FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 26, 2013

SECRETARY OF LABOR,	:	CONTEST PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. SE-2012-359-RM
Petitioner,	:	Order No. 8792037; 3/22/2012
	:	
	:	Mine: Winn Materials, LLC
	:	Mine ID: 40-03094
	:	
	:	CIVIL PENALTY PROCEEDING
	:	
v.	:	Docket No. SE 2012-540-M
	:	A.C. No. 40-03094-291606
	:	
	:	
WINN MATERIALS, LLC,	:	
Respondent.	:	Mine: Winn Materials, LLC

DECISION

Appearances: Jennifer Booth Thomas, Office of the Solicitor, U.S. Department of Labor, Nashville, TN, for the Petitioner
Justin M. Winter, Law Office of Adele L. Abrams, P.C., Beltsville, MD, for the Respondent

Before: Judge Simonton

This case is before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration ("MSHA"), against Winn Materials, LLC, at its Winn Materials, LLC mine (the "mine"), hereinafter referred to as Respondent, pursuant to section 104(d)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* ("Act" or "Mine Act"). On April 24, 2013, a hearing was held in Nashville, Tennessee. The parties' post-hearing briefs are of record.

I. ISSUES FOR ADJUDICATION

Was Respondent's violation of 30 C.F.R. § 56.11001 the result of high negligence and an unwarrantable failure to comply with the cited regulation? While Respondent admits to the violation of the standard, Respondent asserts that the Secretary has not proven the necessary elements to show that this citation was appropriately designated as high negligence, or as an unwarrantable failure to comply pursuant to section 104(d)(2) of the Mine Act. Accordingly, Respondent also contests the penalty amount assessed by MSHA.

II. FINDINGS OF FACT

A. Stipulations

Pursuant to the parties' Joint Stipulations submitted at the hearing on April 24, 2013, the parties have stipulated to the following facts:

Respondent Winn Materials, LLC mines and produces limestone that enters into and has an effect upon interstate commerce within the meaning of the Federal Mine Safety and Health Act of 1977 and is subject to the Federal Mine Safety and Health Act of 1977, and thus, to the jurisdiction of the Federal Mine Safety and Health Review Commission. Further, the Administrative Law Judge has the authority to hear this case and issue a decision. A reasonable penalty will not affect Winn Materials, LLC's ability to remain in business.

The violation at issue in this case was properly served by a duly authorized representative of the Secretary upon an agent of Winn Materials, LLC, on the date stated therein. Respondent admits to the violation of the standard at issue in this case but continues to contest the unwarrantable failure designation, negligence, and the assessed penalty. Order No. 8792037 was properly issued as an alleged violation pursuant to 104(d)(2) of the Act. The predicate alleged 104(d)(1) citation and alleged 104(d)(1) order(s) were issued to the mine in November of 2011 and remain in contest. Order No. 8792037 is properly issued as required by the Act in accordance with the 104(d) series of violations. The Respondent continues to contest all of the violations in the 104(d) series.

B. Factual Background and Testimony

On March 22, 2012, MSHA inspector Darren Conn arrived at the Winn Materials mine to conduct a routine inspection of the plant. Tr. 17. Prior to his work at the Mine Safety and Health Administration ("MSHA"), Conn had worked as a coal miner for four years, in addition to spending 10 years working for CSX Railroad where he eventually became the vice chair for the central region safety chapter. Tr. 15. In 2008, Conn left CSX to work for MSHA, where he received training at the National Mine Academy in Beckley, West Virginia. Tr. 16-17.

