No. 13-1374

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DICKENSON-RUSSELL COAL COMPANY,

Petitioner,

v.

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION

and

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,

Respondents.

ON PETITION FOR REVIEW OF A DECISION OF THE FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR RESPONDENT THE SECRETARY OF LABOR

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

SAMUEL CHARLES LORD
Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard, Suite 2200
Arlington, Virginia 22209-2296
Telephone: (202) 693-9370
Fax: (202) 693-9361
lord.charlie@dol.gov

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Regulations:

Other Authorities:

JURISDICTIONAL STATEMENT

The jurisdictional statement set forth in the Petitioner's opening brief is satisfactory.

STATEMENT OF THE ISSUE

Whether, under a regulation requiring "each operator" to report each injury at a mine by filing a one-page report with MSHA, the owner-operator of the mine is required to report an injury if an independent contractor reported the same injury.

STATEMENT OF THE CASE

This case involves a citation issued by the Secretary of Labor ("the Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), to a coal mine operator for a violation of 30 C.F.R. § 50.20(a) ("Section 50.20(a)"), a regulation that implements the accident reporting requirement of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 801 *et seq.* ("the Mine Act" or "the Act"). Under Section 50.20(a), each operator must report each accident, occupational injury, and occupational

illness at a mine within ten days of its occurrence or diagnosis by filing a standard one-page reporting form with MSHA.

Dickenson-Russell Coal Company ("Dickenson Coal") owns and operates the Roaring Fork No. 4 Mine ("the Mine"), an underground coal mine in southwestern Virginia. It is undisputed that Dickenson Coal, as the owner-operator of the Mine, meets the regulatory definition of "operator" that applies under Section 50.20(a). Dickenson Coal contracts with Bates Contracting and Construction, Inc. ("Bates Contracting"), a temporary labor agency that supplies contract miners to mine operators. In May 2009, one of the contract miners at the Mine was drilling roof support bolts into the roof strata when a portion of the roof fell and struck him on the elbow. It is undisputed that the event resulted in a reportable "occupational injury" under Section 50.20(a). Bates Contracting reported the injury to MSHA, but Dickenson Coal, which had a self-described "policy and procedure" against reporting injuries suffered by independent contractor employees, did not.

MSHA thereafter issued a failure-to-report citation to Dickenson Coal for a violation of Section 50.20(a). Dickenson Coal contested the citation before an administrative law judge ("ALJ") of the Federal Mine Safety and Health Review Commission ("the Commission"), an independent agency established by Congress to adjudicate disputes arising under the Mine Act. The Secretary moved for summary disposition on the ground that Section 50.20(a) states that "each operator" must file an injury report with MSHA and therefore plainly required Dickenson Coal to file an injury report, whether or not Bates Contracting had already done so. The ALJ granted summary decision to the Secretary, and the Commission declined to exercise discretionary review. This appeal followed.

STATEMENT OF THE FACTS

A. Statutory and Regulatory Framework

In response to the "notorious history of serious accidents and unhealthful working conditions" in the mining industry, Congress enacted the Mine Act in 1977 to establish a comprehensive and pervasive regulatory scheme governing mine safety and health. *Donovan v. Dewey*,

452 U.S. 594, 603 (1981). Congress found that a "stronger" mine safety statute was needed "because earlier laws had proven too weak and mines still had appalling safety records." *Big Ridge, Inc. & Bickett v. Fed. Mine Safety & Health Review Comm'n*, __ F.3d __; 2013 WL 1776633, at * 2 (7th Cir. April 26, 2013) (noting that, at the time the Mine Act was passed, the incidence of work-related injuries and illnesses in the mining industry exceeded the "all-industry" rate by about 14 percent).

The Mine Act requires the Secretary to develop detailed mandatory health and safety standards that govern the operation of the nation's mines. 30 U.S.C. § 811. Those standards are set forth in Chapter I of Title 30 of the Code of Federal Regulations. 30 C.F.R. Parts 1 – 104. Authorized representatives of the Secretary, i.e. MSHA inspectors, must inspect underground mines at least four times per year and surface mines at least twice a year to ensure compliance with these standards, 30 U.S.C. § 813(a), and must conduct follow-up inspections to determine whether previously discovered violations have been corrected, *id.* at § 814(b). Other provisions of the Act require the Secretary's authorized representatives to conduct

additional inspections and investigations of mines if requested to do so by miners, 30 U.S.C. § 813(g), if a mine liberates high quantities of methane or other explosive gases, *id.* at § 813(i), or if an accident occurs, *id.* at § 813(j).

