FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MARTIN COUNTY COAL CORP. and GEO/ENVIRONMENTAL ASSOCIATES, Respondents.	)	Docket Nos. KENT 2002-42-R KENT 2002-43-R KENT 2002-44-R KENT 2002-45-R KENT 2002-251 KENT 2002-261 KENT 2002-262

OPENING BRIEF FOR THE SECRETARY OF LABOR

INTRODUCTION

This case involves citations issued by MSHA to Martin County Coal Corp. ("MCC") and Geo/Environmental Associates ("Geo") following the failure of MCC's Big Branch Slurry Impoundment near Inez, Kentucky. On October 11, 2000, the impoundment, which held over 2 billion gallons of water and coal refuse, failed. The failure released over 300 million gallons of water and coal refuse into an adjacent underground mine. Although it knew that the impoundment had failed in a similar fashion in 1994 and that a portion of the impoundment was constructed with highly permeable rock, MCC did not report unusually high water flowing from the underground mine several

months earlier, and MCC failed to take adequate measures to limit or control seepage from the impoundment into the mine. MCC's failure to follow the approved impoundment sealing plan resulted in an impoundment failure which caused extensive damage to the neighboring community and placed miners' safety at risk.

The judge dismissed one of two contributory violations involving MCC and, with respect to the one contributory violation he affirmed, reduced the penalty by 90 percent. The judge also affirmed only one of four non-contributory violations involving Geo. For the reasons discussed in this brief, the judge's decision contains numerous legal errors and should be vacated in pertinent part.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the judge erred by dismissing, in response to a motion to dismiss by MCC and Geo and before the completion of the Secretary's affirmative case, the citations alleging violations of 30 C.F.R. § 77.216(d) consisting of MCC's failure to periodically redirect the fine refuse slurry discharge along the seepage barrier and 30 C.F.R. § 77.216-3(d) consisting of Geo's failure to record the abatement of hazards in the seven-day impoundment examination report.

2. Whether the judge erred in dismissing the citation alleging a violation of 30 C.F.R. §§ 77.216(d) consisting of MCC's failure to periodically redirect the fine refuse slurry

discharge along the seepage barrier as required by the approved impoundment sealing plan.

3. Whether the judge erred by failing to address all four parts of the Commission's test for "significant and substantial" ("S&S") determinations and failing to make an "S&S" determination regarding the violation of 30 C.F.R. § 77.216(d) consisting of MCC's failure to report changes in the water flow quantity from the South Mains Portal as required by the approved impoundment sealing plan.

4. Whether the judge erred in finding that the violation of 30 C.F.R. § 77.216(d) consisting of MCC's failure to report changes in the water flow quantity from the South Mains Portal was not an "unwarrantable failure."

5. Whether the judge erred in assessing a penalty of only $ 5,500 -- a penalty reduction of 90 percent -- for the violation of 30 C.F.R. § 77.216(d) consisting of MCC's failure to report changes in the water flow quantity from the South Mains Portal.

6. Whether the judge erred in finding that the outflow pipe and a ruler which Geo used to measure the water flow at the South Mains Portal did not constitute an "instrument" within the meaning of 30 C.F.R. § 77.216-4(a)(2).

7. Whether the judge erred in dismissing the citation alleging a violation of 30 C.F.R. § 77.216-3(d) consisting of

Geo's failure to record the abatement of hazards in the seven-day impoundment examination report.

STATEMENT OF THE CASE

A. The Facts

MCC is the operator of a surface and underground coal mine and the Big Branch Slurry Impoundment near Inez, Kentucky. GX-1. Geo is an independent contractor hired by MCC to inspect the impoundment and to prepare certifications of compliance with regulatory requirements pertaining to the impoundment. Ibid. On October 11, 2000, a failure of the impoundment released over 300 million gallons of slurry (water and fine coal refuse) and caused extensive damage to the neighboring community and nearby waterways. GX-1.

The impoundment was built by MCC for the storage of coarse and fine coal refuse and solid waste by-products of the coal cleaning process. GX-1. The impoundment was located adjacent to a preparation plant and two underground mines. Ibid. The 1-C mine employed six underground miners and two surface miners. Ibid. The impoundment pool had a depth of 221 feet and a surface area of 68 acres. Ibid. From the preparation plant, an overland belt conveyor transported the coarse coal refuse to the impoundment, and the slurry was pumped into the impoundment. GX-1, Tr.II 1138-50.

In response to an impoundment failure which occurred in May 1994, MCC submitted an impoundment sealing plan to MSHA on August 8, 1994. GX-1. The plan was prepared by MCC's engineering consultant, Ogden Environmental & Energy Services Company ("Ogden"). Tr.I 56, 60; GX-1, 2, 2a, 2b. The plan was approved by MSHA on October 20, 1994. Ibid. The plan provided that the water flowing from the South Mains Portal of the underground 1-C Mine be monitored daily until remedial work at the 1994 breakthrough point was completed, and that thereafter monitoring be done during the weekly impoundment inspections required by the plan. GX-1, 2, 2a, 2b.

The plan also required construction of a seepage barrier around the perimeter of the impoundment to reduce seepage from the impoundment. GX-1. See GX-2, 2a, 2b. The seepage barrier was to be the primary means of controlling seepage from the impoundment pool into the underground 1-C Mine. GX-1, 2, 2a, 2b. The first phase in constructing the seepage barrier was to use soil and shot-rock around the margins of the impoundment. Ibid. The plan then required that fine refuse, or "fines," be directed along the barrier by periodically redirecting the discharge of the slurry. Tr.I 48, 114-16, 202-11, 486-87, 904-08, 1174-75; Tr.II 299-308, 313, 316, 322, 360, 448-53; GX-1, 2, 2a, 2b. The stated objective of distributing slurry along the shot-rock barrier was to reduce seepage by virtue of the low

permeability of the consolidated fine refuse. GX-1, 2, 2a, 2b. The plan also required construction of a cement underground seal to provide added protection against subsequent breakthroughs in areas under the impoundment. Ibid.

Following MSHA's approval of the plan, MCC proposed modifications concerning the drainage from the South Mains Portal and the construction of the cement seal. GX-1. The plan was subsequently modified by MCC and approved by MSHA on September 29, 1995. Ibid. Under the revised plan, rather than constructing a cement seal, existing mine seals were to be strengthened by adding gunite and reinforcing steel. Ibid.

In February 1996, MCC hired Geo to take over Ogden's engineering consultant role and perform weekly impoundment monitoring, evaluate and modify the impoundment sealing plan, and prepare annual reports and certifications concerning the impoundment. Tr.II 45, 53, 162, 167-68, 214-16, 684-85, 693-95, 756-57, 762-63; GX-1. As part of Geo's monitoring responsibilities, Geo examiners were to measure and record the flow at the South Mains Portal. Tr.I 130, 501-03, 857-58; Tr.II 214-16, 748-50, 757; GX-1. Any unusual change in the quantity or quality of flow was to be reported to the MSHA District Manager. GX-1, 5.

The water flow from the South Mains Portal increased sharply in September 1999. MCC had been monitoring the flow

rate on a weekly basis, but failed to notify MSHA of the increased flow rate. In addition, sometime prior to October 11, 2000, the level of the impoundment pool had risen and the pool extended over MCC's underground 1-C Mine. GX-1. Just before the impoundment failure, there was clear water against the seepage barrier at the farthest end of the impoundment. Tr.I 98-99, 862-67.

At the time of the impoundment failure on October 11, 2000, the impoundment contained approximately 2 billion gallons of water and slurry, and over 300 million gallons of water and slurry were released at the time of the breakthrough. GX-1. A miner was in the underground 1-C Mine, at the 2 North Main belt line area, about fifteen minutes before the breakthrough and was exposed to the potential of injury. Tr.I 872. In addition, other miners routinely worked in other areas which were or could have been affected by the breakthrough. GX-1. Although no one was seriously injured or killed by the breakthrough, no one disputed that the release of over 300 million gallons of water and slurry had the potential to cause serious injury or death. Tr.I 869.

MSHA conducted an investigation after the impoundment failure on October 11, 2000. MSHA concluded that MCC failed to periodically redirect the fine refuse slurry discharge along the seepage barrier and that MCC failed to report an unusual change

in the flow quantity or quality from the South Mains Portal. Tr.I 108-18, 478-86, 795-839, 857-915; GX-1, 2, 3; JX-4a, 4b. Therefore, MSHA issued two citations to MCC alleging two "S&S" and "unwarrantable failure" contributory violations of 30 C.F.R. § 77.216 consisting of MCC's failure to comply with the requirements of the approved impoundment plan. GX-1, JX-4a, 4b.[1]

MSHA also issued five citations to MCC and four citations to Geo alleging five non-contributory violations:

> (1). A citation to MCC alleging a violation of 30 C.F.R. § 77.216(d) because MCC failed to construct underground mine seals in accordance with the approved impoundment plan. JX-4c.
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> (2). A citation to MCC and Geo alleging a violation of 30 C.F.R. § 77.216-3(a)(4) because Geo's impoundment examiner was not qualified to conduct impoundment inspections. JX-4h.[2] (MCC withdrew its contest of this citation).
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> (3). A citation to MCC and Geo alleging a violation of 30 C.F.R. § 77.216-3(d) because Geo failed to record the abatement of hazards in the required seven-day impoundment examination report. JX-4f.[3] (MCC withdrew its contest of this citation).