On the morning of the inspection, Conn traveled with mine personnel Jeremy Childress, Sean Cotham, and Dan Adams from the hopper to the primary crusher, to the screens and belts, all located in the area of the mine known as the primary plant. Tr. 18-19, 60-61. When Conn

came to the tail section of the #2 belt, he noticed a vast rock spill that was blocking access to the tail section of the belt. Tr. 19. As a result of this condition, Inspector Conn issued Order No. 8792037, which states:

> Safe access was not provided to the tail section of the #2's belt at the primary area of the mine. Spillage was observed alongside the west side of the tail section ranging approximately two feet to five feet in height. The grease line for the west side bearing measured two feet above ground level after cleanup and was barely noticeably [sic] when the spillage was observed. The area measured ten feet wide on the north end and eleven feet wide on the south end after cleanup occurred. Miners access the area on a regular basis for maintenance purposes. The condition created a slip, trip, or fall hazard to miners. Management engaged in aggravated conduct constituting more than ordinary negligence in knowing the condition had existed for more than two shifts without correcting it. This violation is an unwarrantable failure to comply with a mandatory standard.

Gov't Exhibit 1. Inspector Conn took photographs of the condition he observed at that time, which show large accumulations of rock that prevent safe access to the grease line, which is located approximately two feet above ground level and was marked by the inspector on the photograph during his testimony. Gov't Exhibit 6; Tr. 21-22. Conn testified that it was important to provide safe access to the grease line because there is a bearing at that location that employees might need to service, grease, or oil. Tr. 22. Conn noted that this condition made it dangerous for a miner to work in the tail section grease line, and that the area had not been roped off or barricaded in any fashion. Tr. 32.

Conn also stated that at the time he observed the area he was not sure of the source of the spillage but was later made aware that there had been a hole in a scalping screen on a surge chute located approximately 15 feet above the #2 belt tail roller. Tr. 25; Gov't Exhibit 9. Conn testified that while the spill was near the tail roller of the #2 belt, both the skirting issue at the #2 belt and the hole in the scalping screen contributed to the accumulation of rocks. Tr. 25.

However, Conn did not feel that the majority of the accumulations that blocked access to the grease line came from the hole in the scalping screen. Tr. 51. In support of this theory, Conn testified that he could tell by looking at the shape of the fallen rocks that the rock accumulation had been there for some time, because the rocks were damp, packed in, and flat. Tr. 26. He felt that, had the violation only existed for a short period of time due to the sudden hole in the surge chute as the Respondent contended at trial, the rock accumulation would have appeared to be more cone-shaped. Tr. 26. Since the spillage was spread out, Conn deduced that it had been there a few days. Tr. 27. In addition, Conn testified that after the rock spill was cleaned up, he noticed a dark, dampened outline of the area where the rocks had been, which indicated to Conn

that there had been water over the area and thus, that the rocks had been there for some time. Tr. 32-33; Gov't Exhibits 8, 10.

In addition, Conn determined that the operator had knowledge of the violation based on his further questioning of mine employees. Tr. 22-24. As recorded in his inspection notes, Conn asked foreman Jeremy Childress how long the excess spillage had existed at the #2's belt tail section, and Childress stated, "[a]t least a couple days." Gov't Exhibit 2; Tr. 23. Conn also looked at the workplace examinations that had been conducted over the four days prior to the inspection. Tr. 27; Gov't Exhibit 3. On the workplace examination notes for the primary area, housekeeping and skirting were marked as inadequate on March 19th and 20th. Tr. 29-30, Gov't Exhibit 3. However, when Childress was asked to explain his response during his testimony at the hearing, he stated that he had meant to acknowledge the problem specifically with the #2 belt, which had existed a couple of days before it was corrected. Tr. 77-78.