As a practical matter, however, "MSHA inspectors cannot be everywhere at once, nor can they be expected to be so familiar with every mine that they will become aware of every condition or practice in need of correction." *Sec'y of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2790 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (D.C. Cir. 1981). For this reason, the Mine Act "relies in the first instance on mines to self-report all injuries." *Big Ridge*, 2013 WL 1776633, at *6. Section 103(d) of the Act requires mine operators to report to the Secretary information regarding mine accidents, at a frequency to be determined by the Secretary. 30 U.S.C. § 813(d). Accordingly, the Secretary has adopted implementing regulations that establish a standardized system for reporting accidents, injuries, and illnesses to MSHA. 30 C.F.R. Part 50 ("Part 50").

Accident, injury, and illness reporting under Part 50 plays a critical role in advancing the Mine Act's regulatory scheme, as the Seventh Circuit

recently and emphatically affirmed. *Big Ridge, Inc. & Bickett v. Fed. Mine Safety & Health Review Comm'n*, __ F.3d __, 2013 WL 1776633, at * 2 (April 26, 2013). In *Big Ridge*, mine operators objected to a demand by the Secretary for the medical and personnel documents that the Secretary needed to determine whether the operators had accurately and completely reported all accidents, injuries, and illnesses to MSHA over the course of a one-year audit period. *Id.* at *4. The Seventh Circuit upheld the Secretary's document demand and held, *inter alia*, that such medical and personnel records were "relevant and necessary" to determine Part 50 reporting compliance, *id.* at *7, and that "without the records, significant numbers of mine-related injuries and illnesses may go unaccounted for, and mines operating under risky and hazardous conditions may continue to do so without sanction," *id.* at *26. "Without knowing whether mines are under-reporting injuries and illnesses," the Court explained, "MSHA would not have an accurate view of the frequency and types of injuries and illnesses caused by mine work, thus hindering its ability to fulfill its duty to develop policies and standards to ensure mine safety." *Id.* at *6.

This case involves Section 50.20(a), a critical Part 50 regulation that states, in relevant part:

> Each operator shall report each accident, occupational injury, or occupational illness at the mine. … The operator shall mail completed [MSHA Mine Accident, Injury, and Illness Report Form 7000-1s] to MSHA within ten working days after an accident or occupational injury occurs or an occupational illness is diagnosed.

30 C.F.R. § 50.20(a). The referenced MSHA Accident, Injury, and Illness Report Form 7000-1 ("Form 7000-1") is a one-page, standardized reporting form that contains basic information about the identity of the operator making the report, the mine where the incident occurred, the date and time of the incident, the injury or illness suffered, and a short narrative of the incident. *See* J.A. 23 (Form 7000-1 submitted by Bates Contracting in this case).

Part 50 provides a regulatory definition of "operator" that controls how that term is used in Section 50.20(a): "As used in this [Part 50], … 'operator' means any owner, lessee, or other person who operates, controls, or supervises a coal mine...." 30 C.F.R. § 50.2. Because multiple entities may "control" or "supervise" all or part of a mine, there may be multiple

"operators" at a mine for the purposes of the Part 50 reporting regulations even if there is just one mine "owner." *Speed Mining, Inc. v. Fed. Mine Safety & Health Review Comm'n*, 528 F.3d 310, 315 (4th Cir. 2008) (interpreting identical "other person" clause in the statutory definition of "operator"). *Accord Ames Constr., Inc. v. Fed. Mine Safety & Health Review Comm'n*, 676 F.3d 1109, 1111 (D.C. Cir. 2012); *D.H. Blattner & Sons, Inc. v. Sec'y of Labor*, 152 F.3d 1102, 1108 (9th Cir. 1998).

