CCASE:
MSHA V. GARDEN CREEK POCHONTAS
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 21, 1989
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
v. Docket Nos. VA 88-09
VA 88-10
GARDEN CREEK POCAHONTAS VA 88-11
COMPANY

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners
DECISION
BY: Ford, Chairman; Backley, Lastowka and Nelson, Commissioners
In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. • 801 et seq., (1982)("Mine Act") the issue is whether Garden Creek Pocahontas Company ("Garden Creek) violated 30 C.F.R. • 50.20(a), a standard requiring the reporting of occupational injuries occurring at a mine. 1/ The

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1/ 30 C.F.R. • 50.20(a) states in part:
Each operator shall maintain at the mine office a supply of MSHA Mine Accident, Injury, and Illness Report Form 7000-1.... Each operator shall report each accident, occupational injury, or occupational illness at the mine. The 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 the form in accordance with the instructions and criteria in 50.20-1 through 50.20-7.... The operator shall mail completed forms to MSHA within
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Secretary of Labor ("Secretary") asserts that Garden Creek violated the standard by failing to report to the Secretary's Mine Safety and Health Administration ("MSHA"), fourteen injuries, including one eye injury, for which medical treatment was administered to miners. The Secretary and Garden Creek agree that the injuries occurred at Garden Creek's No. 6 underground coal mine and that various medications were prescribed to treat

the injuries. They also agree that if the injuries are reportable, they are reportable only "as a result of the use of a prescription medication and not for any other medical reason." Stipulation 16.

Commission Administrative Law Judge Gary Melick held that under the standard "medical treatment" includes the use of prescription medications for the treatment of eye injuries, and, consequently, only an eye injury for which prescribed medication is used constitutes a reportable "occupational injury." Because thirteen of the injuries for which medications were prescribed were not eye injuries, the judge concluded they were not reportable. 10 FMSHRC at 1099. Regarding the one eye injury, although the Secretary established that a prescription for medication was written, the judge found that the miners' use of the medications was not proven. The judge concluded that use of the prescribed medication could not be inferred from the mere fact that medication had been prescribed. The judge therefore held that the Secretary had failed to prove a violation of section 50.20(a). 10 FMSHRC at 1099-1100.

The material facts are not disputed. Garden Creek owns and operates the Virginia Pocahontas No. 6 Mine, an underground coal mine located in Buchanan County, Virginia. From January through September 1987, a number of miners suffered minor injuries at the mine and were issued prescriptions by their attending physicians. The medications prescribed typically were pain relievers and muscle relaxants. These injuries were not reported to MSHA by Garden Creek.

On September 30, 1987, MSHA inspector Richard Blankenship issued 18 citations to Garden Creek under section 104(a) of the Act, 30 U.S.C. □ 814(a), alleging violations of section 50.20(a) for failing to repor the injuries to MSHA. The Secretary filed a complaint proposing the

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injury occurs or an occupational illness is diagnosed....

30 C.F.R. • 50.2(e) defines "occupational injury" as:

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.

(Emphasis added). The regulatory meaning of "medical treatment" is explained in 30 C.F.R. • 50.20-3, which regulation contains criteria differentiating between medical treatment and first aid.

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assessment of civil penalties for the alleged violations. Subsequently, the judge approved a settlement of four of the violations. 11 FMSHRC at 1093. The remaining fourteen alleged violations are the subject of this case. The key issue is the meaning of the phrase "occupational

injury" as used in the Secretary's reporting regulations.
30 C.F.R. • 50.20(a) provides that "occupational injuries" be reported to MSHA. "Occupational injuries" are defined in section 50.2(e), in part, as "any injury to a miner which occurs at a mine for which medical treatment is administered." The term "medical treatment" is further defined by way of example and contrast in section 50.20-3, which contains criteria exemplifying the differences between "medical treatment" and "first aid."
Section 50.20-3(a) states in part:

> Medical treatment includes, but is not limited to, the suturing of any wound, treatment of fractures, application of a cast, or other professional means of immobilizing an injured part of the body, treatment of infection arising out of an injury, treatment of bruise by the drainage of blood, surgical removal of dead or damaged skin (debridement), amputation or permanent loss of use of any part of the body, treatment of second and third degree burns.... First aid includes any one-time treatment and follow-up visit for the purpose of observation, of minor injuries such as, cuts, scratches, first degree burns and splinters. Ointments, salves, antiseptics, and dressings to minor injuries are considered to be first aid.