Childress also testified more generally as to his recollection of the relevant facts pertaining to the violation at issue. At the time of the inspection in March 2012, Childress was the quarry foreman, which meant he was responsible for daily planning, scheduling of employees, and examinations. Tr. 59. Childress had conducted workplace examinations of the primary plant on March 22 and the three days prior. Tr. 60-61. When asked to explain the workplace examination notes he had written for March 19 through 22, Childress provided a detailed explanation of what particular conditions he had referenced when marking areas of the plant as inadequate. He testified that the inadequate housekeeping indication on March 19, 2012 referred to the skirting issue on the #2 belt. Tr. 64. The inspection notes from March 20, 2012 also indicate that housekeeping is inadequate, which Childress testified was in reference to the skirting issue again, as well as housekeeping issues on the surge belt and 7x20 platform, both of which were located outside of the area depicted in the inspector's photographs of the violation. Tr. 66-67. With respect to the housekeeping inadequate marks on the examination notes for March 21, Childress testified that he was referring to the rubber on the scalping screen, handrails, and cleanup on the 7x20 platform, all of which are again areas that are not visible in the photograph of the cited area. Tr. 68; Resp. Exhibit 1 at 4.[1]

Childress stated that when he conducted a workplace examination of the cited area between 5:45 and 6:15 A.M. on March 22, there was no material directly in front of the grease point. Tr. 70. His examination notes for that day indicate that housekeeping is inadequate, which Childress clarified meant that the stops on the surge belt needed to be replaced, the hole in the surge chute needed to be fixed, and the skirts on the crusher run shuttle belt needed repair. Tr. 70-71. Childress testified that he did not note accumulations, nor was the "housekeeping" note a reference to the type of accumulations in the violation, because, at the time he conducted workplace examinations of the cited area while there was a skirting issue on the #2 belt, he did not see a lot of material accumulated on the ground. Tr. 66-67. Specifically, he testified that the

[1] Respondent's exhibit 1 at page 4 contains a photograph of the cited area taken by Inspector Conn, a photograph which was also offered into evidence by the Secretary and marked as Government Exhibit 6.

area under the #2 conveyor had approximately a "five-gallon bucket of material underneath the conveyor itself." Tr. 67.

During this workplace examination, Childress did find a hole in the surge chute that needed work. Tr. 70-71. However, he noted that the conveyors were not running at the time, so although he could see that there was a hole, there were not significant accumulations of material on the ground. Tr. 71-72. He also stated that this surge chute had liners that would often wear through and need replacement, and that he did not feel it was a serious enough issue not to energize the conveyors, since there was not much material and any material present would be small in size. Tr. 72.

After conducting the workplace examination on March 22, Childress returned to the primary plant area later that morning with Inspector Conn. Tr. 73. As they walked toward the area, they could see material falling, at which point Childress radioed the operator and had him shut everything down. Tr. 73. The men then walked over to observe the condition. *Id.* Childress estimated that material was moving through the area at a rate of roughly 1000 to 1200 tons per hour, and that there was, at most, approximately six to seven tons of material that had built up when they came to the area. Tr. 74.

After the accumulations were cleaned up, Inspector Conn noted that the skirting on the #2 belt appeared to be worn out. Tr. 24. Skirting, as Conn explained at hearing, is a 6-7 foot-long piece of rubber that goes up along the sides of a belt, to keep rock on the belt as it comes out of the chute. Tr. 24. After the violation was successfully abated, the men went back to the shop, at which point Conn informed the operator he would be issuing a 104(d) order for the accumulation, designated as the result of high negligence and an unwarrantable failure to comply. Tr. 76; Gov't Exhibit 1.

Conn emphasized that Childress was the foreman at the time of the inspection, which meant that he was overseeing the plant area and responsible for conducting workplace examinations. Tr. 23. Accordingly, Conn considered him an agent of the mine. Tr. 23. Conn also spoke with Mr. Sean Cotham, Mr. Childress's boss, about the skirting issue at the #2 belt, and testified that Cotham told him they knew of the problem with the skirt. Tr. 24. These responses, along with the workplace examination notes from the days prior to the inspection, led Conn to issue Order No. 8792037 as high negligence and an unwarrantable failure, since he felt the operator had known of the violation for a couple of days and had done nothing to correct it. Tr. 24, 30-31; Gov't Ex. 2 at 6; Gov't Ex. 3. However, the testimony of Jeremy Childress indicates that his response to Conn's questioning was intended to tell him how long the skirting issue in particular had lasted, and both men acknowledged that the skirting issue could not have caused the subject violation on its own. Tr. 62-65, 24.