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[1] 30 C.F.R. § 77.216(d) provides:

> The ... construction and maintenance of all ... slurry impoundments ... shall be implemented in accordance with the plan approved by the District Manager.

[2] 30 C.F.R. § 77.216-3(a)(4) provides:

> All inspections ... shall be conducted by a qualified person ....

[3] 30 C.F.R. § 77.216-3(d) provides:

(4). A citation to MCC and Geo alleging a violation of 30 C.F.R. § 77.216-4(a)(2) because Geo failed to record the minimum and maximum readings for the impoundment outflow pipe and submit them in the required annual report. JX-4g.[4] (MCC withdrew its contest of this citation).

(5). A citation to both MCC and Geo alleging violations of 30 C.F.R. § 77.216-4(a)(7) because none of the annual reports included a report certified by a registered professional engineer that the reinforced seals were constructed and maintained in accordance with the approved impoundment plan. JX-4d, 4e.[5]

B. The Judge's Dispositions

1. The judge's dismissal of citations in response to a motion to dismiss

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> All examination and instrumentation monitoring reports ... shall include a report of the action taken to abate hazardous conditions ....

[4] 30 C.F.R. § 77.216-4(a)(2)provides:

> ... [E]very twelfth month ... the person owning, operating, or controlling a ... slurry impoundment ... shall submit to the District Manager a report containing the ... [l]ocation and type of installed instruments and the maximum and minimum recorded readings of each instrument.

[5] 30 C.F.R. § 77.216-4(a)(7) provides:

> ... [E]very twelfth month ... the person owning, operating, or controlling a ... slurry impoundment ... shall submit to the District Manager a report containing ... [a] certification ... that all construction ... was in accordance with the approved plan.

On July 2, 2003, in response to a motion by MCC and Geo, the judge issued an order granting a motion to dismiss the citations alleging violations of Sections 77.216(d) and 77.216-3(d).[6] On August 4, 2003, in response to the Secretary's motion for reconsideration, the judge agreed to hear the testimony of the Secretary's expert witness. Tr.II 33-37. On August 7, 2003, after hearing the testimony of the Secretary's expert witness, the judge stated that he would deny the Secretary's motion. Tr.II at p.990-92.

On August 28, 2003, the judge issued a written order denying the Secretary's motion for reconsideration.[7] Regarding the violation of Section 77.216(d), the judge found that the Secretary failed to establish a prima facie case because prudent mining engineers would not have understood the requirement to

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[6] The judge had orally dismissed the citations at the hearing on June 12, 2003, before the Secretary finished putting on her affirmative case. Tr.I 1243-49. Regarding the violation of Section 77.216(d), the judge found that the Secretary failed to establish that prudent mining engineers would have understood the requirement to "periodically redirect" the fine coal slurry discharge as requiring the operator to physically relocate the fine slurry pipeline around the perimeter of the impoundment. Ibid. Regarding the violation of Section 77.216-3(d) consisting of Geo's failure to record the abatement of hazards in the seven-day impoundment examination report, the judge found that there was insufficient evidence to establish the violation. Ibid.

[7] Appendix A of the judge's decision is a summary of the judge's findings with respect to the dismissal of the citation alleging a violation of Section 77.216 consisting of MCC's

"periodically redirect" the fine coal slurry discharge to require "the kind of impoundment operation which the Secretary now contends was necessary to prevent impoundment failure in the manner it occurred ...." Order of August 28, 2003, at 3-4. The judge further found that the impoundment plan was "specific and operational" and that, therefore, MCC was only required to comply with the "specific operational requirements" without regard to the "goals and objectives" of the plan. Id. at 4. The judge dismissed the citation because he found that the Secretary failed to establish "a violation of those requirements ...." Ibid.

Regarding the violation of Section 77.216-3(d) consisting of Geo's failure to record the abatement of hazards in the seven-day impoundment examination report, the judge found that "the inspector's report notes very tersely that the impoundment breakthrough had been plugged." Order of August 28, 2003, at 5. The judge therefore found that the evidence did not establish a violation. Ibid.

2. The judge's final decision of January 14, 2004

In his final decision of January 14, 2004, the judge affirmed the violation of Section 77.216(d) consisting of MCC's failure to report changes in the water flow quantity from the

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failure to periodically direct the fine refuse slurry discharge along the seepage barrier. 26 FMSHRC at 51.

South Mains Portal during September 1999 as required by the impoundment plan. 26 FMSHRC at 46-7. The judge found that MCC made no effort to evaluate data regarding the large increase in flow before the impoundment failure. 26 FMSHRC at 47. The judge further found that the failure to evaluate the flow data contributed in some measure to the magnitude and timing of the impoundment failure, but that that failure was not an "unwarrantable failure in the sense of wanton or reckless disregard for the risks to life and property." Ibid. The judge found MCC's negligence to be moderate and assessed a penalty of $ 5,500, which was a 90 percent reduction of the penalty MSHA proposed. 26 FMSHRC at 47, 49. The judge did not rule on whether the violation was "S&S," as MSHA alleged.

The judge affirmed the violation of Section 77.216(d) consisting of MCC's failure to construct underground mine seals in accordance with the impoundment plan. 26 FMSHRC at 47-48. The judge found that the plan required that the first anchor bolt be set in the floor two feet from the rib and that the bolt in the roof be similarly set, and that the actual construction did not meet those requirements. Ibid. The judge further found that the bolt spacing as constructed did not contribute to the impoundment failure, and that the degree of negligence was very low. 26 FMSHRC at 48.

The judge affirmed the violations of Section 77.216-4(a)(7) because neither MCC nor Geo reported the construction of six gunite mine seals in the required annual report. 26 FMSHRC at 48. The judge further found that the failure to include the seals in the annual certification did not contribute to the impoundment failure, and that the degree of negligence was very low. Ibid.

The judge dismissed the citation alleging a violation of Section 77.216-4(a)(2) consisting of Geo's failure to record the minimum and maximum readings for the impoundment outflow pipe, which MSHA asserted constituted an impoundment "instrument," and submit them in the annual report. 26 FMSHRC at 44-9. The judge found that the outflow pipe, combined with a ruler which Geo used to measure the flows from the South Mains Portal every seven days in accordance with the plan, did not constitute an "instrument" as "instrument" is defined by impoundment engineers. Ibid.

The judge dismissed the citation alleging a violation of Section 77.216-3(a)(4) consisting of the fact that Geo's impoundment examiner was not qualified to conduct impoundment inspections. 26 FMSHRC at 49. The judge found that there was a lack of evidence that the inspector did not receive a total of eight hours of impoundment inspection refresher training. Ibid.

The Secretary filed a petition for discretionary review appealing all but one of the judge's determinations which were adverse to her. MCC filed a petition for discretionary review appealing the judge's adverse determination with respect to the violation of Section 77.216(d) consisting of MCC's failure to report an unusual change in the water flow quantity from the South Mains Portal. Geo filed a petition for discretionary review appealing the judge's adverse determination with respect to the violation of 30 C.F.R. § 77.216-4(a)(7) consisting of Geo's failure to include in the annual certification a report by a registered professional engineer that the reinforced seals were constructed and maintained in accordance with the impoundment plan. The Commission granted all three petitions for discretionary review.

This brief addresses the judge's determinations which were appealed by the Secretary. The Secretary's response brief will address the judge's determinations which were appealed by MCC and Geo.