Although there may be multiple "operators" at a single mine, the entity that "owns" the mine has the principal statutory responsibility for miner safety and health. So-called "owner-operators" are "'generally in continuous control of mine conditions,'" are "'more likely to know the federal safety and health requirements'" than are independent contractors, and "possess ultimate authority over independent contractors – retaining, supervising, or even dismissing them, if necessary." *Speed Mining*, 528 F.3d at 315 (quoting *Cyprus Indus. Minerals Co. v. Fed. Mine Safety & Health Review Comm'n*, 664 F.2d 1116, 1119 (9th Cir. 1981)). For these reasons, this Court has been wary of "allowing a mine owner to 'exonerate itself from its

statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship.'" *Speed Mining*, 528 F.3d at 315 (quoting *Cyprus Indus.*, 664 F.2d at 1119).

Section 50.20(a) serves important administrative and enforcement purposes beyond merely notifying MSHA of a reportable event. When an operator reports an injury, it sends one copy of Form 7000-1 to the local MSHA district office, 30 C.F.R. § 50.20-1, where the MSHA enforcement personnel who are most familiar with that particular operator will promptly decide whether to conduct an investigation, *id.* at § 50.11(a). In addition, each operator must send a second copy of Form 7000-1 to MSHA's central Office of Injury and Employment Information in Denver, Colorado. *Id.* at § 50.20-1. There, the information from MSHA Form 7000-1s is tabulated and used to compute "incidence rates" and "severity measures" -- numerical formulas used to evaluate a mine's safety and health record -- for each operator across the nation. *Id.* at § 50.1 (explaining how incidence rates and severity measures are calculated based on an operator's total number of reportable incidents, total number of workdays

lost due to occupational injuries and illnesses, and total number of employee hours worked). As the Seventh Circuit discussed in its recent decision regarding Part 50 compliance audits, those operator-specific injury and illness rates are used to identify accident-prone operators in need of increased regulatory scrutiny, and to determine whether an operator should be subject to tough enforcement sanctions because it meets the criteria for "pattern of violations" designation under 30 U.S.C. § 814(e). *See* 30 C.F.R. § 104.2(a)(7) (listing an operator's accident, injury, and illness history among the criteria for "pattern of violation" designation) (Final Rule published Jan. 23, 2013); *Big Ridge*, 2013 WL 1776633, at *3-4, *6 (explaining how an operator might elude "pattern of violations" designation and related enforcement sanctions if it were to intentionally or unintentionally under-report illnesses and injuries).

B. Facts

The injury in this case occurred when the miner was installing roof bolts at the coal face in an active working section of the Mine. J.A. 23. As the MSHA inspector observed, this is a "traditional" and integral job task

in the "continuous mining" method of coal production. J.A. 24; *see generally Merrill ex rel. Estate of Merrill v. Arch Coal, Inc.*, 118 F.App'x. 37, 38 (6th Cir. 2004) (unpublished) (description of the "continuous mining" method, in which a continuous miner machine breaks coal off of the face of a coal seam, a shuttle car transports the loose coal away, and a roof-bolting machine then drills support bolts into the newly-exposed roof). The miner was using a roof-bolting machine to install ten-foot long cable bolts, a form of roof support that is designed to reinforce overhead layers of rock strata. J.A. 9 at ¶6; J.A. 23. Although the miner was technically an employee of Bates Contracting, the temporary labor agency, Bates Contracting had no supervisors at the Mine, and it was Dickenson Coal who controlled and supervised the coal production work being performed by the miner. J.A. 9 at ¶8, ¶9.

As the contract miner installed the ten-foot support bolts, a portion of the roof fell and struck him on the elbow. J.A. 9 at ¶6. The parties stipulated that this resulted in a reportable "occupational injury" as that term is defined in the Part 50 regulations. J.A. 9 at ¶7; 30 C.F.R. § 50.2(e).

It is also undisputed that Dickenson Coal, as the owner-operator of the Mine, meets the Part 50 regulatory definition of "operator." 30 C.F.R. § 50.2(c)(1). *See* J.A. 8-9 at ¶3 (stipulation that Dickenson Coal was an "owner, lessee, or other person who operated, controlled, or supervised" the Mine); Pet'r's Br. at *i* ("Dickenson-Russell Coal Company is … the owner and operator of the Roaring Fork No. 4 Mine.").