30 C.F.R. • 50.20-3(a). Following this general statement of the differences between medical treatment and first aid, the criteria of sections 50.20-3(a)(1)-(a)(8) differentiate between medical treatment and first aid in the treatment of specific injuries including abrasions, bruises, burns, cuts and lacerations, eye injuries, inhalation of toxic or corrosive gases, foreign objects, and sprains and strains. In the case of eye injuries, "medical treatment" is described as involving "removal of imbedded foreign objects, use of prescription medications, or other professional treatment." 30 C.F.R. • 50.20-3(a)(5)(ii) (emphasis added). Use of prescription medications is not otherwise included in the description of "medical treatment" for any other type of injury.
In December 1986, MSHA issued instructional guidelines to assist operators in understanding the reporting requirements of Part 50. MSHA Report on 30 C.F.R. Part 50, Gov. Ex. 16. The 1986 guidelines replaced guidelines issued by MSHA in 1980. Information Report on 30 C.F.R. Part 50, Gov. Ex. 15. The 1980 guidelines and the 1986 guidelines both state that medically treated injuries are reportable, while first aid treated injuries are not reportable, "provided there is no lost workdays, restricted work activity or transfer because of the injury." Gov. Ex. 15 at 9; Gov. Ex. 16 at 9. The 1986 guidelines also provide, "any use

of prescription medication normally constitutes medical treatment" and,

in listing general procedures considered medical treatment, includes the "use of prescription medications other than a single dose or application given on a first visit for the relief of pain." Gov. Exh. 16 at 10. In distinguishing medical treatment from first aid for specific types of injuries, however, the guidelines parallel the regulatory criteria and refer only to the use of prescription medications for treatment of eye injuries. Gov. Exh. 16 at 11.

Before the judge, the Secretary maintained that the 1986 guidelines are consistent with section 50.20-3(a) and are entitled to deference. The judge rejected this argument. He noted that the regulations at section 50.20-3 explicitly set forth only one type of injury for which the use of prescription medication constitutes "medical treatment." He stated that "by specifically mentioning in her regulations that the treatment of eye injuries by use of a prescription medication constitutes 'medical treatment' for purposes of Part 50 reporting requirements, the Secretary has implicitly excluded the treatment of all other injuries by use of prescription medicine alone from the term 'medical treatment' under Part 50." 10 FMSHRC at 1099. He concluded that the Secretary's attempt to expand the regulations through the guidelines to include any use of prescription medication for injuries was erroneous and inconsistent with the regulations. 10 FMSHRC at 1099.

On review, the Secretary again argues that the interpretation of "medical treatment" set forth in the guidelines is consistent with the language of the regulations and is entitled to deference. Sec. Br. 9. Like the judge, we disagree.

While the Commission has recognized that in certain circumstances guidelines, policy memorandums, manuals or similar MSHA documents may "reflect a genuine interpretation or general statement of policy whose soundness commends deference and therefore results in the [Commission] according it legal effect," we have declined to do so where the interpretation or policy statement is inconsistent with the plain language of the standard. King Knob Coal Co., 3 FMSHRC 1417, 1420 (June 1981). See also Western Fuels-Utah Inc., 11 FMSHRC 278, 285-86 (March 1989); United States Steel Corp., 5 FMSHRC 3, 6 (January 1983). In the latter circumstances, the Commission has concluded that "the express language of a ... regulation unquestionably controls." King Knob, 3 FMSHRC at 420. Here, the guidelines not only are inconsistent with the relevant language of Part 50, they are themselves internally inconsistent. Therefore, we decline to give them effect.

The guidelines statement that "any use of prescription medication normally constitutes medical treatment" is not even remotely alluded to in the language of Part 50. The Secretary did not include the use of prescription medication in the general regulatory description of "medical treatment" in section 50.20-3(a). To the contrary, as the judge properly noted, the Secretary designated the use of prescription medication as

constituting medical treatment only in the case of eye injuries. 30 C.F.R.
 50.20.3(a)(5)(ii)
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The Secretary contends, however, that section 50.20-3(a) is not all inclusive but rather provides illustrative examples. The Secretary particularly notes that section 50.20-3(a) begins "[m]edical treatment includes, but is not limited to" and argues that because the criteria that follow this language illustrate examples of "medical treatment," use of prescription medication for types of injuries other than those to the eye may constitute medical treatment.
The Secretary's argument is at odds with regulatory structure of section 50.20-3. Section 50.20-3(a) lists specific procedures that are to be classified as medical treatment and reported to MSHA, such as the suturing of wounds, the treatment of infections and the treatment of fractures. This regulation also states that medical treatment is not limited to such procedures. Thus, other procedures of a like kind not specifically listed must be reported by mine operators as medical treatment. The familiar rule of statutory construction, ejusdem generis, provides that where general words are followed by specific examples in a statutory provision, the general words are construed to embrace only objects similar in nature to the specific examples. 2A Sutherland Stat. Constr. • 47.17 (4th ed). Therefore, the question is whether the general words of this regulation ("medical treatment") can fairly be read to include the use of the prescription medications at issue in this case, given the nature of the specific examples used in the regulation. We think not. The use of the medications prescribed in this case bears little similarity to the suturing of wounds, the treatment of fractures, or the other procedures specifically enumerated in the regulation.
In addition, as discussed above, section 50.20-3(a)(5)(ii) provides that an injury to the eye is classified as medical treatment whenever prescription medications are used, but none of the other specifically listed occupational injuries designate the use of prescription medications as medical treatment. A regulation cannot be applied in a manner that fails to inform a reasonably prudent person of the conduct required. Mathies Coal Company, 5 FMSHRC 300, 303 (March 1983). For the reasons set forth above, we believe that the Secretary's regulation failed to inform Garden Creek that it was required to report the thirteen non-eye injuries involved here, and we affirm the judge's ruling that Garden Creek's failure to report them did not violate section 50.20-3(a).
In concluding that Garden Creek had not violated section 50.20-3(a) in connection with the one eye injury, the judge found that although the Secretary proved that the miner suffered an eye injury for which a physician prescribed medication, the Secretary failed to prove that the miner used the medication. 10 FMSHRC at 1099-1100. The judge rejected the Secretary's contention that use of the medication should be inferred