ARGUMENT

I. THE JUDGE ERRED BY DISMISSING, IN RESPONSE TO A MOTION TO DISMISS BY MCC AND GEO AND BEFORE THE COMPLETION OF THE SECRETARY'S AFFIRMATIVE CASE, THE CITATIONS ALLEGING VIOLATIONS OF SECTION 77.216(d) CONSISTING OF MCC'S FAILURE TO PERIODICALLY REDIRECT THE FINE REFUSE SLURRY DISCHARGE ALONG THE SEEPAGE BARRIER AND SECTION 77.216-3(d) CONSISTING OF GEO'S FAILURE TO RECORD THE ABATEMENT OF HAZARDS IN THE SEVEN-DAY IMPOUNDMENT EXAMINATION REPORT

Commission Procedural Rule 63(b) provides:

> . . . A party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

29 C.F.R. § 2700.63(b) (emphasis added). In addition, Rule 52(c) of the Federal Rules of Civil Procedure, which is consistent with Commission Rule 63(b), provides that the district court may enter judgment after a party has been "fully heard."[8] The advisory committee notes state that "judgment on partial findings is made after the court has heard all the evidence bearing on the crucial issue of fact ...." Fed.R.Civ.P. 52(c) Advisory Committee Note (emphasis added).[9]

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[8] Commission Procedural Rule 1(b) provides that the Commission will be guided by the Federal Rules of Civil Procedure on any procedural question not regulated by the Commission's Procedural Rules. 29 C.F.R. § 2700.1(b).

[9] Rule 52(c) replaced a portion of Rule 41(b) which permitted the court to dismiss an action after the close of the

Thus, a motion to dismiss is not normally granted before the conclusion of a party's case-in-chief unless it is "manifestly clear" that the plaintiff will not prove his case. D.P. Apparel Corp. v. Roadway Express Inc., 736 F.2d 1, 3 (1st Cir. 1984) (Rule 41(b) case). When a claim is dismissed under Rule 52(c), the district court's factual findings are reviewed under the clearly erroneous standard. Burger v. New York Institute of Technology, 94 F.3d 830, 835 (2d Cir. 1996).

In this case, the judge erred by dismissing the two citations in question before the Secretary had an opportunity to fully present all relevant evidence pertaining to the violations and before the judge had an opportunity to carefully consider all of the evidence which the Secretary had submitted. In addition, because the judge engaged in no legal analysis with respect to the plain meaning or ambiguity of the "seepage barrier" provision, it could not have been "manifestly clear" to the judge that the Secretary could not establish the violation pertaining to that provision.

Regarding the violation of Section 77.216(d) consisting of MCC's failure to periodically redirect the fine refuse slurry discharge along the seepage barrier, the judge dismissed the citation without permitting the Secretary to present expert

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plaintiff's case-in-chief. Ibid.; 9A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 2573.1 (1995).

testimony to establish (1) that MCC's method of discharging the slurry in the impoundment was ineffective and could not possibly have covered the barrier with fines as intended by the seepage barrier provision, and (2) that the term "redirect" required MCC to either move the discharge pipe or take some other equivalent action so that fine refuse would be deposited along the barrier to minimize seepage from the impoundment into the mine. Tr.II 16-24.

In addition, the judge dismissed the citation without considering the deposition testimony of MCC Foreman Steven Gooslin, who testified that MCC's method of discharging the slurry did not cover a portion of the barrier with fines. The judge received the transcript of Gooslin's deposition just moments before he made his ruling, Tr.I 1221, and clearly did not have an adequate opportunity to read or review the testimony.

Regarding the violation of Section 77.216-3(d) consisting of Geo's failure to record the abatement of hazards in the seven-day impoundment examination report, the judge dismissed the citation without considering deposition testimony which would have established that abatement actions were taken but were not recorded. See Gooslin Dep. at 44-51, 67.

Because the judge dismissed the two citations before the Secretary was permitted to present evidence which was relevant,

probative, and non-cumulative with respect to the violations, and before the judge had an opportunity to carefully consider all of the evidence which the Secretary had submitted and analyze the evidence in accordance with the applicable case law, the judge dismissed the citations prematurely and improperly.[10]

II. THE SECRETARY'S INTERPRETATION OF SECTION 77.216(d) WITH RESPECT TO MCC'S FAILURE TO PERIODICALLY REDIRECT THE DISCHARGE OF FINE REFUSE SLURRY ALONG THE SEEPAGE BARRIER IS CORRECT

A. Standard of Review

Once an impoundment plan is approved and adopted, its provisions and revisions are enforceable as mandatory standards. See UMWA v. Secretary of Labor, 870 F.2d 662, 671 (D.C. Cir. 1989) (roof plan). If the meaning of a provision contained in the plan is plain, the provision must be enforced in accordance with that meaning unless such enforcement would lead to absurd results. See Secretary of Labor v. Excel Mining, LLC, 334 F.3d

[10] Neither the judge's order denying the Secretary's motion for reconsideration nor the summary of the dismissal in Appendix A to the judge's decision of January 14, 2004, reconsidered or revisited the judge's previous dismissal of the citations. The judge failed to discuss the testimony of MSHA's expert witness as it pertained to the Secretary's prima facie case that MCC's method of discharging the slurry in the impoundment was ineffective and could not possibly have covered the barrier with fines as intended by the "seepage barrier" provision, and that the term "redirect" required MCC to either move the discharge pipe or take some other equivalent action so that fine refuse would be deposited along the barrier to minimize seepage from the impoundment into the mine. In addition, the judge failed to

1, 7 (D.C. Cir. 2003) (standard); Lodestar Energy, Inc., 24 FMSHRC 689, 693 (July 2002) (standard). See also Fay v. Oxford Health Plan, 287 F.3d 96, 104 (2d Cir. 2002) (ERISA plan); Local Union 47 v. NLRB, 927 F.2d 635, 641 (D.C. Cir. 1991) (collective-bargaining contract).

Courts use the traditional tools of statutory construction in determining whether the meaning of a provision is plain. Arizona Public Service Co. v. EPA, 211 F.3d 1280, 1288 (D.C. Cir. 2000) (Clean Air Act). The traditional tools include the text, the history, the overall structure and design, and, especially important here, the purpose of the provision. See ibid. See also Consolidation Coal Co., 15 FMSHRC 1555, 1557 (Aug. 1993) (applying traditional tools of interpretation to ascertain a standard's plain meaning). Where a plain meaning can be ascertained from the provision itself, that meaning controls unless the literal application of the provision will produce a result "demonstrably at odds with the intentions of its drafters." Environmental Defense Fund, Inc. v. EPA, 82 F.3d 451, 468 (D.C. Cir. 1996) (quoting Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982)). See Consolidation Coal, supra.

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discuss the deposition testimony of Foreman Gooslin as it pertained to both of the violations in question.

If the meaning of a provision is ambiguous, deference must be given to the reasonable interpretation of the government agency vested with the authority to administer and enforce the provision. See Excel Mining, 334 F.3d at 7; Energy West Mining Co. v. FMSHRC, 40 F.3d 457, 463 (D.C. Cir. 1994); Energy West Mining Co., 17 FMSHRC 1313, 1317 and n.6 (Aug. 1995) (ventilation plan). The agency's interpretation is reasonable as long as it is not inconsistent with the language and the purpose of the provision. Secretary of Labor v. Ohio Valley Coal Co., 359 F.3d 531, 535-36 (D.C. Cir. 2004).

B. The Judge Failed to Address Whether MCC Failed to Comply With the Interpretation of the Seepage Barrier Provision Which the Secretary Advanced and With Which MCC Agreed

MSHA, MCC, and the inspector who was called as MCC's witness all agreed on the meaning of the seepage barrier provision: fine refuse had to adequately cover the seepage barrier to reduce or limit seepage from the impoundment into the mine. To MSHA, physically moving the discharge pipe was the obvious and effective option to achieve coverage of the seepage barrier with fine refuse, but MCC could have used any other effective means to cover the seepage barrier. The judge, however, found that the Secretary never established that a reasonably prudent mining engineer in 1994 would have understood the seepage barrier to mean that MCC had to physically move the discharge pipe. Order of August 28, 2003, at 3. That is not

the interpretation which the Secretary, or anyone else, advanced. The issue which the judge should have addressed but did not was whether the Secretary's interpretation of the seepage barrier provision was reasonable and if so, whether MCC failed to comply with the Secretary's reasonable interpretation.

C. The Secretary's Interpretation of the Seepage Barrier Provision Is Reasonable, and MCC Failed to Comply With the Secretary's Reasonable Interpretation

The plain meaning of the seepage barrier provision can be discerned using the traditional tools of interpretation, which include both the text and the purpose of the provision. See Arizona Public Service Co., 211 F.3d at 1288; Consolidation Coal, 15 FMSHRC at 1557. When examining the text of a provision, words are normally presumed to have their ordinary, dictionary meaning. See Pioneer Inv. Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 388 (1993); Ohio Valley, 359 F.3d at 535; Walker Stone Co. v. Secretary of Labor, 156 F.3d 1076, 1081 (10th Cir. 1998); Island Creek Coal Co., 20 FMSHRC 14, 19 (Jan. 1998). The relevant language of the seepage barrier provision stated:

> Following the completion of the "seepage barrier" fine refuse shall be directed along the barrier by periodically redirecting the discharge of fine refuse slurry.