Bates Contracting filed an MSHA Form 7000-1 regarding the roof bolter's injury within ten days of its occurrence, J.A. 23, but Dickenson Coal did not. J.A. 9 at ¶10; J.A. 10 at ¶11. Instead, Dickenson Coal took the position that "it did not need to submit a 7000-1 Form for an injury to a contractor's employee." J.A. 10 at ¶11. *See also* J.A. 60-61 (signed declaration by Dickenson Coal's president that it was not his company's "procedure" to report illnesses or injuries involving "independent contractor" employees).

The Secretary issued a citation to Dickenson Coal for its failure to report the occupational injury pursuant to Section 50.20(a), the regulation requiring that "each operator" report "each" injury by filing a Form 7000-1

with MSHA. J.A. 24-25. The issuing inspector stated that Dickenson Coal's practice of not reporting injuries involving contractor employees "will result in a false Incidence Rate" for the operator that would "not reflect the true accident history for employees performing traditional mining jobs at this operation." *Id.* The inspector also observed that Dickenson Coal's practice of not reporting contractor injuries would limit MSHA's "ability to recognize and address accident trends," and that MSHA had previously reiterated the importance of accurate injury reporting to Dickenson Coal officials. J.A. 25.

SUMMARY OF THE ARGUMENT

Section 50.20(a) requires "*each* operator" to report "each" occupational injury at the mine by submitting a completed Form 7000-1 to MSHA (emphasis added). It is undisputed that Dickenson Coal is an "operator" and that the miner suffered an "occupational injury," so Dickenson Coal was required to report the injury to MSHA under the plain terms of the regulation. Contrary to Dickenson Coal's contention, the word "each" does not mean "one or the other but not both"-- "each" means

"every one of two or more." As the "owner-operator" of the Mine, Dickenson Coal was responsible for reporting the injury to MSHA whether or not Bates Contracting had already reported it.

Although Courts may interpret a regulation against its plain meaning where application of the literal terms would produce an "absurd result" or "defeat the intent" of the regulation, neither of those extremely narrow exceptions to the plain meaning rule applies here. By preventing confusion over which operator will report a particular injury, and by allowing MSHA to more readily track each operator's safety and health history, application of the literal terms of the regulation advances the regulatory goals of Part 50.

Finally, even if the meaning of the regulation is not plain, the Secretary's interpretation deserves deference. The conclusion that the owner-operator must report an injury sustained by a contractor employee is consistent with the language and purpose of the regulation, and the Secretary previously instructed owner-operators to file a Form 7000-1 whenever a temporary contract miner is injured.

STANDARD OF REVIEW

The proper construction of a regulation is a matter of law, so review by this Court is *de novo*. *Frahm v. United States*, 492 F.3d 258, 262 (4th Cir. 2007).

ARGUMENT

A. Principles of Regulatory Interpretation

When faced with a question of regulatory interpretation, Courts follow a two-part analysis that first inquires whether the text of a regulation speaks with clarity to the issue presented and, if not, whether the agency's interpretation should be granted deference. *See Talk America, Inc. v. Mich. Bell Tel. Co.*, __ U.S. __, 131 S.Ct. 2254, 2261 (2011) ("In the absence of any unambiguous statute or regulation, we turn to the [agency]'s interpretation of its regulations…."); *Chase Bank USA, N.A. v. McCoy*, 562 U.S. __, 131 S.Ct. 871, 881 (2011) ("'[D]eference is warranted only when the language of the regulation is ambiguous.'") (quoting *Christensen v. Harris Cnty.*, 529 U.S. 576, 588 (2000)).

Analysis of whether a regulation is ambiguous "begins with the text." *Chase Bank*, 131 S.Ct. at 878. If there is only one plausible interpretation of the regulation's text, the regulation is unambiguous and its plain language controls. *Id.* at 881; *Ohio Valley Envtl. Coal. v. Aracoma Coal Co.*, 556 F.3d 177, 193 (4th Cir. 2009) (citing *Christensen*, 529 U.S. at 588). When a regulation "speaks with clarity to an issue," the judicial inquiry into the regulation's meaning is finished "in all but the most extraordinary circumstance." *United States v. Halliburton Co.*, 710 F.3d 171, 178 (4th Cir. 2013) (statutory interpretation case).

