

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR  
WASHINGTON, D.C. 20006

June 19, 2002

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

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

DECISION

BY THE COMMISSION:

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\_\_\_\_\_ This is a civil penalty proceeding arising from the issuance of citations by the Department of Labor’s Mine Safety and Health Administration (“MSHA”) against Virginia Slate Company (“Virginia Slate”), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”). At issue is whether Administrative Law Judge Avram Weisberger, upon remand, correctly determined that two violations were not due to Virginia Slate’s unwarrantable failure and properly assessed penalties. 23 FMSHRC 867 (Aug. 2001) (ALJ). For the reasons that follow, we vacate and remand the judge’s unwarrantable failure determinations and penalty assessments.

I.

Factual and Procedural Background

A. Virginia Slate I

This is the second time that this proceeding has been before the Commission. A more complete summary of the background facts is found in the Commission’s prior decision. 23 FMSHRC 482 (May 2001) (“Virginia Slate I”), *vacating and remanding* 22 FMSHRC 378 (Mar. 2000) (ALJ).

Virginia Slate operates an open pit mine from which it extracts slate, grinds it in a crusher, and produces various kinds of building materials. 23 FMSHRC 482; Tr. I 22. Virginia Slate is owned by Adco Land Corporation, which is owned by V. Cassel Adamson, Jr. (“Adamson, Jr.”), who also served as attorney for Virginia Slate in the Commission proceedings. 23 FMSHRC 482. Adamson’s son, Cassel Adamson III (“Adamson III”), worked at the mine. *See id.* at 484-85. Roy Terry served as a foreman; Leroy Williams and James Carter were crusher operators. 22 FMSHRC at 379, 381.

Briefly, on June 2, 1998, MSHA inspector Ricky Joe Horn conducted an inspection of Virginia Slate’s operation. 23 FMSHRC at 482-83. As a result, Horn issued a total of fourteen citations and orders. S. Ex. 1-14. Among those citations and orders, two are directly at issue before the Commission. Order No. 7711667 charged a violation of 30 C.F.R. § 56.9301<sup>1</sup> for failing to use bumper blocks or other impeding devices to prevent a front-end loader, which was loading the hopper on a crusher, from running into the hopper, hitting a rock, or overturning. 23 FMSHRC at 483. The inspector determined that the violation was significant and substantial (“S&S”)<sup>2</sup> and that it occurred as a result of Virginia Slate’s unwarrantable failure<sup>3</sup> to comply with the regulation. *Id.*

Horn also issued Order No. 7711681, which cited a violation of 30 C.F.R. § 56.14100,<sup>4</sup> for failing to inspect mobile equipment prior to its being placed in operation on a shift. *Id.* Horn concluded that preshift examinations had not been adequately performed because he found a number of equipment defects that should have been detected and corrected. *Id.* The inspector designated the violation as S&S and due to Virginia Slate’s unwarrantable failure. *Id.*

Subsequently, the Secretary filed a civil penalty assessment of \$8978 for the citations and

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<sup>1</sup> Section 56.9301 provides: “Berms, bumper blocks, safety hooks, or similar impeding devices shall be provided at dumping locations where there is a hazard of overtravel or overturning.” 30 C.F.R. § 56.9301.

<sup>2</sup> The S&S terminology is taken from section 104(d)(1) of the 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.”

<sup>3</sup> The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by “an unwarrantable failure of [an] operator to comply with . . . mandatory health or safety standards.”

<sup>4</sup> Section 56.14100(a) provides: “Self-propelled mobile equipment to be used during a shift shall be inspected by the equipment operator before being placed in operation on that shift.” 30 C.F.R. § 56.14100(a).

orders that were issued. Virginia Slate challenged the penalty assessments, and a hearing was held before an administrative law judge.<sup>5</sup> The judge affirmed the underlying violations. However, the judge disagreed with the inspector's determinations that some of the violations were S&S or due to Virginia Slate's unwarrantable failure to comply with the applicable regulations. 22 FMSHRC at 380-92. The judge reduced the Secretary's proposed penalty assessments to \$4400. *Id.* at 392.