GX-2. The common dictionary definition of the word "along" is "over the length of (a surface)." Webster's Third New

International Dictionary at 60 (1993). The common dictionary definition of the word "redirect," which was undefined in the plan, is "to change the course of: channel in a new direction." Id. at 908 (emphasis added). Under these definitions, MCC was required to direct the fine refuse over the length of the barrier by periodically changing the course of the discharge of fine refuse slurry.

In addition, the purpose of the seepage barrier provision was explicitly stated in the plan: "to reduce ... seepage from the impoundment that could contribute to the occurrence of another breakthrough." GX-2. See Tr.I 53-54. Complete coverage of the seepage barrier with fines was imperative because the fines reduced permeability and served as the primary means of seepage control. GX-2a, 2b; Tr.I 53-54. Indeed, the fact that a specific provision requiring that the slurry be directed along the barrier was included in the plan is evidence that the fines were to serve as seepage control.

Both MSHA and MCC itself recognized the purpose of the seepage barrier provision. MSHA Engineers John Fredland, Patrick Betoney, and Harold Owens all testified that, under the plan, fine refuse had to be deposited in the impoundment against the shot rock portion of the seepage barrier because the fines would serve as the primary seepage control. Tr.I 53, 192, 486-87, 963. MSHA Inspector Robert Bellamy testified that the

seepage barrier had to be coated with fines. Tr.II 640. MCC Superintendent Larry Muncie testified that slurry was to be deposited on the impoundment to control seepage, and MCC President and General Manager Dennis Hatfield testified that slurry was supposed to be distributed so that it would become part of barrier which controls seepage. Tr.I 1171-74, 1314. Even Ogden, MCC's independent contractor and original drafter of the plan at the time it was first submitted to MSHA, understood that fine refuse was to completely cover the seepage barrier to reduce the potential for piping-induced breakthroughs. GX-2a, 2b.[11] Accordingly, there was no misunderstanding on either MSHA's or MCC's part that under the plain meaning of the provision, MCC was to ensure that the seepage barrier would be adequately covered with fine refuse to reduce seepage from the impoundment. Cf. Lasser v. Reliance Standard Life Insurance Co., 344 F.3d 381, 386 (3d Cir. 2003) (enforcing the plain meaning of an ERISA plan where, inter alia, both parties were aware of the plain meaning when the policy began).

Assuming arguendo that the meaning of the seepage barrier provision was ambiguous because the provision was silent as to the particular method of discharging the slurry along the barrier, the Commission should defer to the Secretary's

[11] Piping or internal erosion is a process by which seeping water carries away small particles of soil or weathered rock.

interpretation of the provision because that interpretation is reasonable, i.e., it is consistent with the plan's language and purpose. See, e.g., Energy West, 40 F.3d at 461 (ambiguity in the Mine Act with respect to occupational injury information); Lodestar, 24 FMSHRC at 693. As to the provision's language, both MSHA and MCC itself understood that the performance-oriented language of the plan conferred flexibility on MCC as to how best to cover the seepage barrier with fine refuse. MSHA Engineer Fredland testified that there was no explicit requirement to move the discharge pipe around the perimeter of the impoundment and that it was up to MCC to decide how to distribute the fines along the seepage barrier. Tr.I 170, 192. MSHA Engineer Owens testified that the impoundment was approximately one mile long and that the discharge pipe would have to be moved, or something similar would have to be done, to get the fines along the seepage barrier. Tr.I 1098. MSHA Impoundment Inspector Robert Bellamy testified that the most efficient way to direct slurry along the seepage barrier would be to extend the pipe along the seepage barrier and discharge it at separate locations, but that there were ways of directing the slurry without moving the pipe. Tr.II 628, 640. MSHA expert witness Richard Almes testified that the plan did not explicitly require that the discharge pipe be relocated and that MCC should

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GX-1 at 25.

have either moved the pipe or used some other method to make sure the fine refuse was deposited along the seepage barrier. Tr.II 283, 313, 454. Even Ogden suggested to MCC in 1996 or 1997 that the discharge pipe be moved along the barrier. Tr.I 898-99. To MSHA, physically moving the discharge pipe was the obvious and effective option for compliance -- but, as the judge himself noted at one point, the Secretary submitted that any other method which achieved the purpose of the plan could have been used by MCC. Order of August 28, 2003 at 4.[12]

The Secretary's interpretation -- that the plan required either physically moving the discharge pipe or using some other method which covered the barrier with an adequate amount of fines to limit seepage from the impoundment into the mine -- is also reasonable because it achieves the purpose of the plan. There was no dispute that the barrier was constructed of permeable rock and that its purpose, to function as a "seepage" barrier, could not be achieved until a sufficient amount of

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[12] Other methods of covering the barrier with fines were identified at the hearing. MSHA Engineer Fredland testified that the barrier was completed in 1995 and there was an opportunity to get the fines on the barrier at that point when the impoundment level was lower, or some other compacted material or other means of creating a true seepage barrier could have been used. Tr.I 329-30. MSHA Engineer Owens testified that the slurry could be discharged at various places in the impoundment to coat to the top of the barrier. Tr.I 893. MSHA expert witness Almes testified that a main slurry discharge pipe could be run around the top of the seepage barrier along with a

fines was placed on the barrier to limit seepage into the mine. Because the Secretary's interpretation is consistent with the plan's language and purpose, it is reasonable and entitled to deference.

MCC failed to comply with the Secretary's interpretation because the method which MCC used to discharge the slurry proved to be ineffective in covering the barrier sufficiently to reduce or limit seepage from the barrier into the mine. MSHA Engineer Betoney testified that, at the time of the impoundment failure, the distance from the discharge location to the back of the impoundment was 2600 feet (almost half a mile). Tr.I 480. MSHA expert witness Almes testified that when you discharge the slurry from a pipeline, the most control you have over the slurry out into the impoundment might be thirty, forty, or fifty feet. Tr.II 307. Almes further testified that, depending on the velocity of the flow being discharged, the slurry will begin to meander back toward the pipe and clear water will build up at the farthest end of the impoundment. Ibid.

There is reliable evidence that, just before the impoundment failure, there was clear water against the seepage barrier at the farthest end of the impoundment -- a fact which would establish that the slurry was not being distributed all

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number of smaller discharge lines at various points along the barrier. Tr.II 310-11.

the way around the perimeter of the seepage barrier.[13] MSHA Engineer Fredland testified that if you discharge the slurry from only one point in the impoundment, as MCC did, you will always have an area at the other end of the impoundment which the fines do not cover -- and that that is in fact what happened here. Tr.I 111-12, 105, 157. MSHA Engineer Owens testified that, in order for the fines to coat to the top of the seepage barrier, the slurry would have to be discharged at various places in the impoundment. Tr.I 891-93. MSHA Engineers Fredland and Betoney testified that, during the post-breakthrough investigation, they noted that the water had been eighteen to twenty-four inches above the slurry line at the area of the breakthrough. Tr.I 105, 479-80, 716, 744. MCC Foreman Steven Gooslin testified that he did not recall the discharge pipe ever being moved to the back of the impoundment and that he observed clear water against the barrier in that area before the breakthrough. Gooslin Dep. at 53, 57. Even during 1996 or 1997, Ogden suggested to MCC that the discharge pipe be moved

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[13] The citation stated MSHA's initial conclusion that MCC failed to periodically redirect the fine refuse along the seepage barrier because the discharge pipe was not physically moved. JX-4a. During the hearing, however, the Secretary made it clear that MCC failed to comply with the seepage barrier provision because it did not physically move the discharge pipe or use any other method to effectively cover the seepage barrier with fines. See supra, pp. 24-25.

along the barrier of the impoundment, but that was never done. Tr.I 898-99.

In addition, there is reliable evidence that the failure to completely cover the seepage barrier was a contributing factor in the impoundment failure. MSHA Engineer Owens testified that water in the impoundment was above the settled fines in an area of approximately one-quarter acre. Tr.I 862-867. MSHA Engineer Fredland testified that because there were no fines to limit seepage near the top of the barrier, water was seeping through the highly permeable shot rock and eventually into the mine. Tr.I 98-99. See also GX-1.

MCC knew that the seepage barrier was constructed of permeable rock and that the rock had to be completely covered with an adequate amount of fines to reduce seepage into the mine. Nonetheless, the foregoing evidence demonstrates that repositioning the pipe was ineffective and did not achieve the purpose of the provision. MCC was required to, but failed to, either move the discharge pipe or use some other method which would cover the barrier with a layer of fine refuse thick enough and high enough to reduce seepage from the impoundment into the mine.

