FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 30, 2006

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

BEFORE: Duffy, Chairman; Jordan, Young, Commissioners[1]

DECISION

BY: Young, Commissioner[2]

This civil penalty proceeding, which arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act" or "Act"), involves citations and an order that were issued as a result of a slurry spill and a breakthrough at a coal waste impoundment owned and operated by Martin County Coal Corporation ("MCC") on October 10, 2000. Administrative Law Judge Irwin Schroeder affirmed four citations and dismissed four citations/orders issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") that were contested by MCC and its independent contractor, Geo/Environmental Associates ("Geo"). 26 FMSHRC 35 (Jan. 2004) (ALJ). The Secretary of Labor, MCC and Geo filed petitions for discretionary review appealing the judge's decision, which the Commission granted. For the reasons that follow, we affirm in part, reverse in part, vacate and remand in part.[3]

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[1] Commissioner Suboleski recused himself in this matter.

[2] A majority of the Commissioners joins in each section of Commissioner Young's opinion, and therefore it constitutes the Commission's decision in this case. A footnote at the beginning of each section explains which Commissioners join in that section.

[3] Administrative Law Judge Schroeder is no longer with the Commission. We therefore remand the proceeding to the Chief Administrative Law Judge for reassignment.

I.

Factual and Procedural Background

MCC, a wholly owned subsidiary of A.T. Massey Coal Company, Inc., operated the Big Branch Slurry Impoundment located near Inez, in eastern Kentucky. 26 FMSHRC at 36; Jt. Stips. 1 & 3; Tr. 4-5.[4] MCC developed the impoundment in the mid-1980s for storage of both coarse refuse and slurry (fine refuse). 26 FMSHRC at 37; Gov't Ex. 1, at 2. Prior to the 2000 breakthrough, the impoundment had a depth of 221 feet and a surface area of 68 acres. Gov't Ex. 1, at 2. It held 2.125 billion gallons of water. *Id*.

The impoundment was located adjacent to a preparation plant and two underground mines. *Id*. The preparation plant employed 23 persons and processed approximately 7,500 tons of clean coal daily from MCC's underground and surface mines. *Id.* An overland belt conveyor transported the coarse coal refuse from the preparation plant to the impoundment, where it was then pumped into the impoundment as slurry. *Id.*

MCC operated two underground mines adjacent to the impoundment, the 1-S (Stockton Seam) Mine and 1-C (Coalburg Seam) Mine. *Id*. The 1-S Mine had ceased mining by the time of the 2000 impoundment breakthrough and was not involved in the breakthrough accident. *Id.* The 1-C Mine employed six underground miners and two surface miners. *Id.* At the time of the breakthrough, most of the 1-C mine had been abandoned, and coal was not being produced. *Id*. The only active portions of the 1-C Mine were the Nos. 1-3 North Mains through which belt conveyors transported coal from various MCC mines to the preparation plant. *Id*. These mains were isolated from the abandoned workings in the 1-C Mine by seals. *Id.*; Jt. Ex. 3.

A. 1994 Breakthrough

On May 22, 1994, water and slurry broke into the abandoned mine workings of the 1-C Mine. 26 FMSHRC at 37-38; Gov't Ex. 1, at 13-14; MCC Ex. P. The water drained through the mine and resulted in discharges from the mine at three locations, including the South Mains Portal on the west side of the mine. MCC Ex. A1, at 012291; Gov't Ex. 1, at 14, Fig. 25. Nearly 112 million gallons of slurry and water were discharged. Gov't Ex. 1, at 14. The outflow in the 1994 breakthrough was mostly water and caused no significant downstream damage. *Id.* The void was filled with spoil material from the surrounding hillside, and the failure was plugged. *Id.*; MCC Ex. A1, App. 1 at 012302. According to the 1994 MSHA accident investigation report, the breakthrough occurred through an opening created by a collapse of the mine roof or by water from the impoundment penetrating a natural hill seam in the roof rock. Gov't Ex. 14, at 14-15. The report recommended that the impoundment plan be modified to prevent a recurrence. *Id*. at 15.

[4] The transcript from the hearings held on June 9 through June 12, 2003 is referred to as "Tr." and the transcript from the hearings on August 4 through August 7, 2003 is referred to as "Tr. I."

B. 1994 Impoundment Sealing Plan

On May 23, 1994, the day after the breakthrough, Ogden Environmental & Energy Services ("Ogden"), a geotechnical engineering consulting firm hired by MCC, prepared an Impoundment Sealing Plan with remedial measures (the "May Plan"). 26 FMSHRC at 38; MCC Ex. 1, App. 1. MCC then submitted an Impoundment Sealing Plan to MSHA on August 10, 1994 (the "August Plan"), which incorporated the May Plan. Gov't Ex. 2; MCC Ex. A1, at 012289 & App. 1. After MSHA first reviewed the August Plan, it did not approve the plan. *See* Gov't Ex. 2A (letter of Sept. 9, 1994); MCC Ex. J. MCC provided additional information to MSHA on October 5, 1994, and the revised Impoundment Sealing Plan was approved by MSHA on October 20, 1994. 26 FMSHRC at 38; Gov't Ex. 2A.

The May Plan, under the heading of "Short Term Plan," stated:

> Flow from the South Mains entry will be monitored daily, until 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 the appropriate mine management. All necessary remedial measures will be implemented.

MCC Ex. A1, App. 1 at 012303. The August Plan called for the construction of a seepage barrier around the perimeter of the impoundment except for those portions which did not have mine works below. 26 FMSHRC at 38. The seepage barrier was to be constructed using the spoil material from the Stockton Seam, which consisted of highly permeable shot sandstone material. *Id*.; Gov't Ex. 1, at 16-17; MCC Ex. A1, at 012295. The plan contemplated that once the seepage barrier was constructed, fine refuse material would be deposited on the barrier to decrease permeability of the barrier. 26 FMSHRC at 38. The plan provided that "fine refuse shall be directed along the barrier by periodically redirecting the discharge of fine refuse slurry." MCC Ex. A1, at 012297. Construction of the seepage barrier occurred between February and September of 1995. 26 FMSHRC at 39; Gov't Ex. 1, at 16.

The August Plan also required installation of reinforced seals separating the abandoned workings, which had been flooded by the 1994 breakthrough, from the active areas of the mine to protect miners in the event of another breakthrough. MCC Ex. A1, at 012297. However, because of construction difficulties, the seals were not constructed in accordance with that plan. Gov't Ex. 1, at 18; Tr. 436-38. On September 7, 1995, MCC submitted a revised seal plan that called for strengthening the existing seals with gunite and steel reinforcement. Gov't Ex. 1, at 18-19; Gov't Ex. 7. The revised plan was approved by MSHA on September 29, 1995. Gov't Ex. 1, at 18-19; Gov't Ex. 7; Tr. 437-39. The reinforced seals were constructed in February and March of 1996. Gov't Ex. 1, at 18.

C. Hiring of Geo to Monitor Impoundment, Including the South Mains Portal

In February 1996, MCC hired Geo, an engineering consulting firm employing several former Ogden engineers, to perform weekly impoundment monitoring and to prepare impoundment annual reports and certifications. Gov't Ex. 6; Tr. I 684-85, 693-95, 757, 762-63. Generally, the weekly inspections of the impoundment were performed and recorded by Eddie Howard, a field technician for Geo. 26 FMSHRC at 39, 41; Gov't Ex. 6. Howard provided the results of his inspection to both MCC and to his supervisors at Geo. 26 FMSHRC at 39, 41. One of the weekly measuring points was the flow of water from the South Mains Portal, which had been a discharge point in the 1994 breakthrough. *Id.*; MCC Ex. A1, at 012292, App. V (plan view showing South Mains as discharge point); Gov't Ex. 6. The amount of water from the South Mains area of the mine was determined by measuring the height of water in the outflow pipe from a small pond constructed at the foot of the South Mains Portal. 26 FMSHRC at 40. Howard recorded the flow in inches with a ruler. *Id*. at 40, 48-49.

D. 2000 Breakthrough

On October 10, 2000, at approximately 4:00 p.m., belt examiner Mathias Simpkins entered the 1-C Mine to examine and clean the belts. Gov't Ex. 1, at 3; Tr. 359-61. He remained in the mine until 11:50 p.m. Gov't Ex. 1, at 3. He then radioed the dispatcher to report that he had just left the mine. *Id.* While Simpkins was still talking to the dispatcher, Lovell Tony Bowen, an electrician who was working on an overland belt, radioed the dispatcher at 12:05 a.m. that the belt had stopped. *Id*. The dispatcher displayed the belt monitor screen on his computer, which indicated that the 2 North belt was off. *Id*. Simpkins unsuccessfully attempted to restart the belt. *Id.* Bowen traveled in his truck to the 2 North Portal where he observed slurry flowing out of the portal at high velocity and at a height of approximately 3 feet. *Id*. & Fig. 8. Bowen reported his findings to the radio dispatcher. Gov't Ex. 1, at 3. Bowen and Simpkins traveled to the South Mains Portal where they observed an outpouring of slurry greater than at the North Portal, creating a large gully just below the portal. *Id*. at 4 & Fig. 9; Tr. 351-52, 373-74. Simpkins reported the impoundment breakthrough to the foreman of the preparation plant. Gov't Ex. 1, at 4.

The dispatcher contacted the President of MCC, Dennis Hatfield, at approximately 1:15 a.m. *Id*. At 1:40 a.m., all miners were withdrawn from the preparation plant and it was closed. *Id*. Bulldozers began to push soil material into the breakthrough at approximately 2:00 a.m. and the breakthrough was plugged at approximately 4:30 a.m. *Id*. MSHA was contacted at 3:00 a.m. *Id.* As a result of the breakthrough, more than 300 million gallons of slurry-laden water had rushed out of the impoundment and into adjacent streams, eventually reaching the Ohio River. 26 FMSHRC at 41; Gov't Ex. 1, at 4, Figs. 10, 11. Some families were evacuated from their homes, but no lives were lost. Gov't Ex. 1, at 4; 26 FMSHRC at 41.