On review, the Secretary appealed the judge's finding of no unwarrantable failure with regard to two citations (Citation Nos. 7711663 and 7711665) and three orders (Order Nos. 7711661, 7711667, and 7711681). 23 FMSHRC at 483. The Commission affirmed the judge's determination of no unwarrantable failure with regard to Citation No. 7711665. *Id.* at 488-89. However, with regard to the remaining citation, Citation No. 7711663, and the three orders, the Commission vacated and remanded the judge's negative unwarrantable failure determinations. *Id.* at 484-87, 490-92. The Commission also vacated and remanded the judge's penalty assessments, because he failed to consider the relevant penalty criteria in assessing penalties for the citations and orders. *Id.* at 492-95.

B. Remand<sup>6</sup>

1. Unwarrantable Failure

\_\_\_\_\_ In Order No. 7711667, Virginia Slate was charged with failing to provide berms, bumper-blocks, safety hooks, or similar impeding devices for the front-end loader that loaded the hopper of the crusher. 23 FMSHRC at 490. The judge reviewed record testimony and concluded that the Secretary had failed to adduce sufficient evidence to establish that the violation was so obvious that Virginia Slate should have known of the conditions. 23 FMSHRC at 868. He credited Adamson, Jr. over crusher operator Williams in finding that the front-end loader was used only to load the hopper for about 10 minutes on June 1, 1998. *Id.* The judge acknowledged the testimony of MSHA Inspector Horn, who stated that Adamson III told him that the front-end loader had been used during the week prior to June 2 (the day the citation issued); however, the judge further noted that the Secretary failed to call Adamson III as a witness or explain her failure to do so. *Id.* The judge concluded that it had not been established that Virginia Slate's conduct reached the level of aggravated conduct that would constitute unwarrantable failure. *Id.*

\_\_\_\_\_ In Order No. 7711681, the judge noted that there was a lack of evidence to indicate the

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<sup>5</sup> The hearing was held over a three-day period (October 12-14, 1999), and transcript references note the day of hearing by Roman numeral I through III, followed by the page number.

<sup>6</sup> On remand, the judge addressed the unwarrantability designations of Order No. 7711661 and Citation No. 7711663. These two determinations were not appealed or otherwise directed for review and, thus, are not now before the Commission.

duration of the conditions of mobile equipment that had not been disclosed by preshift examinations. *Id.* at 869. Nor was there anything to indicate how long Virginia Slate had failed to conduct preshift examinations. *Id.* The judge concluded that, for the reasons stated in his prior decision, 22 FMSHRC at 390, the Secretary failed to establish that violation was a result of Virginia Slate's unwarrantable failure. 23 FMSHRC at 869.

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## 2. Penalties

The judge reaffirmed the penalties he had assessed in his initial decision for the citations and orders that the Commission had remanded to him for further consideration. The judge began by addressing the penalty for Citation No. 7711660. 23 FMSHRC at 869. However, as the Commission noted in *Virginia Slate I*, 23 FMSHRC at 484 n.5, the Secretary had vacated that citation prior to the judge's first decision. In addition, the judge omitted any discussion of the penalty for Citation No. 7711663, which had been remanded to him.

In addressing the penalty for Order No. 7711661,<sup>7</sup> which involved Virginia Slate's failure to have a protective guard on the V-belt drive and pulleys on the feeder attached to the crusher, the judge first noted that the level of gravity was relatively high, given that the violation could have resulted in a miner injury. 23 FMSHRC at 870. He further found that the violation was abated in a timely fashion, and that there was no evidence that a fine would have an adverse impact on Virginia Slate's ability to remain in operation. *Id.* He stated that there was no evidence that the penalty should be mitigated by the size of Virginia Slate's operation. *Id.* He then noted that the history of violations did not result in mitigating or increasing the penalty. *Id.* Finally, the judge held that the level of negligence was no more than moderate – less than that ascribed by the Secretary. *Id.* The judge concluded by finding that a penalty of \$300 was appropriate. *Id.*