Childress also testified that there was no way the skirting issue on the #2 belt could have cause this accumulation because of the size of the accumulated material, since the rocks that typically go through the #2 belt are smaller. Tr. 74. He testified that the excessive spillage seen in the pictures was caused by a hole in the surge chute, though some smaller sources of spillage may have included holes in the surge belt and the #2 belt. Tr. 72-74.

After considering the conflicting testimony and the inconsistencies on the record, I find that foreman Jeremy Childress's testimony carries more weight and is a more complete recollection of the specific events on the day of the investigation. Inspector Conn testified to a theory of the events that asserted that the cited condition was caused by the rubber skirting issue on the #2 belt, but contradicted himself several times by also stating that the skirting issue could not have caused all the accumulations in the photograph of the violation submitted into evidence, and that he could not tell how much relative contribution to the accumulation was attributable to each source of spillage. Tr. 50-51. In contrast, Childress provided a detailed, step-by-step narrative of the day of the inspection, and provided logical explanations of mine personnel's responses to Childress's questioning, the workplace examination notes, and the physical shape of the rock accumulations.

III. APPLICABLE LAW AND ANALYSIS OF EVIDENCE

A. Undisputed Violation of 30 C.F.R. Section 56.11001

Citation No. 8792037 was written for a violation of 30 C.F.R. § 56.11001, which states, "[s]afe means of access shall be provided and maintained to all working places."

The Joint Stipulations submitted at the hearing by the parties state that Respondent admits to violating 30 C.F.R. 56.11001. Joint Stip. at 2. In addition, mine foreman Jeremy Childress admitted at hearing that the accumulations pictured represented a hazard in terms of getting safely to the grease line. Tr. 82. Thus, the issues remaining for adjudication before me are whether the high negligence and unwarrantable failure designations are correct and whether the assessed penalty is appropriate.

B. Negligence

Negligence "is conduct, either by commission or omission, which falls below a standard of care established under the Mine Act to protect miners against the risks of harm." 30 C.F.R. § 100.3(d). "A mine operator is required to be on the alert for conditions and practices in the mine that affect the safety and health of miners and to take steps necessary to correct or prevent hazardous conditions or practices." *Id.* Low negligence exists when "[t]he operator knew or should have known of the violative condition or practice, but there are considerable mitigating circumstances." *Id.* at Table X. Moderate negligence is when "[t]he operator knew or should have known of the violative condition or practice, but there are mitigating circumstances." *Id.* High negligence exists when [t]he operator knew or should have known of the violation, condition or practice and there are no mitigating circumstances. *Id.* Finally, the operator is guilty of reckless disregard where it "displayed conduct which exhibits the absence of the slightest degree of care." *Id.* MSHA considers mitigating circumstances which may include, but are not limited to, actions taken by the operator to prevent or correct hazardous conditions or practices. *Id.*

As noted above, Conn designated this order as "high negligence" because he felt that the operator had known of the violation and that there were no mitigating factors present. However, there were inconsistencies between his testimony at hearing and his prior deposition with respect to what he felt was the definition of "high negligence" under the Mine Act. Tr. 38-40; Resp. Exhibit 5 at 32. While Conn testified that he did not see any mitigating factors that affected his negligence designation, he did state that the lack of footprints or any indication that miners had actually traveled in that area was a mitigating factor for the purposes of the likelihood designation, which he had marked as unlikely. Tr. 41-43; *Id.* at 16, 21-22.

