FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 30, 2013

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDING Docket No. SE 2010-21-M A.C. No. 01-00028-000196859
v.	:	
VULCAN CONSTRUCTION MATERIALS, L.P., Respondent	:	Mine: Fort Payne Quarry

ORDER GRANTING SUMMARY DECISION
DISMISSAL ORDER

Before: Judge L. Zane Gill

Procedural History, Summary Decision Standard, Decision Summary

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "Act"), 30 U.S.C. § 815(d). [1] The underlying controversy involves a single citation—Citation No. 6516682[2]–issued to Vulcan Construction Materials, L.P. by the Department of Labor's Mine Safety and Health Administration under Section 104(a) of the Act, 30 U.S.C. § 814(a). At issue is whether Vulcan violated the immediate accident notification requirement of 30 C.F.R. § 50.10(b) when it failed to report an employee's heart attack to MSHA within 15 minutes.

The Secretary of Labor and Vulcan filed cross-motions for summary decision pursuant to Federal Mine Safety and Health Review Commission Procedural Rule 67, 29 C.F.R. § 2700.67. The Commission's Procedural Rules provide that a motion for summary decision shall be granted only if the entire record, including pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows that: (1) there is no genuine issue as to any material fact; and (2) the moving party is entitled to summary decision as a matter of law. 29 C.F.R. § 2700.67(b); *see also Energy W. Mining Co.*, 17 FMSHRC 1313, 1316 (Aug. 1995). For the reasons set forth below, I find that there is no genuine issue of material fact presented, and conclude that Vulcan is entitled to summary decision as a matter of law. The employee's heart attack did not constitute an immediately reportable accident because it was not an "injury" under 30 C.F.R. §

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[1] This decision was drafted by OALJ Intern Robert Weedman

[2] Citation Number 6516682 originally alleged a violation of 30 C.F.R. § 50.20(a) and proposed a civil penalty of $100.00. On January 19, 2012, the Secretary of Labor amended the citation to allege a violation of 30 C.F.R. § 50.10(b). Accordingly, the proposed penalty was raised to the statutory minimum of $5,000.00, as required by Congress for such a violation pursuant to the provisions of the Mine Act, 30 U.S.C. § 820(a) (2).

50.10(b). Accordingly, Vulcan's Motion for Summary Decision is **GRANTED**, Citation Number 6516682 is **VACATED**, the Secretary's Motion for Summary Decision is **DENIED**, and this case is **DISMISSED**.

Introduction/Syllabus

In 2009, Rex Lowe suffered a heart attack while working at a mine and was taken to a hospital where doctors performed open-heart surgery, saving his life. Doctors determined his heart attack was the culmination of many years of progressing coronary atherosclerosis. MSHA learned of Mr. Lowe's heart attack seven days later when Vulcan submitted a mine accident, injury, and illness report. MSHA then cited Vulcan for violating the immediate accident notification requirement found in 30 C.F.R. § 50.10. The regulation requires mine operators to notify MSHA within fifteen minutes of an accident involving an injury of an individual at a mine which has a reasonable potential to cause death. MSHA argues that heart attacks are included within the meaning of "injury" and Vulcan violated the standard when it did not immediately report Lowe's heart attack as an accident. Vulcan responds that Lowe's heart attack was not immediately reportable as an accident because it was an illness, not an injury. This dispute requires me to determine whether Lowe's heart attack was an immediately reportable accident, and if so, whether Vulcan should have known it.

Along with their cross-motions, the parties filed the following joint stipulation of facts and exhibits:

Stipulated Facts

1. During all times relevant to this matter, the Respondent, Vulcan Construction Materials, LP, was the owner and operator of the Fort Payne Quarry, Mine ID No. 01-00028.

2. Fort Payne Quarry is a "mine" as defined in section 3(h) of the Mine Act, 30 U.S.C. § 802(h).

3. The mining operations in Fort Payne Quarry are subject to the jurisdiction of the Mine Act and the Administrative Law Judge and the Federal Mine Safety and Health Review Commission have Jurisdiction over these proceedings.

4. Fort Payne Quarry is a surface metal/non-metal mine.

5. On July 6, 2009, Rex Lowe was an employee of Vulcan Construction Materials.

6. On July 6, 2009, Rex Lowe was 54 years of age with a date of birth of September 25, 1954.

7. On July 6, 2009, Mr. Lowe was employed as a bagger/warehouse man by Vulcan Construction Materials, LP.

8. On July 6, 2009, Mr. Lowe began his shift at 6:30 a.m. at the Fort Payne Quarry.

9. On July 6, 2009, Mr. Lowe was in the quarry near a tail pulley when he appeared to be suffering from an undiagnosed medical condition.

10. On July 6, 2009, Mr. Lowe was cleaning underneath the tail pulley at the onset of his physical symptoms.

11. On July 6, 2009, at 7:30 a.m. Mr. George Grguric, Plant Manager, observed that Mr. Lowe was demonstrating physical signs of a yet undiagnosed heart attack.

12. On July 6, 200,9 at 7:30 a.m., Jason Weeks, shipping loader operator, Roger Barron, repairman, and Olin Summerall, stock truck driver, each observed Mr. Lowe suffering from an undiagnosed medical condition.

13. On July 6, 2009, the physical signs and symptoms that Mr. Lowe exhibited are that he became faint and discolored.

14. On July 6, 2009, at 7:30 a.m. Mr. Grguric transported Mr. Lowe to the hospital.

15. On July 6, 2009, at approximately 8:30 a.m., Rex Lowe was diagnosed as having suffered a heart attack while working at the mine.

16. On July 6, 2009, Mr. Lowe underwent open heart surgery.

17. On July 6, 2009, a cardiac catheterization was performed on Mr. Lowe.

18. On July 6, 2009, the cardiac catheterization performed on Mr. Lowe revealed a total occlusion of his right coronary artery.

19. On July 6, 2009 the cardiac catheterization performed on Mr. Lowe revealed a severe occlusion of the left main and left anterior descending coronary arteries.

20. On July 6, 2009, a thrombus extraction and balloon angioplasty, followed by stent replacement, was performed on Mr. Lowe.

21. On July 6, 2009, at 8:30 a.m., George Grguric, Plant Manager, who transferred Mr. Lowe to the hospital was told by doctors at the hospital that Mr. Lowe had suffered a heart attack.

22. On July 6, 2009, Mr. Grguric did not notify MSHA that Mr. Lowe had suffered a heart attack within fifteen (15) minutes of learning Mr. Lowe's diagnosis at 8:30 a.m., by calling 1-800-746-1533.

23. Respondent alleges that sometime after 8:45 a.m., Ms. Misty Hillis, Vulcan Construction Material's representative, called and left Mr. Wyatt Andrews of the Southeastern District a voicemail to report Mr. Lowe's condition.

24. Respondent alleges, that at approximately 1:30 p.m., Ms. Hillis reported Mr. Lowe's condition to the MSHA toll-free number at 1-800-746-1533.

25. On July 6, 2009, Ms. Hillis did not notify MSHA that Mr. Lowe had suffered a heart attack within fifteen (15) minutes of learning Mr. Lowe's diagnosis at 8:30 a.m., by calling 1-800-746-1533.