With regard to Citation No. 7711665, which addressed Virginia Slate's failure to provide guard rails or catwalks to ensure safe access to the clutch and throttle levers to operate the crusher, the judge omitted any reference to the level of gravity of the violation. *Id.* He found no evidence on the following criteria: that the penalty would have any adverse effect on Virginia Slate's ability to remain in business; that the penalty should be mitigated by the size of its operation; and that would suggest that its history of violations was either very good or very bad. *Id.* Taking this into account along with the level of negligence, which was less than asserted by the Secretary, the judge concluded by finding that a \$300 fine was appropriate. *Id.*

In addressing Order No. 7711667, which concerned Virginia Slate's failure to provide berms, safety hooks, or other similar impeding devices for the front-end loader that was at the crusher hopper, the judge noted that the gravity of the violation was high given the danger of overturning the loader. *Id.* Based on crediting the testimony of Adamson, Jr. (that the loader

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<sup>7</sup> This order is inadvertently referred to as "Order No. 771161" in the judge's decision on remand. 23 FMSHRC at 870.

was only used for a brief time), the judge found that the violation was not so obvious that Virginia Slate's level of negligence was more than moderate. *Id.* at 871. The judge found that the violation was timely abated. *Id.* As with the prior citation, he found no evidence with regard to ability to remain in operation, appropriateness of the penalty compared to size of the operator, and history of violations. *Id.* He concluded that a \$200 penalty was appropriate. *Id.*

Finally, the judge addressed the penalty in connection with Order No. 7711681, which charged Virginia Slate with failing to perform adequate preshift examinations on mobile equipment. *Id.* The judge found that the violation was timely abated. *Id.* As in his prior penalty analysis, he found no evidence that the penalty would have an adverse impact on its ability to remain in business or that the penalty should be mitigated by the size of its business, and that its history of violations was neither very good nor very bad. *Id.* The judge further noted that the level of negligence was less than that asserted by the Secretary. *Id.* He concluded by imposing a \$300 penalty. *Id.*

On September 17, 2001, the Commission issued a sua sponte direction for review limited to issues raised by the judge's penalty assessments. Concurrently with the issuance of the Commission's direction for review, the Secretary of Labor filed a petition for discretionary review challenging the judge's unwarrantability determination with regard to two of the four violations on remand. On September 25, 2001, the Commission issued a second direction for review granting the Secretary's petition.

## II.

### Disposition

#### A. Unwarrantable Failure

##### 1. Order No. 7711667

The Secretary's primary argument in support of vacating the judge's negative unwarrantability determination in Order No. 7711667 is that the judge abused his discretion when he failed to explain why the "missing witness rule" (sometimes referred to as the "adverse inference rule") was not applied against Virginia Slate. PDR at 5-7.<sup>8</sup> Specifically, the Secretary had contended that the fact that Adamson III was not called as a witness by Virginia Slate warranted an inference that, if he had been called, his testimony would have been adverse to the operator. *Id.* Significantly, the Secretary failed to raise this matter before the judge in *Virginia*

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<sup>8</sup> The Secretary designated her Petition for Discretionary Review as her brief on the merits in addressing the judge's negative unwarrantability determinations. Virginia Slate did not file a brief with the Commission.

*Slate I* with regard to this particular violation. See S. Trial Br. at 39-41.<sup>9</sup> Further, the Secretary did not attempt to raise it before the judge on remand, as neither party filed supplemental pleadings with the judge. Having failed to raise the missing witness rule before the judge, it is now too late for the Secretary to argue on review for the application of the rule. 30 U.S.C. § 823(d)(2)(A)(iii). Cf. *Eagle Energy, Inc.*, 23 FMSHRC 1107, 1119-20 & n.18 (Oct. 2001) (Commission reviewed judge's application of missing witness rule, an issue which had been raised at trial).

The Secretary further challenges the judge's crediting Adamson, Jr. over crusher operator Williams with regard to how long the front-end loader had been used. PDR at 8-9. A judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). The Commission has recognized that, because the judge "has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination." *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)), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998). The Secretary has failed to put forth any persuasive reason to override these well-established principles regarding the judge's credibility determinations.