With respect to the operator's knowledge of the violation, the Secretary focused on mine management's responses to Inspector Conn's questioning, the workplace examination notes, and the physical formation of the limestone accumulations to support her assertion that management had knowledge of the cited condition and that the condition had existed for several days. While the Secretary focused on Childress's statement that the problem with spillage *on the #2 belt* had lasted a few days, it is clear from the wording of the question and from Childress's further explanations at the hearing that Childress meant this statement in reference to the skirting issue on the #2 belt specifically, a problem Respondent had noted in workplace examinations and taken steps to correct. Tr. 77-78; Gov't Exhibit 2 at 6. The testimony of both Mr. Childress and Inspector Conn confirm that while mine personnel had knowledge of the skirting issue on the #2 belt, the #2 belt could not have caused all the accumulations that created the cited condition. Tr. 47-48, 74-75.

Notably, Conn testified of the accumulations in the photograph of the violation that "it was clear to me that that did not happen from just a rubber skirt issue," thus acknowledging the multiple sources of spillage that contributed to the violation. Tr. 24. In addition, he stated upon looking at the photograph of the total accumulations in the primary plant that the accumulations in the upper right-hand portion of the picture most likely came from the chute or the hole in the screen above. Tr. 52. In the photograph of the condition, the piles of rock in the upper right-hand part of the site most obviously block access to the grease line. Gov't Exhibit 6. Thus, Conn's testimony and admissions concerning the multiple sources of accumulation cast doubt on Respondent's knowledge of, and ability to correct, this violation prior to the hole in the surge chute that occurred on March 22, 2013.

Further, the Secretary argued that, had the accumulation mostly come from the hole in the surge chute above, the rocks would have fallen straight down and formed a cone shape, as opposed to the spread-out mounds of limestone depicted in the photograph of the violation. Tr. 83; Gov't Exhibit 6. However, Childress explained that the primary hole the rocks were escaping out of was located on the inside of one of the decks, so by the time the material fell to the area below it would have hit the tail pulley and reflected off of the sides, causing rocks to fall in all different directions and creating the spread out piles depicted in the pictures. Tr. 84. He also testified that, in contrast, material coming out of the #2 belt as a result of the skirting issue would have escaped between the belt and the guard, and would have hit the guard and fallen straight down. Tr. 65. The Secretary made no attempt to rebut this explanation, and Inspector Conn had not inspected the surge chute nor investigated the hole in the scalping screen at the time he wrote the citation. Tr. 48.

The Secretary also presented evidence that after rock accumulations were cleaned up, the ground below where the rock piles had been was damp, to show that the rocks must have been there for some time. However, the Secretary's reliance on the damp areas shown in the photograph of the cited area post-cleanup is unconvincing, since the photograph also reveals that the ground in areas never covered by rock accumulation also appears damp. Gov't Exhibit 10. When Childress was asked whether it had rained during the time of the inspection, he responded ambiguously with, "Huh-uh." Tr. 89. Respondent's brief refers to the weather records for Montgomery County, Tennessee on the date in question to support their statement that it had in fact rained three-tenths of an inch on March 22, 2012. Resp. Brief at 12 (citing http://www1.ncdc.noaa.gov/pub/orders/IPS-408AA784-E7EE-48AD-8E8E-65504447EE44-wxc3.pdf). To support this assertion, however, Respondent incorrectly references weather data for March 22, 2011, exactly one year prior to the inspection, which does not indicate any rain. *Id.* Despite this error, I take judicial notice of the fact that it had, as Respondent states in their brief, in fact rained three-tenths of an inch in Montgomery County, Tennessee, on March 22, 2012, as national weather records indicate.[2] However, this fact is still inconclusive since the inspection took place the morning of March 22 and there is nothing in the record to suggest it had rained prior to the inspection. Taken together, none of the evidence presented on this point was conclusive or persuasive.