from the fact that it was prescribed, holding that the necessary causal connection did not exist to support the inference. 10 FMSHRC at 1110. Again, we agree with the judge.

The Mine Act imposes on the Secretary the burden of proving the violation the Secretary alleges by a preponderance of the evidence. See Consolidation Coal Co., 11 FMSHRC 966, 973 (June 1989). The Commission

has recognized that in certain circumstances the Secretary may establish a violation by inference. Mid-Continent Resources, 6 FMSHRC 1132 (May 1984). Any such inference, however, must be inherently reasonable and there must be a rational connection between the evidentiary facts and the ultimate fact inferred. Mid.Continent Resources, 6 FMSHRC at 1138. Here, the required connection is lacking because common experience teaches the use of medication does not always follow its prescription. Although a prescription may be written, its use may become unnecessary because a transitory medical condition has abated. Also, intervening factors, such as a decrease in the severity of an injury, the disappearance of symptoms may cause the patient to forego the filling of a prescription or the use of a prescribed medication.

Moreover, recognition of an inference is largely influenced by the difficulty of obtaining the direct evidence necessary to establish the fact to be inferred. See e.g., Mid-Continent, 6 FMSHRC at 1138. Here, the record does not establish that proof of the use of the medication was unavailable to the Secretary or was unreasonably difficult to obtain. Compare FMC v. Svensea American Union, 390 U.S. 390 U.S. 238, 248-49 (1968). Indeed, the inspector testified that he spoke with some of the miners regarding their prescriptions, and the parties stipulated that in three instances involving non-eye injuries the prescribed medication was taken. Stipulation 12. The Secretary did not explain why similar information was not elicited from the miner who suffered the eye injury. Thus, we are hard pressed to give credence to the Secretary's assertion that requiring proof of the use of the prescribed medications would be "unduly burdensome." The litigation process requires the parties to obtain the evidence necessary to prove their allegations. Should the Secretary truly find that proving the use of a prescription medication is onerous, the Secretary should revise her regulation to make the prescription of medication, rather than its use, a determinative factor of "medical treatment." 2/

2/ Indeed, MSHA currently is reviewing the regulations in Part 50 to improve illness, injury and accident reporting under the Mine Act. Of particular relevance here, the Secretary has solicited comments and information on how the current regulatory definition of "occupational injury" should be revised and what the term "medical treatment" should include. 53 Fed. Reg. 45878 (1988). The Secretary has a similar effort

underway regarding reporting requirements under the Occupational Safety and Health Act of 1970, 29 U.S.C. • 651 et seq., ("OSHAct"), under which employers also must record occupational injuries requiring medical treatment. 29 C.F.R .• 1904. One suggested revision of the OSHAct regulations would require any medication prescribed for use for more than 48 hours to be considered "medical treatment" and therefore reportable. This proposal comes from "the Keystone National Policy Dialogue On Work-related Illness and Injury Recordkeeping," January 31, 1989, The Keystone Center, Keystone, Colorado at 32.

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Accordingly, we hold that the judge properly vacated the fourteen citations at issue, and we affirm the judge's decision.

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Commissioner Doyle, concurring in part and dissenting in part:

In this case, the Secretary of Labor ("Secretary") cited the operator, Garden Creek Pocahontas Company ("Garden Creek"), for its alleged failure to report fourteen instances in which medical treatment had been rendered to miners. In each instance, the medical treatment consisted entirely of the use of prescription medication by the injured miner. The majority, in affirming the administrative law judge, concludes that the use of prescription medication comprises medical treatment only when that use is in conjunction with the treatment of eye injuries. The majority also concludes that the Secretary has not proven actual use of the prescription medication in the one case involving an eye injury. While I concur with the majority in its determination that the Secretary has failed to prove actual use of the prescription medication in the eye injury case, I must respectfully dissent from their determination that the use of prescription drugs does not constitute "medical treatment" of injuries other than eye injuries.