26. On July 13, 2009, Wilma Gooch, Health and Safety Coordinator for Respondent, submitted MSHA Form 7000-1 to report Mr. Lowe's heart attack.

27. Pursuant to the MSHA Report on 30 C.F.R. 50, Directorate of Technical Support dated December 1986, PC-7104, "heart attacks are classified as illnesses because they do not normally result from work accidents or a single instantaneous exposure in the environment."

28. On July 28, 2009, MSHA Inspector Charles M. Morrison issued Citation No. 6516682 alleging a violation of 30 C.F.R. § 50.20(a).

29. On January 24, 2012, the Secretary amended Citation No. 6516682 from 30 C.F.R. § 50.20(a) to 30 C.F.R. § 50.10(b).

30. Citation No. 6516682 was served on Respondent or its agent as required by the Mine Act.

31. The MSHA inspector, Charles M. Morrison, who issued Citation No. 6516682, was acting in his official capacity as a duly authorized representative of the Secretary of Labor.

32. The size of the mine and the size of the controller are accurately reflected and accounted for in the Proposed Assessment of penalty for Citation No. 6516682.

33. The Respondent worked 25,707 hours at the Fort Payne Quarry for the calendar year 2008.

34. The assessed penalty, if affirmed, will not impair Respondent's ability to remain in business.

35. Pursuant to Section 110(i) of the Mine Act, 30 U.S.C. § 820(i), the Secretary originally assessed a civil penalty in the amount of $100 against Respondent for the cited standard of 30 C.F.R. § 50.20(a).

36. Pursuant to Section 110(a)(2) of the Mine Act, 30 U.S.C. § 820(a)(2), the Secretary amended the originally assessed civil penalty to the statutory minimum of $5,000 against Respondent for the cited amended standard of 30 C.F.R. § 50.10(b) on January 24, 2012 which is the minimum penalty the Secretary may assess for failure to timely report a death at a mine or an injury at a mine that has a reasonable potential to cause death.

37. MSHA designated the negligence as moderate negligence for the assessed violation.

38. Since the violation at issue was a reporting violation, MSHA designated the gravity of the violation as follows: (a) "no likelihood," (b) "no lost workdays," (c) "non-significant and non-substantial."

39. Vulcan Construction Materials, LP demonstrated good faith in achieving rapid compliance after notification of the alleged violation.

40. On July 6, 2009, Vulcan Construction Materials was aware of the requirement in 30 C.F.R. § 50.10(b) to report accidents involving injuries at a mine, that have a reasonable potential to cause death to MSHA within 15 minutes of the reportable accident.

Secretary's List of Exhibits

1. Citation No. 6516682

2. Inspector's Notes for citation No. 6516682

3. MSHA Form 7000-1

Respondent's List of Exhibits

A. Yellow Jacket – Report on 30 C.F.R. Part 50

B. Physician's notes regarding Mr. Lowe's diagnosis

Statement of Facts

Rex Lowe worked as a bagger and warehouseman at Vulcan Construction Materials, L.P.'s Fort Payne Quarry in DeKalb, Alabama. Stip. 1, 7. On July 6, 2009, Lowe began his shift in the quarry at 6:30 a.m. Stip. 8. While cleaning underneath the tail pulley of a belt conveyer, Lowe began experiencing signs of physical distress including chest pain. Stip. 9; R. Ex. B p. 2. At 7:30 a.m., Lowe's coworkers, including Vulcan's plant manager, Mr. Grguric, noticed that he became faint and discolored, and appeared to be suffering from an undiagnosed medical condition. Stip. 11, 12, 13. Grguric then transported Lowe to a hospital, and at 8:30 a.m., doctors diagnosed him as having suffered an acute myocardial infarction—a heart attack—while working at the mine. Stip. 14, 15. Doctors performed a cardiac catheterization which revealed a total occlusion of his right coronary artery and a severe occlusion of the left main and left anterior descending coronary arteries. Stip. 17, 18, 19. That day he underwent open heart surgery, and doctors successfully performed a thrombus extraction and balloon angioplasty, followed by a stent replacement. Stip. 16, 20. Seven days later, Vulcan reported the heart attack to the Mine Safety and Health Administration (MSHA) by submitting MSHA Form 7000-1. Stip. 26. MSHA received Form 7000-1 within the regulation's ten-day requirement for reporting accidents, injuries, and illnesses, but an inspector later cited Vulcan for failure to notify MSHA of a mine accident within fifteen minutes of the heart attack. Stip. 28. The citation alleged a

violation of 30 C.F.R. § 50.10(b), which requires operators to notify MSHA within fifteen minutes of a mine accident involving an injury of an individual at a mine which has a reasonable potential to cause death. Stip. 29. Vulcan contested the citation, arguing there was no accident to report. Both parties have moved for summary decision.

Vulcan's Argument

Vulcan challenges the citation, contending that it did not violate the immediate notification requirement for accidents because there was no accident to report. Until doctors told Vulcan's plant manager, Mr. Grguric, of the heart attack, Vulcan did not believe Lowe was in serious danger, and it was completely unclear what he may have been suffering from, if anything.[3] After Vulcan learned of the diagnosis, it relied on MSHA's longstanding guidance to determine that Lowe's heart attack was an illness, not an injury, and thus not immediately reportable as an accident. Moreover, MSHA and the Secretary have never included heart attack within the definition of an injury, and MSHA's only public policy pronouncement on this issue— MSHA Report on 30 C.F.R. Part 50, Directorate of Technical Support dated December 1986, PC-7014 (the "Yellow Jacket")—specifically states that a heart attack is not an injury. Thus, the Secretary's interpretation of "injury" here is merely a litigating position that does not deserve deference. Finally, the Secretary's reading of the regulation is overbroad and unreasonable because it would force operators to construe a broad range of symptoms as reportable. The reporting requirements of section 50.10(b) would then be limitless because they would require operators to call the immediate reporting line every time an employee is either taken to a hospital or a doctor.

The Secretary's Argument

The Secretary responds that this Court should grant deference to his interpretation that a heart attack constitutes an injury within the meaning of 30 C.F.R. § 50.2(h) (2), because the regulation is ambiguous and his interpretation is reasonable. Interpreting the term to include heart attacks is consistent with common dictionary definitions and judicial usage in a variety of contexts. In addition, recent mine safety case law confirms that heart attacks are reportable injuries. Because of this, Vulcan knew or should have known it had experienced a reportable accident when its Plant Manager, Mr. Grguric, observed Lowe to be faint and discolored. In addition, Vulcan knew or should have known it had experienced a reportable accident when Mr. Grguric personally transported Lowe to the hospital. Moreover, Vulcan knew or should have known it had experienced a reportable accident when hospital doctors informed Mr. Grguric that Lowe had suffered a heart attack and was admitted to the hospital for open heart surgery. Finally, allowing Vulcan to interpret a heart attack as an "illness" is impermissible because it defeats the purpose of the standard. It would incentivize a mine operator to wait until it learned the medical cause of a potentially fatal occurrence before reporting it to MSHA. This would compromise the health and safety of miners by preventing MSHA from immediately investigating and preventing any further exposure to hazards.

