FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 17, 2001

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. VA 99-8-M
VIRGINIA SLATE COMPANY	:	

BEFORE: Jordan, Chairman; Riley, Verheggen, and Beatty, Commissioners

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge Avram Weisberger determined that Virginia Slate Company ("Virginia Slate") violated a number of safety standards, and that the violations were not due to unwarrantable failure. 22 FMSHRC 378 (Mar. 2000) (ALJ). The Commission granted the Secretary of Labor's petition for discretionary review challenging the judge's determinations of no unwarrantable failure. For the following reasons, we affirm in part, vacate in part, and remand, and we vacate the penalty assessments and remand them for reassessment.

I.

Factual and Procedural Background

Virginia Slate mines slate from an open pit, crushes it in a crusher, and uses it to make different materials. 22 FMSHRC at 378; Tr. I at 22.[1] The company is owned by Adco Land Corporation, which in turn is owned by V. Cassel Adamson Jr., Esq. Tr. II at 90. Adamson Jr. is also counsel for Virginia Slate in this case. V. Br. at 8. On June 2, 1998, Ricky Joe Horn, an

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[1] The transcript contains a separate volume for each day of the three-day hearing. Transcript references note the appropriate hearing day by Roman numeral I through III followed by the page number.

inspector for the Department of Labor's Mine Safety and Health Administration ("MSHA"), inspected Virginia Slate's operation. 22 FMSHRC at 378. As a result of the inspection, Horn issued Order No. 7711661 under 30 C.F.R. § 56.1407(a) because there was no protective guard for the V-belt drive and pulleys on the feeder attached to the crusher. 22 FMSHRC at 382. The unguarded V-belt and pulleys were approximately 3 feet above ground level. *Id.* Horn designated the violation significant and substantial ("S&S")[2] and a result of the operator's unwarrantable failure. *Id.*; Gov't Ex. 2.

The inspector issued Citation No. 7711663 under section 56.1407(a) because there was no protective guard on the tail pulley for the No. 2 belt on the crusher. *Id.* at 382-83. The unguarded tail pulley was located approximately 2½ feet above ground level. *Id.* Horn did not designate the violation S&S but did designate it unwarrantable. Gov't Ex. 3.

The inspector issued Citation No. 7711665 under 30 C.F.R. § 56.11001 because there were no guard rails or catwalks to provide safe access to clutch and throttle hand levers used to operate the crusher. 22 FMSHRC at 383. Access to the levers could only be obtained by walking on a 6-inch wide I-beam located approximately 6 feet above the ground. *Id.* Horn cited the violation as S&S and unwarrantable. Gov't Ex. 5.

The inspector issued Order No. 7711667 under 30 C.F.R. § 56.9301 because there were no bumper blocks or any other impeding devices to prevent a front-end loader, loading the hopper on the crusher, from running into the hopper, hitting a rock, or overturning. 22 FMSHRC at 385. The inspector designated the violation S&S and a result of the operator's unwarrantable failure. Gov't Ex. 6.

The inspector issued Order No. 7711681 under 30 C.F.R. § 56.14100, which requires inspection of mobile equipment prior to its being placed in operation on a shift. 22 FMSHRC at 390. He concluded that such preshift examinations had not been adequately performed because he found a number of alleged mobile equipment violations that would otherwise have been detected and corrected. *Id.*; Gov't Ex. 11. The inspector cited the violation as S&S and unwarrantable. Gov't Ex. 11. Horn also issued several other orders and citations to Virginia Slate.

Virginia Slate challenged the orders and citations that are the subject of this review (Order Nos. 7711661, 7711667, and 7711681, and Citation Nos. 7711663 and 7711665) as well as a number of other orders and citations. These matters proceeded to hearing before Judge Weisberger.

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[2] The S&S terminology is taken from section 104(d)(1) of the Mine Act, 30 U.S.C. § 814(d)(1), which distinguishes as more serious any violation that "could significantly and substantially contribute to the cause and effect of a . . . mine safety or health hazard."

I.

Disposition

A. Unwarrantable Failure Issues

1. Order No. 7711661 and Citation No. 7711663[3]

As to Order No. 7711661, the judge determined that Virginia Slate violated section 56.1407(a)[4] because there was no protective guard on the V-belt drive and pulleys for the feeder attached to the crusher. 22 FMSHRC at 382. He determined that the violation was S&S but did not result from the operator's unwarrantable failure based on the credited testimony of Adamson Jr. that the crusher had not operated during the period in question. *Id.* As to Citation No. 7711663, he concluded that the operator violated section 56.1407(a) because there was no guard on the tail pulley for the No. 2 belt on the crusher. *Id.* at 383. He determined that the violation was not S&S, and did not result from the operator's unwarrantable failure for the same reasons as in his analysis of Order No. 7711661 and because the guard at issue had been removed in order to clean the area. *Id.* The judge's unwarrantable failure analyses for both Order No. 7711661 and Citation No. 7711663 consisted of a reference to his unwarrantable failure analysis for Citation No. 7711660, dealing with a similar violation involving a missing guard on the crusher.[5] *Id.* at 378-79, 381-83.