Courts are authorized to deviate from the literal language of a regulation only if application of its plain terms would "lead to absurd results" or if such an interpretation would "defeat the intent" of the regulation. *Halliburton*, 710 F.3d at 180; *United States v. Boynton*, 63 F.3d 337, 344 (4th Cir. 1995) (applying the "absurd results" and "purpose-defeating" canons to a question of regulatory interpretation). The two exceptions to the plain meaning rule are "extremely narrow" and rarely apply. *Hillman v. I.R.S.*, 263 F.3d. 338, 342 (4th Cir. 2001). An outcome is

"absurd" only if it is "so gross as to shock the general moral or common sense." *Md. State Dep't of Educ. v. U.S. Dep't of Veterans Affairs*, 98 F.3d 165, 169 (4th Cir. 1996) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 59-60 (1930)). *See also In re Sunterra Corp.*, 361 F.3d 257, 265 (4th Cir. 2004) (framing the absurdity issue as "not whether the result would be 'unreasonable,' or even 'quite unreasonable,' but whether the result would be absurd"). The "defeats the purpose" exception only applies where application of the literal terms produces an outcome that is "demonstrably at odds" with "clearly expressed intent to the contrary." *United States v. Crabtree*, 565 F.3d 887, 890 (4th Cir. 2009) (quoting *Sigmon Coal, Inc. v. Apfel*, 226 F.3d 291, 304 (4th Cir. 2000), *aff'd*, 534 U.S. 438 (2002)). *See also Logan v. United States*, 552 U.S. 23, 36 (2007) (quoting *Cabell v. Markham*, 148 F.2d 737, 739 (2d. Cir.) (L. Hand, J.), *aff'd*, 326 U.S. 404 (1945)) (applying plain meaning unless the literal terms "'could not conceivably have been intended to apply' to the case at hand").

If the regulation is ambiguous, Courts defer to an agency's interpretation of its own regulation "as a general rule." *Decker v. Nw. Envtl.*

Def. Ctr., __ U.S. __, 133 S.Ct. 1326, 1337 (2013). The Court's review of an agency's interpretation of its own regulation is "highly deferential," *Ohio Valley Envtl. Coal.*, 556 F.3d at 193, and deference is withheld only if the interpretation is "'plainly erroneous or inconsistent with the regulation,'" *Decker*, 133 S.Ct. at 1337 (quoting *Chase Bank*, 131 S.Ct. at 880), or if there is "reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Talk America*, 131 S.Ct. at 2261 (internal quotations omitted). To be deserving of deference, an agency's interpretation "need not be the only possible reading of a[n ambiguous] regulation – or even the best one – to prevail." *Decker*, 133 S.Ct. at 1337.

In the Mine Act, Congress separated enforcement and rulemaking powers from adjudicative powers, and assigned the first two to the Secretary and the last to the Commission. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 160-61 (D.C. Cir. 2006). Under this split-authority scheme, it is the Secretary's interpretation of the law, and not the interpretation of the Commission or its ALJs, that is entitled to deference

when a Court is confronted with an ambiguous Mine Act provision. *Sec'y of Labor ex rel. Wamsley v. Mutual Mining, Inc.*, 80 F.3d 110, 113-15 (4th Cir. 1996). *Accord Sec'y of Labor v. Excel Mining, LLC*, 334 F.3d 1, 6 (D.C. Cir. 2003).

B. The Plain Meaning of the Reporting Regulation Requires Each Operator, Including an Owner-Operator, to Report Each Injury

Regulatory interpretation begins with the text and, if the text is unambiguous, ends with the text. This is just such an open-and-shut case.

Section 50.20(a) states in relevant part that "*each* operator shall report each… occupational injury… at the mine." 30 C.F.R. § 50.20(a) (emphasis added). It is undisputed that Dickenson Coal, the self-described "owner and operator" of the Roaring Fork No. 4 Mine, Pet'r's Br. at *i*, meets the Part 50 definition of "operator." 30 C.F.R. § 50.2(c)(1). *See also* J.A. 8-9 (stipulation that Dickenson Coal was "an owner, lessee, or other person who operates, controls, or supervises a coal mine"). It is also undisputed that the injured miner suffered a reportable "occupational injury" when a portion of the mine roof fell on his elbow. J.A. 9 at ¶6, ¶7. Based on these

undisputed facts, Dickenson Coal was required to report the injury to MSHA.