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Nonetheless, the Secretary correctly asserts that the judge failed to adhere to the Commission's remand instructions and consider all the relevant aggravating factors in determining unwarrantability. PDR at 9-10. We specifically instructed the judge in *Virginia Slate I* to consider "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." 23 FMSHRC at 490. Despite this explicit instruction, the judge's discussion of unwarrantability was largely limited to the duration of the violation. 23 FMSHRC at 868. The only specific evidence he cited in his entire analysis of the unwarrantability of this violation concerned testimony relevant to the length of time the front-end loader was used, on which he based his conclusion that it was only utilized for approximately 10 minutes. *Id.*

However, whether conduct is "aggravated" in the context of unwarrantable failure is determined by examining many other factors as well, including 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 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) ("*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);

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<sup>9</sup> Nor did the Secretary raise the issue before the Commission in *Virginia Slate I*. See PDR at 10-11, 19-20.

*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.

Given the judge's limited examination of the unwarrantability factors that he was asked to consider, we must again vacate his determination, with instructions to consider *all* the unwarrantability factors in conjunction with the specific facts of the violation. For example, the judge should analyze whether the violation posed a high degree of danger, particularly in light of his finding (in the context of his penalty determination) that as a result of the violation, there was a danger of the loader overturning. 23 FMSHRC at 870. Similarly, when discussing whether the operator had knowledge of the violation, the judge should explain his finding through reference to specific record evidence. In his unwarrantable failure analysis, he simply made a global statement that the Secretary failed to prove the violation was so obvious "that the operator *should have had* knowledge of these conditions." *Id.* at 868 (emphasis added). However, the judge on remand should also determine the extent of the operator's knowledge of the violation, specifically addressing testimony of Adamson, Jr. Tr. II 155-71.<sup>10</sup>

If the judge finds that Adamson, Jr. knew or had reason to know that impeding devices had not been provided around the front-end loader, the judge should also consider whether or not Adamson, Jr. was a supervisor, and, if he was, whether he violated the standard of care required of supervisory personnel by failing to stop a known violation. Under Commission precedent, supervisors are held to a high standard of care, *Midwest Material*, 19 FMSHRC at 35, and a supervisor's involvement in a violation should be considered in an unwarrantability analysis of the violation. *See Lion Mining Co.*, 19 FMSHRC 1774, 1778 (Nov. 1997) (foreman's failure to stop a known violation was a contributing factor in an unwarrantable failure finding because of the high standard of care to which foremen and other supervisory personnel are held).<sup>11</sup>

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<sup>10</sup> In his testimony, Adamson, Jr. did not contradict the inspector's assertions that no stop blocks or impeding device had been used to prevent the front end loader from over-traveling or overturning. Tr. II 134. Moreover, Adamson, Jr. made clear that he had agreed to permit the loader to be utilized to feed the crusher, Tr. II 156, 161, despite the fact that he "felt uncomfortable with it not having a steel thing around it or a concrete thing around it, something that was stronger than just the loose rock piled up." Tr. II 165.

<sup>11</sup> Chairman Verheggen would affirm the judge's determination that unwarrantable failure was not established on the ground that the judge adequately considered the unwarrantability factors pursuant to our explicit instruction. 23 FMSHRC at 490-91; *see Consol*, 22 FMSHRC at 353 (providing that a judge need only consider the relevant factors in an unwarrantability analysis). The judge found that the violation lasted only 10 minutes in duration based on his crediting the testimony of Adamson, Jr. over the conflicting testimony of crusher operator Williams. 23 FMSHRC at 868; slip op. at 3. In addition, the judge determined that the Secretary failed to establish any prior obviousness or knowledge of the violative conditions.