MSHA assembled a team of investigators and sent them to the scene. 26 FMSHRC at 42. An extensive investigation ensued, and one year later MSHA issued the following citations and order:

Citation No. 7144401, alleging a significant and substantial ("S&S") and unwarrantable failure violation of 30 C.F.R. § 77.216(d) for failure to follow the approved plan because MCC failed to report to MSHA any unusual change in flow quantity or quality from the South Mains Portal;

Order No. 7144402, alleging an S&S and unwarrantable failure violation of section 77.216(d) for not following the approved plan that required MCC to periodically direct the fine refuse slurry discharge along the seepage barrier;

Citation No. 7144403, alleging a violation of section 77.216(d) because MCC failed to construct the underground mine seals in accordance with the approved plans;

Citation Nos. 7144404 and 7144408, alleging that MCC and Geo, respectively, failed to include reference to the underground seals in the annual report and certifications in violation of 30 C.F.R. § 77.216-4(a)(7);

Citation No. 7144409, alleging a violation of 30 C.F.R. § 77.216-3(d) for Geo's failure to indicate the actions taken to abate the hazardous conditions after the impoundment breakthrough on the required 7-day examination report;

Citation No. 7144410, alleging that the annual reports prepared by Geo failed to include the maximum and minimum readings for the South Mains Portal outflow pipe in violation of 30 C.F.R.§ 77.216-4(a)(2);

Citation No. 7144411, alleging that the weekly examinations conducted by Geo were performed by an unqualified inspector who had not received annual refresher training in violation of 30 C.F.R. § 77.216-3(a)(4).

E. Proceedings Before the Administrative Law Judge

A hearing was held in two parts before Judge Schroeder. A majority of the lay witnesses were heard during the week of June 9, 2003. 26 FMSHRC at 36. The expert witnesses and the remaining lay witnesses were heard during the week of August 4, 2003. *Id*. Prior to issuing his decision, the judge dismissed two of the Secretary's claims: (1) Order No. 7144402, alleging that MCC violated section 77.216(d) for its failure to direct the slurry along the seepage barrier on the impoundment; and (2) Citation No. 7144409, alleging that Geo violated the requirement in section 77.216-3(d) to note the abatement measures on the 7-day examination report. 8/28/03 Order.[5]

[5] At the end of the Secretary's case on June 12, 2003, MCC and Geo moved to dismiss the Secretary's case and the judge initially orally dismissed Order No. 7144402 and Citation No. 7144409. Tr. 1221, 1245, 1247. On July 2, 2003, the judge issued an Order Granting Partial Motion to Dismiss, memorializing his earlier ruling and dismissing the two claims. On August 4, 2003, in response to the Secretary's motion for reconsideration, the judge agreed to

The judge issued his decision on January 14, 2004. 26 FMSHRC at 35. As a preliminary matter, the judge noted that he did not make a determination of the cause of the impoundment failure because it was not at issue in any of the citations or orders before him. *Id*. at 42. The judge found that MCC violated section 77.216(d) by not complying with the impoundment plan provision governing the reporting of unusual changes in water flow quantity from the South Mains Portal during September 1999. *Id*. at 46-47. He did not discuss the related S&S designation and also determined that the violation was not a result of unwarrantable failure. *Id*. at 47. The judge found that both MCC and Geo violated section 77.216-4(a)(7) by not including a reference to the underground seals construction in the annual certification reports.[6] *Id*. at 48. The judge dismissed Citation No. 7144410, which alleged that Geo failed to include the readings for the South Mains Portal outflow pipe in the annual reports under section 77.216-4(a)(2). *Id*. at 48-49. The judge directed MCC to pay a civil penalty of $5,600 and Geo to pay a civil penalty of $100 for all of its violations. *Id*. at 50.

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hear the testimony of the Secretary's expert witness. Tr. I 36. On August 7, after hearing the Secretary's witness, the judge again stated that the Secretary had not established a claim as to Order No. 7144402, regarding the redirecting of the slurry discharge along the seepage barrier. Tr. I 990-92. On August 28, 2003, the judge issued an Order Denying Motion to Reconsider Dismissal of Citations, which dismissed the order and the citation. Appendix A of the judge's decision also sets forth his reasoning for dismissing Order No. 7144402. 26 FMSHRC at 51.

[6] Although Geo has filed an appeal of this violation, MCC has not. In addition, two other citations that are discussed in the judge's decision have not been appealed and are no longer at issue before the Commission. *See* 26 FMSHRC at 47-49 (Citation No. 7144403, in which the judge found a violation of section 77.216(d) for seals that were not constructed in accordance with the approved plan; Citation No. 7144411, in which the judge dismissed a violation of section 77.216-3(a)(4) for inspections by an unqualified inspector).

II.

Disposition

A. Summary Dismissal of Order No. 7144402[7]

The judge vacated the Secretary's order alleging a violation of section 77.216(d)[8] for MCC's failure to comply with a provision of the Impoundment Sealing Plan that requires the operator to "periodically redirect" the coal refuse discharge along the seepage barrier. 26 FMSHRC at 51. In that order, the Secretary maintained that the failure to perform the task resulted in an inadequate seepage barrier which, in turn resulted in the impoundment failure. *Id*. The judge found that the Secretary never established a prima facie case. *Id.* He reasoned that the Secretary failed to establish that prudent mining engineers in 1994 would have understood the provision to require what the Secretary contended was necessary and that the slurry discharge methods that the Secretary alleged were required under this provision were "far from standard industry practice." 8/28/03 Order, at 4; *see also* 26 FMSHRC at 51.

The Secretary alleges that the judge prematurely dismissed Order No. 7144402 without considering documentary evidence and deposition testimony directly related to the violation. She further maintains that the judge failed to engage in any analysis with respect to the plain meaning or ambiguity of the "seepage barrier" provision that the Secretary advanced and with which MCC agreed. Additionally, the Secretary asserts that if the provision is ambiguous, her interpretation of the plan provision is reasonable and thus entitled to deference. MCC counters that the judge correctly dismissed the order at the proper time in the proceedings. It argues that the judge correctly found that it complied with the plain meaning of the provision. Additionally, MCC asserts that the Secretary is not entitled to deference in interpreting the plan provision.

Preliminarily, the first question we consider is whether the Secretary was fully heard on Order No. 7144402. Commission Rule 63(b) states in pertinent part: "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). Federal Rule of Civil Procedure 52(c) entitled "Judgment on Partial Findings" states in part: "If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim . . . that cannot under the controlling law be

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[7] Commissioner Jordan joins Commissioner Young in Part. II.A of this opinion.

[8] 30 C.F.R. § 77.216(d) provides:

> The design, construction, and maintenance of all water, sediment, or slurry impoundments and impounding structures . . . shall be implemented in accordance with the plan approved by the District Manager.

maintained . . . . Such a judgment shall be supported by findings of fact and conclusions of law . . . ."[9]

The judge initially dismissed the Secretary's claim prior to the time that all her evidence was presented (Tr. 1221, 1245, 1247; 7/2/03 Order). On June 12, 2003, at the hearing, the Secretary offered the deposition testimony of Steven Gooslin, the preparation plant foreman, which was admitted only minutes before the judge directed a verdict dismissing the Secretary's claim. Tr. 1220, 1245. Nonetheless, on August 4, 2003, the judge agreed to hear the testimony of the Secretary's remaining expert witnesses. Tr. I 36. Therefore, on balance, the judge had an opportunity to hear and address the Secretary's entire case. The Secretary also faults the judge for failing to specifically address the evidence raised after his initial dismissal rulings. A judge, however, does not need to address every point of evidence and must only include findings and conclusions on "material issues of fact [and] law." 29 C.F.R. § 2700.69(a). Accordingly, although the judge's rulings were somewhat disjointed, he heard all the evidence presented relating to Order No. 7144402 and, under Rule 63, the Secretary was heard on all the facts.[10]

With regard to the plan provision at issue, the Impoundment Sealing Plan states "Following the completion of the 'seepage barrier' fine refuse shall be directed along the barrier by periodically redirecting the discharge of fine refuse slurry." MCC Ex. A1, at 012297. It is well established that plan provisions are enforceable as mandatory standards. *UMWA v. Dole*, 870 F.2d 662, 671 (D.C. Cir. 1989); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 409 (D.C. Cir. 1976); *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995); *Jim Walter Res., Inc.*, 9

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[9] Commission Rule 1(b) states:

> On any procedural question not regulated by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. ("the Act"), these Procedural Rules, or the Administrative Procedure Act (particularly 5 U.S.C. 554 and 556), the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure.

29 C.F.R. § 2700.1(b).

[10] MCC incorrectly argues that the issue was not properly preserved for appeal under Federal Rule of Civil Procedure 59 because the Secretary failed to raise the argument that further proof was necessary prior to the judge's June 12, 2003 dismissal. MCC Resp. Br. at 5. Rule 59 provides for new trials and the amendment of final judgments. *Building Indus. Ass'n of Superior CA v. Sec'y of Interior*, 247 F.3d 1241, 1245 (D.C. Cir. 2001) (providing that Rule 59 applies only to final judgments). However, the judge did not enter a decision in this case until January 14, 2004. 26 FMSHRC at 35. The Secretary properly brought her June 20, 2003 motion to reconsider the judge's orders of dismissal at the interlocutory stage of the proceedings, and appropriately sought review of the issue by filing a petition for discretionary review with the Commission within 30 days of the judge's decision. 30 U.S.C. § 823(d)(2)(A)(i); 29 C.F.R. § 2700.70(a).

FMSHRC 903, 907 (May 1987) ("*JWR*"). As such, the law governing the interpretations of regulatory standards is applicable to plan provisions. *Energy West*, 17 FMSHRC at 1317.[11]

The "language of a regulation . . . is the starting point for its interpretation." *Dyer v. United States*, 832 F.2d 1062, 1066 (9th Cir. 1987) (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)). Where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written unless the regulator clearly intended the words to have a different meaning or unless such a meaning would lead to absurd results. *See id.*; *Utah Power & Light Co.*, 11 FMSHRC 1926, 1930 (Oct. 1989); *Consolidation Coal Co*., 15 FMSHRC 1555, 1557 (Aug. 1993). It is only when the meaning is ambiguous that deference to the Secretary's interpretation is accorded. *See Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (finding that reviewing body must "look to the administrative construction of the regulation if the meaning of the words used is in doubt") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)).

