FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

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

REPLY BRIEF FOR THE SECRETARY OF LABOR

INTRODUCTION

In her opening brief, the Secretary argued that the administrative law judge incorrectly dismissed citations alleging violations of 30 C.F.R. §§ 77.216(d), 77.216-3(d), and 77.216-4(a)(2), and that the judge inadequately and incorrectly analyzed the "significant and substantial" ("S&S"), "unwarrantable failure," and civil penalty aspects of the violation of Section 77.216(d) he affirmed. For the reasons set forth in the Secretary's opening brief and this brief, MCC's and Geo's attempts to salvage the challenged aspects of the judge's decision are unavailing. In particular, MCC and Geo repeatedly attempt in effect to persuade the Commission to affirm findings

the judge simply did not make. Because MCC and Geo cannot argue in support of findings the judge did not make, and because the Commission cannot affirm findings the judge did not make, the Commission should vacate the aspects of the judge's decision challenged by the Secretary.

ARGUMENT

I. THE JUDGE ERRED BY DISMISSING THE CITATIONS ALLEGING VIOLATIONS OF SECTIONS 77.216(d) AND 77.216-3(d) BEFORE THE COMPLETION OF THE SECRETARY'S AFFIRMATIVE CASE

The Secretary demonstrated in her opening brief that 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. 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 the Secretary had submitted. In addition, the judge engaged in no legal analysis with respect to the plain meaning or ambiguity of the "seepage barrier" provision.

A. The Secretary Did Not Waive Her Right to Call Additional Witnesses

MCC asserts (Response Brief at 5-6) that, under Rule 59 of the Federal Rules of Civil Procedure, the Secretary waived the argument that the judge made his ruling without considering all of the relevant evidence because the Secretary failed to raise the argument before the judge made his initial ruling granting partial dismissal during the hearing. Tr.I 1221. See Order of July 2, 2003. MCC's assertion is fundamentally flawed.

Rule 59 authorizes a motion to alter or amend a judgment after the entry of judgment. See Building Industry Ass'n of Superior California v. Secretary of Interior, 247 F.3d 1241, 1245 (D.C. Cir. 2001) (Rule 59 only applies to final judgments); Wright and Miller, Federal Practice and Procedure, § 2810.1 (1995). Thus, the question here is whether the Secretary raised the argument before the judge issued a final decision. She did. The Secretary raised the argument in her motion for reconsideration of the judge's ruling granting partial dismissal -- a ruling that was not entered as a final decision. See Secretary of Labor on behalf of David Hopkins v. Asarco, 1996 WL 384375 (July 1995) (judge's disposition of less than all claims

was not a final decision). Accordingly, Rule 59 has no applicability.[1]

B. The Judge's Dismissal of the Citations in Question Was Not Harmless Error Because the Secretary's Rights Were Substantially Affected

An error is "harmless" when it "does not affect the substantial rights of the parties." Fed. R. Civ. Proc. 61. MCC's assertion (Response Brief at 6-7) that any error in the judge's initial ruling was "harmless" because it was corrected by the order on reconsideration issued on August 28, 2003, is incorrect.

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

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[1] In addition, the Secretary did not waive her right to call additional witnesses under a general waiver analysis. A waiver is a conscious, strategic decision to "intentional[ly] relinquish[ ] or abandon[ ] ... a known right" United States v. Olano, 507 U.S. 725, 733 (1993) (internal quotation marks and citation omitted). The parties, and the judge himself, knew from prehearing conference calls and the prehearing order that the hearing was divided into two parts and that the Secretary would be presenting expert witness testimony during the second part of the hearing scheduled for the week of August 6, 2003. When counsel for the Secretary responded "that's it" to the judge's question whether "that is the end," Tr.I 1221, counsel for the Secretary was simply referring to the end of the Secretary's presentation of the fact witnesses, since everyone knew that expert witnesses would not be presented until the second part of the hearing. Accordingly, the Secretary did not intentionally relinquish or abandon her right to call additional witnesses before concluding her case-in-chief. Counsel for the Secretary's response to the judge's question was fully explained to the judge in the Secretary's motion for reconsideration.