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[3] Under the Mine Act, notice to an operator's agent is imputed to the operator. *See S. Ohio Coal Co.*, 4 FMSHRC 1458, 1463-64 (Aug. 1982). In this case Mr. Grguric, the Plant Manager, is Vulcan's agent.

Discussion

Deference

The Secretary argues that his interpretation of heart attack as an "injury" within the meaning of 30 C.F.R. §§ 50.10 & 50.2(h) (2) deserves deference. Sec'y's Mot. Summ. D. 15, Oct. 16, 2012. The Supreme Court has said that when reviewing a challenged interpretation of regulatory language, the Secretary's interpretation of his own regulation is "controlling unless plainly erroneous or inconsistent with the regulation." *See Auer v. Robbins*, 519 U.S. 452, 461 (1997). However, "*Auer* deference is warranted only when the language of the regulation is ambiguous." *Christensen v. Harris Cnty.*, 529 U.S. 576, 588, (2000). Courts determine the plainness or ambiguity of a regulation by referring to "the language itself, the specific context in which that language is used, and the broader context as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). My review of the immediate notification requirement in 30 C.F.R. § 50.10(b), along with its specific and overall context within the regulation, leads me to conclude that it unambiguously does not include heart attacks within the meaning of injury. Accordingly, deference to the Secretary's interpretation of the regulation is not warranted.

Unambiguous / Plain Text

Rex Lowe was diagnosed as having suffered a myocardial infarction. Since the Secretary alleges that Vulcan violated 30 C.F.R. § 50.10(b), the starting point is to determine whether a heart attack fits within the plain meaning of "injury" under section 50.10. The regulations never explicitly mention a heart attack; it has no special regulatory meaning that would preclude consideration of the ordinary meaning of the term. *See Bluestone Coal Corp.*, 19 FMSHRC 1025, 1029 (June 1997) (noting that in the absence of a regulatory definition or technical usage of a word, the Commission would normally apply the ordinary meaning). Merriam Webster defines a heart attack as "an acute episode of heart disease marked by the death or damage of heart muscle due to insufficient blood supply to the heart muscle usually as a result of a coronary thrombosis or a coronary occlusion and that is characterized especially by chest pain—called also myocardial infarction." *Heart Attack Definition* http://www.merriam-webster.com/medlineplus/heart%20attack (last visited Aug. 25, 2013). In short, a heart attack is an acute episode of heart <u>disease</u> marked by the death or damage of heart muscle. The fact that a heart attack is "an acute episode of heart disease" is significant because the immediate notification provision in 30 C.F.R. § 50.10 never mentions disease:

> The operator shall immediately contact MSHA at once without delay and within 15 minutes at the toll-free number, 1-800-746-1553, once the operator knows or should know that an accident has occurred involving:
>
> (a) A death of an individual at the mine;
>
> (b) An injury of an individual at the mine which has a reasonable potential to cause death;

(c) An entrapment of an individual at the mine which has a reasonable potential to cause death; or

(d) Any other accident.

30 C.F.R. § 50.10.

The explicit language of section 50.10 requires immediate notification only when there has been an accident involving a death, an injury which has a reasonable potential to cause death, an entrapment which has a reasonable potential to cause death, or any other accident. It says nothing about disease. But, the explicit text of section 50.10(b) doesn't exclude disease either. Section 50.10(b) requires an operator to contact MSHA within 15 minutes once it knows or should know that an accident has occurred involving an injury at a mine which has a reasonable potential to cause death. Thus, if a heart attack is a disease process, and the regulation's meaning of injury does not implicitly contemplate disease, then a heart attack is not subject to the immediate notification requirement. If, however, the regulation could implicitly include "disease" within the meaning of "injury with a reasonable potential to cause death," the meaning of injury might be ambiguous.

The Secretary argues for the latter interpretation, but an isolated reading of one subsection of a regulation is not the standard by which ambiguity is determined. The Supreme Court has noted that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Hence, the regulation is not necessarily ambiguous even though an expansive reading of subsection 50.10(b) would not explicitly exclude "disease" from the meaning of "injury." In this case, other Part 50 regulations provide critical guidance on the statutory context of "injury" by supplying the regulatory meaning for the terms "accident," "occupational injury," and "occupational illness," as found in section 50.2:

§ 50.2 Definitions.

As used in this part:

(e) Occupational injury means any injury to a miner which occurs at a mine for which medical treatment is administered, or which results in death or loss of consciousness, inability to perform all job duties on any day after an injury, temporary assignment to other duties, or transfer to another job.

(f) Occupational illness means an illness or disease of a miner which may have resulted from work at a mine or for which an award of compensation is made.

(h) Accident means
(1) A death of an individual at a mine;
(2) An injury to an individual at a mine which has a reasonable potential to cause death;

> (3) An entrapment of an individual for more than 30 minutes or which has a reasonable potential to cause death;
> (4) An unplanned inundation of a mine by a liquid or gas;
> (5) An unplanned ignition or explosion of gas or dust;
> (6) In underground mines, an unplanned fire not extinguished within 10 minutes of discovery; in surface mines and surface areas of underground mines, an unplanned fire not extinguished within 30 minutes of discovery;
> (7) An unplanned ignition or explosion of a blasting agent or an explosive;
> (8) An unplanned roof fall at or above the anchorage zone in active workings where roof bolts are in use; or, an unplanned roof or rib fall in active workings that impairs ventilation or impedes passage;
> (9) A coal or rock outburst that causes withdrawal of miners or which disrupts regular mining activity for more than one hour;
> (10) An unstable condition at an impoundment, refuse pile, or culm bank which requires emergency action in order to prevent failure, or which causes individuals to evacuate an area; or, failure of an impoundment, refuse pile, or culm bank;
> (11) Damage to hoisting equipment in a shaft or slope which endangers an individual or which interferes with use of the equipment for more than thirty minutes; and
> (12) An event at a mine which causes death or bodily injury to an individual not at the mine at the time the event occurs.

30 C.F.R. § 50.2.

At first blush, the definition of accident does not seem to add much insight to the meaning of the section 50.10 notification requirement for purposes of this analysis. Section 50.2(h) (1)-(3) are nearly identical to section 50.10(a)-(c), and section 50.2(h) (4)-(12) does not deal with injury at a mine. Likewise, the section 50.2(e) definition of occupational injury does not appear to settle the meaning any more than section 50.10 does because it neither explicitly rejects nor includes disease. However, when the meanings of accident and injury are considered in light of the Part 50 regulatory definition and its reference to occupational illness, it becomes clear that the immediate notification requirement unambiguously does not include heart attacks within the meaning of injury.

The regulation defines occupational illness as "an illness or disease . . . which may have resulted from work at a mine." 30 C.F.R. § 50.2(f). A heart attack fits within the meaning of occupational illness when it may have resulted from work at a mine, because occupational illness includes "illness or disease," and a heart attack is an "acute episode of heart disease." Moreover, throughout the Mine Act and the Part 50 regulations, the terms "accident," "injury," and

"illness," are presented as separate and distinct concepts.[4] To include heart attacks within the meaning of "injury" would make at least some occupational illness a subset of occupational injury. The plain text of the regulation does not contemplate this result because such a construction would render the meaning of "illness" superfluous.