As the Secretary correctly asserts, the judge failed to evaluate what the provision plainly means and then to determine whether there was a violation of the provision. In dismissing the violation, the judge simply pointed to the fact that the Secretary failed to prove that the phrase "periodic redirecting" of slurry would have been understood by prudent mining engineers in 1994 to mean re-locating the slurry pipe. 26 FMSHRC at 51; 8/28/03 Order, at 4. The judge seemed to suggest that the Secretary was arguing that the slurry discharge pipe had to be re-located along the seepage barrier in order to fulfill the requirements of the plan provision. However, the Secretary's argument was not so narrow. Her motion to reconsider the dismissal order states that the phrase "periodic re-directing" of slurry, in the circumstances of this impoundment, would mean to move the slurry discharge pipe or take "some equivalent action so that fine refuse is deposited between the impoundment pool . . . and the seepage barrier." S. Mot. to Reconsider Orders of Dismissal (6/20/03), at 9. *See also* S. Br. at 20 ("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."); Tr. 9 (Secretary's Opening Argument asserting that MCC "failed to ensure that fine

[11] We dispute the concurrence's assertion that our "interpretative approach directly contradicts established Commission case law." Slip op. at 28. *See Energy West,* 17 FMSHRC at 1316-17 (applying controlling Commission case law on regulatory interpretation to interpretation of ventilation plan). We need not address the concurrence's assertion that plan provisions are treated "very differently from mandatory standards," Slip op. at 28 (citing *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280-81 (Dec. 1998) and *JWR*, 9 FMSHRC at 906-08), or the deference arguments raised by the parties because we determine that the plan provision is plain. *See Exportal Ltda v. United States*, 902 F.2d 45, 50 (D.C. Cir. 1990) (quoting *Pfizer, Inc. v. Heckler*, 735 F.2d 1502, 1509 (D.C. Cir. 1984) ("Deference . . . is not in order if the rule's meaning is clear on its face.")

coal refuse was deposited along the impoundment seepage barrier."); *see also* Tr. I 20. Thus, the judge's focus was incorrect and his analysis incomplete.[12]

"In determining the meaning of regulations, the Commission . . . utilizes 'traditional tools of . . . construction,' including an examination of the text and the intent of the drafters." *Amax Coal Co.*, 19 FMSHRC 470, 474 (Mar. 1997) (quoting *Local Union 1261, UMWA v. FMSHRC,* 917 F.2d 42, 44-45 (D.C. Cir. 1990)). In a plain meaning analysis, the Commission also looks to the language and design of the Secretary's regulations as a whole. *New Warwick Mining Co.*, 18 FMSHRC 1365, 1368 (Aug. 1996).

Based on its plain language, the plan provision requires the operator to place or cause to move fine refuse over the length of the seepage barrier by regularly changing the course of the slurry discharge. This plain meaning was also recognized by both MSHA and MCC. MCC Superintendent Larry Muncie testified that the Impoundment Plan required that the slurry be "repositioned and redistributed" so that it became part of the seepage barrier. Tr. 1170-75. MCC President and General Manager Dennis Hatfield also testified that one plan provision stated "as slurry was pumped into the impoundment . . . it would be redirected throughout the impoundment pool and effectively coat the seepage barrier." Tr. 1312-13. Likewise, MSHA engineers who were part of the investigation team testified that the plan required the slurry fines to be distributed along the seepage barrier. Tr. 192, 486-87. The primary MSHA inspector for the impoundment, Robert Bellamy, testified that the plan required the operator to use whatever means necessary to direct the slurry discharge along the seepage barrier. Tr. I 639-41.

The Impoundment Plan clearly states the purpose of the seepage barrier. The plan provides that:

> The purpose of the "seepage barrier" is twofold. The primary purpose for the barrier will be to reduce, to the extent practical, seepage from the impoundment that could contribute to the occurrence of another "breakthrough." Secondarily, the barrier will provide bulk that will collapse into the subsided area in the event another "breakthrough" occurs and should form a "plug," limiting the amount of fine coal refuse and water entering the mine.

MCC Ex. A1, at 012294. Inherent in the language of the impoundment plan is the requirement that the operator take the necessary measures to fulfill the purpose of the action mandated, as clearly set forth in the plan. Here, the plan required MCC to ensure that fine slurry was distributed along the length of the seepage barrier so as to prevent and limit the impact of another breakthrough.

Reading the provision at issue within the context of the overall plan is consistent with the Commission's construction of mine plans in accordance with well-settled rules of construction.

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[12] Our concurring colleague is similarly focused on the means used to comply with the clear mandate of the plan provision at issue. Slip op. at 27.

Mettiki Coal Corp., 13 FMSHRC 3, 7 (Jan. 1991) ("a written document must be read as a whole, and . . . particular provisions should not be read in isolation"). Because the plan contains an express purpose and the meaning of the provision is apparent, the operator, as we have previously held in *RAG Cumberland Resources, LP*, must carry out the activities required under the plan in an effective manner. *See* 26 FMSHRC 639, 647-48 (Aug. 2004), *aff'd, Cumberland Coal Res., LP*, 2005 WL 3804997, at *2 (D.C. Cir. 2005) (unpublished) (requiring compliance to be undertaken in an "effective manner."). It is incumbent upon MCC to ensure that its compliance with the plan is effective, especially given its past history with impoundment failures.[13] MCC does not sufficiently comply with the impoundment plan by merely pumping fine slurry into the impoundment without ensuring that the fines have accomplished the stated purpose, which is to adequately cover the seepage barrier "to reduce, to the extent practical, seepage from the impoundment that could contribute to the occurrence of another 'breakthrough.'" MCC Ex. A1, at 012294. This interpretation of the plan provision is also consistent with the purpose of section 75.216, which governs impoundment plans. As the Commission found, the purpose of section 75.216 "is to assure the safety of impoundments and minimize the risk and effect of failure." *Monterey Coal Co.*, 5 FMSHRC 1010, 1017 (June 1983).

According to the plain meaning of the plan provision, MCC was required to cover the seepage barrier with fines in order to fulfill the purpose of the provision. The judge, however, never addressed whether MCC adequately complied with the provision. The evidence in the record is not conclusive on this issue. *Compare* Tr. I 565 *with* Tr. 479 (Inspector Bellamy testifying that he saw the slurry discharge pipe being moved, whereas the MSHA investigation revealed that water level in the impoundment was above the slurry fines indicating inadequate fines against the barrier); MCC Foreman Gooslin Dep. Tr. 56-57 (testifying that there was clear water up against the seepage barrier in the pump area). Accordingly, we vacate the judge's dismissal of Order No.7144402. Furthermore, because fact-finding is not the province of the Commission, we remand the question of whether MCC provided effective coverage of the seepage barrier under the terms of the Impoundment Plan. *See Mid-Continent Res.*, 16 FMSHRC 1218, 1222-23 (June 1994) (holding that remand appropriate when judge failed to adequately address evidentiary record); *RAG Cumberland Res*., 26 FMSHRC at 647-48. *See also Wyoming Fuel Co.,* 16 FMSHRC 19, 21 (Jan. 1994) (providing that attempting to comply with the provisions of a plan does not allow one to escape from liability). If the judge on remand finds a violation, it will then be necessary to determine whether the violation is S&S and the result of unwarrantable failure.

[13] The questions relied on by our concurring colleague (e.g., must the fines "cover every square inch of the seepage barrier?" Slip op. at 27), to reach the conclusion that the provision is ambiguous are simply evidentiary matters best left to the judge on remand.

B. Summary Dismissal of Citation No. 7144409[14]

The judge found that there was insufficient evidence to establish a violation of section 77.216-3(d)[15] for Geo's alleged failure to record the abatement of hazards in the 7-day impoundment examination report. 7/2/03 Order. He determined that Geo's impoundment inspector "very tersely" noted "that the impoundment breakthrough had been plugged." 8/28/03 Order, at 5. The judge found that this notation sufficiently met the requirement that a 7-day inspection report include, among other things, a report of the action "taken to abate hazardous conditions." *Id*. at 4-5.

The Secretary asserts that the judge erroneously dismissed Citation No. 7144409 because he found that the Geo inspector's report stated that the impoundment breakthrough had been plugged when it simply did not mention any abatement measure. Geo responds that the judge correctly dismissed the citation.

The 7-day report does not state that the impoundment breakthrough had been plugged, as the judge incorrectly held. Gov't Ex. 10. The report makes no mention of plugging or stopping the breakthrough that had occurred a day earlier. *Id.* The report only indicates that "all water and some fines were lost from slurry pool due to mine breakthrough." *Id*. Therefore, we conclude that the judge erred.[16]

We are not persuaded by Geo's assertion that its inspector did not have to mention any abatement measure because there was no hazard at the time of the inspection. Section 77.216-3(d) requires that the monitoring report include "the action taken to abate hazardous conditions." The plain language of the standard requires a reporting of "the action taken." Thus, under the standard's plain meaning, actions in the past, or at least since the last report 7 days ago, should be recorded. Additionally, the Secretary's interpretation of reporting actions taken since the last 7-day report provides a comprehensive picture of the impoundment from week to week. If one were to accept Geo's interpretation that it was required to report only hazards that existed at the time of the inspection, significant events would not have to be mentioned. Such a result would thwart the safety-promoting purpose of the standard and the Mine Act and must be avoided. *Consolidation*, 15 FMSHRC at 1557.

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[14] Chairman Duffy and Commissioner Jordan join Commissioner Young in Part II.B of this opinion.

[15] 30 C.F.R. § 77.216-3(d) provides in pertinent part: "All examination and instrumentation monitoring reports . . . shall include a report of the action taken to abate hazardous conditions."

[16] As discussed in the preceding analysis, the judge did have an opportunity to hear all of the Secretary's evidence relating to Citation No. 7144409 prior to finally dismissing the claim on August 28, 2003. Accordingly, we reject the Secretary's assertion that the judge committed a procedural error in granting the partial dismissal.

Of course, here, we note that MSHA issued an order pursuant to section 103(k), 30 U.S.C. § 813(k), at 9:00 on the morning following the breakthrough, and issued nine modifications of that order over the next several days. MCC Ex. CC. Consequently, not only was MSHA apprised of the ongoing abatement activity during the operative time period, the order required MCC to seek permission from the agency before each phase of the abatement could proceed. Thus, MCC was complying with the spirit, if not the letter, of the requirements of section 77.216.

Nevertheless, because the inspection report does not state that the impoundment breakthrough was abated, we reverse the judge and find a violation based on undisputed evidence. *American Mine Services, Inc*., 15 FMSHRC 1830, 1834 (Sept. 1993) (remand unnecessary because evidence justified only one conclusion). In remanding the matter for an assessment of a civil penalty under Mine Act section 110(i), 30 U.S.C. § 820(i), we note that this is a bookkeeping violation of a de minimis nature, given that MSHA was at the scene the day after the failure, and because of the agency's ongoing awareness of all abatement efforts undertaken under the aegis of the section 103(k) order in force when this report was required to be written.