revisited the judge's initial dismissal of the citations on June 12, 2003. Both in the order denying reconsideration and in the summary of the dismissal, the judge failed to discuss the testimony of MSHA's expert witness as it pertained to the Secretary's prima facie case -- i.e., the Secretary's 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 in both documents to discuss the deposition testimony of Foreman Gooslin as it pertained to both of the violations in question. Moreover, none of the judge's rulings contained any legal analysis with respect to the plain meaning or ambiguity of the seepage barrier provision.

The judge's initial error should not be found to be "harmless" because the Secretary's rights in the proceeding have been substantially affected. See Greensboro-High Point Airport Auth'y v. Civil Aeronautics Bd., 231 F.2d 517, 521-22 (D.C. Cir. 1956) (failure to consider an issue that was "flatly raised" was not harmless error). Here, both in the order denying reconsideration and in the summary of the dismissal, the judge

failed to address all of the relevant evidence and analyze the evidence in accordance with applicable law and failed to engage in any legal analysis regarding the plain meaning or ambiguity of the seepage barrier provision. The judge's ongoing and uncorrected failure to address and analyze all of the relevant evidence substantially affected the Secretary's rights in the proceeding.

C. The Judge's Dismissal of the Citations in Question Deprived the Secretary of the Right to be Fully Heard Under Commission Procedural Rule 63(b)

The Secretary demonstrated in her opening brief that the judge's initial ruling on June 12, 2003, deprived the Secretary of her right to present "a full and true disclosure of the facts" under Commission Procedural Rule 63(b). In addition, as demonstrated above, neither the order denying reconsideration nor the summary of the dismissal corrected the error.

MCC is incorrect in claiming that the Secretary stated the wrong legal standard to be applied to the judge's dismissal of the citations in question. Response Brief at 7-10. Under Commission Procedural Rule 63(b), the Secretary is entitled to present a "full and true" disclosure of the facts. In addition, under Rule 52(c) of the Federal Rules of Civil Procedure, which is consistent with Commission Rule 63(b), the Secretary is entitled to be "fully heard" before a judge issues a ruling. For three reasons, the judge failed to meet the applicable

standard when he dismissed the citations in question. First, the Secretary was deprived of the opportunity to fully present all relevant evidence pertaining to the violations. Second, the judge did not have an opportunity to fully and carefully consider all of the evidence the Secretary had submitted. Third, the judge failed to engage in any legal analysis with respect to the plain meaning or ambiguity of the "seepage barrier" provision. Accordingly, the judge committed legal error in dismissing the two citations in question.

D. Summary Decision Was Inappropriate

Geo is mistaken in asserting (Response Brief at 18-24) that it was entitled to summary decision as a matter of law. Under Commission Procedural Rule 67, summary decision shall be granted only if "there is no genuine issue as to any material fact" and "the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67. Summary decision is not appropriate where the nonmoving party has not had an opportunity to present all of its evidence. See Celotex Corp. v. Catrett, 477 U.S. 317, 326-27 (1986). Summary decision was not appropriate here because the judge dismissed the citation before having an opportunity to fully and carefully consider Gooslin's deposition testimony describing the action taken to abate the hazardous condition, which was not included in the seven-day impoundment inspection report.

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. MCC, Like the Judge, Attacks an Interpretation the Secretary Has Never Advanced

The Secretary demonstrated in her opening brief (1) that 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; (2) that using the traditional tools of interpretation, which include both the text and the purpose of the provision, the plain meaning of the seepage barrier provision can be discerned; and (3) that in the alternative, if the meaning of the seepage barrier provision was ambiguous because the provision was silent as to the particular method to be used to discharge the slurry along the barrier, the Commission should defer to the Secretary's interpretation of the provision because that interpretation is reasonable, i.e., is consistent with the plan's language and purpose.