The rules drafters—MSHA and Congress—assigned specific meanings to the terms, "accident," "injury," and "illness," by consistently listing each one in every provision meant to address all three, and by excluding mention of one when a requirement was not meant to address that particular term. In section 50.2(h) (3) for example, entrapment with a reasonable potential to cause death is defined as an accident, irrespective of whether the individual has been injured or not.

Likewise, illness is conspicuously absent from the immediate notification provisions in sections 50.10, 50.11, and 50.12, even though nearly every other section of the Part 50 regulations lists accident, injury, and illness. In fact, none of the Subpart B regulations dealing with immediate accident notification ever mentions illness or disease, anywhere.[5] This is also true of the Mine Act's immediate notification provisions.[6]

The immediate notification requirement's complete failure to mention illness or disease supports the conclusion that it does not include mere illness or disease, and hence, does not include heart attacks. If the immediate accident notification requirement were read to include heart attacks within the meaning of injury, the result would be an overlap of the concepts of injury and illness that would write the term "illness" out of the regulation.

Since an accident involving an injury under 50.10(b) requires immediate notification when the injury has "a reasonable potential to cause death," and occupational injury includes "any injury to a miner which occurs at a mine," occupational injury's broad definition also includes those injuries that satisfy the immediate accident notification requirement. Hence, an accident involving an injury with a reasonable potential to cause death is a subset of occupational injury. This is confirmed in section 50.20(a) where the accident reporting requirements distinguish between section 50.10 accidents involving occupational injuries, and those that do not. *See*, 30 C.F.R. § 50.20(a) (specifying the proper forms to complete "[w]hen an accident specified in § 50.10 occurs, which does not involve an occupational injury"). But because a heart attack is a disease, and an occupational illness is defined as "an illness or disease," to include heart attacks within the meaning of "injury" would make at least some occupational illness a subset of occupational injury -- a tortured, contradictory, and illogical result.

The plain text of the regulation does not contemplate this result. Conspicuously absent from the definition of accident, is any reference to illness or disease. Nor does section 50.20 make any distinction between accidents that do and do not involve occupational illnesses, as it

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[4] *See, e.g.*, 30 U.S.C. §§ 801(b), 801(c), 801(f), 801(g), 802(k), 811(a), 813(a), 813(b), 813(d), 813(j), 813(k); 30 C.F.R. §§ 50.1, 50.2, 50.20(a), 50.20(b), 50.20-1, 50.20-2, 50.20-3, 50.30-1, 50.41.

[5] *See* 30 C.F.R. §§ 50.10, 50.11, 50.12.

[6] *See* 30 U.S.C. §§ 813(d), 813(j), 813(k).

does with occupational injuries. In fact, except for the explicit inclusion of injury with a reasonable potential to cause death within the meaning of "accident," accident, injury, and illness are referred to throughout the Mine Act and Part 50 regulations as separate and distinct concepts.[7] Additionally, even though nearly every section of the Part 50 regulations lists accident, injury, and illness, none of the Subpart B regulations—dealing with immediate accident notification—ever mentions illness or disease, anywhere.[8] This is also true of the Mine Act's immediate notification provisions.[9] This complete lack of mention leads to the conclusion that the meaning of injury does not, by virtue of intent of the drafters or reasonable interpretation, include mere illness or disease, and hence does not include heart attacks. The rules drafter—MSHA—showed that it knew how to draft regulations that carefully and separately addressed the concepts of illness and disease. It could have explicitly included disease in the immediate notification provision had it really meant to expand "injury" as argued by the Secretary. Because it did not, I conclude the plain text of the regulation unambiguously does not include within the meaning of "injury" mere illness, including heart attacks. Given the plain text and regulatory context of the immediate notification requirement, such an interpretation would be overly broad and altogether unwarranted because it would render superfluous the regulation's use of the term "illness."

Specific Context

Immediate reporting of heart attacks would be inconsistent with the specific context of the Subpart B regulations, 30 C.F.R. §§ 50.10, 50.11, and 50.12. In addition, a review of the overall context of Part 50, and the specific context of the immediate notification requirement in Subpart B, confirms that the regulation unambiguously does not include heart attacks within the meaning of injury.

MSHA promulgated the immediate notification requirement in 2006 after an explosion at the Sago Mine in Tallmansville, West Virginia resulted in 12 fatalities, and a fire at the conveyor belt drive at the Aracoma Alma Mine No. 1 in Melville, West Virginia resulted in two fatalities in January of that year. *See* Emergency Mine Evacuation, 71 Fed. Reg. 12252, 12254. Of the 12 miners killed at the Sago Mine, one died of carbon monoxide poisoning shortly after the explosion. *See* Richard A. Gates et al., MSHA, Report of Investigation: Fatal Underground Coal Mine Explosion, January 2, 2006, Sago Mine, Wolf Run Mining Company, Tallmansville, Upshur County, West Virginia, ID No. 46-08791 188 (May 9, 2007), *available at* http://www.msha.gov/Fatals/2006/Sago/ftl06C1-12.pdf. The rest were trapped underground. *See id.* at 31. The mine operator did not notify the Secretary of Labor's Mine Safety and Health Administration of the accident until approximately two hours after it occurred, and it was later learned that most of the miners lived for hours after the initial blast but ultimately succumbed to carbon monoxide poisoning. *See* Emergency Mine Evacuation, 71 Fed. Reg. 71430, 71433; Gates et al., *supra*, at 29-33. The Federal Mine Safety and Health Act of 1977 was

[7] *See, e.g.*, 30 U.S.C. §§ 801(b), 801(c), 801(f), 801(g), 802(k), 811(a), 813(a), 813(b), 813(d), 813(j), 813(k); 30 C.F.R. §§ 50.1, 50.2, 50.20(a), 50.20(b), 50.20-1, 50.20-2, 50.20-3, 50.30-1, 50.41.
[8] *See* 30 C.F.R. §§ 50.10, 50.11, and 50.12.
[9] *See* 30 U.S.C. § 813(d), 813(j), 813(k).

amended later that year to require that mine operators immediately notify MSHA within fifteen minutes once the operator knows or should know that a mine accident has occurred.

The amended rule helps assure that miners, mine operators, and MSHA will be able to respond quickly and effectively to mine disasters, emergencies, and other potentially life threatening situations. *See* Emergency Mine Evacuation, 71 Fed. Reg. 71430, 71431; *see also* 30 U.S.C. § 813(j) (granting the Secretary authority to supervise and direct rescue and recovery activities and take whatever action deemed appropriate to protect the life of any person in the event of a mine accident). Immediate notification also serves "to prevent the destruction of any evidence which would assist in investigating the cause" of an accident. *See id.* (requiring operators to prevent destruction of any evidence which would assist the Secretary in investigating the cause or causes of an accident). In short, immediate notification allows MSHA to address unsafe or potentially life threatening conditions and practices at mines when a quick response could make a difference.