C. Citation No. 7144401

1. Violation[17]

The judge found that MCC violated section 77.216(d) by failing to report unusual changes in water flow quantity from the South Mains Portal during September 1999, as required by the Impoundment Sealing Plan. 26 FMSHRC at 46-47. He determined that the Impoundment Sealing Plan required the operator to report unusual flows to MSHA. *Id.* at 38, 46. He reasoned that the record was clear that there was a large increase in flow that occurred approximately a year prior to October 2000 and that neither MCC nor Geo evaluated or reported the flow data. *Id*. at 47. The judge determined that a "prudent" look at the data would have provided a warning that further study of the condition was warranted and that "much more could and should have been done here." *Id*. He also found that the failure to evaluate the South Mains Portal flow data contributed in some measure to the magnitude and timing of the impoundment failure. *Id.*

MCC asserts that the judge committed error in finding that the reporting provision, which was part of the short-term May Plan, was a requirement of the permanent Impoundment Sealing Plan. It also argues that the judge's determination of violation is not supported by substantial evidence. The Secretary responds that substantial evidence supports the judge's finding that MCC failed to report an "unusual" change in water flow. She maintains the text of the Impoundment Sealing Plan plainly requires monitoring of the South Mains. Additionally, the Secretary urges that her interpretation, that such monitoring was required under the Impoundment Sealing Plan, was reasonable and entitled to deference.

[17] Chairman Duffy joins Commissioner Young in Part II.C.1 of this opinion.

Turning to MCC's first argument, we address whether the South Mains reporting requirement is part of the Impoundment Sealing Plan. The South Mains reporting requirement is found under the heading "Short-Term Plan" in the May Plan, which is incorporated into and designated as an appendix to the August Plan. MCC Ex. A1, at 012303. The judge found that the May Plan was part of the August Plan when he stated that the May 1994 plan "became an Impoundment Sealing Plan that was approved by MSHA on October 20, 1994." 26 FMSHRC at 38. Substantial evidence supports this preliminary determination.[18]

MSHA Inspector John Fredland, who has reviewed impoundment plans for 20 years, testified that "when a plan is approved in stages, the previous plan stays in effect and the new plan just covers changes" (Tr. 25, 223, 306), and that a long-term plan does not supercede a shorter-term plan, unless express changes are submitted. Tr. 305-06. Inspector Bellamy also considered the May short-term plan in effect and advised MCC to continue taking readings of the South Mains when he noticed that it had missed a few in 1999. Tr. I 592, 599-601, 627-28. In addition, MCC's actions support the view that the plan required South Mains monitoring because MCC continued to monitor the point after the August Plan was in place. Gov't Ex. 6.

It was within the judge's province to weigh the evidence and make any credibility determinations. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp*. v. *NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)). The judge found, in agreement with the testimony of the MSHA inspectors, that "since the monitoring requirement has never been removed from the Impoundment Sealing Plan, the requirement is still present." 26 FMSHRC at 38. *See Metric Constructors, Inc.,* 6 FMSHRC 226, 232 (Feb. 1984) (providing that when a judge's finding rests on credibility determination, Commission will not substitute its judgment for that of judge absent clear indication of error), *aff'd,* 766 F.2d 469 (11th Cir. 1985).

The judge also determined that the plain language in the May Plan required weekly monitoring of the South Mains to continue. 26 FMSHRC at 38. He pointed to the text, which said: "Flow from the South Mains entry will be monitored daily until remedial work at the seepage point is completed. Monitoring will be done during regular impoundment inspections *after that*." *Id.* (emphasis original). He reasoned that the phrase "after that" indicated monitoring was to continue after the short-term remedial measures and, since the monitoring

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[18] When reviewing an administrative law judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co*., 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

requirement was never removed from the Impoundment Plan, the requirement remained. *Id.* This holding is supported by the aforementioned testimony of MSHA witnesses.

The judge's holding is consistent with other language in the plan, which states that MCC was to continue to monitor the area of the breakthrough and the discharge points. MCC Ex. A1, at 012292. The South Mains was the major discharge location in the 1994 breakthrough and, as MCC witness Muncie testified, it was "the lowest elevation point of the Impoundment so if anything was amiss the South Mains discharge would be a good indicator of a problem that needed investigation." Tr. 1180. Thus, from a practical standpoint it made sense to continue to monitor this point.

As the judge found: "The purpose of the Plan was to contain the risk of failure of the pool structure as the pool level increased. The requirement for monitoring the flow of water from South Mains Portal was included in the Plan for the purpose of alerting responsible parties to the level of risk posed by the impoundment as time passed." 26 FMSHRC at 46. Thus, we agree with the judge that the requirement to monitor the South Mains and to report any unusual changes in flow quality or quantity that would indicate possible impoundment leakage to MSHA was part of the permanent Impoundment Sealing Plan.

With regard to the judge's conclusion that MCC violated the plan provision by failing to report unusual changes in water flow to MSHA, we believe that a remand is necessary. At the outset, we agree in large part with the basic approach taken by the judge to address the issue of whether a violation occurred. In particular, we agree with the judge that MCC should have assessed the water flow levels at the South Mains Portal with a heightened degree of scrutiny given the prior impoundment failure and the fact that "as the pool level rose the risk of failure rose." *Id*. at 47. As the judge stated, "[i]n the context of this increasing risk of impoundment failure, I would expect a reasonably prudent mining engineer to pay increasing attention to warning which might have been derived from the South Mains Portal flow data properly appreciated." *Id.*

However, we cannot uphold the judge's decision because he failed to explain what test he applied in determining whether "unusual changes" took place, to explain how he weighed competing testimony in the record, to make explicit findings to support his conclusion that a violation occurred, and to set forth a discernible path that allows the Commission to perform its review function.

The Commission requires that a judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent*, 16 FMSHRC at 1222. The D.C. Circuit has explained that, "[p]erhaps the most essential purpose served by the requirement of an articulated decision is the facilitation of judicial review." *Harborlite Corp. v. ICC*, 613 F.2d 1088, 1092 (D.C. Cir. 1979). Without findings of fact and adequate justification for the conclusions reached by a judge, we cannot perform our review function effectively. *Anaconda Co.*, 3 FMSHRC 299, 300 (Feb. 1981) (citations omitted).

As an initial matter, the judge does not clearly explain what test he used to determine whether the Impoundment Plan was violated and how he applied any such test. In particular, he does not define the key phrase "unusual changes" in the context of the Impoundment Plan and does not explain how this definition is linked to his ultimate conclusion that MCC violated the Plan. The closest that he comes to setting forth a definition of "unusual changes" is his statement that "[w]eekly and even monthly changes in the flow amount, *in the absence of water quality changes or catastrophic increases in quantity*, were probably meaningless to the people who reviewed the information." 26 FMSHRC at 47 (emphasis added). However, the judge does not explicitly apply this formulation as his test. Moreover, he states that "[i]t is significant that there was no change in the water quality, i.e., no coal refuse fines were being transported by the increased water flow" (*id*. at 40-41), and he nowhere finds that any increases in water flow were "catastrophic," nor does he explain or define that term. This language appears to be dicta, as the standard merely requires reporting of "unusual" changes, not "catastrophic" shifts. The judge's observation concerning the meaning attached to "[w]eekly and . . . monthly changes in the flow amount" is at odds with his conclusion that he would have expected a reasonably prudent mining engineer to more closely observe the flow data from the South Mains Portal. *Id*. at 47.

Beyond this, the judge failed to adequately address the evidence before him, to explain how he weighed the competing testimony in the record, and to make necessary factual findings. The relevant part of the judge's opinion discussing the question of whether a violation occurred (*id.* at 46-47) contains no citations to any testimony, contains no credibility determinations, does not attempt to resolve the competing testimony in the record, and contains no findings that provide a clearly discernible basis for the conclusion that a violation occurred. In particular, although the judge concluded that the plan had been violated in some manner, he never explicitly found anywhere in his opinion that MCC had failed to report "unusual changes" in water flow to MSHA, which is the precise matter at issue here.

Similarly, while there is extensive documentary and testimonial evidence showing a sharp and sustained increase in flows from the South Mains Portal, and while the judge noted the context created by the 1994 breakthrough, the judge does not otherwise adequately explain what path he followed to reach his conclusion that a violation occurred. It is highly significant that perhaps the most important sentence in his opinion is badly garbled and is not even a complete sentence. The judge states at one point: "While I am persuaded by the testimony that the Fall 1999, flow data (even when related to various sources of rain fall information) does not prove that the failure began then or even at any particular time [sic]." *Id*. at 47. Key words were obviously omitted from this "sentence," but we can only guess what they were and what the judge intended to say. Because of the uncertainty of what the judge attempted to say in this pivotal sentence and the surrounding text, a remand is warranted.

In summary, because the judge's opinion fails to articulate the basis for his conclusion and omits necessary findings, we cannot affirm it. Although we take no position on whether the record demonstrates that there were "unusual changes" in water flow that should have been reported by MCC, the judge's opinion falls far short of providing adequate support for his conclusion that the Plan was violated. We hereby remand this issue so that another judge can

review the evidence in detail and provide a coherent discussion of the legal issues involved. If the judge finds a violation, further analyses of the S&S nature and the unwarrantable failure of the violation will be warranted. The judge erred in his discussion of both the S&S and unwarrantable failure issues, and so we provide the following instruction.

2. S&S[19]

Although the Commission's test for an S&S violation is mentioned in a preliminary discussion in the decision, the judge did not address the S&S designation for the violation. 26 FMSHRC at 43-44, 47 (citing *Mathies Coal Co*., 6 FMSHRC 1, 3-4 (Jan. 1984)). He merely stated that the failure to evaluate the South Mains Portal flow data contributed in some measure to the magnitude and timing of the impoundment failure. *Id.* at 47.

The S&S terminology is taken from section 104(d) of the Mine Act, 30 U.S.C. § 814(d), and refers to more serious violations. A violation is S&S if, based on the particular facts surrounding the violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *See Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). In *Mathies*, the Commission further explained:

> In order to establish that a violation of a mandatory safety standard is significant and substantial under *National Gypsum*, the Secretary of Labor must prove: (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.

6 FMSHRC at 3-4 (footnote omitted).

The judge never made findings as to whether the violation was S&S. Under Commission Rule 69(a), the judge is responsible for addressing "all findings of fact and conclusions of law, and the reasons or bases for them, on all the material issues of fact, law or discretion presented by the record." The parties contend that the judge made findings that support each of their respective views. The Secretary states that the judge found the first two elements of the *Mathies* test whereas MCC argues that the judge did not find the violation to be S&S. Without explicit findings by the judge, it is impossible to evaluate his decision on this issue.