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2. Order No. 7711681

The Secretary's primary argument on review is that the judge ignored the Commission's remand instructions and record evidence. PDR at 11-14. On its face, the judge's unwarrantability analysis does not address the factors that the Commission instructed him to consider, namely "the extent and duration" of Virginia Slate's failure to perform adequate preshift examinations, "its knowledge that it was not adequately carrying out such examinations," and "the obviousness" posed by the underlying violations.<sup>12</sup> 23 FMSHRC at 492. Relying on a purported lack of record evidence on duration, the judge appears to have done little more than reiterate his prior unwarrantability determination without examining the other factors that he was specifically instructed to consider. 23 FMSHRC at 869. Thus, we must again vacate and remand the judge's unwarrantability analysis.

In addition, we conclude that the judge looked at the record evidence too narrowly and ignored relevant evidence that is pertinent to the issue of duration. As the Secretary notes on appeal, PDR at 12, the judge did not even consider testimony of Roy Lee Green in support of a defective seatbelt violation (Order No. 7711669) that he credited in *Virginia Slate I*, 22 FMSHRC at 387-88. This testimony was indicative of how long the underlying seatbelt violation existed and, therefore, was relevant to the issue of how long the operator failed to perform adequate preshift examinations of mobile equipment. Thus, the judge erred when he concluded that there was "nothing in the record to indicate how long the safety defects had been in existence prior to being cited." 23 FMSHRC at 869. For this additional reason, vacating the judge's analysis is warranted.<sup>13</sup>

B. Penalties

As was noted in *Virginia Slate I*, 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

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These findings are backed by substantial evidence given the scant amount of evidence presented by the Secretary to support the unwarrantable designation. *See* Tr. II 133-42.

<sup>12</sup> Commissioner Beatty also concluded that the judge should consider the danger posed by the underlying violations. 23 FMSHRC at 492 n.22.

<sup>13</sup> In *Virginia Slate I*, Commissioner Jordan concluded that the record evidence would support only one conclusion – that the violation was the result of the operator's unwarrantable failure – and she would have reversed the judge. 23 FMSHRC at 499-500. Consistent with that opinion, Commissioner Jordan would again reverse the judge's determination and affirm the inspector's unwarrantability designation.

each of the six penalty criteria when assessing a penalty.<sup>14</sup> 23 FMSHRC at 493 (citations omitted). Such findings of fact are necessary to provide operators with notice of 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. *Douglas R. Rushford Trucking*, 22 FMSHRC 598, 601 (May 2000). An explanation is particularly essential when a judge's penalty assessments substantially diverge from the Secretary's proposed penalties. *Sellersburg Stone Co.*, 5 FMSHRC 287, 293 (Mar. 1983), *aff'd* 736 F.2d 1147 (7th Cir. 1984). As the Commission 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.*

The Commission previously vacated the judge's penalty assessments because he failed to explain the basis for the penalties, and remanded to the judge "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 five violations at issue. 23 FMSHRC at 493-95. The judge's penalty assessments presently on review must again be vacated because they fail to include factual findings for all of the criteria. Nevertheless, in vacating these assessments, we do not imply that the judge cannot draw on his factual determinations from his two prior decisions when he once again analyzes the penalty criteria.<sup>15</sup> Rather, he clearly can utilize these prior findings along with the new findings that we are instructing him to make, in order to arrive at an appropriate penalty assessment under section 110(i).

1. Citation No. 7711660

It is apparent that the judge erred in addressing Citation No. 7711660. The Secretary had vacated that citation before the judge's initial decision in *Virginia Slate I*. Thus, the judge should not have considered Citation No. 7711660 in his remand decision, and his assessment is vacated.

2. Order No. 7711661

On balance, the judge's consideration of the penalty criteria lacks findings specific to the violation before him. As the Secretary notes, S. Br. at 2, the judge reduced the proposed penalty from \$700 to \$300. Consistent with the principles noted above, greater analysis is required to substantiate the reduction. *See Cantera Green*, 22 FMSHRC 616, 622-23 (May 2000).

Further, the judge stated there was no evidence in the record as to whether the penalty

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<sup>14</sup> The guiding legal principles concerning penalty assessments are more fully set out in our prior decision in *Virginia Slate I*, 23 FMSHRC at 492-93.