MSHA listed some of the types of injuries that require immediate reporting under the amended rule:

> Based on MSHA experience and common medical knowledge, some types of "injuries which have a reasonable potential to cause death" include concussions, cases requiring cardio-pulmonary resuscitation (CPR), limb amputations, major upper body blunt force trauma, and cases of intermittent or extended unconsciousness. These injuries can result from various events, including an irrespirable atmosphere or ignitable gas, compromised ventilation controls, and roof instability.

Emergency Mine Evacuation, 71 Fed. Reg. 71430, 71434.

In this case, the Secretary has not alleged or shown that Lowe's heart attack was caused, even in part, by an unsafe or unhealthful condition or practice in the mine or that his investigative function was thwarted by Vulcan's failure to immediately notify. Thus, immediate reporting of a heart attack is inconsistent with the concerns addressed in Part 50's Subpart B regulations when the event is completely unrelated to mine activities or conditions, is not preventable by MSHA or the operator, and poses no threat to the health and safety of other miners

Overall Context

Reporting heart attacks pursuant to the Subpart C regulations of 30 C.F.R. § 50.20 within ten days instead of fifteen minutes is not inconsistent with the overall context of the regulation and preserves MSHA's interest in compiling incident statistics.

In addition to immediate response to and investigation of accidents, the Mine Act also gives MSHA the general responsibility of "obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents, and the causes of diseases and physical impairments originating in such mines." 30 U.S.C. § 813(a); *see also Akzo Nobel Salt,*

Inc., 18 FMSHRC 1950, 2014 (Nov. 1996) MSHA is able to fulfill this function through its regulations promulgated in Part 50, charging that "[t]he principal officer in charge of health and safety at the mine or the supervisor of the mine area in which an accident or occupational injury occurs, or an occupational illness may have originated, shall complete or review [Form 7000-1]. *See* 30 C.F.R. § 50.20(a). Thus, heart attacks and other illnesses that are not immediately reportable are nonetheless reportable in the normal course of events. MSHA's need to gather and analyze event data that is not immediately reportable is in no way compromised.

Differing Dictionary Definitions

The Secretary contends that the regulation is ambiguous because the word "injury" has alternative dictionary definitions that are consistent with his interpretation. He cites *Catawba Cnty, N.C. v. EPA*, 571 F.3d 20, 38-39 (D.C. Cir. 2009) and *NMA v. Kempthorne*, 512 F.3d. 702, 708 (D.C. Cir. 2008) (cert. denied, 129, S.Ct. 624 (2008)) for the proposition that the existence of differing dictionary definitions indicates ambiguity. Sec'y Resp. to Resp't Mot. S. Decision p. 4. In support, he plucks definitions of "injury" from Webster's Third New International Dictionary and The American Heritage Dictionary to show that the term means "2: hurt, damage, or loss sustained," and "1. Damage or harm done to or suffered by a person or thing," respectively. Sec'y Resp. to Resp't Mot. S. Decision p. 3. With those definitions in hand, he asserts that a "heart attack constitutes "damage" or "harm" "sustained" or "suffered" by the person having the heart attack." Sec'y Resp. to Resp't Mot. S. Decision p. 3.

However, courts have recognized that if Congress uses a term susceptible of several meanings, it does not follow that Congress has implicitly authorized an agency to choose any one of those meanings, depending on the litigation needs of a particular case. *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C.Cir.2006). The Supreme Court has noted that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 at 118. In the absence of any regulatory context for the meaning of "injury," reliance on a dictionary meaning might make more sense than it does in this case. But, as discussed above, "injury" is defined in the regulation, and its context within the regulation fills in any definitional gap.

The Secretary makes much of the fact that heart attacks are serious enough to have a reasonable potential to cause death, even going so far as to imply that cardiac catheterization performed in a hospital after a heart attack is more likely to result in death than full cardiac arrest requiring cardio-pulmonary resuscitation ("CPR") on the jobsite. *See* Sec'y Resp. to Resp't Mot. S. Decision p. 5. Although a heart attack can be said to cause "injury" to the heart muscle, it is not the type of injury contemplated by the regulations. The effect of any illness or disease can be said to cause damage or harm to an individual's body.

The immediate notification provision makes it clear that to qualify as an injury, an event must have a reasonable potential to cause death. The issue here, however, is the plainness or ambiguity of the word "injury," not the serious nature of heart attacks. A heart attack cannot be forced into the definition of "injury" merely because it has a reasonable potential to cause death. Many diseases and illnesses have a reasonable potential to cause death. Illnesses and diseases such as diabetes, pneumonia, cancer, depression, and black lung disease could all be swept into the immediate reporting requirement as well if the Secretary's argument prevailed. Operators would be required to immediately notify MSHA anytime an employee left work to see a doctor

or go to a hospital in relation to any number of ailments. Without proper consideration of whether something is an illness or an injury, focusing on "damage or harm," or the "potential to cause death," will lead to absurd results. In addition to writing illness and disease out of the regulations, it would have the effect of creating new duties, something the Secretary cannot do without notice and comment. *See Am. Min. Cong. v. MSHA*, 995 F.2d 1106, 1110 (D.C. Cir. 1993) (noting that the legislative or interpretive status of an agency rule turns on the prior existence or non-existence of legal rights and duties). The regulations do not contemplate a heart attack as an injury.

Differing Judicial Interpretations

The Secretary points out that just as the existence of differing dictionary definitions might indicate ambiguity, so too does the existence of differing judicial interpretations. Sec'y Resp. to Resp't Mot. S. Decision p. 4. He cites three cases[10] from the Fifth Circuit, all of which he claims support his interpretation of "injury" here because they characterize heart attacks as injuries in a variety of inapposite contexts. *See* Sec'y Resp. to Resp't Mot. S. Decision p. 3-4.

While it is true that these cases characterize heart attacks as injuries, they do it in the context of discussing whether a heart attack is a compensable injury under workers' compensation insurance contract law. The reasoning in all three cases undercuts the Secretary's position by requiring some sort of causal connection—physical or mental—between work activity and the heart attack in order to show a compensable injury. *See Bridgestone*, 381 F. App'x at 472-74 (discussing the Louisiana Supreme Court's interpretation of "accident" in *Ferguson v. HDE, Inc.*, 270 So. 2d 867, 870 (La. 1972), where it construed the Louisiana state worker's compensation statute and insurance contract law to grant compensation for accidental injury when a heart attack was precipitated by job-related mental or emotional causes); *C & D*, 376 F. App'x at 392 (denying review of a Department of Labor Benefits Review Board decision granting death benefits under the Longshore and Harbor Workers Compensation Act because the causal nexus required for a compensable injury under the Act was present when strenuous work activities precipitated the fatal heart attack); *Gooden*, 135 F.3d at 1069 (vacating a Department of Labor Benefits Review Board decision for improperly denying workers compensation benefits under the Longshore and Harbor Workers Compensation Act based on the Administrative Law Judge's improper focus on the employee's pre-existing heart condition, and remanding for a finding of whether the conditions of employment constituted the precipitating cause of his heart attack).

