conduct of miners who are working on a shift during the time that a fire boss or other certified person is conducting a pre-shift examination for the next shift. See W. Va. Code § 22A-2-22 ("[M]iners regularly employed on a shift during which the mine is being preshift examined by a fire boss or certified person shall be permitted to leave or enter the mine in the performance of their duties.").

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Alexander, 136 W. Va. 521, 537, 66 S.E.2d 201, 209 (1950) (refusing to give deference where “there exists no ambiguity in the statutes”).

We note, however, that the conclusions in this Opinion do not speak to any other mine-safety examinations that may also be required by state or federal law. As the Supreme Court of Appeals has recognized, there are various nonexclusive mine-safety examinations required under the West Virginia Code. The performance of some does not necessarily eliminate the need to perform others. See *Itmann Coal Co.*, 166 W. Va. at 87-88, 272 S.E.2d at 670-71 (“To promote safety in a highly dangerous business, the Legislature has provided nonexclusive, multiple examinations for potential safety risks, one of which is preshift examination of the entire mine.”).

Sincerely,

A handwritten signature in black ink that reads "PATRICK MORRISSEY". The signature is written in a cursive, slightly slanted style.

Patrick Morrissey
Attorney General

Elbert Lin
Solicitor General

Steven Travis
Assistant Attorney General