On review, the Secretary argues that the judge failed to give weight in his unwarrantable analyses to the involvement of supervisor Cassel Adamson III in the violations. PDR[6] at 12-14, 16. She asserts that the judge also failed to give adequate weight to out-of-court statements made by supervisor Adamson III concerning the violations. *Id.* at 14, 16. She contends that, because these out-of-court statements are admissions by a party-opponent under Rule 801(d)(2)(D) of the

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[3] All Commissioners vote to vacate and remand the judge's negative unwarrantable failure determinations for Order No. 7711661 and Citation No. 7711663.

[4] Section 56.14107(a) provides that "[m]oving machine parts shall be guarded to protect persons from contacting gears, sprockets, chains, drive, head, tail, and takeup pulleys, flywheels, couplings, shafts, fan blades, and similar moving parts that can cause injury."

[5] The judge analyzed and affirmed Citation No. 7711660 (22 FMSHRC at 378-82) even though the Secretary informed the judge that she had vacated that citation. S. Post-Hr'g Br. at 2. The judge also erroneously referred to Citation No. 7711660 as Order No. 7711660. Gov't Ex. 1.

[6] The Secretary designated her petition for discretionary review as her opening brief.

Federal Rules of Evidence,[7] the judge erred in treating them as hearsay. *Id.* The Secretary argues that the judge erred when he drew an adverse inference against the Secretary because she did not call supervisor Adamson III to testify, and when he failed to draw such an inference against the operator because it did not call Adamson III to testify. *Id.* She asserts that the judge erred in both the order and the citation in crediting Adamson Jr.'s testimony that the crusher was not in operation during the period in question, and by ignoring miner Leroy Williams' testimony that the crusher was operated without guards. *Id.* at 15-16. Virginia Slate responds that the judge ignored evidence that the crusher was out of service at the time of the inspection and claims that the judge improperly admitted hearsay testimony. V. Br. at 2-3.

As a threshold matter, we reject the Secretary's assertion that the judge erred by failing to draw an adverse inference against Virginia Slate for not calling Adamson III as a witness. It is well-established that an adverse inference may be drawn against a party if the party fails to call as a material witness a person who may reasonably be assumed to be favorably disposed toward that party or a person who is peculiarly available to that party. *United States v. Ariza-Ibarra*, 651 F.2d 2, 15-16 (1st Cir.), *cert denied*, 454 U.S. 895 (1981); 2 *McCormick on Evidence* § 264, at 174-76 (5th ed. 1999). As an employee of Virginia Slate and as Adamson Jr.'s son, it can be reasonably assumed that Adamson III was favorably disposed toward Virginia Slate and was peculiarly available as a witness to that party. *Ariza-Ibarra*, 651 F.2d at 15-16; *see Jones v. Otis Elevator Co.*, 861 F.2d 655, 659-60 (11th Cir. 1988) ("Because of an employee's economic interests, the employer-employee relationship is recognized as" making the employee peculiarly available as a witness to the employer); Alan Stephens, Annotation, *Adverse Presumption or Inference Based on Party's Failure to Produce or Examine Family Member Other than Spouse — Modern Cases*, 80 A.L.R.4th 337, 373-77 (1990) (discussing cases where courts have drawn an adverse inference against a party for failing to call a material witness who is the party's son or daughter). However, the decision to draw an adverse inference against a party for not calling a material witness to testify lies within the sound discretion of the trier of fact. *See Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 267 n.1 (D.C. Cir. 1998) ("The decision to draw an adverse inference has generally been held to be within the discretion of the fact finder."); *Underwriters Labs. Inc. v. NLRB*, 147 F.3d 1048, 1054 (9th Cir. 1998) (the adverse inference rule "does not create a conclusive presumption against the party failing to call the witness") (quoting *Rockingham Machine-Lunex Co. v. NLRB*, 665 F.2d 303, 305 (8th Cir. 1981)). There is nothing in the record to indicate that the judge abused his discretion when he refused to draw an adverse inference against Virginia Slate for not calling Adamson III as a witness.[8]

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[7] Federal Rule of Evidence 801(d)(2)(D) provides in pertinent part that "[a] statement is not hearsay if . . . [t]he statement is offered against a party . . . by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship."

[8] We disagree with the Secretary that the judge erred when he drew an adverse inference against her because she did not call Adamson III to testify. The judge never stated anywhere in his decision that he drew such an inference against the Secretary.

Regarding unwarrantable failure, that terminology is taken from section 104(d) of the Mine 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 2003-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC 189, 194 (Feb. 1991); *see also Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 136 (7th Cir. 1995) (approving Commission's unwarrantable failure test).

Whether conduct is "aggravated" in the context of unwarrantable failure is determined by looking at all the facts and circumstances of each case to see if any aggravating factors exist, such as the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts are necessary for compliance, the operator's efforts in abating the violative condition, whether the violation is obvious or poses a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000), *appeal docketed*, No. 01-1228 (4th Cir. Feb. 21, 2001) ("*Consol*"); *Cyprus Emerald Res. Corp.*, 20 FMSHRC 790, 813 (Aug. 1998), *rev'd on other grounds*, 195 F.3d 42 (D.C. Cir. 1999); *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Peabody Coal Co.*, 14 FMSHRC 1258, 1261 (Aug. 1992); *BethEnergy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988). 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. *Consol*, 22 FMSHRC at 353.