The judge dismissed the citation because he found that the Secretary never established that a reasonably prudent mining engineer would have understood the seepage barrier provision to mean that MCC had to physically move the discharge pipe. Order of August 28, 2203, at 3. The interpretation that MCC had to

physically move the pipe, however, is not the interpretation the Secretary advanced. Instead, the interpretation advanced both by the Secretary and by MCC was that MCC had to use some method that would adequately cover the seepage barrier. The judge never addressed that interpretation and never determined whether MCC adequately covered the seepage barrier.

MCC cursorily asserts that it did adequately cover the seepage barrier. Response Brief at 11. This assertion cannot avail MCC, however, because the judge did not make such a finding, and the Commission cannot affirm a finding the judge did not make. Because the judge never made a finding as to whether MCC adequately covered the seepage barrier, the Commission should remand the case to a judge to resolve that determinative factual question after considering all of the relevant evidence. See Gary D. Morgan v. Arch of Illinois, 21 FMSHRC 1381, 1392-93 (Dec. 1999); Mid-Continent Resources, Inc., 16 FMSHRC 1218, 1222 (June 1994).

B. MCC's Arguments With Regard to Interpretation Are Wrong

1. It is established law that the Secretary's reasonable interpretation of a plan provision is entitled to deference

Most of MCC's arguments with regard to interpretation pertain to whether the Secretary's interpretations of ambiguous plan provisions are entitled to deference. If the Commission finds that the plan provision in this case was unambiguous --

and it should -- it need not reach MCC's deference-related arguments. If the Commission reaches MCC's deference-related arguments, it should reject them for the reasons given below.

a. The judge had an "opportunity to pass" on the question of deference

MCC's claim that the Commission need not consider the question of deference because the Secretary failed to raise the issue before the judge (Response Brief at 12) is unpersuasive.

Section 113(d)(2)(A)(iii) of the Mine Act provides that "[e]xcept for good cause shown, no assignment of error by any party shall rely on any question of fact or law upon which the administrative law judge has not been afforded an opportunity to pass." 30 U.S.C. § 823(d)(2)(A)(iii). An "opportunity to pass" is provided when a reasonable fact-finder would necessarily have seen the question raised as part of the case. Time Warner Entertainment Co. v. FCC, 144 F.3d 75, 81 (D.C. Cir. 1988). See also BHP Copper, Inc., 21 FMSHRC 758, 761 (July 1999) ("a matter raised on review must have been at least implicitly raised below or intertwined with an issue tried before the judge") (internal citations and quotation marks omitted). In her post-hearing brief to the judge, the Secretary raised the question of deference in discussing the alleged violation of Section 77.216(d) consisting of MCC's failure to report an unusual change in flow from the South Mains Portal. See Secretary's

Post-Hearing Brief at 19. In addition, in her motion for reconsideration, the Secretary asserted that the plain meaning of the seepage barrier provision was controlling but acknowledged, in the context of a notice claim raised by MCC, that the language of the provision might be ambiguous. See Secretary's Motion to Reconsider Orders of Dismissal at 18; Secretary's Response to the Opposition to Reconsideration at 4-5. Having been apprised of the underlying question of interpretation, the judge should have applied the established law. See Connecticut Dept. of Public Utility Control v. FCC, 78 F.3d 842, 849 (2d Cir. 1996).

b. The Secretary's interpretation of an ambiguous plan provision is entitled to deference

In Energy West Mining Co., 17 FMSHRC 1313, 1317 and n.6 (Aug. 1995), the Commission held that a ventilation plan provision was ambiguous and, noting that "[a]n agency's reasonable interpretation of its regulations is entitled to deference," remanded the case for a determination of "whether the Secretary's interpretation of the provision [was] reasonable ...." Accordingly, MCC's suggestion (Response Brief at 13) that there is no Commission case law to support the Secretary's claim that the Secretary's reasonable interpretation of an ambiguous plan provision is entitled to deference is wrong.