In finding that MCC complied with the "specific and operational" terms of the plan, the judge appears to have focused exclusively on a literal reading of the word "redirect"

and failed to consider the purpose of the seepage barrier provision. Because the judge ignored the fundamental principle that the plain meaning controls except in cases where the literal application of a provision will produce a result "demonstrably at odds with the intentions of its drafters," the judge erred. Environmental Defense Fund, supra. See also Consolidation Coal, supra. This case, like Environmental Defense Fund, requires "a flexible, purpose-oriented interpretation to avoid absurd or futile results." 82 F.3d at 468 (internal citations omitted). A purpose-oriented interpretation such as the Secretary's interpretation -- that the seepage barrier provision required either physically moving the discharge pipe or using some other method which would cover the barrier with an adequate amount of fines to limit seepage -- is reasonable because it is consistent with the provision's language and Ogden's intentions and it furthers the purpose of the plan.

In addition, the judge erred by ignoring the fundamental principle that a term in a provision should not be interpreted in a vacuum, i.e., without reference to related language in the provision and without reference to the purpose of the provision. See United States v. Bohai Trading Co., 45 F.3d 577, 580 (1st Cir. 1995) (rejecting a statutory analysis that suffered "from extreme myopia" and observing that statutes are not enacted, and

should not be read, "on a piecemeal basis"). See also Mettiki Coal Corp., 13 FMSHRC 3, 7 (Jan. 1991). The judge interpreted the term "redirect" without any reference to the immediately preceding phrase "directed along the [seepage] barrier." To discern a provision's plain meaning, the provision must be read in context. See Borgner v. Brooks, 284 F.3d 1204, 1208 (11th Cir. 2002) (reading all parts of a statute together to achieve a consistent whole), cert. denied sub nom. Borgner v. Florida Bd. of Dentistry, 537 U.S. 1080 (2002); Local Union 1261, UMWA v. FMSHRC, 917 F.2d 42, 45 (D.C. Cir. 1990) ("If the first rule of statutory construction is "Read," the second rule is "Read On!"").

The judge's finding also ignores the explicitly stated purpose of the seepage barrier provision: to cover the seepage barrier with enough fine refuse to prevent another impoundment failure. See Emery Mining Corp. v. Secretary of Labor, 744 F.2d 1411, 1414-15 (10th Cir. 1984) (interpreting the terms of MSHA's training regulation so that they were consistent with Congress' expressed intent in the Mine Act); Western Fuels-Utah, Inc., 19 FMSHRC 994, 999-1000 (Jun. 1997); Consolidation Coal Co., 15 FMSHRC 1555, 1557 (Aug. 1993) (interpreting MSHA's escapeway standard in accordance with its intended purpose). The impoundment plan was drafted in response to a previous breakthrough in May 1994, and MSHA recommended that MCC's

existing impoundment plan be modified to "ensure against a similar occurrence." GX-1 at 15. MCC responded by submitting a plan which contained the seepage barrier provision and which was drafted "to prevent a recurrence" of the May 1994 failure. GX-2. Accordingly, both MSHA and MCC understood that the explicit "goal and objective" of the plan was to cover the seepage barrier with fine refuse to reduce seepage and guard against another impoundment failure. In finding that MCC was not required to comply with the "goals and objectives" of the plan, the judge improperly ignored the explicit purpose of the provision.[14]

Furthermore, the judge erred by dismissing the citation on the ground that the Secretary never established "a prima facie case" because the Secretary never established that "the phrase 'periodically redirecting' had a meaning well understood by prudent mining engineers in 1994 that would require actions by the mine operator as now thought necessary by the Secretary." Order of August 28, 2003, at 3. In so finding, the judge stated that the issue was "not a question of 'notice' of the meaning asserted by the Secretary." Ibid. Instead, the judge

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[14] The judge also failed to identify the "specific and operational" requirements of the provision with which MCC complied. Order of August 28, 2003 at 4. See Bohai Trading Co., 45 F.3d at 580. The judge identified what MCC was not required to do (physically move the discharge pipe); he never identified what MCC was required to do.

apparently dismissed the citation on the ground that, on the merits, the Secretary did not establish that her interpretation of the seepage barrier provision was the more reasonable interpretation. Order of August 28, 2003, at 3-4. It is black-letter deference law that, to be accepted, an agency's interpretation need only be a reasonable interpretation and need not be more reasonable than the competing interpretation. See, e.g., Joy Technologies, Inc. v. Secretary of Labor, 99 F.3d 991, 996 (10th Cir. 1996); Energy West, 40 F.3d at 461-63. Here, the Secretary's interpretation is reasonable because it is consistent with the provision's language and with MCC's own understating of the provision's requirements and because it achieves the provision's explicit "goal and objective."

The judge substituted the reasonably prudent person test -- which is part of a "fair notice" analysis -- for a merits deference analysis.[15] The courts have made it clear that, in cases involving an agency's interpretation of regulatory language, the "fair notice" analysis and the merits analysis are distinct and different. See Paralyzed Veterans of America v. D.C. Arena L.P., 117 F.3d 579, 584 (D.C. 1997) (ambiguity for deference purposes does not necessarily mean lack of "fair notice"); Island Creek, 20 FMSHRC at 19 (questions of

[15] The Secretary argued the reasonably prudent person test in response to a "fair notice" argument raised by MCC.

interpretation and of "fair notice" are distinct). By substituting the reasonably prudent person test for a merits deference analysis, the judge committed legal error. See RAG Cumberland Resources LP v. FMSHRC, 272 F.3d 590, 597 (D.C. Cir. 2001) (questions of interpretation under the Mine Act are not resolved under a theoretical reasonable person analysis).

It is also important to note that, in any event, MCC did have fair notice of the Secretary's interpretation. MCC had fair notice from the plain terms of the seepage barrier provision, from the provision's stated and intended purpose, and from Ogden's explicit suggestion in 1996 or 1997 to MCC that the discharge pipe be moved along the barrier. Tr.I 898-99. See Freeman United Coal Mining Co. v. FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997) (plain language of MSHA standard provided fair notice of what it required); see also Lodestar, 24 FMSHRC at 694.

None of the factors referred to by the judge support a finding either that, on the merits, the Secretary did not establish that her interpretation of the seepage barrier provision was reasonable interpretation, or that MCC did not have fair notice of that interpretation. First, as shown above, MCC experienced an impoundment failure in 1994 and knew from Ogden, the original drafter of the impoundment plan, that the seepage barrier provision required fine refuse to completely

cover the seepage barrier to reduce the potential for piping-induced breakthroughs. GX-2a, 2b. Thus, contrary to the judge's finding (Order of August 28, 2003, at 4), MCC did contemplate, at the time that the impoundment sealing plan was devised, that the impoundment could fail again unless the barrier was adequately covered with fines which would control seepage.

Second, the judge's reliance on MSHA's expert witness testimony that the phrase "'periodically redirect the slurry discharge' had no technical meaning in 1994 or in 2000" and that there was no "standard industry practice" with respect to slurry discharge (Order of August 28, 2003, at 4) is misplaced. There was no standard industry practice or technical meaning to the seepage barrier provision because the impoundment was constructed with a seepage barrier which was a unique design concept. Tr.II 315-18. Nonetheless, as shown above, MCC knew precisely the requirements of the seepage barrier provision -- to cover the barrier with fines to limit seepage into the mine.

Third, the MSHA inspector's failure to issue citations during past inspections, which was noted by the judge (Order of August 28, 2000 at 4), does not establish that the Secretary's interpretation was unreasonable and that MCC lacked notice. The inspector testified that even though the seepage barrier provision lacked specificity, he understood the provision to

mean that MCC had to use "their best ability to cover the seepage barrier with fines." Tr.II 640. Thus, the inspector's testimony is consistent with what both MSHA and MCC understood the requirements of the seepage barrier provision to be.

Finally, the judge erred by according controlling weight to the MSHA inspector's interpretation of the plan through the inspector's conduct. The Commission has held that an inconsistent enforcement pattern by MSHA inspectors does not estop the agency from proceeding under an interpretation of the standard which it concludes is correct. U.S. Steel Mining Co., 15 FMSHRC 1541, 1546-47 (Aug. 1993); Nolichuckey Sand Co., 22 FMSHRC 1057, 1063-64 (Sept. 2000). In addition, courts do not review and defer to the interpretations of lower-level agency employees. Rather, they review and defer to the authoritative interpretation of the agency itself. See, e.g., Bigelow v. Dept. of Defense, 217 F.3d 875, 880-81 (D.C. Cir. 2000). In any event, the inspector's interpretation of the seepage barrier provision -- that MCC was "obligated to use whatever means necessary to fulfull the requirements of the plan" (Tr.II 640) -- was consistent with the Secretary's interpretation that MCC was required to physically move the pipe or use any other effective means to cover the seepage barrier with fines. By according controlling weight to the inspector's conduct (or, more precisely, to the inspector's inaction) as though it

constituted MSHA's interpretation of the plan, the judge relied on the inspector's inaction to estop MSHA from enforcing the Secretary's interpretation. Such an approach is legal error. Because there has been no affirmative misconduct by the inspector, the inspector's conduct cannot estop the Secretary. See Drozd v. INS, 155 F.3d 81, 90 (2d Cir. 1998); Linkous v. United States, 142 F.3d 271, 277-78 (5th Cir. 1998); Frillz, Inc. v. Lader, 104 F.3d 515, 518 (1st Cir.), cert. denied, 522 U.S. 813 (1997). See also OPM v. Richmond, 496 U.S. 414, 421-22 (1990).[16]

Because the judge failed to analyze the relevant evidence under the correct interpretation, the Commission should vacate the judge's finding and remand the issue.