The judge ruled that the violations in Order No. 7711661 and Citation No. 7711663 were not unwarrantable for the same reasons he relied on in determining the violation in Citation No. 7711660 was not unwarrantable. 22 FMSHRC at 382-83. In fact, as previously indicated, the judge merely referenced back to his ruling on Citation No. 7711660, without even restating that analysis with respect to the higher numbered order and citation.[9] Unlike his testimony about the belt violation in Citation No. 7711660, however, Williams testified that the belts involved in Order No. 7711661 and Citation No. 7711663 had both been run in an unguarded state during production. Tr. I at 164-65, 169. Based on this distinction in Williams' testimony, the judge erred when he applied his credibility determination concerning Williams' testimony about the belt violation in Citation No. 7711660 to his unwarrantability analyses of the belt violations in

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[9] In his unwarrantable analysis for Citation No. 7711660, the judge noted that Inspector Horn testified that Roy Terry, a foreman, and the two crusher operators had told the inspector that the crusher had been operated in an unguarded condition for the two weeks prior to Horn's inspection. 22 FMSHRC at 381. However, the judge did not credit this testimony in part because Williams, one of the crusher operators, did not testify that the belt involved in Citation No. 7711660 had been run without a guard even though he testified that the belt had no guard "at the time leading up to the inspection." *Id.*

Order No. 7711661 and Citation No. 7711663, and failed to consider Williams' testimony that the belts involved in Order No. 7711661 and Citation No. 7711663 were run without guards during production.[10]

We are mindful that the record is anything but clear on a number of these important issues.[11] Nonetheless, testimony was offered that, at least for some period of time, equipment was operated, apparently in production mode, without guards. Because the judge imported his unwarrantable failure analysis from a vacated citation into these other matters, we are unable to determine if he appropriately considered such evidence and how he disposed of it to reach a contrary result. We therefore vacate the judge's determinations as to unwarrantable failure with respect to Order No. 7711661 and Citation No. 7711663 and remand for the judge to properly consider testimony that fairly detracts from his decision on that issue.

2. Citation No. 7711665[12]

The judge determined that Virginia Slate violated section 56.11001[13] because there were no guard rails or catwalks to provide safe access to the clutch and throttle levers used to operate the crusher. 22 FMSHRC at 383. He concluded that the violation was S&S but did not result

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[10] Contrary to the Secretary's assertions, the judge did not err by not considering Inspector Horn's testimony that Adamson III told him that the guards involved in Order No. 7711661 and Citation No. 7711663 had at one time been in place but that he did not "know how long the guard[s] had been off." Tr. I at 57, 65. It is not clear from Adamson III's out-of-court statements how long he knew the guards were missing. Indeed, he may only have discovered the guards were missing after they were cited. Thus, his out-of-court statements are not probative of whether the violations in Order No. 7711661 and Citation No. 7711663 were unwarrantable. Accordingly, there is no need for the Commission to determine whether Adamson III was a supervisor or whether the judge erred in treating his out-of-court statements as hearsay.

[11] At the hearing, the judge sought clarification of confusing and conflicting testimony, often obtained from the same witness. Unfortunately, the judge's attempt to clarify the record appears to have been thwarted by attorneys seemingly intent on impeaching their own witnesses or misapprehending the nature of "hearsay" testimony and its role in administrative proceedings.

[12] Commissioners Riley and Verheggen vote to affirm the judge's negative unwarrantable failure determination for Citation No. 7711665. Commissioner Beatty does not join this part of the opinion and instead votes with Chairman Jordan to reverse the judge's negative unwarrantability finding. See slip op. at 16-17. Under *Pennsylvania Electric Co.*, 12 FMSHRC 1562, 1563-65 (Aug. 1990), *aff'd on other grounds*, 969 F.2d 1501 (3d Cir. 1992), the effect of the split decision is to allow the judge's unwarrantability determination to stand as if affirmed.

[13] Section 56.11001 provides that "[s]afe means of access shall be provided and maintained to all working places."

from the operator's unwarrantable failure because, based on Adamson Jr.'s credited testimony, the crusher had only been run for a short time without the guards in order to test the crusher. *Id.* at 383-84.

On review, the Secretary argues that the judge failed to give weight to foreman Terry's involvement in the violations and to his out-of-court statements about the condition of the guard railings and catwalk on the crusher. PDR at 16-18. She contends that, because these out-of-court statements are admissions by a party-opponent under Rule 801(d)(2)(D) of the Federal Rules of Evidence, the judge erred in treating them as hearsay. *Id.* at 18. The Secretary asserts that the judge erred in drawing an adverse inference against the Secretary because she did not call Terry to testify and in failing to draw an adverse inference against the operator because it did not call Terry to testify. *Id.* at 18-19. She asserts that the judge erred in crediting Adamson Jr.'s testimony that the crusher was not operated during the period in question and in ignoring miner Williams' testimony that the crusher was operated without a safe means of access to its controls. *Id.* at 19. Virginia Slate asserts that the judge failed to consider evidence that the crusher was out of service at the time of the inspection and that the judge improperly admitted hearsay testimony. V. Br. at 2-3.