The Commission requires that a judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent*, 16 FMSHRC at 1222. "Without findings of fact and some justification for the conclusions reached

[19] Chairman Duffy and Commissioner Jordan join Commissioner Young in Part II.C.2 of this opinion.

by a judge, we cannot perform our review function effectively." *Anaconda*, 3 FMSHRC at 300. Accordingly, if the judge newly assigned to this case finds a violation of section 77.216(d), we remand for a full *Mathies* analysis of whether the violation of section 77.216(d) contained in Citation No. 7144401 is S&S.

3. Unwarrantable Failure, Negligence, and Penalty[20]

The judge found that the violative conduct did not amount to an unwarrantable failure "in the sense of wanton or reckless disregard for the risks to life and property." 26 FMSHRC at 47. He assessed the negligence as moderate, found the $55,000 penalty proposed by the Secretary to be excessive and assessed a penalty of $5,500. *Id*. at 47, 49-50.

The Secretary argues that the judge erred in finding that the violation of section 77.216(d) was a result of moderate negligence and not an unwarrantable failure. She contends that, instead of applying the Commission's test, the judge applied an incorrect unwarrantable failure test when he stated that MCC's conduct was not "wanton or reckless disregard for the risks to life and property." *Id*. at 47. The Secretary also asserts that the judge erred in assessing the penalty for the violation because he failed to: (1) make findings with respect to three of the six statutory criteria under section 110(i) of the Mine Act; and (2) explain why he reduced the proposed penalty by 90%. MCC submits that the judge's moderate negligence finding is erroneous, as MCC was not negligent with regard to this violation. It also argues that the Commission should not overturn the judge's determination of no unwarrantable failure and that the Secretary's argument is hypertechnical. In addition, MCC contends that the judge's penalty reduction is supported by the evidence.

The unwarrantable failure terminology is taken from section 104(d) of the Act, 30 U.S.C. § 814(d), and refers to more serious conduct by an operator in connection with a violation. In *Emery Mining Corp.*, 9 FMSHRC 1997 (Dec. 1987), the Commission determined that unwarrantable failure is aggravated conduct constituting more than ordinary negligence. *Id.* at 2001. Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or a "serious lack of reasonable care." *Id.* at 2002-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test). The Commission examines various factors in determining whether a violation is unwarrantable, including the extent of a violative condition, the length of time that it has existed, whether the violation is obvious or poses a high degree of danger, whether the operator has been placed on notice that greater efforts are necessary for compliance, and the operator's efforts, made prior to the issuance of the citation or order, in abating the violative condition. *Mullins & Sons Coal Co*., 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *Quinland Coals, Inc*., 10 FMSHRC 705, 709 (June 1988); *Kitt Energy Corp*., 6 FMSHRC 1596, 1603 (July 1984); *Midwest Material*, 19 FMSHRC at 34; *Enlow Fork Mining Co.*, 19 FMSHRC

[20] Chairman Duffy and Commissioner Jordan join Commissioner Young in Part II.C.3 of this opinion.

5, 11-12, 17 (Jan. 1997). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000).

The judge failed to utilize the Commission's established test for unwarrantable failure. Notwithstanding MCC's argument, the judge's error was more than semantic. "Wanton" is defined as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences. In criminal law, wanton usu[ally] connotes malice . . . , while reckless does not." *Black's Law Dictionary* 1613 (8th ed. 2004). "Wanton" involves an element of malice, which is simply not required for a finding of unwarrantable failure. Malice denotes much more than aggravated conduct. Thus, the judge utilized too demanding a standard for unwarrantable failure.

In addition, the judge failed to examine any of the factors referred to above that the Commission reviews when determining whether a violation is a result of unwarrantable failure. As we noted earlier, the Commission requires that a judge analyze and weigh all probative record evidence, make appropriate findings, and explain the reasons for his or her decision. *Mid-Continent*, 16 FMSHRC at 1222. Given the absence of any meaningful findings, we remand the determination of negligence and unwarrantable failure, again, should a violation of the standard be found.[21]

As to the penalty, the Commission's judges are "accorded broad discretion in assessing civil penalties under the Mine Act." *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986). Such discretion is not unbounded, however, and must reflect proper consideration of the penalty criteria set forth in section 110(i) and the deterrent purpose of the Act.[22] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The

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[21] Because of the close relation between unwarrantable failure and negligence, on remand, if the judge finds a violation, he must make a complete analysis of unwarrantable failure under the correct standard and determine the proper level of negligence attributable to the violation. *See Emery*, 9 FMSHRC at 2001 (reasoning that unwarrantable failure constitutes more than ordinary negligence).

[22] Section 110(i) sets forth six criteria to be considered in the assessment of penalties under the Act:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i).

judge must make "[f]indings of fact on each of the statutory criteria [that] not only provide the operator with the required notice as to the basis upon which it is being assessed a particular penalty, but also provide the Commission and the courts . . . with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient." *Sellersburg,* 5 FMSHRC at 292-93. "[A]ssessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal." *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984). In reviewing a judge's penalty assessment, we must determine whether the judge's findings with regard to the penalty criteria are in accord with these principles and supported by substantial evidence.

The judge analyzed only three of the penalty criteria, finding that MCC is a large operator; that the $55,000 penalty MSHA proposed would not hinder MCC's ability to stay in business; and that MCC's negligence in failing to report changes in the South Mains water flow quantity was moderate. 26 FMSHRC at 36, 47. Because we are remanding the issue of unwarrantable failure, we vacate the judge's finding on negligence. In addition, the judge failed to address three other penalty criteria: the gravity of the violation; MCC's history of violations; and MCC's demonstrated good faith in attempting to achieve rapid compliance after notification of the violation.[23]

Accordingly, if a violation is found, we direct the judge on remand to address fully all six elements of the penalty criteria.

D. Citation No. 7144408[24]

The judge found that both MCC and Geo violated section 77.216-4(a)(7)[25] by not referring to the underground seals construction in the annual reports and failing to provide certifications for the seals in those reports. The judge rejected Geo's argument that it had no certification responsibility since it did not perform underground engineering. 26 FMSHRC at 48. The judge reasoned that even though Geo did not work underground, that was not a reason to omit underground features in the annual certification and that a certifying engineer should have at least noted the exclusion of the underground seals so that a supplementary certification of the

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[23] The judge also failed to explain in any detail why he reduced the penalty significantly from $55,000 to $5,500. As stated in *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000), an explanation for a substantial divergence between the Secretary's original penalty proposal and the judge's penalty assessment is "particularly essential."

[24] Chairman Duffy joins Commissioner Young in Part II.D of this opinion.

[25] Section 77.216-4(a) provides in pertinent part that "every twelfth month following the date of the initial plan approval, the person owning, operating, or controlling a water, sediment, or slurry impoundment . . . shall submit to the District Manager a report containing the following information: . . . (7) [a] certification by a registered professional engineer that all construction, operation, and maintenance was in accordance with the approved plan."

seals could have been obtained. *Id*. The judge concluded that the degree of negligence was very low and assessed a civil penalty of $100 each for both MCC and Geo. *Id*. at 48-50. MCC did not appeal the determination that it violated the certification requirement.

Geo argues that the judge erred in finding a violation against it because it was cited for a task, i.e., certifying the seals, that it was not hired to do and for something over which it had no control. It contends that the Secretary abused her enforcement discretion in citing it for the violation, when it is not "the person owning, operating, or controlling a water, sediment, or slurry impoundment" under section 77.216-4(a).[26] The Secretary responds that Geo, as an independent contractor, qualifies as a person operating an impoundment under the plain language and meaning of section 77.216-4(a). The Secretary asserts that if the standard is deemed ambiguous, her interpretation is reasonable and entitled to deference. Additionally, the Secretary argues that substantial evidence supports the judge's finding that Geo was properly cited for the violation.

The threshold question with regard to this violation is who was required to file the annual report mandated by section 77.216-4(a). The judge erred by never analyzing the plain terms of section 77.216-4(a) to answer this question. *Dyer*, 832 F.2d at 1066 (citing *Consumer Products Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980) (holding that the "language of a regulation . . . is the starting point for its interpretation"). The language of the standard imposes the annual reporting requirement on "the person owning, operating, or controlling" an impoundment and states that this person will submit "*a* report" to the MSHA District Manager. 30 C.F.R. § 77.216-4(a) (emphasis added). Thus, the standard itself contemplates that a single person – the one owning, operating, or controlling the impoundment – is responsible for the submission and validity of a single annual report.

Further examining the regulatory language, we note that the phrase "owning, operating or controlling" is not defined in the regulation. Thus, we consider the ordinary meaning of the words. *Lopke Quarries, Inc.*, 23 FMSHRC 705, 708 n.2 (July 2001). "Own[ing]" is defined as having "rightful title to." *Webster's Third New Int'l Dictionary* (Unabridged) (1993) at 1612. "Operating" is defined as "perform[ing] a work or labor; . . . manag[ing] and . . . keep[ing] in operation; . . . engaged in active business." *Id.* at 1580-81. "Controlling" is "exercis[ing] restraining or directing influence over." *Id.* at 496-97. Because we determine that the language of the regulation is plain, we need not address the Secretary's arguments that her interpretation of the standard is entitled to deference. *Exportal*, 902 F.2d at 50.

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[26] The Secretary argues that Geo failed to raise before the judge the contention that section 77.216-4(a) does not apply to it because Geo is not a "person owning, operating or controlling" an impoundment. Although it is true that Geo did not explicitly raise the argument below, the argument is sufficiently intertwined with Geo's assertions to the judge that it was not the operator of the impoundment and should not be cited under the standard, such that the issue is properly the subject of review. *Beech Fork Processing, Inc.*, 14 FMSHRC 1316, 1319-21 (Aug. 1992).