III. THE JUDGE ERRED BY FAILING TO DETERMINE WHETHER THE VIOLATION OF SECTION 77.216(d) CONSISTING OF MCC'S FAILURE TO REPORT CHANGES IN THE WATER FLOW QUANTITY WAS "SIGNIFICANT AND SUBSTANTIAL"

To establish that a violation is "S&S" under Commission case law, the Secretary must establish:

> (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard -- that is, a measure of danger to safety -- contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury

[16] Because the judge found that the Secretary failed to establish the violation, he did not address the questions of whether the violation was "S&S" and an "unwarrantable failure." The Secretary continues to maintain that it was both.

in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3 (Jan. 1984). Although the Secretary alleged that MCC committed an "S&S" violation of Section 77.216(d), the judge only made findings with respect to the first two parts of the Commission's "S&S" test and failed to make an "S&S" determination. The judge's failure to make an "S&S" determination was legal error. See Eagle Nest Inc., 14 FMSHRC 1119, 1123 (July 1992) (judge must "comprehensively" address the evidence in making findings with respect to "S&S" violations).

The judge only made findings with respect to the first two parts of the Commission's "S&S" test. With respect to the first part, substantial evidence supports the judge's finding of a violation. MCC was required to monitor the water flow quantity at the South Mains Portal under the approved impoundment plan and was required, but failed, to report and take remedial measures concerning the unusual change in water flow.

The monitoring requirement in the impoundment plan was included in the "Short Term Plan" provisions and stated:

> Flow from the South Mains will be monitored daily, until the remedial work at the seepage point is completed. Monitoring will be done during regular impoundment inspections after that. Any unusual change in flow quantity or quality that would indicate possible impoundment leakage will be reported immediately to MSHA and

> appropriate mine management. All necessary remedial measures will be implemented.

GX-5. MSHA Engineers Fredland and Betoney testified that because daily monitoring was only required "until the remedial work at the seepage point [was] completed," MSHA interpreted the daily monitoring requirement as a "short term" requirement. MSHA interpreted monitoring that was to be done "during regular impoundment inspections after that" as representing a "long term" requirement because it was a continuing requirement for MCC to monitor the South Mains Portal on a weekly basis after remedial work at the 1994 seepage point was completed. Tr.I 215-24, 304-06, 327, 607, 616-17. Fredland further testified that the weekly monitoring requirement was part of the plan's "long term" measures because the plan had been through several modifications and revisions but the weekly monitoring requirement was never removed from the plan and MCC continued to conduct weekly monitoring throughout the plan's existence. Tr.I 223, 305-06. MSHA Inspector Bellamy testified the monitoring was a continuing requirement under the plan and that he talked to Geo about several missing reports between April and September 1999. Tr. 592, 600; GX-6. The judge agreed with MSHA's interpretation, finding that completion of remedial work at the seepage point was "the end of the short term measures" and that "monitoring of the flows at the South Mains entry on a weekly

basis [was] a part of the long term measures." 26 FMSHRC at 38-39.

The evidence also supports the judge's finding that there was a significant increase in water flow in September 1999 at the South Mains Portal which should have been reported to MSHA and which required remedial measures to be taken. 26 FMSHRC at 47. From 1994 to September 1999, the average flow was 5.5 inches, but in September 1999, there was a marked increase -- a 56 percent increase in the flow depth and a 235 percent increase from the original flow quantity -- which was not reported to MSHA. Tr.I 241-43, 321, 502-03, 811-12, 816, 845, 859, 981-82; GX-1 at p. 26 and fig. 38.[17] Between September 1999 and October 2000, the average flow rose to 8.6 inches. GX-1 at p. 26 and fig. 38. Despite the dramatic increase in flow, MCC did not report the change to MSHA and did not take any remedial action in response to the unusual change.

With respect to the second part of the "S&S" test, substantial evidence supports the judge's finding that the violation contributed to a measure of danger. Reliable evidence established that an increase in flow quantity was an indication that some piping activity or internal erosion was occurring in

[17] Geo Impoundment Examiner Frank Howard took weekly water outflow measurements at the South Mains Portal by using a ruler to measure the depth of the water flowing through an 18-inch diameter pipe. Tr.II 223, 226, 247; GX-1 at p.26.

September 1999. Tr.I 102-03, 236-40, 601-02; GX-1 at p.26, 28-32. In addition, the fact that the South Mains outflow increased sharply, stayed at the increased level for a time, and then fluctuated severely, was evidence consistent with a seepage pattern that would be expected as piping occurred. Tr.I 236-40; GX-1 at p.26. Moreover, there was no dispute that the outflow information in question was not reported to MSHA. Regardless of the reason for the impoundment failure, substantial evidence supports the judge's finding that the underlying violation -- MCC's failure to report the unusual change in flow quantity and MCC's failure to implement necessary remedial measures -- "contributed in some measure to the magnitude and timing of the impoundment failure." 26 FMSHRC at 47.

The judge failed, however, to analyze the evidence and make findings with respect to the third and fourth parts of the "S&S" test. There is undisputed evidence which establishes a reasonable likelihood that the hazard contributed to would result in injury and a reasonable likelihood that the injury would be reasonably serious. On October 11, 2000, the impoundment contained approximately 2 billion gallons of water and slurry, and over 300 million gallons of water and slurry were released at the time of the breakthrough. GX-1. A miner was in the underground 1-C Mine, at the 2 North Main belt line area, about fifteen minutes before the breakthrough and was

exposed to the potential of injury. Tr.I 872. In addition, other miners routinely worked in other areas which were or could have been affected by the breakthrough. GX-1. Although no one was seriously injured or killed by the breakthrough, no one disputed that the release of over 300 million gallons of water and slurry had the potential to cause serious injury or death. Tr.I 869. By failing to analyze the "S&S" evidence and make appropriate "S&S" findings, the judge committed legal error requiring remand.

IV. THE JUDGE ERRED IN FINDING THAT THE VIOLATION OF SECTION 77.216(d) CONSISTING OF MCC'S FAILURE TO REPORT CHANGES IN THE WATER FLOW QUANTITY WAS NOT AN "UNWARRANTABLE FAILURE"

A violation is an "unwarrantable failure" if it involves "aggravated conduct constituting more than ordinary negligence" and is characterized by conduct such as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." Emery Mining Corp., 9 FMSHRC 1997, 2000-04 (Dec. 1987). The judge found that MCC's failure to report changes in the water flow quantity from the South Mains Portal was not an "unwarrantable failure" because MCC's conduct was not a "wanton or reckless disregard for the risks to life and property." 26 FMSHRC at 47. Because the Commission's "unwarrantable failure" test contains no requirement that the violation involve "wanton or reckless disregard for the risks to

life or property," the judge applied an incorrect test. The judge also failed to evaluate the evidence which establishes an "unwarrantable failure" violation under the correct test.

The law defines "wanton" as "unreasonably or maliciously risking harm while being utterly indifferent to the consequences." Black's Law Dictionary (7th ed. 1999). In criminal law, "wanton" connotes malice, while "reckless" does not. Ibid. Under either definition, "wanton" differs significantly from the Commission's "unwarrantable failure" test with respect to the state of mind and degree of culpability. "Wanton" conduct and "reckless disregard" are not the same: "wanton misconduct" is defined as conduct "in reckless disregard of the rights of another, coupled with the knowledge that injury will probably result." Black's Law Dictionary (7th ed. 1999) (emphasis added).

Moreover, although the purpose of the Mine Act is to prevent death and serious physical harm and occupational diseases, the judge only relied on the risk to life in his "unwarrantable failure" analysis. The Commission examines "all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in

abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation." Eagle Energy, Inc., 23 FMSHRC 829, 840 (Aug. 2001); Consolidation Coal Co., 22 FMSHRC 340, 355, 363-364 (Mar. 2000).[18] Evidence of such "unwarrantable failure" factors in this case which the judge ignored include the following.