We reject the Secretary's assertion that the judge erred by failing to give any weight to Williams' testimony about foreman Terry's out-of-court statements indicating that Terry knew about the missing guard railings and catwalk for several months but did nothing about the problem. Terry was not called as a witness. The judge did not ignore Terry's out-of-court statements; rather he noted that Terry was a foreman and that Williams testified that Terry knew for several months that the crusher did not have guard railings or a catwalk and that Terry had told him that he did not know why they were missing. 22 FMSHRC at 383-84; Tr. I at 185-86. However, the judge did not place much weight on Terry's out-of-court statements because they were not corroborated. 22 FMSHRC at 383-84; *see Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1137 (May 1984) (examining contradictory or corroborating evidence in evaluating out-of-court statements). The judge determined that Williams' testimony was unclear as to how long the crusher had operated without safe access.[14] 22 FMSHRC at 384. On the other hand, based on his demeanor, the judge credited Adamson Jr.'s testimony that, apart from a ten minute test period, the crusher had not operated in production without guard railings and a catwalk.[15] *Id.* The

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[14] We disagree with the Secretary that, because Terry's out-of-court statements are admissions by a party-opponent under Rule 801(d)(2)(D) of the Federal Rules of Evidence, the judge erred in treating them as hearsay testimony. The Commission is not required to apply the Federal Rules of Evidence. *See Mid-Continent*, 6 FMSHRC at 1135-36 & n.6 (holding that "[w]hile the Federal Rules of Evidence may have value by analogy, they are not *required* to be applied to [Commission] hearings — either by their own terms, by the Mine Act, or by [Commission] procedural rules." (emphasis in original)).

[15] Contrary to Virginia Slate's argument that the judge ignored evidence that the crusher was out of service at the time of the inspection, the judge found that the crusher was out of service at the time of the inspection. 22 FMSHRC at 381-82.

Commission does not lightly overturn a judge's credibility determinations, which are entitled to great weight. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). We find no compelling reason to overturn the judge's credibility findings about Terry's out-of-court statements and Williams and Adamson Jr.'s testimony regarding guard railings and a catwalk on the crusher. Accordingly, we determine that the judge did not err when he gave little weight in his unwarrantable failure analysis to Terry's out-of-court statements.

We also reject the Secretary's assertion that the judge erred by failing to draw an adverse inference against the operator for not calling Terry to testify. It is within the discretion of the trier of fact whether to draw an adverse inference against a party for failing to call as a material witness a person who may reasonably be assumed to be favorably disposed toward that party or a person who is peculiarly available to that party. *Overnite Transp.*, 140 F.3d at 267 n.1; *Underwriters Labs.*, 147 F.3d at 1054. Although Terry was Virginia Slate's foreman, there is nothing in the record to indicate that the judge abused his discretion when he did not draw an adverse inference against the operator for not calling Terry as a witness. The judge also did not err by drawing an adverse inference against the Secretary for failing to call Terry to testify. Although the judge stated in his unwarrantable analysis that "the Secretary did not indicate why it had not called Terry to testify," the judge never stated in his analysis of the violation that he had drawn an adverse inference against the Secretary for not calling Terry to testify. 22 FMSHRC at 384.

Contrary to our dissenting colleagues (slip op. at 16-17), we do not think Virginia Slate's actions regarding the lack of guard rails or catwalks on the crusher constituted aggravated conduct. It is undisputed that the crusher had been run by a Murphy engine which broke down on May 10, 1998, and was replaced by a Caterpillar engine. Tr. II at 10-11. Williams testified that the original catwalk had been removed in order to remove the Murphy engine and had remained off while the Caterpillar engine was installed. Tr. I at 197. Adamson Jr. testified that it was unclear whether the Caterpillar engine would be able to run the crusher because it was a smaller engine than the Murphy. Tr. II at 11. In the late afternoon of June 1, Virginia Slate tested the Caterpillar engine for ten minutes. 22 FMSHRC at 384; Tr. II at 12. Adamson Jr. testified that, prior to testing, all unnecessary personnel were cleared of the crusher area. Tr. II at 16-17. He testified that the catwalk had not been replaced at that time because it was uncertain whether the controls for the Caterpillar would need to be moved to the other side of the crusher. Tr. II at 12, 15-16. Immediately after testing, Virginia Slate ordered that a catwalk be installed the next morning and that the crusher not be run without a catwalk. 22 FMSHRC at 384; Tr. II at 14. We do not think its actions constituted aggravated conduct because the operator needed to test the new equipment, the test period was short, the operator reduced risk during testing by removing unnecessary personnel, it intended to install the catwalk the next morning, and, after testing, it prohibited operation of the crusher until the catwalk was installed.

Based on the foregoing, we would affirm the judge's negative unwarrantable failure determination as to Citation No. 7711665.

3. Order No. 7711667[16]

In Order No. 7711667, the judge concluded that Virginia Slate violated section 56.9301[17] because there were no bumper blocks or any other impeding devices to prevent the front-end loader, when loading the crusher with rock, from running into the crusher, hitting a rock, or overturning. 22 FMSHRC at 385. He determined the violation was not S&S and, because the Secretary's evidence failed to establish how long the violation had lasted, did not result from the operator's unwarrantable failure. *Id.* at 385-86. The judge's unwarrantable failure analysis for Order No. 7711667 consisted of a reference to his unwarrantable failure analysis for Citation No. 7711666, which dealt with a violation of section 56.9300(a)[18] because of the lack of a berm along the bank of a mine roadway. *Id.* at 384-86; Gov't Ex. 5.