These cases support Vulcan's motion to dismiss. The Secretary has not alleged a causal nexus between Lowe's work activity and the heart attack. The facts support Vulcan's assertion that Lowe's heart attack was the result of natural causes and in no way work related, something the Secretary does not dispute.

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[10] *Bridgestone Firestone N. Am. Tire, L.L.C. v. Liberty Mut. Ins. Co.*, 381 F. App'x 467 (5th Cir. 2010) (unpublished); *C & D Prod. Serv's. v. Dir., Office of Worker's Comp. Programs*, 376 F. App'x 392, (5th Cir. 2010) (unpublished); *Gooden v. Dir., Office of Worker's Comp. Programs, U.S. Dep't of Labor*, 135 F.3d 1066, (5th Cir. 1998).

Even if these cases were relevant, they would be of little help in determining the meaning of "injury" under the Mine Act, because they interpret workers' compensation insurance contract law under the Longshore and Harbor Workers' Compensation Act, and the Louisiana State Workers' Compensation Statute. The Secretary has failed to show how those statutory frameworks are related to the policy elements that underlie the immediate reporting requirements MSHA is trying to expand in this case. The Supreme Court has said that regulatory language "cannot be construed in a vacuum." *Davis v. Michigan Dep't of the Treasury,* 489 U.S. 803, 809 (1989). "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Id*. The context of the immediate notification requirement, as discussed above, does not require or allow for a meaning of "injury" that is consistent with the meaning central to the workers' compensation cases cited above. Accordingly, the nuances of what may be a compensable personal injury for Longshore and Harbor workers in Louisiana is of no help in determining whether an acute myocardial infarction at a mine in Alabama is immediately reportable. In sum, neither the text, the legislative history, nor the general safety purpose of the regulation indicates any ambiguity in the regulation.

Finally, MSHA has consistently interpreted heart attacks to be outside the meaning of injury since at least the December 1988 release of the Part 50 Program Policy Letter. The "Yellow Jacket" states that "heart attacks are classified as illnesses because they do not normally result from work accidents or a single instantaneous exposure in the environment." *See* Stip. 27; MSHA Report on 30 C.F.R. 50, Directorate of Technical Support dated December 1986, PC-7014.

The Yellow Jacket gives the following guidance regarding heart attacks:

> <u>HEART ATTACKS</u>
>
> 38. Q. What if an employee suffers a heart attack at work, is taken home and subsequently dies. Is this a reportable case?
>
> A. Yes. All fatal or nonfatal heart attacks occurring on mine property, occupational injuries and occupational illnesses must be reported. Heart attacks are classified as illnesses because they normally do not result from work accidents or single, instantaneous exposure in the environment. Most fatalities due to heart attacks are considered to be the result of natural causes and not from work activity. However, all such incidents whether or not the employee dies on the mine property should be reported and a final chargeability determination will be made by MSHA on a case-by-case basis.

MSHA Program Information Bulletin No. 88–05, p. 30 (Sept. 28, 1988) (Review and Update of Program Circular (PC) 7014-Report on 30 CFR Part 5O), *available at* http://www.msha.gov/stats/part50/rptonpart50.pdf.

Plainly erroneous or inconsistent

The Secretary's interpretation is plainly erroneous and inconsistent with the regulation for all of the same reasons that make it unambiguous. Specifically, the regulation plainly does not require immediate notification of illnesses or diseases because illness is not listed in the definition of accident. Since a heart attack is an "acute episode of heart disease," and the regulation deals with disease and illness together and regards illness and injury as distinct and separate concepts, a heart attack is not an injury. Such an interpretation is also inconsistent with the regulation because the immediate notification requirement is meant to enhance MSHA's accident investigation and response capabilities. Immediate notification of a heart attack that was not the result of any mine activity or condition and poses no threat to the safety or health of other miners detracts from MSHA's accident response abilities by tying up valuable resources dealing with information that is properly reported on Form 7000-1.

Fair & Considered Judgment

Had I found the regulation to be ambiguous, the Secretary's interpretation would still not merit deference because it is inconsistent with the existing regulation and does not represent the agency's fair and considered judgment on the matter.

The Secretary argues that his interpretation that a heart attack is an injury within the meaning of Part 50 deserves deference because: (1) it is reasonable; (2) numerous federal courts have interpreted the term injury to include heart attacks; (3) and doing otherwise would eviscerate the standard's language, limiting MSHA's options to enforce important mine safety provisions. Sec'y's Mot. Summ. Decision 14-15, Oct. 16, 2012.

It would be improper to apply *Chevron* deference here because the Secretary's position in this case is a litigating position, an interpretative guideline which does not receive *Chevron* deference. *See Martin v. Occupational Safety and Health Review Comm'n,* 499 U.S. 144, 157 (1991) (noting that interpretative rules and enforcement guidelines are not entitled to the same deference as norms that derive from the exercise of the Secretary's delegated lawmaking powers). Furthermore, courts defer to agency interpretations of ambiguous regulations first put forward in the course of litigation only where they "reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins,* 519 U.S. at 462; *Akzo Nobel Salt, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 212 F.3d 1301, 1304-05 (D.C. Cir. 2000).

The interpretation advanced by MSHA is not its fair and considered judgment because it is inconsistent with the apparent regulatory and reporting scheme and has no support in regulations, rulings, interpretive guidance, or administrative practice. It is inconsistent because the Secretary has done nothing to refute the validity of the Yellow Jacket guidance, which directly contradicts his litigation position in this case. There is no evidence that MSHA has taken any policy-level action to counteract the language in the preamble to the 2006 immediate notification rule amendment. "As stated by the Commission in *Cougar Coal*, 'it would benefit the mining community if the Secretary would clarify when it is urgent to notify MSHA, when it is not, and what reports are required.' 25 FMSHRC at 52". *Newmont USA Ltd.*, 32 FMSHRC 391, 397 (Apr. 2010).

The Secretary argues that three cases in particular are persuasive authority, and are relevant to the issue of whether a heart attack is a reportable injury. But while I agree they are persuasive, neither case addresses the precise issue presented here. The facts and reasoning of each are distinct from those found here. Accordingly, the reasoning and holding of each are not dispositive. The cases are *E.S. Stone & Structure, Inc.*, 33 FMSHRC 515 (Jan. 2011) (ALJ), and *Standard Sand & Silica Co.*, 2011 WL 6880704 (Dec. 2011) (ALJ), both of which cite *Cougar Coal Co.*, 25 FMSHRC 513 (Sept. 2003).

Cougar Coal

The circumstances in *Cougar Coal* were very different from those at issue in this case. In *Cougar Coal*, a miner fell 18 feet, hitting his head on the edge of a power center on the way down, after being electrocuted by 7200 volts of electricity while working on top of a utility pole. *Cougar Coal Co.*, 24 FMSHRC 176, 186-87 (Feb. 2002) (*rev'd* on appeal, 25 FMSHRC 513 (Sept. 2003)). Coworkers administered CPR after finding him unconscious and in cardiac arrest. He was revived, but as a result of the shock and fall, suffered lacerations to his head, serious burns, a fractured vertebra in his neck, and had to be hospitalized for several weeks. *Id*. at 187. After the accident, Cougar Coal employees moved the boom truck from the accident site without first obtaining permission from MSHA, and failed to notify MSHA of the accident. *Id.* at 186.