<sup>15</sup> Although these two prior decisions will have been vacated, the judge is free to resuscitate any findings on specific penalty criteria that we have not overturned.

should be mitigated by Virginia Slate's size or whether it would have any effect on the operator's ability to remain in business. However, there is a reference to Virginia Slate's size in the Secretary's Petition for Civil Penalty Assessment (dated November 23, 1998), which states that the size of the mine is "9767 production tons or hours." Ex. A. Thus, Virginia Slate is a small operator (*see* 30 C.F.R. § 100.3(b)), a factor that the judge should consider in his penalty analysis for each violation. Moreover, in the absence of evidence that the proposed penalty would affect Virginia Slate's ability to continue in business, "it is presumed that no such adverse affect would occur." *Sellersburg*, 5 FMSHRC at 294. Thus, the judge should affirmatively apply this principle in his penalty analysis.

Finally, the judge stated, "A penalty should not be mitigated or increased as the result of the history of violations." 23 FMSHRC at 870. Later, in his discussion of other violations, the judge stated that "there was no evidence" to suggest that Virginia Slate's history of violations was either very good or very bad. *Id.* at 870-71. At trial, the Secretary had admitted into evidence an "Assessed Violation History Report" for a two-year period prior to the trial. S. Ex. 33. Thus, there is evidence that the judge should fully consider, which he apparently did not, in assessing penalties for the violations at issue.

The above discussion concerning the penalty criteria regarding size, ability to stay in business, and history of violations also apply to the penalty analyses for the citations and orders listed below.

3. Citation No. 7711663

The judge omitted any discussion of this citation and penalty assessment, which had been remanded by the Commission in *Virginia Slate I*. 23 FMSHRC at 494. Therefore, the judge must address the penalty in connection with this violation consistent with the legal principles noted above.

4. Citation No. 7711665

Consistent with our discussion of the penalty criteria in Order No. 7711661, the judge must fully consider the size of Virginia Slate's operation and its history of violations. In addition, the judge omitted from his analysis any discussion of gravity in the penalty assessment for this violation; however, he clearly considered gravity in his decision in *Virginia Slate I*. 22 FMSHRC at 384. He should include this analysis on remand.

5. Order No. 7711667

As with Citation No. 7711665, the judge must fully consider the size of Virginia Slate's operation and its history of violations.

6. Order No. 7711681

The judge did not include in his penalty assessment any consideration of the gravity of the violation. 23 FMSHRC at 871. While the judge omitted from his analysis any discussion of gravity in the penalty assessment for this violation, he clearly considered gravity in his decision in *Virginia Slate I*, 22 FMSHRC at 390, as he did with Citation No. 7711665. The judge should include this analysis in his decision on remand.

In sum, the administrative law judge has now addressed the section 110(i) penalty criteria in two decisions. Omissions in the judge's decision presently on review, as with the judge's decision in *Virginia Slate I*, require that we again vacate and remand to the judge for his analysis of the proposed assessment. As we noted above, the judge can make full use of the findings on the statutory criteria that he has previously made that are supported by record evidence. However, the judge's determination of the penalty assessed for a particular violation is an exercise of his discretion that is bounded by proper consideration of *all* of the six statutory criteria. See *Sellersburg*, 5 FMSHRC at 292-94. Accordingly, in light of our decisions in *Virginia Slate I* and here, in which we have vacated the judge's penalty analyses because of his incomplete consideration of the penalty criteria, the judge on remand must consider, *in toto*, all six of the penalty criteria. See Commission Rule 30(a), 29 C.F.R. § 2700.30(a) ("The decision shall contain findings of fact and conclusions of law on each of the statutory criteria . . .").

III.

Conclusion

Based on the foregoing, we vacate the judge's negative unwarrantability determinations and his penalty assessments and remand the proceeding to the judge for further consideration consistent with this decision.

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Theodore F. Verheggen, Chairman

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Mary Lu Jordan, Commissioner

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Robert H. Beatty, Jr., Commissioner

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