The Secretary argues that the judge erred by concluding, based on Adamson Jr.'s testimony, that only the excavator was used to feed the crusher during the period in question and by ignoring Williams' testimony that the front-end loader was regularly used to feed the crusher.[19] PDR at 20. The Secretary asserts that the judge also erred by ignoring Adamson Jr.'s testimony that the front-end loader had been used to feed the crusher on June 1 and Inspector Horn's testimony that Adamson III had told him that the front-end loader had been used to feed the crusher for a week before the inspection. *Id.* Virginia Slate responds that the judge improperly admitted hearsay testimony and ignored relevant evidence that the crusher was out of service at the time of the inspection. V. Br. at 2-3.

We conclude that the judge erred in his unwarrantable failure analysis by failing to consider all the relevant aggravating factors, such as the obviousness of the violation, the operator's knowledge of the violation, or any abatement efforts by the operator. *Mullins*, 16 FMSHRC at 195. We also think the judge erred by adopting his unwarrantable failure analysis for Order No. 7711666 as his unwarrantable failure analysis for Order No. 7711667. 22

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[16] All Commissioners vote to vacate and remand the judge's negative unwarrantable failure determinations for Order No. 7711667.

[17] Section 56.9301 provides that "[b]erms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning."

[18] Section 56.9300(a) provides that "[b]erms or guardrails shall be provided and maintained on the banks of roadways where a drop-off exists of sufficient grade or depth to cause a vehicle to overturn or endanger persons in equipment."

[19] Inspector Horn testified that section 56.9301 only required the use of bumper blocks or other impeding devices when the crusher was fed by the front-end loader, which was mobile equipment, but not when it was fed by the excavator, which was stationary equipment. Tr. II at 143-45.

FMSHRC at 384-86. The facts involved in Order No. 7711666, apart from duration, are too dissimilar to the facts involved in Order No. 7711667 to allow the same unwarrantable failure analysis to be applied to both orders.

Contrary to the Secretary's assertion, the judge did not conclude that only the excavator had been used to feed the crusher during the period in question. Although the judge in his unwarrantable analysis for Order No. 7711666 examined the evidence relating to when the excavator versus the front-end loader had been used to feed the crusher, he did not make a finding on the issue. Thus, the judge did not conclude in his unwarrantable failure analysis for Order No. 7711667, which references his unwarrantable failure analysis for Order No. 7711666, that only the excavator had been used to feed the crusher.

In sum, we vacate and remand the judge's negative unwarrantable failure determination for Order No. 7711667 and instruct him to analyze the unwarrantability issue separate from Order No. 7711666, taking into consideration all relevant aggravating as well as mitigating factors.

4. Order No. 7711681[20]

The judge concluded that Virginia Slate violated section 56.14100[21] by failing to perform adequate preshift examinations of mobile equipment. 22 FMSHRC at 390. He determined that the violation was S&S but did not result from the operator's unwarrantable failure because the record did not contain sufficient facts to establish that the operator's actions constituted aggravated conduct. *Id.*

The Secretary argues that the judge erred by not considering the nature of violative conditions which went undetected and uncorrected as a result of the operator's failure to carry out an adequate preshift examination of mobile equipment. PDR at 21-24. She also asserts that the judge erred by refusing to admit into evidence citations which allegedly showed a number of violations which went undetected or uncorrected because of Virginia Slate's inadequate preshift inspections of mobile equipment. *Id.* at 24. Virginia Slate responds that some of the alleged violations which may have gone undetected or uncorrected as a result of the operator's alleged failure to carry out an adequate preshift examination were not violations. V. Br. at 4-6.

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[20] Commissioners Riley, Verheggen, and Beatty vote to vacate and remand and Chairman Jordan votes to reverse the judge's negative unwarrantable failure determination for Order No. 7711681.

[21] Section 56.14100 provides in pertinent part that "[s]elf-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift."

We conclude that the judge failed to examine aggravating factors that may have been relevant to his unwarrantability analysis, such as the extent and duration of the operator's failure to carry out adequate preshift examinations or its knowledge that it was not adequately carrying out such examinations. The judge also failed to consider the underlying violations which went undetected or uncorrected because of the operator's inadequate preshift examinations and conditions. He found that the presence of safety violations involving inoperable horns and defective seatbelts on Virginia Slate's mobile equipment indicated that adequate preshift examinations had not been carried out. 22 FMSHRC at 390. The judge should have considered the obviousness posed by these underlying violations as a relevant factor in his analysis of whether the operator's failure to carry out the examinations was unwarrantable.[22]

In sum, we vacate the judge's determination that Order No. 7711681 was not due to unwarrantable failure and remand for reconsideration.[23] On remand, the judge must address all the relevant factors relating to the preshift examination violation, including the underlying violations that were not detected or corrected because of the inadequate examinations.