The operator in *Cougar Coal* conceded that the employee had been injured, but argued there had been no accident because the injuries did not pose a reasonable potential to cause death. *Cougar Coal*, 25 FMSHRC at 520. In overturning the ALJ's decision, the Commission held that the ALJ incorrectly discounted testimony relating to the "nature of the accident" or the "act of the accident" as irrelevant to the question of whether the injuries had a reasonable potential to cause death. The Commission labeled his analysis hypertechnical because the nature of the accident was such that any reasonable person would know it had a reasonable potential to cause death. *Id*. at 521. The ALJ focused on proof of life-threatening injuries, holding that the Secretary did not prove the injuries had a reasonable potential to cause death because no official medical records explicitly stated as much. "It is significant to note that when transferred [the miner's] condition was described in the emergency record as "serious." Thus, this medical evidence fails to establish that [his] injuries were deemed either critical, or <u>very</u> serious by the emergency department." *Cougar Coal*, 24 FMSHRC at 187 (emphasis in original). The judge also erroneously discredited the inspector's opinion of [the] injuries and required that the Secretary furnish a medical opinion that [the] injuries had a reasonable potential to cause death. *Cougar Coal*, 25 FMSHRC at 520 (citing *Cougar Coal*, 24 FMSHRC at 187-88).

Here, Lowe had no external injuries. He was not found unconscious, unresponsive, or not breathing. More importantly, he was not found in a state of cardiac arrest and subsequently revived only after CPR. The Commission's *Cougar Coal* ruling created a *per se* rule that incidents involving CPR are injuries with a reasonable potential to cause death. The Commission did not interpret "injury" to include heart attacks, nor did it set out a *per se* rule requiring immediate notification of illnesses with a reasonable potential to cause death. Finally, the label of "hypertechnical" does not apply to Vulcan's defense because it relies on the

meaningful distinction between illness and injury, not the subtle and nebulous distinction between serious and very serious.

E.S. Stone

The Secretary argues that in *E.S. Stone*, the ALJ "concluded that a heart attack itself was a reportable injury." Sec'y Resp. to Resp't Mot. S. Decision p. 5. He did not. The issue in that case was not whether heart attacks are reportable injuries, or even whether heart attacks are reportable accidents. The issue was whether a mine operator can delay reporting a fatality to MSHA beyond the 15 minute deadline, for purposes of conducting a brief and reasonable investigation into the incident. *E.S. Stone*, 33 FMSHRC at 518. This is not the question at issue in this case.

In *E.S. Stone*, a miner was discovered lying on the ground. Coworkers quickly determined that he was not breathing, had no discernible pulse, and was unresponsive. *Id.* at 518. Although coworkers performed CPR on the miner for 25 minutes before an ambulance and a medical response helicopter arrived, all efforts to revive him were unsuccessful. The coroner pronounced him dead at the site. *See id.* at 519. The citation alleged that the mine operator failed to contact MSHA within fifteen (15) minutes of a fatality. *Id*. at 519. The operator argued that even though it notified MSHA 32 minutes beyond the 15 minute deadline, it reported the fatality in full compliance with the regulation because the preamble to the regulation authorizes and anticipates a brief and reasonable investigation into an incident prior to notifying MSHA. *Id*. at 518. The ALJ concluded that the operator failed to comply with the requirements of 30 C.F.R. § 50.10 because it knew it had experienced a reportable accident *arguably* at 11:23 a.m. (fifteen minutes after CPR was initiated) and *conclusively* at 12:20 p.m. (fifteen minutes after the official pronouncement of death), but did not contact MSHA until 12:52 p.m. *Id.* at 519-20 (emphasis added).

Contrary to the Secretary's reading of this case, the holding is not that a heart attack itself is a reportable injury: MSHA cited the operator for violating section 50.10(a), and unlike this case, there was no dispute over whether the incident was reportable or not. Rather, the holding was that there is no exception to the 15 minute reporting requirement. In addition, the operator's argument in *E.S. Stone* focused on the justification that it conducted a brief, reasonable investigation into the incident prior to notifying MSHA, and that such an investigation was authorized and anticipated by the preamble to the regulation.

Standard Sand & Silica Co.

The Secretary argues that *Standard Sand & Silica Co.* is persuasive authority because "the facts are very similar." Sec'y Resp. to Resp't Mot. S. Decision p. 6. However, the facts of *Standard Sand* are analogous to *E.S. Stone*, not this case. In *Standard Sand*, a miner was discovered lying on the ground, unresponsive, not breathing, and without a pulse. 2011 WL 6880704 at *2. A coworker performed CPR until an ambulance arrived and emergency personnel took over but the miner was never revived. The operator failed to notify MSHA until more than 15 minutes after the miner was pronounced dead. *Id.* at *2.

Although the mine operator in *Standard Sand* made the same argument as Vulcan—that the heart attack was not an injury, but an illness—the case was decided on facts that are inapposite to those at issue in this case. Unlike Mr. Lowe, the miner in *Standard Sand* was found lying on the ground, not breathing, unconscious, and without a pulse. *Id.* at *2. Also unlike Mr. Lowe's situation, CPR was performed on the *Standard Sand* miner, and the miner died. *Id.* at *2. In his ruling, the ALJ held that the operator "failed to comply with the requirements of 30 C.F.R. § 50.10" when it "contacted MSHA reasonably promptly, although not immediately, after learning of the death." *Id*. at *4. In finding against the operator, the judge focused on the time CPR was performed and the time the miner was pronounced dead. Both of those events are explicitly listed in the regulations and case law as immediately reportable accidents. Heart attacks are not. Mr. Lowe survived his illness, and he never received CPR.

Allowing the operator in *Standard Sand* to stand on the argument that the miner's heart attack was not an injury would have been bad policy for a number of reasons. Most importantly, to do so would have defeated the purpose of the Mine Act by allowing operators to wait for an official medical diagnosis or an autopsy report before making a decision, *ex post*, on whether to report a death at a mine. Indeed, the ALJ correctly ruled that the operator in *Standard Sand* violated the immediate notification requirement because all the operator knew at the time of the accident was that an employee had been found unconscious and was in cardiac arrest. Emergency lifesaving efforts (CPR) were immediately attempted, but the miner was never revived. There was no way for the operator to know that mine activities or conditions did not cause the cardiac arrest without an official medical diagnosis or autopsy report. Had some unknown or hidden mine hazard caused the harm to the miner, valuable time would have been wasted during the operator's delay. It is exactly that type of delay that was intended to be remedied by the new regulations. There was no way for the operator to know that the miner had experienced a heart attack at the time, and allowing it to justify its failure to report based on an *ex post* autopsy report might incentivize operators to adopt a wait and see approach, possibly leaving other miners exposed to unknown hazards.