Dickenson Coal argues that the "only rational interpretation" of Section 50.20(a) is that the injury had to be reported "by one or the other operator, but not both." Br. 11. The trouble with Dickenson Coal's argument is that the word "each" does not mean "one or the other, but not both" – "each" means "every one of two or more considered individually or one by one," *Random House College Dictionary*, 414 (Revised ed. 1980), or "this as well as that," *Webster's Third New Int'l Dictionary*, 713 (2002). Indeed, the word "each" is synonymous with "every," and circuit courts have matter-of-factly assumed that the phrase "each operator" means "every operator," without having to consult dictionaries. *D.H. Blattner & Sons, Inc. v. Sec'y of Labor*, 152 F.3d 1102, 1104 (9th Cir. 1998) (paraphrasing "each operator" in 30 C.F.R. § 41.20); *Nat'l Indus. Sand Ass'n v. Marshall*, 601 F.2d 689, 694 (3d Cir. 1979) (paraphrasing "each operator" in 30 U.S.C. 825(a)).

Dickenson Coal asserts that there is "no suggestion that the use of 'each' is intended to apply to reporting by multiple operators." Br. 10. But there need be no such suggestion if the phrase "each operator" is unambiguous. What is missing here is not further elaboration on the meaning of the word "each" but rather any textual evidence that "each" should be interpreted against its ordinary meaning. Standing alone, "each" tends to be a significant and highly instructive term. *See D.H. Blattner & Sons*, 152 F.3d at 1108 (finding that the phrase "*each* operator" "strongly supports the view that mines may have multiple operators") (emphasis in original). In this instance, where there is no evidence that the drafters meant to say "one or the other operator, but not both," the use of the word "each" speaks with clarity to the question presented, *Halliburton*, 710 F.3d at 178, and the "plain language controls," *Ohio Valley Envtl. Coal.*, 556 F.3d at 193.

Contrary to Dickenson Coal's claim, the question of whether the temporary labor agency, Bates Contracting, was an "operator" for the purposes of the Part 50 reporting regulations is not relevant. *See* Pet'r's Br.

2 (listing the question of Bates Contracting's status as an operator as one of the "issues presented for review"). Dickenson Coal, the owner-operator of the Mine, had an independent duty to report the injury under the "each operator shall report" language of Section 50.20(a), whether or not Bates Contracting was also an "operator" under Part 50. It is therefore not necessary to determine whether Bates Contracting met the regulatory definition of "operator," i.e., whether it "controlled" or "supervised" any aspect of the Mine's operations. 30 C.F.R. § 50.2(c)(1). [1]

---

[1] Although the question of Bates Contracting's status as an "operator" is not relevant, it should be clarified that Part 50 provides a regulatory definition of "operator" that controls how that term is used in Section 50.20(a). 30 C.F.R. § 50.2 ("*As used in this part*: … (c) 'Operator' means…") (emphasis added). Dickenson Coal is wrong to suggest that the statutory definition of "operator" should be applied to Section 50.20(a). Br. 10-14.

The statutory definition differs from the regulatory definition because it contains an additional clause: "any independent contractor performing services or construction at such mine." *Compare* 30 U.S.C. § 802(d), *with* 30 C.F.R. § 50.2(c)(1). This Court and other circuit courts have disagreed over how broadly to interpret the statutory definition's "independent contractor" clause, but there is no need to revisit that debate in the present case for the reasons set forth above. *Compare Old Dominion Power Co. v. Donovan*, 772 F.2d 92 (4th Cir. 1985) (construing the independent contractor clause more narrowly), *and N. Ill. Steel Supply Co. v. Sec'y of Labor*, 294 F.3d 844 (7th Cir. 2002) (same), *with Otis Elevator Co. v. Sec'y of Labor*, 921 F.2d 1285 (D.C. Cir. 1990) (construing the independent contractor clause more broadly), *and Joy Techs. v. Sec'y of Labor*, 99 F.3d 991 (10th Cir. 1996) (same).