B. Penalty Assessment Issues[24]

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

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[22] Commissioner Beatty believes that the judge should consider the danger posed by these underlying violations, as well as their obviousness, in determining whether the operator's failure to adequately conduct the preshift examinations was unwarrantable. *See Consol*, 22 FMSHRC at 350-55 (failure to ensure that methane checks were made was unwarrantable because a dangerous methane accumulation went undetected as a result); *Rock of Ages Corp.*, 20 FMSHRC 106, 115 (Feb. 1998), *aff'd in relevant part*, 170 F.3d 148 (2d Cir. 1999) (failure to search for undetonated explosives was unwarrantable because dangerous undetonated explosives went undetected as a result). He notes that it is well established Commission law that the danger posed to miners by a violation is an important factor in unwarrantability analysis. *See Rock of Ages Corp.*, 20 FMSHRC at 115; *Jim Walter Res., Inc.*, 19 FMSHRC 1761, 1770 (Nov. 1997); *Midwest Material*, 19 FMSHRC at 34.

[23] Contrary to our dissenting colleague's opinion (slip op. at 18-19), we do not think the record evidence is so one-sided as to allow only the conclusion that the operator's actions were unwarrantable. When a judge fails to adequately address the evidentiary record, a remand is necessary for fuller evaluation. *Mid-Continent Res., Inc.*, 16 FMSHRC 1218, 1222-23 (June 1994). Here, the judge, as fact finder, is in the best position to evaluate the relevant factors.

[24] All Commissioners vote to vacate the judge's penalty assessments for all the orders and citations on review and to remand for reassessment of appropriate penalties.

section 110(i) and the deterrent purpose of the Act.[25] *Id.* (citing *Sellersburg Stone Co.*, 5 FMSHRC 287, 290-94 (Mar. 1983), *aff'd*, 736 F.2d 1147 (7th Cir. 1984)). The 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. Assessments "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 Commission has recently reiterated the need for its judges to fully satisfy the statutory requirements of section 110(i) by providing findings of fact on each of the six penalty criteria when assessing a penalty. *Cantera Green*, 22 FMSHRC 616, 620-26 (May 2000); *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 600-02 (May 2000); *Hubb Corp.*, 22 FMSHRC 606, 611-13 (May 2000). Such findings of fact are necessary to provide respondents with notice as to the basis upon which the penalty is being assessed and to provide the Commission and any reviewing court with the information they need to accurately determine whether a penalty is appropriate. *Rushford Trucking*, 22 FMSHRC at 601. An explanation is particularly essential when a judge's penalty assessments substantially diverge from the Secretary's proposed penalties. *Sellersburg*, 5 FMSHRC at 293. As we noted in *Sellersburg*, without an explanation for such a divergence, "the credibility of the administrative scheme providing for the increase or lowering of penalties after contest may be jeopardized by an appearance of arbitrariness." *Id.*

For each of the orders and citations on review, the judge's penalty assessments indicate that he failed to consider relevant penalty criteria when assessing penalties. In his penalty assessment for Order No. 7711661, the judge did not make findings regarding each of the penalty criteria for that order but merely referenced his penalty assessment for Citation No. 7711660. 22

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[25] 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).

FMSHRC at 382.[26] Because he merely referenced his penalty assessment for Citation No. 7711660 when assessing the penalty for Order No. 7711661, his penalty assessment for Order No. 7711661 includes the same failings discussed with respect to that prior penalty assessment. Further, although Citation No. 7711660 and Order No. 7711661 both involve missing guard violations, the circumstances of the violations are different. Thus, the judge should have made findings of fact specific to Order No. 7711661 concerning the gravity of the violation, the operator's abatement efforts,[27] and the operator's negligence.

In his penalty assessment for Citation No. 7711663, apart from an analysis of the gravity of the violation, the judge did not make findings regarding any of the other penalty criteria specific to that citation but instead referenced his penalty assessment for Citation No. 7711660. *Id.* at 383. As a consequence, his penalty assessment for Citation No. 7711663 contains the same problems as his penalty assessment for Citation No. 7711660. Additionally, the judge should have made findings of fact specific to Citation No. 7711663 concerning the operator's abatement efforts and the operator's negligence.

In his penalty assessment for Citation No. 7711665, the judge made penalty criteria findings specific to that citation for the gravity of the violation and for whether the operator was negligent. *Id.* at 384. For the remaining four penalty criteria, the judge referenced his penalty assessment for Citation No. 7711660. *Id.* As a result, his penalty assessment for Citation No. 7711665 contains the same problems as his penalty assessment for Citation No. 7711660. Additionally, the judge should have made findings specific to Citation No. 7711665 about the operator's abatement efforts.

In his penalty assessment for Order No. 7711667, the judge made no findings regarding the penalty criteria specific to that order but referenced back to his penalty assessment for Order No. 7711666. 22 FMSHRC at 386. In his penalty assessment for Order No. 7711666, the judge made specific findings on the gravity of the violation and on the operator's degree of negligence.

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[26] The judge's penalty assessment for Citation No. 7711660 mentioned the six section 110(i) penalty criteria but his analysis was insufficient. 22 FMSHRC at 382. He found that the penalty would not adversely affect the operator's ability to remain in operation and that the penalty should not be mitigated by the size of Virginia Slate's operation. *Id.* He also found that "[t]he violative condition was abated in a timely fashion." *Id.* The judge mentioned Virginia Slate's "history of violations" but he did not make findings about that history or state whether he considered it a mitigating or aggravating factor in assessing the penalty. *Id.*

[27] While Citation No. 7711660 indicates that the violation was terminated about 4 hours after it was cited (Gov't Ex. 1), Order No. 7711661 states that the violation was terminated approximately 27 hours after it was cited (Gov't Ex. 2 at 2).