Due Process

Vulcan relies on the Yellow Jacket's guidance that heart attacks are illnesses. The Secretary did not dispute Vulcan's contention that it was acting in reliance on the Yellow Jacket. The Secretary's position in this litigation is directly opposed to the Yellow Jacket guidance, a position that would leave all mine operators guessing as to which of the two contrary positions MSHA will elect to enforce.

Even if the Secretary's litigating position had been reasonable and consistent with the Mine Act, Vulcan's Motion for Summary Decision prevails given the lack of fair notice. The due process clause prevents an agency from enforcing a new interpretation of a regulation when there is no advance warning of the conduct prohibited or required. *See, Gates & Fox Co. v. Occupational Safety and Health Review Comm'n,* 790 F.2d 154, 156 (D.C. Cir. 1986). The Commission has not required MSHA to provide operators with actual notice of its interpretation prior to enforcement. *Energy W. Mining Co.*, 17 FMSHRC at 1318. Instead, it has used an objective standard of notice, asking "whether a reasonably prudent person familiar with the mining industry and the protective purposes of the standard would have recognized the specific

prohibition or requirement of the standard." *Id*. (*citing Ideal Cement Co.,* 12 FMSHRC 2409, 2416 (Nov. 1990)).

Vulcan alleges that for years it has consistently relied on MSHA's longstanding and well-known guidance in the Yellow Jacket. Resp't Opp. to Sec'y Mot. S. Decision p. 2-3. As discussed above, the Yellow Jacket classifies heart attacks as illnesses "because they do not normally result from work accidents or a single instantaneous exposure in the environment." Stip. 27. Vulcan alleges the Yellow Jacket public policy pronouncement is the only guidance MSHA has ever provided specifically on this issue, and that it reasonably relied on it as the Agency's only public guidance to conclude Lowe's heart attack was not an injury that is immediately reportable. Resp't Op. to Sec'y Mot. S. Decision p. 1-4.

The Secretary failed to dispute any of Vulcan's allegations regarding the inconsistency of MSHA's prior pronouncements with its litigating position. The Secretary has not alleged the Yellow Jacket guidance is no longer valid or has been superseded, or even that MSHA has ever before advanced an alternate or differing interpretation. In fact the Secretary declined to even directly address Vulcan's claim that it never believed Lowe's condition was immediately reportable based on its good-faith reliance in the language of MSHA's Yellow Jacket. Instead, of directly addressing Vulcan's claim that it reasonably relied on the Yellow Jacket language, the Secretary focused on the question of whether there is an exception to the 15 minute reporting requirement, something Vulcan never argued.

Reasonable Potential to cause death

The facts of this case indicate that Vulcan did not know and should not have known that an accident occurred because Lowe's symptoms were indicative of illness, not injury. Vulcan argues that before doctors diagnosed Lowe's heart attack, it did not know, and should not have known, that he was in serious danger. When Lowe appeared faint and discolored, it was unclear what may have been causing his distress, if anything. Such symptoms did not indicate a condition that had a reasonable potential to cause death because any number of things could cause someone to become faint and pale. Second, Vulcan alleges convincingly that if it thought Lowe's situation had been life-threatening, Grguric would not have driven Lowe to the hospital, but would have called an ambulance instead. And finally, when doctors diagnosed Lowe as having suffered a heart attack at work, Vulcan relied on the Yellow Jacket's guidance to conclude it was not an immediately reportable accident.

This Court recognizes that the ultimate cause of an incident does not control whether it must be immediately reported as an accident. But the apparent cause, or lack thereof, bears heavily on whether a mine operator knew or should have known that an injury with a reasonable potential to cause death has occurred. *See Cougar Coal Co.*, 25 FMSHRC at 520 (noting that the nature of the events surrounding the injury, as well as the actual injury sustained, must be considered when determining whether the accident had a reasonable potential to cause death).

Accordingly, in the preamble to the 2006 Miner Act, the Secretary listed—based on MSHA experience and common medical knowledge— certain types of injuries, along with their apparent cause, that are specifically likely to have a reasonable potential to cause death. *See*

Emergency Mine Evacuation, 71 Fed. Reg. 71430, 71434. Those injuries include concussions, cases requiring cardio-pulmonary resuscitation (CPR), limb amputations, major upper body blunt force trauma, and cases of intermittent or extended unconsciousness. *See Id.* at 71434. The Secretary has specified that such injuries can result from various events, including an irrespirable atmosphere or ignitable gas, compromised ventilation controls, and roof instability *See Id.* at 71434. Notably absent from the list is any type of illness or disease, including heart attacks. Despite a longstanding admonition by the Commission to clarify the reporting requirements, the Secretary did not add illness or disease to the regulation even when he had the opportunity to do so. Instead of creating an expansive rule requiring immediate notification for any medical emergency or any incident requiring a trip to the hospital, the Secretary listed amputations, concussions, blunt force trauma, and intermittent or extended periods of unconsciousness.

In this case, the Secretary did not allege that Lowe experienced any of the enumerated injuries or any visible wound. Nor did the Secretary allege that Vulcan had reason to believe any of those injuries had occurred. Moreover, the Secretary did not allege that Vulcan was aware of any event or condition at the mine that may have been the cause of Lowe's condition, or that it was caused by the work environment, work conditions, work activity, or even that there was any event such as an irrespirable atmosphere or ignitable gas, compromised ventilation controls, or roof instability, that would have alerted Vulcan to a potential accident. Finally, the Secretary did not allege that any of this might have occurred, but that the proof of it had been lost or destroyed because Vulcan did not preserve the site of the accident in violation of section 50.12.

Far from such grave injuries and indicative events, the Secretary relies on the fact that Lowe "became faint and discolored," and that "Mr. Grguric transported Mr. Lowe to the hospital," to assert that Vulcan knew it had experienced an immediately reportable accident. Stip. 13, 14. In this case, Lowe began experiencing his physical symptoms at 7:30 in the morning after he had been at work for just one hour. Unlike the miners in *Cougar Coal*, *E.S. Stone*, and *Standard Sand & Silica*, he was not found unconscious and in cardiac arrest, and did not require CPR. Instead, Lowe was breathing on his own, had no external injuries or wounds, and there was no mine equipment or activity that appeared to play any part in his condition. Given all that, and the fact that he was outdoors in the quarry where irrespirable atmosphere, ignitable gas, compromised ventilation controls, and roof instability, were not an issue, I conclude that before hospital doctors diagnosed Lowe as suffering from a heart attack, Vulcan reasonably did not know, and could not have known he was suffering from an injury with a reasonable potential to cause death.

Moreover, when hospital doctors diagnosed Lowe as suffering from a heart attack, it was confirmed to Vulcan that Lowe's medical condition was an illness or disease, and not the result of an injury. At that point, Vulcan knew that Lowe's medical condition was not an immediately reportable accident. Vulcan reasonably believed heart attacks were illnesses, not injuries, and thus not accidents subject to the immediate notification standard

Accordingly, it is **ORDERED** that Citation No. 6516682 is **VACATED** and this case is **DISMISSED**.

/s/ L. Zane Gill
L. Zane Gill
Administrative Law Judge

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