It is undisputed that MCC owned the Big Branch Slurry Impoundment. The record demonstrates that MCC was also responsible for managing the impoundment, for keeping it in operation on a day-to-day basis, and for controlling it. For example, the record reveals that the Superintendent of the adjacent MCC preparation plant, an MCC official, was responsible for the daily operation of the impoundment and the disposal of refuse from the plant into the impoundment. Tr. 1257. Among other things, the MCC Superintendent, Larry Muncie, had overall responsibility for carrying out the Impoundment Sealing Plan (Tr. 1167), for monitoring the condition of the impoundment (Tr. 1150), and for ensuring that the refuse went to the proper locations (Tr. 1150). He also decided whether and when to pump clear water from the impoundment to the preparation plant. Tr. 1188-90. He assigned each shift foreman to inspect the impoundment during each shift and to look for leakage, boils, erosion, or anything else abnormal. Tr. 1178. Muncie also personally inspected the impoundment at least once during each shift that he worked (Tr. 1206-07) and personally inspected the South Mains Portal at least three times per week (Tr. 1178). In addition, he reviewed the 7-day monitoring reports submitted to him by Eddie Howard, a Geo employee; signed the reports to finalize them; and was responsible for deciding whether problems raised by the reports needed to be addressed. Tr. 1151-1154. Thus, under the plain terms of section 77.216-4(a), MCC was clearly "the person owning, operating, or controlling" the impoundment. As a result, MCC was solely responsible under section 77.216-4(a) for submitting the annual report to MSHA.[27]

The record also reveals that Geo was hired by MCC as an engineering consultant to monitor the condition of the impoundment and to provide annual certifications covering the Impoundment Sealing Plan. Tr. I 693-694, 762-763; Gov't Ex. 9. Geo, as the engineering consultant, prepared the annual reports for 1995 through 2000 on behalf of MCC. Gov't Ex. 9. Each report contained a description of the construction that MCC had undertaken during the preceding year, certain monitoring results from the impoundment, and certification by a registered engineer from Geo that, during the preceding year, all construction and maintenance activities had been carried out in accordance with approved plans. Tr. I 110-111; Gov't Ex. 9. Each year the reports, which expressly stated that they were prepared "on behalf of" MCC (Gov't Ex. 9), were initially submitted by Geo to MCC. Tr. I 117. Subsequently, MCC would either submit the report to MSHA itself or request that Geo send it directly to MSHA on its behalf. Tr. I 117-118. Accordingly, Geo's duties encompassed far less than controlling or operating the impoundment itself as contemplated by the standard. Geo, the registered engineer hired by MCC

[27] Indeed, as mentioned above, MSHA issued a citation to MCC alleging that the annual report was deficient because it did not contain a certification addressing the underground seals as required by section 77.216-4(a)(7). Citation No. 7144404. MCC did not appeal the judge's decision upholding that citation. We note that the judge incorrectly stated that Citation Nos. 7144404 (against MCC) and 7144408 (against Geo) pertained to the seal certification for 1995, when, in fact, the citations covered all reporting periods after the mine seal work was completed in 1996. 26 FMSHRC at 48.

to conduct certain monitoring and to make certifications, was not "the person owning, operating, or controlling" the impoundment. Thus, section 77.216-4(a) is inapplicable to Geo in this case.[28]

We also reject the Secretary's argument that Geo is covered by the standard because as an independent contractor, it is generally considered an "operator" under the Mine Act. Section 3(d) of the Mine Act defines an "operator" as including an "independent contractor performing services" at a mine. 30 U.S.C. § 802(d). The Secretary's argument lacks merit because section 77.216-4(a) does not contain the word "operator."[29] Instead, the regulation applies to "the person owning, operating, or controlling" the impoundment. If the Secretary intended for the statutory definition to apply, she could have simply used the term "operator" or defined the term "operating" in section 77.216-4(a) to include independent contractors. Indeed, the fact that the Secretary did not expressly include those terms in light of the well-known definition of "operator" leads us to conclude that something other than the statutory definition of "operator" applies in section 77.216-4(a).

Likewise, the Secretary's use of the term "operator" in the preamble to the rule does not establish that all independent contractors fall under the reach of the standard. 57 Fed. Reg. 7468, 7469-70 (Mar. 2, 1992). First, a preamble is "not officially promulgated" and does not take precedence over the express words of the regulation. *See King Knob Coal Co., Inc.*, 3 FMSHRC 1417, 1420 (June 1981) (quoting *H.B. Zachry v. OSHRC*, 638 F.2d 812, 817 (5th Cir. 1981) (providing that "the express language of a statute or regulation 'unquestionably controls' over material like a . . . manual"). Under the plain terms of section 77.216-4(a), only "the person owning, operating, or controlling" the impoundment would be subject to the annual reporting

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[28] Our dissenting colleague discusses Geo's monitoring and certification duties and then concludes, without elaboration, that these duties constituted "manag[ing] and . . . keep[ing] in operation" the impoundment. Slip op. at 32. Among other things, this conclusion ignores the fact, as discussed above, that MCC owned the impoundment, operated it on a day-to-day basis, and made all final decisions regarding what actions should be taken at the impoundment. Moreover, the case cited by the dissent, *Bituminous Coal Operators' Assoc., Inc. v. Sec'y of Interior*, 547 F.2d 240, 246 (4th Cir. 1977), does not support the position that Geo was operating or controlling the impoundment. In that decision, the court held that construction companies that are excavating and constructing portions of an underground mine are "controlling or supervising" a mine within the meaning of the Mine Act. *Id.* By contrast, the record in this case contains no evidence that Geo, an engineering consultant, engaged in any excavation or construction activities, supervised any MCC employees who were doing so, or otherwise supervised the operation of the impoundment.

[29] Even if section 77.216-4(a) applied to "operators" of an impoundment, which it does not, MSHA apparently did not cite Geo because it was the "operator" of the Big Branch impoundment. MSHA Engineer Theodore Betoney, the MSHA official who issued Citation No. 7144408 to Geo, was asked by the judge if he was suggesting that Geo was the "operator" of the Big Branch impoundment. Betoney answered "No." Tr. 647.

requirement. Second, nowhere does the preamble expressly state or even imply that the rule applies to independent contractors.

Finally, the position that Geo could be cited as an independent contractor for violating section 77.216-4(a) ignores the specific nature of that standard. Section 77.216-4(a) creates an annual reporting requirement that, by its terms, is applicable to "*the* person owning, operating, or controlling" the impoundment (emphasis added). For purposes of this case, such a narrowly prescribed reporting requirement is very different from a more broadly worded, non-reporting safety standard. With regard to such a general safety standard (e.g., "Machinery and equipment shall be operated only by persons trained in the use of and authorized to operate such machinery or equipment"),[30] the responsibility for complying with the standard can rest with the production operator, an independent contractor, or both, depending on the circumstances. But the responsibility for complying with a specific reporting requirement such as that in section 77.216-4(a) rests solely with the person designated by the standard to submit the report, absent explicit regulatory language providing otherwise.

Under section 77.216-4(a), MCC was solely responsible for submitting the annual report, including engineering certifications, as "the person owning, operating, or controlling" the Big Branch impoundment. Therefore, we reverse the judge's finding of violation against Geo and vacate Citation No. 7144408.

E. Citation No. 7144410[31]

The judge dismissed Citation No. 7144410, which alleged that Geo failed to include the readings for the South Mains portal outflow pipe in the annual reports under section 77.216-4(a)(2).[32] 26 FMSHRC 48-49. He reasoned that the critical issue was whether the South Mains portal outflow pipe combined with a ruler constituted an "instrument" for purposes of this regulation, and therefore the readings had to be listed in an annual report submitted to MSHA.

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[30] 30 C.F.R. § 77.404(b).

[31] Chairman Duffy and Commissioner Jordan join Commissioner Young in Part II.E of this opinion.

[32] Section 77.216-4(a) provides in pertinent part:

> [E]very twelfth month following the date of the initial plan approval, the person owning, operating or controlling a . . . slurry impoundment . . . shall submit to the District Manager a report containing the following information:
>
> . . . .
>
> (2) Location and type of installed instruments and the maximum and minimum recorded readings of each instrument for the reporting period.

Id. The judge found that the pipe was not an "instrument" as it was not identified as such on the plan view.[33] *Id*.

The Secretary argues that 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. Geo responds that the judge should be affirmed because the drainage pipe was not an "instrument," as it was not listed as an "instrument" in the plan view.

Section 77.216-4(a) requires that the annual report to MSHA contain the "[l]ocation and type of installed instruments and the maximum and minimum recorded readings of each instrument for the reporting period." Both the parties and the judge overlook one of the plain requirements of the standard: the instrument must be "installed." *See Dyer*, 832 F.2d at 1066 (providing that where the language of a regulatory provision is clear, the terms of that provision must be enforced as they are written).

The evidence was undisputed that the Geo examiner utilized a ruler within a drainage pipe to measure the outflows from the South Mains. This type of measuring device would seem to fit the common definition of "instrument." However, it clearly does not trigger the reporting requirement of section 77.216-4(a)(2) because the ruler, which was carried by the examiner, was not "installed" in any manner. Therefore, because only "installed" instruments are covered under section 77.216-4(a)(2), we reject as unreasonable the Secretary's interpretation that the pipe and ruler should be listed in the annual report and the resultant readings should be included in the report. Accordingly, although we employ different reasoning, we affirm the judge's dismissal of Citation No. 7144410 in result.

III.

Conclusion

With respect to Order No. 7144402 (redirecting the fines) against MCC, we vacate the judge's dismissal of the order and remand consistent with the instructions in this decision. If the judge finds a violation, additional analyses of whether the violation is S&S and a result of unwarrantable failure will be necessary. As to Citation No. 7144409 (7-day report) against Geo, we reverse the dismissal, find a violation, and remand for the assessment of a civil penalty. With respect to Citation No. 7144401 (reporting of unusual changes in water flow) against MCC, we vacate and remand the finding of a violation, the negligence finding, the S&S determination, the unwarrantable failure determination, and the penalty determination. As to Citation No. 7144408 (certification of seals) against Geo, we reverse and dismiss. With respect to Citation No. 7144410 (inclusion of flow readings in the annual report) against Geo, we affirm in result the

[33] A plan view is a detailed dimensional drawing of an impoundment. *See, e.g.,* Jt. Ex. 2. Plan views must accompany a proposed impoundment plan and be submitted to MSHA. 30 C.F.R. §§ 77.216 & 77.216-2.

judge's dismissal. On remand, the judge may re-open the record to take additional evidence or for further briefing, as needed.

Michael G. Young, Commissioner

Chairman Duffy, concurring:

I join Commissioners Young and Jordan in vacating the judge's dismissal of Citation No. 7144402 and remanding the matter for further fact-finding. I would remand the "redirecting the fines" issue to the newly assigned judge because it is unclear what analysis the judge below used to conclude that no violation occurred. The judge concluded that the Secretary had failed to make a prima facie case on this issue, but the judge's discussion is so incomplete and confused that we can only guess as to the precise reasoning he used. Similarly, although it appears that the judge attempted to apply the "reasonably prudent person" test, there is no adequate explanation of how he concluded that the operator lacked sufficient notice of the interpretation relied upon by the Secretary.