Id. at 385. He also concluded that the violation was abated in a timely fashion.[28] *Id.* For the remaining three penalty criteria in Order No. 7711666, the judge referenced his penalty assessment for Citation No. 7711660. *Id.* Thus, the judge's penalty assessment for Order No. 7711667 is confusing and appears to merely reference his two previous deficient penalty assessments for Citation No. 7711660 and Order No. 7711666.

The judge erred when he applied his findings on gravity, negligence, and abatement from his penalty assessment for Order No. 7711666 to his penalty assessment for Order No. 7711667 because the circumstances involved in the two orders are not similar. With reference to Virginia Slate's history of violations, the judge also erred in his penalty assessment for Order No. 7711667 by referencing his penalty assessment for Citation No. 7711660 (by reference to his penalty assessment for Order No. 7711666) in which he did not make adequate findings on the operator's history of violations.

In his penalty assessment for Order No. 7711681, the judge concluded that the gravity of the violation was high and "the level of negligence was no more than moderate." 22 FMSHRC at 390. For the remaining four penalty criteria, however, he failed to make any findings of fact but only stated that he had taken them into account. *Id.*

On the basis of the foregoing, we conclude that the judge failed to adequately explain the basis for the penalties he assessed for the violations at issue herein. We vacate the judge's penalty assessments for all of the orders and citations on review and remand for detailed findings of fact as to each of the six section 110(i) criteria and reassessment of an appropriate penalty for each of the violations at issue.

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[28] Order No. 7711666 indicates that the violation was terminated approximately 2 days after it was cited. Gov't Ex. 5.

III.

Conclusion

For the foregoing reasons, we vacate the judge's negative unwarrantable failure determinations for Order Nos. 7711661, 7711667, and 7711681 and for Citation No. 7711663, and remand for further consideration consistent with our decision. The judge's negative unwarrantable failure determination for Citation No. 7711665 stands as if affirmed. Further, we vacate the judge's penalty assessments for all of the orders and citations on review and remand for reassessment of an appropriate penalty for each violation consistent with this decision.

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

Chairman Jordan, concurring in part and dissenting in part:

I agree with my colleagues' decision to vacate and remand the judge's negative unwarrantable failure determinations for Order No. 7711661 (lack of a protective guard on the V-belt drive and pulleys for the feeder attached to the crusher), for Citation No. 7711663 (no protective guard on the tail pulley for the No. 2 belt on the crusher), and for Order No. 7711667 (lack of impeding devices for front-end loader). However, for the reasons set forth below, I disagree with their decision to affirm the judge's negative unwarrantable failure determination as to Citation No. 7711665. As I explain below, I also disagree with their decision to vacate and remand the judge's negative unwarrantable failure determination for Order No. 7711681.

1. Citation No. 7711665[1]

The judge found that Virginia Slate violated 30 C.F.R. § 56.11001 because of the lack of guard rails or catwalks to provide safe access to the clutch and throttle levers used to operate the crusher. 22 FMSHRC 378, 383 (Mar. 2000) (ALJ). However, he determined that the violation was not the result of the operator's unwarrantable failure. *Id*. at 383-84. The focus of his reasoning, as well as that of my colleagues, centers mostly on evidentiary questions regarding the role of foreman Roy Terry, and on the testimony of Leroy Williams (which the judge refused to credit) that this condition had existed for an extended period of time. These tangential issues needlessly complicate this question, as the undisputed evidence shows that the violation, which was plainly visible and took place in the presence of mine supervisors, created a highly dangerous situation, thus warranting a finding of unwarrantable failure.

The judge concluded that the violation was significant and substantial, and acknowledged that a serious injury could have developed. *Id*. To access the levers of the crusher, a miner had to walk on an I-beam, approximately 6 inches wide, and located about 6 feet above the ground. *Id*. at 383. As the judge noted, according to the uncontradicted testimony of Inspector Horn, a miner walking on the beam while operating the motor could loose his or her balance. *Id*. According to Horn, the miner could quite easily fall into the rotating pulley or V-belt drive. Tr. I at 76.

Inspector Horn testified that to start the engine, it was necessary to hold on with one hand and push the clutch down and in with the other, while standing on the metal frame. Tr. I at 69. He testified that a fall into the V-belt drive would probably result in a permanently disabling injury and would be reasonably likely to "cut his arm off or leg, whatever went into it." Tr. I at 76-77. He was also quite clear that the risk of injury would be the same whether the operator was producing or just test firing the engine. Tr. I at 78-79.

[1] Commissioner Beatty votes with Chairman Jordan to reverse the judge's negative unwarrantability finding. *See* slip op. at 6 n.12.

The judge's finding that the new motor in the crusher was tested for 10 minutes on June 1 without protective catwalks, 22 FMSHRC at 384, is uncontroverted. Adamson, Jr. testified that he and the foreman started the engine and fed six buckets of rock into the feeder. Tr. II at 13-14. Commission precedent makes clear that these individuals should be held to a high standard of care. *See Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007, 2011 (Dec. 1987) ("section foreman is held to a 'demanding standard of care in safety matters,'" quoting *Wilmot Mining Co.*, 9 FMSHRC 684, 688 (Apr. 1987)); *S&H Mining, Inc.*, 17 FMSHRC 1918, 1923 (Nov. 1995) (heightened standard of care required of section foreman and mine superintendent).