MCC's reliance on Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1280-81 (Dec. 1998) (Response Brief at 12), is misplaced. The Commission in Harlan held that the Secretary has the burden of production with respect to establishing the meaning of an ambiguous plan provision intended by the parties. The Commission never addressed the question of whether the Secretary's interpretation was entitled to deference. See Sharkey v. Ultramar Energy Ltd., 70 F.3d 226, 230 (2d Cir. 1995) (a party may have the burden of production and be entitled to deference).

MCC argues that, under United States v. Mead Corp., 533 U.S. 218 (2001), the Secretary's interpretation of a plan provision is not entitled to traditional Chevron deference because neither the Secretary's approval of a mine-specific plan nor the Secretary's issuance of a citation for a violation of the plan represents the exercise of delegated authority to make rules carrying the force of law. Response Brief at 12-13. MCC is mistaken on both points.

As to the first point, the Secretary's approval of a mine-specific plan represents the exercise of authority delegated to the Secretary under the Mine Act to impose mine-specific plan requirements carrying the same legal force as nation-wide standards. See UMWA v. Secretary of Labor, 870 F.2d 662, 671 (D.C. Cir. 1989) (roof control plan). See also Zeigler Coal Co.

v. Kleppe, 536 F.2d 398, 409 (D.C. Cir. 1976); Penn Allegh Coal Co., 3 FMSHRC 2767, 2772 (Dec. 1981).

As to the second point, the Secretary's exercise of delegated authority may take the form of the issuance and litigation of a citation. In Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1 (D.C. Cir. 2003), the District of Columbia Circuit accorded the Secretary's interpretation Chevron deference and stated:

> [I]n the statutory scheme of the Mine Act, "'the Secretary's litigating position before [the Commission] is as much an exercise of delegated lawmaking powers as is the Secretary's promulgation of a ... health and safety standard,'" and is therefore deserving of deference.

334 F.3d at 6 (quoting RAG Cumberland Resources LP v. FMSHRC, 272 F.3d 590, 596 n.9 (D.C. Cir. 2001) (quoting Martin v. OSHRC, 499 U.S. 144, 157 (1991)).

MCC's claim (Response Brief at 13) that the Secretary's interpretation it is not entitled to deference because it is being set forth for the first time during the litigation of this case is unsupported by the law. An interpretation may be set forth for the first time during the litigation of a case so long as there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment." Bigelow v. Dept. of Defense, 217 F.3d 875, 878 (D.C. Cir. 2000) (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)). Here, as in

Bigelow, there is no reason to suspect that the interpretation set forth during this case is anything other than the position of the agency. In addition, there is no evidence that MSHA has ever before had any reason to address the issue, and there is no evidence that MSHA has ever adopted a different interpretation or contradicted its position on appeal. Accordingly, the Secretary's interpretation is entitled to deference because it reflects the agency's considered opinion.

C. MCC's Attempt to Evade the Plain Meaning of the Seepage Barrier Provision Is Unpersuasive

None of the factors relied on by MCC -- (1) testimony that it may have been hard to physically relocate the pipe because that would have required a new method for decanting clarified water, (2) a 1998 modification to the August 1994 impoundment sealing plan, and (3) testimony with respect to industry practice (Response Brief at 15-17) -- alter the plain meaning of the provision: that MCC had to use some method that would adequately cover the seepage barrier.

First, MCC was free to choose any method to comply with the provision, as long as the seepage barrier was effectively covered with fines. If the chosen method was difficult or ineffective at achieving the purpose of the provision, MCC could have explored alternative methods with MSHA. Tr. 204.

Second, the 1998 modification only addressed the placement of fine refuse during the construction of an embankment to increase the capacity of the impoundment, and did not change or modify the 1994 seepage barrier provision. Tr.I 325-327.