While I agree that this matter should be remanded, I am concerned about the majority's approach to interpreting the provisions of the Impoundment Sealing Plan in addressing this issue. For example, the majority decision argues that the words of the plan provision in question are clear and therefore that a "plain meaning" approach must apply here. Slip op. at 9-11. However, the question is not whether each discrete word within the provision has a plain meaning based upon a review of dictionary definitions. Instead, the key question is whether it is clear what the statement "fine refuse shall be directed along the barrier by periodically redirecting the discharge of fine refuse slurry" meant in the context of this case where each side believes that its interpretation is consistent with the plain meaning of the words in a mutually agreed upon plan provision.

Although it is undisputed that the fines had to be periodically redirected, it is not clear from the words alone precisely what the phrase "periodically redirect" means here: Did MCC have to periodically move the outlet pipe itself? Was it sufficient if MCC instead periodically changed the direction in which the pipe was aimed without actually moving it? Was it sufficient if fines were being periodically redirected by the natural water flows within the impoundment? The issue is made even more complicated by the Secretary's position that the plan should be interpreted as requiring compliance by "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." S. Br. at 25 (emphasis added). What is an adequate amount of fines? Were the fines required to cover every square inch of the seepage barrier? How high along the rim of the impoundment were the fines required to reach? A plain meaning analysis simply cannot resolve these kinds of questions.[34]

Based on the foregoing, I think the conclusion is inescapable that the relevant words of the plan provision are ambiguous and/or silent with regard to key issues raised by this case. Because the plan provision is ambiguous and/or silent, the question is what is the correct

[34] My purpose in writing a separate concurring opinion in this case is not to endorse any particular answers to the questions I have raised above. Instead, my purpose is to demonstrate that a "plain meaning" approach to the words of the plan provision simply cannot be stretched to work in this case.

approach for the Commission to take in interpreting the provision. The majority opinion incorrectly states that, because a plan provision is enforced as a mandatory standard, the same rules of deference apply in interpreting a plan provision as would apply in interpreting a mandatory standard promulgated by the Secretary, i.e., the Secretary's interpretation should be upheld if it is reasonable. Slip op. at 8-9. As shown below, the majority's interpretive approach directly contradicts established Commission case law and ignores the fact that plan provisions are measures negotiated between MSHA and the operator,[35] not regulations promulgated by the Secretary.

The Commission has made clear that, in interpreting plan provisions, it will treat plan provisions very differently from mandatory standards promulgated by the Secretary. With regard to plan provisions, the Secretary has the burden of showing that a plan provision applies to an operator and that the condition or practice in question violated the provision.[36] *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275, 1280-81 (Dec. 1998); *Jim Walter Res., Inc.*, 9 FMSHRC 903, 906-08 (May 1987) ("*JWR*"). As stated in *Harlan Cumberland*, "When a plan provision is ambiguous, the Secretary may establish the meaning intended by the parties by presenting credible evidence as to the history and purpose of the provision, or evidence of consistent enforcement." 20 FMSHRC at 1280 (footnote and citation omitted). In *JWR*, the Commission ruled that the Secretary had failed to meet his burden in upholding his interpretation of a plan provision, where (1) the record contained "no detailed and consistent testimony from the Secretary's witnesses illuminating the meaning of the . . . provision" and (2) "the Secretary presented no evidence of any prior consistent enforcement of the . . . provision that might have established that [the operator] was on notice regarding the Secretary's interpretation of the

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[35] As explained by the Commission, "[t]he ultimate goal of the approval and adoption process is a mine-specific plan with provisions understood by both the Secretary and the operator and with which they are in full accord." *Jim Walter Res.*, *Inc*. 9 FMSHRC 903, 907 (May 1987) ("*JWR*").

[36]The majority decision cites *Energy West Mining Co.*, 17 FMSHRC 1313, 1317 (Aug. 1995), for the proposition that plan provisions are interpreted in the same way as regulatory standards. Slip op. at 9. However, the majority greatly overstates the authority of *Energy West,* which simply states that plan provisions are "enforceable" as mandatory standards, but does not discuss the controlling Commission case law on burden of proof and deference in the context of plan provisions. The principle that the Commission should not defer to the Secretary's interpretation of plan provisions as though they were promulgated standards is underscored by the nature of the plan provision involved here. The provision was set forth in a bid proposal by an independent contractor that was subsequently submitted to MSHA and ultimately approved as the Impoundment Plan. Obviously much less deference is due to the Secretary's interpretation of a bid proposal drafted by a third party than in the case of a regulatory standard that is drafted and proposed by the Secretary, subjected to notice and comment rulemaking, and published as a provision of the Code of Federal Regulations.

meaning of the provision." 9 FMSHRC at 907-08. *See also Harlan Cumberland*, 20 FMSHRC at 1281.

Accordingly, on remand, I believe the judge must determine whether the Secretary has met her burden of demonstrating the meaning of the plan provision in question through evidence of the history of the provision, e.g., contemporaneous memos or letters, testimony of persons involved in the negotiating and approval process, opinions from experts regarding whether the words had a generally accepted technical meaning, or evidence of consistent enforcement. Furthermore, as explained in *JWR*, 9 FMSHRC at 908, the operator must have been adequately put on notice as to MSHA's intended meaning. Thus, a proper analysis based on the "reasonably prudent person" test (*see U.S. Steel Mining Co.*, 27 FMSHRC 435, 438-44 (May 2005)) should be conducted in conjunction with the analysis set forth in *Harlan Cumberland* and *JWR*. Once the meaning of the plan provision has been properly determined, the judge should engage in fact-finding to ascertain whether MCC complied with the provision.

Finally, I am also concerned about certain language in the majority decision stating that compliance with the plan provision in question must be carried out in "an effective manner." Slip op. at 10-11. Although I agree that the fines had to be redirected in a way that was fully consistent with the intent of the plan provision – once that intent is determined – I believe that there is a danger that "effectiveness" might be equated with whether or not a breakthrough of the seepage barrier occurred. It is important to recognize that a breakthrough might have occurred through natural forces even though the fines were distributed along the seepage barrier as well as humanly possible. Conversely, the operator might have failed to comply with the plan provision even though no breakthrough occurred. Moreover, the plan itself stated that the seepage barrier served two separate purposes: (1) to reduce seepage from the impoundment that could contribute to the occurrence of another breakthrough; and (2) to provide bulk that would collapse if another breakthrough were to occur and form a "plug" that would limit the amount of refuse and water entering the mine. MCC Ex. A1, at 012294. Thus, the plan itself recognized that a breakthrough might occur even if fines were "effectively" distributed along the seepage barrier.

In summary, I agree with my colleagues that the judge's decision vacating Citation No. 7144402 should be reversed and remanded to the newly assigned judge. However, I would direct that judge not to use a "plain meaning" approach to interpreting the plan provision and instead to follow established Commission precedents in ascertaining the meaning of the plan provision intended by the parties.

Michael F. Duffy, Chairman

Commissioner Jordan, concurring in part and dissenting in part:

Although I join in the remainder of the majority opinion, I do not agree with the decision of my colleagues to remand to the judge the issue of whether MCC violated the plan provision by failing to report unusual changes in water flow to MSHA, nor in their reversal of the judge's finding of violation against Geo for its failure to include references to the underground seals construction in the annual certification reports.

A. Citation No. 7144401 - Failure to Report Unusual Changes in Water Flow

I agree with the majority's ruling that the requirement to monitor the South Mains and to report any unusual changes in flow or quality or quantity that would indicate possible impoundment leakage to MSHA was part of the permanent Impoundment Sealing Plan. The next question is whether substantial evidence supports the judge's finding that MCC violated the provision by failing to report unusual changes in water flow to MSHA and by failing to implement necessary remedial measures. The record revealed that from 1994 to September 1999, the average flow measurement from the South Mains was 5.5 inches. Gov't Ex. 1, at 26 and Fig. 38; Tr. 298. In September 1999, the average flow rose to 8.6 inches. Gov't Ex. 1, at 26 and Fig. 38; Tr. 298-99, 811-15. The increase in flow represented a 56% increase in flow depth.[37] Tr. 502-03, 980-81. MSHA engineering expert Richard Almes testified that this change represented a marked increase and was unusual. Tr. I 333-36; *see also* Tr. 1067-70. MSHA Technical Support Inspector Fredland testified that the flow increase was significant and had roughly doubled. Tr. 131. He also explained that, as the increase was not accounted for by rainfall or other factors, the increase could indicate a possible leak in the impoundment. Tr. 131-32, 244-45. I conclude that a 56% increase in flow that occurred approximately a year prior to the October 2000 impoundment failure should be viewed as out of the ordinary, or "unusual."

It is true that evidence was introduced that calls this finding into question. MCC Preparation Plant Superintendent Muncie and the weekly Geo examiner Howard testified that the weekly data did not give them any indication of an unusual change, and its expert discerned no changes that would have been cause for concern. Tr. 1218-19; Tr. I 222-24. MCC expert engineer Chris Lewis reviewed the data and discerned no changes that would have given him concern. Tr. I 889-90. Barry Thacker, President of Geo, also testified that the increase in flow would have naturally occurred as the impoundment level increased. Tr. I 698-703, 780-81. MCC introduced evidence that showed that other factors, such as surface run-off from the surrounding watershed, affected the flow in the South Mains. MCC Br. at 9-10. MCC witnesses testified that for an unusual change to happen, the color of the water had to darken, which did not occur. Tr. I 68-69, 224, 464; 26 FMSHRC 35, 40-41 (Jan. 2004) (ALJ). Additionally, MSHA Inspector Bellamy, who regularly inspected the impoundment, also did not detect an unusual

[37] The judge excluded evidence of converting the flow measurements from inches to gallons per minute, which would establish an even greater increase in flow at the time of September 1999. Tr. 838-39, 981.

change in the weekly data and no citations were ever issued for failing to report an unusual change to MSHA. Tr. I 568-69.