First, the violation existed for a significant length of time. From 1994 to September 1999, the average flow was 5.5 inches, but in September 1999, the average flow rose to 8.6 inches. GX-1 at p.26 and fig. 38. The increase in flow was "unusual" because it represented a 56 percent increase in the flow depth and a 235 percent increase from the original flow quantity. Tr.I 241-43, 321, 502-03, 811-12, 816, 845, 859, 981-82; GX-1 at p. 26 and fig. 38.[19] The "unusual" increase in flow

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[18] In addition, the judge improperly injected a "risk to property" component into the Commission's "unwarrantable failure" test. The purpose of the Mine Act is not to protect property. Rather, the stated purpose of the Act is to "prevent death and serious physical harm" and occupational diseases. 30 U.S.C. § 802. The judge therefore applied an incorrect test. When the decisionmaker below applies an incorrect legal test, the reviewing body is required to vacate the decision and remand the case. See, e.g., County of Los Angeles v. Secretary of HHS, 192 F.3d 1005, 1011-12 (D.C. Cir. 1999).

[19] Geo Impoundment Examiner Frank Howard took weekly water outflow measurements at the South Mains Portal by using a ruler to measure the depth of the water flowing through an 18-inch diameter pipe. Tr.II 223, 226, 247; GX-1 at p.26.

was not reported to MSHA and continued until the impoundment failure in October 2000. Tr.I 884-86, 1060-61.

The increase in flow was far above the 1 to 1.5 inch increase or the 30 to 50 percent increase that MSHA expert witness Richard Almes would have considered to be usual, particularly because of the drought conditions during 1999 and 2000. Tr.II 333-36.[20] MSHA Engineer Owens and expert witness Almes testified that the increase in flow could not be attributed to the slight amount of rainfall because rainfall would only cause a temporary flow increase and here, the flow increased and never returned to the 5.5 inch average. Tr.I 815, 982, 1064-66; Tr.II 335-36. Geo Impoundment Engineer Scott Ballard testified that a doubling in flow would cause concern during a period of little rainfall. Tr.II 150-52. Ballard's testimony is consistent with the testimony of MSHA Engineers John Fredland and Harold Owens and MSHA's expert witness Almes, who all testified that there was little rainfall between September 1999 and October 2000, when the average flow nearly doubled. MCC monitored the flow rate on a weekly basis, but failed to notify MSHA of the increased flow rate which existed for over one year. MCC's inaction in light of its duty to know

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[20] MSHA Engineer Harold Owens testified that the rainfall at Inez, Kentucky, and Wolf Creek revealed drought-like conditions which paralleled rainfall data from Jackson, Kentucky, located approximately 50 miles away. Tr.I 811, 1067-70, 1118-19; GX-6b.

the flow quantity from the South Mains Portal constitutes "unwarrantable failure."

Second, the violation posed a high degree of danger to miners. The failure to report an unusual increase in water flow, which was dramatic in this case, prevented MCC and MSHA from assessing and taking remedial measures to prevent an impoundment failure that had the potential to release over 2 billion gallons of water and slurry into areas where miners usually worked.

Third, MCC knew or should have known that greater care in monitoring and reporting was necessary. MCC knew that it had had a similar impoundment failure in May 1994. MCC also knew that constructing a seepage barrier within the impoundment was a new design concept and that the barrier had to be adequately covered with fines to control seepage into the mine. In addition, MCC knew that the South Mains Portal was the designated monitoring point that measured for possible impoundment leakage.

Despite the unusually large increase in flow from the South Mains Portal beginning in September 1999 and continuing until the impoundment failure in October 2000, MCC did not report the change to MSHA and did not take any remedial action in response to the "unusual" change in conditions at this location from the previous six years. The judge's own finding that MCC failed "to

take advantage of available opportunities to evaluate the South Mains Portal flow data" (26 FMSHRC at 47) is reminiscent of the "see-no-evil" approach to mine safety rejected by the Commission in Kenny Richardson, 3 FMSHRC 8, 16 (Jan. 1981), aff'd, 689 F.2d 632 (6th Cir. 1982), cert. denied, 461 U.S. 928 (1983) (Section 110(c) case)). Self-imposed ignorance cannot be a mitigating factor in determining the level of MCC's negligence. See Douglas R. Rushford Trucking, 24 FMSHRC 648, 650 (July 2002).

Because the judge failed to analyze the relevant evidence under Commission case law, the Commission should vacate the judge's moderate negligence finding and remand the "unwarrantable failure" issue.

V. THE JUDGE ERRED IN ASSESSING A PENALTY OF ONLY $ 5,500 FOR THE VIOLATION OF SECTION 77.216(d) CONSISTING OF MCC'S FAILURE TO REPORT CHANGES IN THE WATER FLOW QUANTITY

In assessing a penalty of $ 5,500 for the violation in question, the judge failed to consider and make findings with respect to three of the six statutory criteria under Section 110(i) of the Mine Act which must be considered in assessing civil penalties. See Cantera Green, 22 FMSHRC 616, 620 (May 2000). The judge found (1) that MCC is a large operator, (2) that the $ 55,000 penalty MSHA proposed would not hinder MCC's ability to stay in business, and (3) that MCC's negligence in failing to report changes in the water flow quantity from the

South Mains Portal was moderate. 26 FMSHRC 36-37, 47. The judge failed, however, to address the remaining three criteria which must be addressed under Section 110(i): MCC's history of previous violations, the gravity of the violation, and MCC's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation. By failing to address all six statutory criteria, the judge erred. Cantera Green, 22 FMSHRC at 620-21. See also Virginia Slate Co., 23 FMSHRC 482, 492-95 (May 2001) (failure to consider statutory penalty criteria); Douglas R. Rushford Trucking, 22 FMSHRC 598, 602 (May 2000) (same).

In addition, the judge erred because he failed to explain why he reduced the proposed penalty by 90 percent. Under Commission case law, a judge is required to provide an explanation when he significantly reduces (or increases) the proposed penalty. Cantera Green, 22 FMSHRC at 622-23 (judge must explain his divergence from the penalties proposed by the Secretary). See also Virginia Slate, 23 FMSHRC at 493 (failure to explain a reduction of 57 percent); Rushford Trucking, 22 FMSHRC at 602 (failure to explain a reduction of 88 percent). In this case, the judge failed to provide such an explanation; he simply stated, without any explanation, that the proposed penalty "was excessive under the circumstances." 26 FMSHRC at 47.

The $ 55,000 proposed penalty is appropriate and supported by the evidence which shows that the violation was serious and that MCC displayed a lack of diligence in protecting miners' safety. Several miners were underground before the impoundment failure and could have been killed. In addition, MCC knew that it had had an impoundment failure in the past, it knew that the impoundment was constructed of highly permeable rock, and it knew that the pool level was increasing with the routine addition of thousands of gallons of water. Given the proven violation and the operator's size, gravity, negligence, and history, no reduction in the proposed penalty is warranted. Accordingly, the Commission should vacate the judge's findings and remand the issue.

VI. THE JUDGE ERRED IN DISMISSING THE CITATION ALLEGING A VIOLATION OF SECTION 77.216-4(a)(2) CONSISTING OF GEO'S FAILURE TO RECORD THE MINIMUM AND MAXIMUM READINGS FOR AN IMPOUNDMENT "INSTRUMENT" AND SUBMIT THEM IN THE ANNUAL REPORT

The citation alleged a violation of 30 C.F.R. § 77.216-4(a)(2) consisting of GEO's failure to record the minimum and maximum readings from each "instrument," i.e., the South Mains Portal outflow pipe, which were taken every seven days, and submit them in the required annual report. The issue is whether the outflow pipe, combined with a ruler used to measure the depth of the flow, was an "instrument" within the meaning of Section 77.216-4(a)(2). The judge determined that the

pipe/ruler combination was not an "instrument" within the meaning of the standard, and dismissed the citation. 26 FMSHRC at 14-15. The judge erred because he ignored the ordinary, dictionary meaning of the term "instrument," and because he failed to accord deference to the Secretary's interpretation of her own standard.