Third, common industry practice does not establish that the Secretary's interpretation is unreasonable. This impoundment was unique: it was constructed with a seepage barrier that was not a typical impoundment construction. Tr.II 56, 315-318. Thus, general industry custom and practice is of limited relevance. See generally Bristol Steel & Iron Works, Inc. v. OSHRC, 601 F.2d 717, 722 (4th Cir. 1979) (industry custom and practice cannot be used to subvert the purpose of safety legislation). Likewise, the Coal Impoundment Procedures Manual is merely a general reference guide and does not address the terms of the unique impoundment sealing plan in this case, which was designed and approved for this specific site. Tr.I 323-325.

D. MCC Had Notice of the Secretary's Interpretation

The Secretary demonstrated in her opening brief that MCC had notice of her interpretation 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.

MCC's claim that the Secretary failed to meet her burden of providing fair notice because the plan "said nothing about relocating the pipe" is unavailing. Response Brief at 17-19. Adequate notice may be provided in a variety of ways. Here, for example, the Secretary demonstrated that MCC had adequate notice of her interpretation because it knew, from the plain language of the plan, that it was required to direct the fine refuse over the length of the seepage barrier by periodically changing the course of the discharge of fine refuse slurry. See Peterson Bros. Steel Erection Co. v. Secretary of Labor, 26 F.3d 573, 576 (5th Cir. 1994) (if the wording of a provision is explicit and unambiguous, notice is adequate without consideration of any other factors).

In addition, if MCC could only accomplish adequate coverage by relocating the pipe, the fact that the plan itself did not specify relocation is irrelevant. The fact that Ogden, the original drafter of the plan, expressly told MCC to move the pipe to distribute the fines establishes that MCC had adequate notice that such relocation was required. See, e.g., Ohio Cast Products, Inc. v. OSHRC, 246 F.3d 791, 798-99 (6th Cir. 2001) (notice provided because company's private consultant and expert had first-hand knowledge of OSHA's methodology); United States v. Pitt-Des Moines, Inc., 168 F.3d 976, 987 (7th Cir. 1999)

(notice provided by communications from client's on-site representative and from general contractor).

Moreover, adequate notice was provided because a reasonably prudent person, evaluating the purpose of the provision and the situation presented, would know that the provision meant that the fines had to be effectively distributed along the seepage barrier to prevent leakage from the impoundment. See Stillwater Mining Co. v. FMSHRC, 142 F.3d 1179, 1182 (9th Cir. 1998) (reasonably prudent mine operator would understand that provision prohibited using equipment beyond design capacity so as to create hazard to miners); Freeman United Coal Mining Co. v. FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997) (reasonably prudent mine operator would understand that allowing beams supporting walkway to deteriorate to point of collapse constituted failure to maintain in good repair so as to prevent accidents and injuries to miners); Island Creek Coal Co., 20 FMSHRC 14, 24-25 (1998) (reasonably prudent mine operator would understand that six-hour flow of methane and elevated levels of methane represented safety hazard). As cited in our opening brief, MSHA Engineers John Fredland, Patrick Betoney, and Harold Owens, MSHA Inspector Robert Bellamy, MCC Superintendent Larry Muncie, MCC President and General Manager Dennis Hatfield, all testified that the seepage barrier provision meant that the fines had to be effectively distributed along the seepage

barrier to prevent leakage from the impoundment. See Secretary's Opening Brief at 22-23.

MCC's reliance on the fact that the inspector never issued a citation to MCC and never told MCC that it was doing anything inconsistent with the plan does not establish a lack of notice. Response Brief at 19. Although the fact that MSHA did not issue a citation in the past is one of the elements to be weighed in evaluating a fair notice defense, it is not a dispositive element -- that is, it is not sufficient by itself to establish that MCC was not aware of the plan's requirements. See Fluor Daniel v. OSHRC, 295 F.3d 1232, 1238-39 (11th Cir. 2002); Donovan v. Daniel Marr & Son Co., 763 F.2d 477, 484 (1st Cir. 1985); Alan Lee Good, doing business as Good Construction, 23 FMSHRC 995, 1005-06 (2001). A fair notice defense based solely on the fact that the agency has not issued a citation before amounts to an estoppel-by-inaction defense -- and the government cannot be estopped by inaction from enforcing the law. See Secretary's Opening Brief at 35-36.