As noted by the majority, 30 C..F.R. •50.20-3(a) sets forth a general definition of "medical treatment," prefaced by the words "includes, but is not limited to.." Listed within that definition are a number of medical procedures with respect to fairly serious injuries that may occur in mines, such as fractures, amputations, loss of use of bodily parts, wounds, infections arising out of injuries, and second and third degree burns, as well as bruises requiring blood drainage. Following this definition of "medical treatment," the regulation provides a general definition of "first aid" that includes one-time treatment of minor injuries such as cuts, scratches, first degree burns and splinters, as well as follow-up observation of those injuries.

Following these definitions, there is set forth in 30 C.F.R. □ 50.20-3(a)(1)-(8) a list of eight categories of injuries, the treatmen of which may involve either "medical treatment" or "first aid." For the most part, these categories do not include injuries listed in the general definition of "medical treatment." 1/ The Secretary contends that the

categories in section 50.20-3(a) are not all-inclusive but, rather, set forth illustrative examples. I agree.

The doctrine of ejusdem generis, relied on by the majority to reach its determination that treatment of injuries by use of prescription drugs is not included in the definition of "medical treatment," is inapplicable to the standard in issue. That rule of statutory construction is used when there is "an incompatibility

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1/ The exceptions are burns, which, if they are second or third degree, fall within the general definition of injuries requiring "medical treatment," and cuts, which, to the extent they are wounds requiring sutures, also fall within that definition.

between specific and general words so that all words in a statute... can be given effect, ..." Sutherland Stat. Const. •47.17 (4th ed.). (emphasis added.) There is no incompatibility between the general and specific words in section 50.20-3(a)'s description of medical treatment.

More importantly, the doctrine is inappropriate in this case because the regulation specifically does not restrict itself to the terms listed, but instead provides that the general term, medical treatment, "includes, but is not limited to," the specific examples that follow. (emphasis added.)

Of more relevance to the issue at hand is the rule of construction with respect to definitions. A definition that uses the term "includes" is "more susceptible to extension of meaning by construction" than a definition that uses the term "means." Sutherland Stat. Const. •47.07 (4th ed.) The "word 'includes' is usually a term of enlargement, and not of limitation... It, therefore, conveys the conclusion that there are other items includable, though not specifically enumerated..." id.

The regulation itself contains other indications that use of prescription medication as a form of "medical treatment" is not limited to eye injuries. Within the eight categories of section 50.20-3(a), three categories make specific reference to prescription or non-prescription medication. Category (5), "Eye Injuries," lists use of non-prescription medication as "first aid" and use of prescription medication as "medical treatment." Category (3), "Burns, Thermal and Chemical" lists use of non-prescription medication as "first aid" but makes no reference to the use of prescription medication in the description of "medical treatment." Category (7), "Foreign Objects " also lists application of non-prescription medication as "first aid and makes no specific reference to prescription medication in the description of "medical treatment." As this language indicates, one form of "first aid" is the use of non-prescription medication. By defining "first aid" to include the use of non-prescription medication, I believe it can reasonably be inferred that the use of prescription medication falls within the

definition of "medical treatment." 2/

2/ The use of prescription medication could also be inferred to constitute medical treatment in at least two additional categories. Category (6), "Inhalation of Toxic and Corrosive Gases," limits "first aid" to the removal of the miner to fresh air and the one-time administration of oxygen. "Medical treatment" is described as any professional treatment beyond "first aid." Category (8), "Sprains and Strains," limits "first aid" to soaking, compresses, and bandages. "Medical treatment" includes "other professional treatment."

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In addition, I believe that the common meaning of the words "including, but not limited to," would put a reasonably prudent person on notice that the list is not all-inclusive.

I also find that the Secretary's interpretation, to the effect that "medical treatment" includes the use of prescription medication except where a "single dose or application is given on the first visit merely for relief of pain," is a reasonable one, consistently held and fully consonant with the purposes of the Mine Act. Information Report on 30 C.F.R Part 50, (1980), Gov. Ex. 15, MSHA Report on 30 C.F.R. Part 50 (1986), Gov. Ex. 16. It is thus entitled to deference by the Commission. Bushnell v. Cannelton Indus., Inc., 867 Fed. 2d. 1432, 1438 (D.C. Cir. 1989).

For the foregoing reasons, I would reverse the administrative law judge's determination that the Secretary, by specifically mentioning the use of prescription medication only in the eye injury category, has thereby excluded the treatment of all other injuries by use of prescription medication alone from the definition of "medical treatment." Accordingly, I would find a violation in those instances where the judge found that prescription medication was actually used.

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