Absent an indication to the contrary, words are presumed to have their ordinary, dictionary meaning. Pioneer Inv. Services, 507 U.S. at 388; Walker Stone, 156 F.3d at 1081. When a term in a standard is not expressly defined and there is no indication that a technical usage was intended, the ordinary meaning of the word should be applied. Island Creek, 20 FMSHRC at 19. Here, neither the Mine Act nor the relevant standards define the term "instrument." More specifically, the term is not defined in the provision setting forth the definitions applicable to the surface installation standards at 30 C.F.R. §§ 77.214-77.216-5. 30 C.F.R. § 77.217 (2004). See also 30 C.F.R. § 77.2 (setting forth definitions applicable to 30 C.F.R. Part 77 in general).[21]

Because "instrument" is not defined in the standards, and because there is no indication that a technical meaning was

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[21] This is in contrast to other MSHA standards which do provide precise, technical definitions of specifically identified "instruments." See, e.g., 30 C.F.R. § 70.2(i) (defining "MRE instrument" as a specific type of gravimetric dust sampler for purposes of Part 70); 30 C.F.R. § 71.2(g)

intended, the term should be given its ordinary, dictionary meaning. Webster's Third New International Dictionary (1993) defines an "instrument" as "a measuring device for determining the present value of a quantity under observation; broadly: a device ... for recording ... data ... obtained by such a measuring device." Id. at 1172. Under this definition, the pipe/ruler combination used by Geo was an "instrument" because it was used to measure and record the depth of flow from the South Mains Portal. MSHA Engineers Betoney and Owens and MSHA Inspector Bellamy testified that the pipe and ruler were the only device used to measure the flow from the South Mains Portal. Tr.I 672-74, 800, 808-12; Tr.II 600-01. MSHA Engineer Betoney, MSHA Expert Witness Almes, and MSHA Inspector Bellamy testified that the pipe and ruler fit within the ordinary meaning of an "instrument" because they were used to "monitor" or "measure" the flow from the South Mains Portal. Tr.I 672-75, 678-79; Tr.II 329, 393, 578-79, 601-02. Geo President Barry Thacker's testimony that the flow was measured using the pipe and ruler and then documented in the report is consistent with the ordinary meaning of "instrument." Tr.II 749. MSHA Inspector Bellamy testified that the pipe was used as an "instrument" because it was used to measure the flow, and that

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(same, as applied to Part 71); 30 C.F.R. § 77.314 (referring specifically to "automatic temperature control instruments").

its omission from the plan did not establish that it was not an instrument. Tr.II 578-79. Inasmuch as "instrument" is not expressly defined in the standards, the judge should have examined and applied the ordinary, dictionary definition meaning of the term. He did not.

Despite the clarity apparent on the face of Section 77.216-4(a)(2), Geo claimed that the outflow pipe and ruler which it admittedly used to measure and record the depth of flows from the impoundment every seven days was not an "instrument" within the meaning of the standard. When examining the meaning of a term contained in a standard, the initial inquiry is whether the standard is clear or ambiguous. Walker Stone, 156 F.3d at 1080; Lodestar Energy, 24 FMSHRC at 692. The meaning of the term "instrument" in Section 77.216-4(a)(2) is clear.

Where the meaning of a standard is ambiguous, both the Commission and courts must defer to Secretary's interpretation if it is reasonable. Walker Stone, 156 F.3d at 1080; Lodestar, 24 FMSHRC at 693. An interpretation is reasonable if it "sensibly conforms to the purpose and wording of the regulations." Walker Stone, 156 F.3d at 1080 (citation and internal quotations omitted). The Secretary's interpretation of the term "instrument" in Section 77.216-4(a)(2) as including the pipe and ruler which Geo used to measure and record the impoundment outflows every seven days is reasonable. As

discussed above, the pipe/ruler combination was an "instrument" within the ordinary, dictionary meaning of the word because it was used to measure and record the flow coming from the impoundment. In addition, MSHA Impoundment Engineer Owens, an inspector with thirty years experience, testified that, from an engineering perspective, the pipe was an "instrument" used to measure the flow quantity from the impoundment. Tr.I 1035. Owens pointed out that the South Mains pipe fell within the definition of an "instrument" in the Glossary of Terms for Dam Safety, published by the Federal Emergency Management Agency, as "an arrangement of devices installed into or near dams ... which provide for measurements that can be used to evaluate the structural and performance parameters of the structures." Tr.I 1079-84; GX-9a. Thus, the pipe at the South Mains Portal would be considered an "instrument" by the engineering profession. Tr.I 671-72, 1035-38; Tr.II 328, 426-27, 429-30.

An agency's interpretation of its own regulations is entitled to a high level of deference and must be accepted unless it is plainly erroneous or inconsistent with the regulation. General Electric Co. v. EPA, 53 F.3d 1324, 1327 (D.C. Cir. 1995) (citations and internal quotations omitted). The Secretary's interpretation of "instrument" is consistent both with the ordinary meaning of the word and with the more technical definition used by dam and impoundment engineers. In

addition, the Secretary's interpretation furthers the purposes of the Mine Act by promoting the monitoring, and thus the safeness, of impounding structures. See Island Creek, 20 FMSHRC at 22 ("regulations must be interpreted in a manner consonant with the safety-promoting purposes of the Mine Act"). Accordingly, the judge should have given deference to the Secretary's interpretation. He did not; instead, he effectively gave deference to the interpretation of Geo President Thacker by relying primarily on Thacker's circular and self-serving testimony that an "instrument" is a data source "identified and designated as an 'instrument' in a particular document." 26 FMSHRC at 49.

Geo's own actions over approximately four years suggest that Geo understood that the pipe/ruler combination was an "instrument" within the meaning of the standard. Geo conducted weekly inspections and monitoring of the impoundment from 1996 to the time of the breakthrough in 2000. GX-6. Geo has never argued, either with reference to the citation regarding its inspector's qualifications or otherwise, that the weekly inspections and monitoring were not inspections under 30 C.F.R. § 77.216-3, which requires impoundment inspections and the monitoring and recording of readings from instruments every seven days. The fact that Geo monitored the outflows at the South Mains pipe every seven days and recorded the readings in

the weekly impoundment inspection report indicates that Geo believed the pipe was an "instrument" within the meaning of Section 77.216-3.

The fact that Geo failed to identify the pipe/ruler combination on the plan view of the impoundment as required by 30 C.F.R. § 77.216-2(a)(7) does not, as the judge reasoned, 26 FMSHRC at 48-49, establish that the pipe/ruler combination was not an "instrument" within the meaning of Section 77.216-4(a)(2). Geo's failure to comply with one standard cannot be relied on to support its self-serving attempt to artificially restrict the application of another. Applying the dictionary definitions discussed above, the pipe/ruler combination was an "instrument" within the meaning of Section 77.216-4(a)(2) if Geo used it as a measuring and recording device. It did.

Moreover, because the Secretary's interpretation of "instrument" was in accord with both the plain meaning of the word and the specialized definition used by dam and impoundment engineers, Geo had fair notice that the pipe and ruler used to measure the impoundment outflows constituted an "instrument" under Section 77.216-4(a)(2). See Lodestar, 24 FMSHRC at 694.

Because the judge erred in ignoring the ordinary, dictionary definition of "instrument" and failed to accord deference to the Secretary's reasonable interpretation of her own standard, the dismissal of the citation should be vacated.

Remand is not necessary because the Commission must find that Geo failed to comply with the Secretary's reasonable interpretation of the standard.

VII. THE JUDGE ERRED IN FINDING NO VIOLATION OF SECTION 77.216-3(d) CONSISTING OF GEO'S FAILURE TO RECORD THE ABATEMENT OF HAZARDS IN THE SEVEN-DAY IMPOUNDMENT EXAMINATION REPORT

Section 77.216-3(d) requires that the monitoring report include "the action taken to abate hazardous conditions." On the night of the impoundment failure, the action taken to abate the hazardous condition was that the hole was plugged to stop the flow of water and slurry from the impoundment breakthrough." Tr.I 654, 740, 780; Gooslin Dep. at 44-51, 67. The judge found that there was no failure to record the "action taken to abate hazardous conditions" on the seven-day inspection report dated October 12, 2000, as required by Section 77.216-3(d), because the impoundment inspector "very tersely" noted that the impoundment breakthrough had been plugged. Order of August 28, 2003, at 5. The judge was simply mistaken.

The inspector's report only indicated that "all water & some fines were lost from slurry pool due to mine breakthrough." GX-10. In other words, the report only described the condition at the small pond which collected the flow coming out of the mine. Because the report in no way indicated that the impoundment failure had been abated by plugging the area where

the breakthrough occurred, the judge's dismissal of this citation should be vacated and the Commission should find a violation of Section 77.216-3(d) based on the foregoing undisputed facts.

CONCLUSION

For all of the reasons discussed above, the Commission should vacate all of the aspects of the judge's decision discussed above. The Commission should affirm the violations of Sections 77.216-3(d) and 77.216-4(a)(2) and should remand all of the remaining issues for an analysis which is careful and complete and in accordance with the law.

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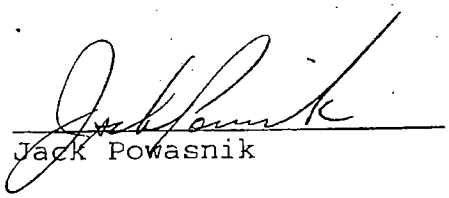

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