III. THE JUDGE ERRED BY FAILING TO MAKE AN "S&S" DETERMINATION WITH RESPECT TO THE VIOLATION OF SECTION 77.216(d) HE AFFIRMED

The Secretary demonstrated in her opening brief that substantial evidence supports the judge's findings with respect to the first two parts of the Commission's test for determining whether a violation is significant and substantial ("S&S"). The

Secretary also demonstrated that the judge failed to analyze the evidence and make findings with respect to the third and fourth parts of the "S&S" test.

As explained in the Secretary's opening brief (pp. 36-37), 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 in question will be of a reasonably serious nature.

Mathies Coal Co., 6 FMSHRC 1, 3 (Jan. 1984). As to the first two parts of the "S&S" test the Secretary relies on the arguments in her opening and response briefs, in support of the judge's finding that there was an unusual change in flow from the South Mains Portal that was not reported to MSHA, and that the reporting failure contributed to the magnitude and timing of the impoundment failure. See Secretary's Opening Brief at 36-41; Secretary's Response Brief at 9-26.

As to the third and fourth parts of the "S&S" test, MCC asserts, in effect, that the judge made implicit findings that satisfy the Commission test. Response Brief at 20-23. MCC's transparent attempt to salvage this aspect of the judge's decision is unavailing. The judge failed to make and explain

appropriate findings with respect to the third and fourth parts of the "S&S" test, and failed to make any finding as to whether the violation was "S&S." See Eagle Nest, Inc., 14 FMSHRC 1119, 1123 (July 1992) ("A judge must analyze and weigh the relevant testimony of record, make appropriate findings, and explain the reasons for his decision."). The Commission should therefore vacate this aspect of the judge's decision and remand the case for adequate analysis and appropriate findings. Ibid.

IV. THE JUDGE ERRED IN FINDING THAT THE VIOLATION OF SECTION 77.216(d) HE AFFIRMED WAS NOT AN "UNWARRANTABLE FAILURE"

The Secretary demonstrated in her opening brief that the judge applied an incorrect "unwarrantable failure" test and that the judge failed to analyze the relevant evidence under Commission case law. MCC argues that the judge's application of a "wanton or reckless disregard" test was correct because the judge's use of the word "or" indicates that the judge applied the terms "wanton" and "reckless" in the disjunctive and found that the violation was not unwarrantable because it was neither "wanton" nor "reckless." Response Brief at 24-25. MCC's argument is misplaced.

First, it is only reasonable to assume that the judge used the term "wanton" because he believed that it is part of the Commission's "unwarrantable failure" test. It is not.

Second, the Commission has found an unwarrantable failure violation where the operator's conduct was less than reckless. See Eagle Energy, Inc., 23 FMSHRC 829, 839 (Aug. 2001) ("a finding of unwarrantable failure does not require a finding of 'reckless disregard'").

MCC also argues that the judge's reference to "life and property" in his unwarrantable failure analysis was proper. Response Brief at 25. It is only reasonable to assume that the judge used the term "property" because he believed that it is part of the Commission's "unwarrantable failure" test. It is not.