However, the Secretary effectively rebutted this evidence. For example, as to the South Mains flow stemming from surface run-off, MSHA Inspector Fredland testified that the main contributor to the South Mains Portal pond was the impoundment, and there was only a small percentage of water coming from the mine or surface run-off. Tr. 226-28. MSHA witnesses also testified that an unusual change would not necessarily involve darker water or particles in the outflow because of the far distance between the impoundment and the South Mains portal and because the solids would settle out before arriving at the South Mains. Tr. 601-03. The record revealed, and the judge found, that MCC and Geo personnel never evaluated the readings over time and so never perceived any change in the data. Tr. 300-02, 504; 26 FMSHRC at 47. MSHA engineer Patrick Betoney testified that unless MCC or Geo monitored the flow by simply plotting the data, there would be no way to monitor the flow accurately. Tr. 505, 626-28. He believed this was especially important given the earlier breakthrough and one of the key items in the plan was monitoring the flow data. Tr. 505. Similarly, MSHA expert Almes testified that "any competent dam engineer . . . is very sensitive to seepage flows related to impoundments" and even more "particularly" "because of a history of a major breakthrough." Tr. I 338.

As to the fact that the MSHA inspector also did not notice an unusual change, MSHA engineer Betoney testified that Inspector Bellamy was at the impoundment on a very infrequent basis – perhaps yearly. Tr. 628. He stated that the inspectors did not graph the flow, as they were not there on a daily or weekly basis. Tr. 626. He testified that an inspector ensures that the weekly inspection is performed in the first place and might look a few months back at the data, but the inspector is not familiar enough with the impoundment to make an overall assessment of the flow. Tr. 627-29. In addition, the Commission has repeatedly held that lack of previous enforcement of a safety standard does not constitute a defense to a violation, and that estoppel does not generally apply against the Secretary. *U.S. Steel Mining Co.*, 15 FMSHRC 1541, 1546-47 (Aug. 1993) (citing *King Knob Coal Co.*, 3 FMSHRC 1417, 1421-22 (June 1981); *Bulk Transp. Serv., Inc.*, 13 FMSHRC 1354, 1361 n.3 (Sept. 1991)).

Because the judge's determination that MCC violated the plan provision requirements to monitor the South Mains and report unusual changes to MSHA (26 FMSHRC at 38, 47) is supported by substantial evidence, I would affirm his finding. *See Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993) (providing that Commission cannot overturn judge's findings that are supported by substantial evidence). Consequently, I believe that a remand is unnecessary. A remand to a new judge (which will be necessary because Judge Schroeder is no longer with the Commission) is particularly inappropriate in this case, as the second judge did not hear the live testimony of the witnesses, so he or she is in no better position than we are in that regard, and will simply have to comb the record for relevant evidence, as has already been done here.

I also disagree with the majority's view that a remand is necessary because the judge "never explicitly found anywhere in his opinion that MCC had failed to report 'unusual changes'

in water flow to MSHA, which is the precise issue at question here." Slip op. at 16. On the contrary, MCC conceded, and the judge found, that "[n]o unusual flows were reported to MSHA." 26 FMSHRC at 46; Tr. 7. Furthermore, the judge explicitly found that "[o]f particular significance is the large increase in flow that occurred approximately a year prior to the October 2000, impoundment failure." 26 FMSHRC at 47.

Moreover, the majority insists on a remand because the judge did not clearly explain what test he used to find a violation, and did not define the phrase "unusual changes." Slip op. at 16. I believe my colleagues are unnecessarily complicating this issue. I do not believe that any "test" need be applied here, and I believe that the judge need not have defined "unusual changes" because the plain meaning of the term is fairly obvious to any reader.[38]

B. Citation No. 7144408 - Failure to Reference Underground Seals Construction in the Annual Certification Reports

The majority's view that 30 C.F.R. § 77.216-4(a) does not apply to Geo is not consistent with the wording of the regulation, nor with the evidence in the record. The standard at issue provides in pertinent part that:

> [E]very twelfth month following the date of the initial plan approval, the person owning, operating, or controlling a water, sediment, or slurry impoundment . . . shall submit to the District Manager a report containing the following information: . . . (7) [a] certification by a registered professional engineer that all construction, operation, and maintenance was in accordance with the approved plan.

30 C.F.R § 77.216-4(a). Even under the dictionary definition of the term "operating" employed by the majority, Geo fits squarely within the purview of this regulation.

The majority defines "operating" as "perform[ing] a work or labor; . . . manag[ing] and . . . keep[ing] in operation; . . . engaged in active business." Slip op. at 21. Its own description of Geo's actions at the impoundment demonstrate that Geo was managing the operation there.

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[38] I believe my colleagues confuse the judge's use of the term "catastrophic increases" in his opinion. The judge stated that "weekly and even monthly changes in the flow amount, in the absence of water quality changes or catastrophic increases in quantity, were probably meaningless to the people who reviewed the information." 26 FMSHRC at 47. I believe he simply meant that the water flow data reviewed by MCC and Geo were probably meaningless viewed in a vacuum, and were only useful when compared to a long-term analysis of changes in flow over a period of time, and that absent such a long-term analysis, the reviewers would only have been alerted to problems if the water quality changed or if there were a catastrophic increase in quantity. Nowhere did he indicate that a change in water flow would only be considered "unusual" if it were "catastrophic."

MCC hired Geo to take over the engineering consultant role, to perform weekly impoundment monitoring, and to prepare impoundment annual reports and certifications. Slip op. at 4. Furthermore, the majority recognizes that "Geo was hired . . . to monitor the condition of the impoundment and to provide annual certifications covering the Impoundment Sealing Plan." Slip op. at 22. Yet in the next breath, and with no explanation or discussion whatsoever, it simply offers the conclusory statement that "Geo's duties [were] far less than controlling or operating the impoundment itself as contemplated by the standard." *Id*.

The evidence in the record does not support this assertion. As Geo itself explains, G. Br. at 2, it performed weekly inspections from early 1996 through October 2000 (Gov't Ex. 6) and prepared annual reports for the impoundment for 1996, 1997, 1998, 1999 and 2000. Gov't Ex. 9. The weekly inspections covered a wide variety of conditions at the impoundment (Gov't Ex. 6), and Geo performed on a weekly basis periodic observation of construction, density testing of the compacted coarse refuse, and monitoring of the existing piezometers. Gov't Ex. 9. In particular, Geo monitored the condition of the structure in regard to erosion, slope stability, cracks and problems with the dam structure itself; monitored flows discharged from the internal drains to see if there were changes indicating a problem, monitored the elevation of the pool and the fines around the embankment, and monitored the conditions of the impoundment itself along the barrier. Tr. I 93-94. Geo's inspector was instructed to call Geo immediately if a change in the water flow occurred so that Geo could implement a plan for further investigation. Tr. I 95-96. In sum, Geo's "function was to look after the impoundment." Tr. 508. Geo's extensive duties thus consisted of "manag[ing] and . . . keep[ing] in operation" the impoundment, consistent with the majority's definition of "operating."[39] In fact, the record does not reveal in any similar detail oversight at the impoundment by MCC during that time frame that would constitute management or operation of the facility. The tasks performed by Geo at the impoundment also support the view that Geo was "controlling" the impoundment. *See Bituminous Coal Operators' Assoc., Inc. v. Sec'y of Interior*, 547 F.2d 240, 246 (4th Cir. 1977) ("[W]hen a construction company is sinking a shaft, excavating a tunnel, or building a tipple, it is controlling or supervising a coal mine . . ."). In sum, the record reflects that MCC had, for the most part, delegated oversight of the impoundment to Geo.

In addition, I reject Geo's argument, G. Br. at 11-15, that it should not have been cited for its failure to certify the seals because it was not hired to do this task and was not permitted to work underground. The judge correctly ruled that simply because Geo did not work underground did not provide a valid reason for excluding underground features of an impoundment plan from the annual certification if the features (in this case, the seals) were part of the plan.[40] 26

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[39] In light of this conclusion, I reject Geo's argument, G. Br. at 20-21, that the Secretary abused her discretion in citing Geo, an independent contractor, as well as proceeding against the owner-operator, MCC.

[40] Although Geo asserts that the seals were not part of the Impoundment Plan, G. Br. at 7-11, the evidence does not support this contention. The seals were included in the plan submitted on August 10, 1994, as part of the protection of miners against possible impoundment

FMSHRC at 48. In its annual report and certification, Geo stated: "[W]e hereby certify that for the [relevant] period . . . the Big Branch Slurry Impoundment was constructed and maintained in general accordance with the approved plans and any recommended changes required to suit field conditions consistent with the disposal concept." Gov't Ex. 9, at MCC004261. This broad statement could certainly lead any reasonable reader to assume that the seals had been examined. I agree with the judge that a certifying engineer should have, at a minimum, noted the exclusion of a feature from a submitted certification so that a supplement by another entity could have been submitted. 26 FMSHRC at 48.

In any event, the importance of the seals in ensuring the integrity of the impoundment was not a foreign concept to Geo. Although Geo attempts to distance itself from any involvement with the seals, in fact the record presents a different picture. For example, Scott Ballard, a senior project manager for Geo, Tr. I 40, had previously worked for Ogden (the predecessor to Geo, slip op. at 3-4). Tr. I 45. While employed by Ogden, he wrote the August 1994 Impoundment Sealing Plan, Tr. I 191, in which seals had initially been proposed. Tr. I 167. When the proposed seals were not accepted by MSHA, Ballard wrote to MCC, providing detailed comments about the seals, Gov't Ex. 2A (October 3, 1994 letter) and MCC forwarded those comments to MSHA. Gov't Ex. 2A (October 5, 1994 letter). Ballard testified that MCC contacted him and requested that he provide calculations for an alternative plan for the seals, which he did. Tr. I 90-91. *See also* Tr. 1297; Gov't Ex. 7 (attachments to Campoy letter of September 7, 1995). Accordingly, given Ballard's significant involvement with the impoundment and the issues involving the seals, the statement by Geo's counsel at oral argument that "Geo actually didn't even know the seals were built," Oral Arg. Tr. 84, appears somewhat farfetched.

The judge's finding that the annual reports and certifications did not include a reference to the underground seals is undisputed. Accordingly, for the reasons stated above, I would affirm the finding of a violation.

For the foregoing reasons, I respectfully dissent.

Mary Lu Jordan, Commissioner

break through. MCC Ex. A1, at 012293 (construction of the hydraulic seal will protect miners along the balkline from a slurry release). Although MSHA required some additional information relating to those seals, the entire Impoundment Plan, including the seal provisions, was approved on October 20, 1994. Gov't Ex. 2A; Tr. 436-37. However, the hydraulic cement seal was never constructed. Tr. 436-38. Instead, on September 7, 1995, MCC submitted a modification to the plan to strengthen the existing mine seals using 1-foot-thick steel reinforced gunite material. Gov't Ex. 7. MSHA approved this proposal and referred to the seals as modifications to the "previously approved impoundment seal plan." Gov't Ex. 7; Tr. I 204.

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