C. Neither of the Exceedingly Limited Exceptions to the Plain Meaning Rule Applies in This Case

An exception to the plain meaning rule of regulatory interpretation is only permitted in two "extremely narrow" instances: where literal application of the provision would lead to absurd results, or where it would defeat the intended purpose of the provision. *Boynton*, 63 F.3d at 344 (regulatory interpretation case); *Halliburton*, 710 F.3d at 180 (statutory interpretation case). *See also Hillman* 263 F.3d.at 342 ("[T]he instances in which either of these exceptions to the Plain Meaning Rule apply are, and should be, exceptionally rare.") (internal quotation marks and citation omitted). Despite Dickenson Coal's arguments to the contrary, Br. 11, 16, neither exception applies here. Far from being "absurd" or "purpose-defeating," the requirement that each operator report each injury advances the purposes of Part 50.

First, requiring that each operator independently report each injury reduces the risk that injuries will go unreported due to a misunderstanding about reporting responsibilities among multiple operators. The "each

operator" approach eliminates confusion about who will report a particular injury by establishing a simple rule: each operator must report each injury.

Second, the "each operator" requirement allows MSHA's data collection office in Denver to more efficiently and accurately track each operator's injury and illness history, thereby ensuring that no operator will evade the tough enforcement sanctions that Congress provided for operators who have demonstrated a "pattern of violations." *See* 30 C.F.R. § 104.2(a)(7); *Big Ridge*, 2013 WL 1776633, at *3-4. The most straightforward and efficient way for the Denver office to maintain an accurate database of the safety and health history of every operator across the nation is to require each operator to file a separate Form 7000-1 each time there is an injury at a mine.

It is MSHA, not the owner-operator, that must maintain an accurate, national data base of injuries and illnesses in the mining industry, so it is not the place of Dickenson Coal's president to opine that the initial report by Bates Contracting gave MSHA enough information, or that separate reports from an owner-operator would only "lead to confusion in any

analysis of MSHA's data." J.A. 61 at ¶5, ¶6. And Dickenson Coal was not authorized to adopt a "policy and procedure" that unilaterally exempts it, through a private understanding reached with a temporary labor contractor, of its regulatory duty to report each injury. J.A. 60-61 at ¶3, ¶4. *Cf. Speed Mining*, 528 F.3d at 315 (eschewing an interpretation of the Mine Act that would allow an owner-operator to "exonerate itself from its statutory responsibility for the safety and health of miners merely by establishing a private contractual relationship").

To the extent that Dickenson Coal contends that "double reporting is an absurd result" because it will result in some duplication of effort as each operator files a separate one-page injury report, Br. 11, the contention is unconvincing. Indeed, this Court has rejected an "absurd result" argument where application of the literal terms of a statute resulted in *de novo* district court litigation on the merits of a whistleblower's retaliation complaint even after the complaint had been previously adjudicated in extensive administrative proceedings. *Stone v. Instrumentation Laboratory Co.*, 591 F.3d 239 (4th Cir. 2009). If redundant, *de novo* employment litigation is not

an "absurd" outcome, then, *a fortiori*, neither is the minor duplication of effort that may result when multiple operators fill out one-page Form 7000-1s regarding the same injury.

D. Even if the Reporting Regulation Lacks a Plain Meaning, the Secretary's Interpretation Deserves Deference

Even if Section 50.20(a) is ambiguous, the Secretary's interpretation deserves deference. As discussed in the previous section, the requirement that an owner-operator report injuries involving contract miners advances the purposes of the Part 50 reporting regulations, and therefore it is not "'plainly erroneous or inconsistent with the regulation.'" *Decker*, 133 S.Ct. at 1337 (quoting *Chase Bank USA*, 131 S.Ct. at 880). In addition, even before the miner was injured in this case, MSHA had issued formal guidance to the mining industry in the form of a Program Policy Letter that expressly instructed owner-operators to report injuries suffered by contract miners. J.A. 29 ("When miners are supplied by a temporary employment agency, under 30 C.F.R. § 50.20 and 50.30 the mine operator is responsible for reporting accidents, injuries, illnesses, production and hours worked by these employees."). MSHA's interpretation as set forth in this litigation

reflects "the agency's fair and considered judgment on the matter in question" and deserves deference. *Talk America*, 131 S.Ct. at 2261.