MCC also argues that the judge considered the relevant evidence under the Commission's "unwarrantable failure" case law. Response Brief at 25-28. MCC is mistaken. Although the judge discussed various items of evidence, he did not discuss that evidence in the context of an "unwarrantable failure" analysis. Because the judge failed to conduct an appropriate and adequate "unwarrantable failure" analysis, the Commission should vacate this aspect of the judge's decision and remand the case for such an analysis. See Arch of Illinois, 21 FMSHRC at 1392-93; Mid-Continent Resources, 16 FMSHRC at 1222.[2]

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[2] Contrary to MCC's claim (Response Brief at 27), the Secretary provided adequate record support in her opening brief that MCC knew or should have known that greater care in monitoring and reporting was necessary. The fact that MCC knew

V. THE JUDGE ERRED IN ASSESSING A PENALTY OF ONLY $ 5,500 FOR THE VIOLATION OF SECTION 77.216(d) HE AFFIRMED

The Secretary demonstrated in her opening brief that the judge failed to consider and make findings with respect to three of the six statutory criteria that must be considered in assessing civil penalties under Section 110(i) of the Mine Act. The Secretary also demonstrated that the judge erred because he

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that it had a similar impoundment failure in May 1994 is supported by the MSHA Report of Investigation and the impoundment sealing plan submitted to MSHA on August 10, 1994. See Secretary's Opening Brief at 30-31, citing GX-1 at p. 15 and GX-2. The fact that MCC knew that constructing a seepage barrier within the impoundment was a new design concept is supported by the testimony of MSHA expert witness Richard Almes and Geo Senior Project Manager Scott Ballard. See Secretary's Opening Brief at 34, citing Tr.II 315-18. See also MCC Opening Brief at 3, citing Tr.II 56. The fact that MCC knew that the seepage barrier had to be adequately covered with fines to control seepage into the mine is supported by the testimony of MSHA Engineers John Fredland, Patrick Betoney, and Harold Owens, MSHA Inspector Robert Bellamy, MCC Superintendent Larry Muncie, MCC President and General Manager Dennis Hatfield, and Ogden, the original drafter of the plan. See Secretary's Opening Brief at 22-23, citing Tr.I 53, 192, 486-87, 963, 1171-74, 1314; Tr.II 640; GX-2a, 2b. The fact that MCC knew that the South Mains Portal was the designated monitoring point that measured for possible impoundment leakage is supported by the MSHA Report of Investigation and the impoundment sealing plan submitted to MSHA on August 10, 1994. See Secretary's Opening Brief at 5, citing GX-1, 2.

In addition, MCC's assertion that MSHA reviewed the same data the Secretary claims should have been reported and never found any unusual change overlooks MSHA Engineer Betoney's undisputed testimony that it is the operator's responsibility to ensure that the impoundment is safe because MSHA is at the impoundment infrequently. Tr.I 629.

failed to explain why he reduced the proposed penalty by 90 percent.

MCC claims, in effect, that the judge implicitly addressed all of the statutory criteria and explained the penalty reduction. Response Brief at 28-31. Again, MCC attempts to do for the judge what the judge did not do himself. Because the judge failed to explicitly address all six statutory criteria, and because the judge failed to adequately explain why he reduced the proposed penalty, the judge committed legal error. See Cantera Green, 22 FMSHRC 616, 620-21 (May 2000). See also Virginia Slate Co., 23 FMSHRC 482, 492-95 (May 2001); Douglas R. Rushford Trucking, 22 FMSHRC 598, 602 (May 2000). The Commission should therefore vacate the judge's penalty assessment and remand the penalty issue for explicit findings and an adequate explanation. See Arch of Illinois, 21 FMSHRC at 1391-92; Mid-Continent Resources, 16 FMSHRC at 1222.

VI. 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 Secretary demonstrated in her opening brief that the judge erred in finding no violation of Section 77.216-4(a)(2) 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. None of the

arguments raised by Geo (Response Brief at 8-14) in support of the judge's finding undercuts the Secretary's argument or merits further discussion.

A. Geo Had Adequate Notice That the Pipe and Ruler Used to Measure the Impoundment Outflow from the South Mains Portal Was an Instrument under Section 77.216-4(a)(2)

Geo claims (Response Brief at 14-18) that it did not have fair notice that the pipe/ruler combination was an instrument under Section 77.216-4(a)(2) because (1) the combination was not included as an instrument in the impoundment sealing plan, (2) MSHA previously accepted the annual certifications without issuing a citation, and (3) the Secretary never told Geo that the combination was an instrument. Geo's notice claims lack merit.