Moreover, their actions were particularly egregious, involving intentional conduct, as Adamson, Jr. admitted. He testified quite candidly that a decision was made to test the crusher for 10 minutes, despite the fact that the catwalks were not in place. Tr. II at 12-17. Permitting this test run in the absence of guard rails or catwalks needlessly placed individuals in a precarious, dangerous situation, constituting aggravated conduct.

As we noted in *Midwest Material Co.*, 19 FMSHRC 30, 34 (Jan. 1997), the Commission has relied upon the high degree of danger caused by a violation to support an unwarrantable failure determination. *See Beth Energy Mines, Inc.*, 14 FMSHRC 1232, 1243-44 (Aug. 1992) (finding unwarrantable failure where unsaddled beams posed a danger to miners entering the area); *Quinland Coals, Inc.*, 10 FMSHRC 705, 709 (June 1988) (finding unwarrantable failure when roof conditions were extremely dangerous). In *Midwest Material*, which involved a violation for improperly dismantling a crane boom, we reversed the judge's finding that the violation was not an unwarrantable failure, basing our conclusion on the extreme danger, the obvious nature of the hazard, and the fact that the violation took place in the presence of a foreman, 19 FMSHRC at 35, all factors that are present in this case as well. Moreover, in *Midwest Material*, we found that the judge had erred by relying on the relatively brief duration of the violative conduct, in light of the high degree of danger posed by the hazard and its obvious condition. *Id.* at 36.

Similarly, in *Lafarge Construction Materials*, 20 FMSHRC 1140 (Oct. 1998), which involved a violation for failure to remove loose materials before allowing a miner to enter a surge bin, we affirmed the judge's holding of unwarrantable failure, again relying on the high degree of danger and heightened standard of care required of a foreman. *Id.* at 1147. We noted that when violations have exposed miners to very dangerous conditions, we have not always relied on most of the remaining factors in the Commission's traditional unwarrantable failure test. *Id.*

Accordingly, I would reverse the judge and find that this citation was the result of the operator's unwarrantable failure.

2. Order No. 7711681

Inspector Horn testified that he found several obvious defects on the mobile equipment, Tr. III at 36, 42-43, 52, including defective horns, parking brakes and seat belts. On the basis of this testimony, the judge found that Virginia Slate violated 30 C.F.R. § 56.14100 because it failed to perform adequate preshift examinations of mobile equipment, and determined that the violation was S&S. 22 FMSHRC at 390. I believe he erred, however, in concluding that it did not result from Virginia Slate's unwarrantable failure.

The operator had been on notice of the duty to perform preshift examinations when the inspector had explained the standard to management officials during a September 1997 special investigation. Tr. III at 33, 46-47. Moreover, the record showed that the failure to perform a proper preshift posed a danger to miners, Tr. III at 50-51, and the judge's designation of the violation as S&S reinforces the Secretary's claim that danger was an aggravating factor.

Nonetheless, Virginia Slate failed to note these conditions on preshift and failed to remedy them. The omission of any mention of these numerous hazards on the preshift reports indicates an indifferent attitude towards the preshift regulation, which is designed to inform the oncoming shift foreman about safety problems, so they can be corrected. The importance of the requirement is underscored by Adamson Jr.'s testimony on the citation charging Virginia Slate with a missing seat belt (which the judge eventually found was S&S and a result of the operator's unwarrantable failure). The judge credited Adamson's testimony that he "neither knew nor reasonably should have known" that part of the seatbelt was missing. 22 FMSHRC at 387. In support of that assertion, Adamson Jr. testified that he "reviewed the pre-shift inspection reports for the time period. . . . [I]t's all checked off on the safety features as being satisfactory, with no exceptions, on that vehicle." Tr. II at 238. It is disingenuous for an operator to claim ignorance of a safety hazard on the basis of defective preshift reports which, if completed correctly, would have alerted management to the problem.

Even more troubling is the judge's finding that the violation of the horn regulation was not the result of unwarrantable failure because the fork lift operator had not communicated the existence of defective horns to any of the operator's managers, and that consequently there was no evidence that the operator had engaged in aggravated conduct. 22 FMSHRC at 386. Had the preshift been properly conducted and the report accurately completed, these hazards would have been noted. Instead, because the operator failed to abide by the preshift regulation, management successfully pleaded ignorance to any knowledge of the defective horns, and was rewarded by the judge's determination that there was no unwarrantable failure.

Finally, the judge erred in stating that evidence regarding the operator's failure to correct violations is not relevant to the degree of operator negligence, *id.* at 390, as section 56.14100(b) specifically requires that "[d]efects on any equipment, machinery, and tools that affect safety shall be corrected in a timely manner to prevent the creation of a hazard to persons."

The omission of several safety defects on the preshift report, and the lack of any effort to correct these hazards, reflects a reckless disregard for the requirements of the preshift standard. Because the only conclusion one can draw from the record evidence is that this violation was the result of the operator's unwarrantable failure, I would reverse the judge. *Am. Mine Servs. Inc.*, 15 FMSHRC 1830, 1834 (Sept. 1993).

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Mary Lu Jordan, Chairman

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