To the extent Dickenson Coal contends that the regulatory history is inconsistent with the Secretary's position, it is incorrect. Br. 16-17.[2] It is true that the Secretary's final Part 50 rule deleted a proposed provision that stated "each operator shall report … each occupational injury … involving an individual working for a contractor at the mine," 42 Fed. Reg. 55568, 55571 (Oct. 17, 1977) (Proposed Rule). But the preamble to the final rule states that the Secretary only deleted the proposed provision because the

[2] In this and other sections of its brief, Dickenson Coal focuses on what it views as shortcomings in the ALJ's interpretation of Section 50.20(a). Dickenson Coal is wrong to focus on the ALJ's interpretation of the law because the validity of the ALJ's interpretation is not the issue. When confronted with an ambiguous Mine Act provision, this Court owes deference to the Secretary's interpretation, and not the interpretation of the Commission or its ALJs. *Mutual Mining, Inc.*, 80 F.3d at 113-15; *Excel Mining,* 334 F.3d at 6. Although the ALJ granted summary decision to the Secretary, he did so based on an interpretation of the Part 50 regulations that was not advanced by the Secretary and has not been adopted by the Secretary on appeal, so this Court need not evaluate the ALJ's interpretation. The Secretary properly advances, and the Court should evaluate, the interpretation the Secretary advanced below. *See Gilliam v. S.C. Dep't of Juvenile Justice*, 474 F.3d 134, 139 (4th Cir. 2007) (quoting *Keller v. Prince George's Cnty.*, 923 F.2d 30, 32 (4th Cir. 1991) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court.")

Mine Act already permitted the agency to "hold extraction operators, or contractors, or both, responsible for compliance with Part 50." 42 Fed. Reg. 65534 (Dec. 30, 1977). The preamble went on to emphasize that "the deletion does not foreclose these options," was "not a material change from the proposed rule," and did not "represent an alteration of present policy." *Id*. Nothing about this deletion or any other aspect of the regulatory history can fairly be read to contradict MSHA's interpretation that Section 50.20(a) requires an owner-operator to file a 7000-1 Form regarding each injury at the mine.

Finally, the small portion of MSHA's Program Policy Manual quoted in Dickenson Coal's brief does not contradict the Secretary's interpretation. Br. 18. The Manual encourages independent contractors to "carefully coordinate their Part 50 reporting responsibilities" with the owner-operator "in order to assure accurate reporting and recordkeeping and to avoid duplication." J.A. 65. Urging operators to coordinate as they each prepare their Form 7000-1s is fully consistent with the requirement that "each operator" report "each injury." As Dickenson Coal correctly observes,

"depending on the employment circumstances of the injured miner, one operator may have some information regarding the miner or the incident, while the other may have different information at its disposal." Br. 21. Coordination between operators is therefore necessary if each operator is to accurately report the injury to MSHA while minimizing the already slight duplication of effort caused when multiple operators gather the same information about a reportable injury before filing separate reports.

CONCLUSION

For the foregoing reasons, the petition for review should be denied.

Respectfully submitted,

s/ Samuel Charles Lord
SAMUEL CHARLES LORD
Attorney
U.S. Department of Labor
Office of the Solicitor
1100 Wilson Boulevard
Suite 2200
Arlington, Virginia 22209-2296
Telephone: (202) 693-9333
Fax: (202) 693-9361
E-mail: lord.charlie@dol.gov

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B) because it contains 5,460 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The foregoing brief is presented in proportionally-spaced typeface using Microsoft Office Word 2010 in 14-point Palatino Linotype font. Footnotes are presented in 13-point Palatino Linotype font.

s/ Samuel Charles Lord
Samuel Charles Lord

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2013, I filed and served the foregoing Response Brief for the Secretary of Labor with the Clerk of the Court by causing a copy to be electronically filed via the appellate CM/ECF system. I also hereby certify that within two business days, I will cause eight copies to be delivered to the Clerk of the Court. I also hereby certify that the following participants in the case will be served via the CM/ECF system and via U.S. Mail, first-class postage pre-paid, on:

Ralph Henry Moore, II, Esq.
Jackson Kelly PLLC
Three Gateway Center, Suite 1500
401 Liberty Ave.
Pittsburgh, PA 15222

John T. Sullivan, Esq.
Federal Mine Safety and Health Review Commission
Office of General Counsel
1331 Pennsylvania Ave., NW
Suite 520N
Washington, DC 20004

s/ Samuel Charles Lord
Samuel Charles Lord