Geo had adequate notice from the plain language of the standard and from the ordinary definition and specialized definition used by dam and impoundment engineers. See, e.g., Freeman United Coal Mining Co. v. FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997) (applying ordinary dictionary definition).

In addition, Geo's own actions over the course of five years demonstrate 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 October 2000. GEO has never argued, with respect to the

citation regarding the 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.[3] The fact that Geo monitored the outflow at the South Mains Portal every seven days and recorded the readings in the weekly impoundment inspection report indicates that Geo believed the pipe/ruler combination was an instrument within the meaning of Section 77.216-3.

Although Geo claims that MSHA previously accepted the annual certifications without issuing a citation (Response Brief at 17-18), that is not sufficient by itself to establish a fair notice defense. See Fluor Daniel, 295 F.3d at 1232; Daniel Marr & Son, 763 F.2d at 484; Good Construction, 23 FMSHRC at 1005-06. A fair notice defense based solely on the fact that the agency has not issued a citation before amounts to an estoppel-by-inaction defense -- and the government cannot be estopped by inaction from enforcing the law. See Secretary's Opening Brief at 35-36.

[3] MSHA issued a citation to Geo alleging a violation of Section 77.216(a)(4) because Geo's impoundment examiner was not qualified to conduct impoundment inspections. JX-4h.

VII. UNDISPUTED EVIDENCE ESTABLISHED THAT GEO, IN VIOLATION OF SECTION 77.216-3(d), FAILED TO RECORD THE ABATEMENT OF HAZARDS IN THE SEVEN-DAY IMPOUNDMENT EXAMINATION REPORT

The Secretary demonstrated in her opening brief that the judge's finding that the impoundment inspector "very tersely" noted on the seven-day inspection report dated October 12, 2000, that the impoundment breakthrough had been plugged was incorrect.

Geo asserts that, under the plain language of Section 77.216-3(d), it only had to report the abatement of a hazardous condition if the hazardous condition existed at the time of the inspection. Geo Response Brief at 19-24. Geo asserts that, under its interpretation, the abatement measures taken here did not have to be reported because the hazardous condition was abated one day before the inspection. Ibid. Geo's position is unpersuasive.

The plain language of the standard requires the report to include "the action taken" to abate a hazardous condition, not "the action to be taken" or "the action being taken." "Taken" is the past participle of "take." Webster's Third New International Dictionary (1993) at 2332. Thus, the phrase "action taken" refers to action a party took in the past. See, e.g., Secretary of Labor on behalf of Terry McGill v. U.S. Steel Mining Co., 23 FMSHRC 981, 986 (Sept. 2001) (using "action

taken" to refer to adverse action an operator took in the past); Western Fuels-Utah, Inc., 19 FMSHRC 994, 1003 (Jun. 1997) (using "action taken" to refer to abatement action an operator took in the past). Under the plain language of the standard, the report has to include abatement actions that have already been completed, i.e., abatement actions that occurred in the past.

Even if the phrase "action taken" is ambiguous -- which it is not -- the Secretary's interpretation is entitled to deference because it is consistent with the design and purpose of the standard. The fact that a qualified person has to inspect and report every seven days suggests that one has to report any hazardous condition that existed and was abated during those seven days. Indeed, if one only had to report a hazardous condition that existed at the time of the inspection, the requirement that one has to report the action taken to abate the condition would usually be superfluous because, by the time the report was submitted, the abatement action would be completed and the hazardous condition would not exist. Reporting how hazards were abated during the seven-day period also provides a comprehensive picture of what hazardous conditions arose and how those conditions were abated during the seven-day period. In contrast, reporting only abatement actions that are in the process of being taken at the time of the

inspection or are going to be taken in the future provides a picture so limited as to serve little useful purpose.

CONCLUSION

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

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CERTIFICATE OF SERVICE

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