The Secretary has not shown that mine management knew of the cited condition and had ignored it for days. Although the skirting issue on the #2 belt had existed for a couple of days, the Secretary failed to show that the skirting issue singlehandedly contributed enough accumulations of material to cause the violation. When asked to comment on the source of accumulations in various parts of the cited area, Conn testified that he could not tell how much material actually accumulated as a result of the skirt rubber issue alone, as opposed to the larger portion of material seen in the photograph of the violation. Tr. 49-50; Gov't Exhibit 6. It is the operator's knowledge of the violation itself (the lack of safe access to the grease line) that I must consider when determining their level of negligence, and not their knowledge of a skirting problem that could possibly have contributed an unknown amount to the overall violation. Childress, who had observed the area in question each day for the three days leading up to the date of the inspection, testified that at most, the area under the #2 conveyor had one five-gallon bucket's worth of material under it on the 19th and 20th. Tr. 67. I find that the skirting issue, which was corrected by the March 20, could not have by itself created such a large accumulation, and thus, that the operator did not know of the violation in the days prior to the inspection as the Secretary alleges.

[2] National Oceanic and Atmospheric Administration, National Climatic Data Center, available at: http://www1.ncdc.noaa.gov/pub/orders/cdo/189437.pdf (weather data collected at Clarksville Sewage Plant, Montgomery County, Tennessee, in March 2012). A court may take judicial notice on its own, at any stage of the proceeding, of facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201.

In contrast, Childress's summary of his workplace examinations and corrective actions taken in the days leading up to the inspection show that the mine was aware of the skirting issue on the #2 belt, fixed it, and did not feel that there were accumulations significant enough to hinder safe access to the grease line in the primary plant section until the spill from the hole in the surge chute that occurred the morning of March 22, 2012. Inspector Conn's testimony confirms that the operator corrected the skirting issue, as he testified that the fact that skirting was marked "adequate" on the workplace examination notes for March 21 and 22 indicated to him that they had corrected the issue. Tr. 54. However, Inspector Conn testified that he did not view the fact that they had fixed the skirting as a mitigating factor when considering negligence. Tr. 55.

Upon examination of the factual circumstances in this case, I find that the operator's knowledge of the violation was less extensive than the Secretary asserts, and further, that there were mitigating factors that Conn failed to account for when writing the violation. The operator knew of the skirting issues on the #2 belt for two days, which contributed *some* accumulations to the violation, but there were mitigating circumstances in that Respondent noticed the issue, marked it in workplace examination notes, and corrected the problem with the skirting. With respect to the main source of limestone in the area, the operator was not aware of the hole in the surge chute until the morning of the inspection and was not aware of the amount of accumulations that would result until the conveyor was turned on later that morning. Upon noticing the violation, the operator immediately radioed to have the conveyors shut down and commenced cleanup, actions which quickly corrected the violation and ensured miners would be able to safely access the grease line safely as soon as possible. In addition, the workplace examination notes show that Respondent was conducting regular examinations and had in fact already taken corrective actions to address one potential source of the violation, the skirting issues on the #2 belt. Accordingly, I find that Respondent had taken steps to prevent and minimize this violation, a mitigating circumstance that makes the appropriate level of negligence for this violation "moderate" rather than "high."

C. Unwarrantable Failure

This citation was issued as an "unwarrantable failure," which has been defined by the Commission as "aggravated conduct constituting more than ordinary negligence." *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). The Commission has stated that whether a citation is an "unwarrantable failure" is a question that should be evaluated based on the facts and circumstances in each case, and in light of each of the following factors: 1) the length of time that the violation has existed; 2) the extent of the violative condition; 3) whether the operator has been placed on notice that greater efforts were necessary for compliance; 4) the operator's efforts in abating the violative condition; 5) whether the violation was obvious or posed a high degree of danger; and 6) the operator's knowledge of the existence of the violation. *See IO Coal Co.*, 31 FMSHRC 1346, 1351 (Dec. 2009); *Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000). Because supervisors are held to a high standard of care, another important factor supporting an unwarrantable failure determination is the involvement of a supervisor in the violation. *REB Enters., Inc.*, 20 FMSHRC 203, 225 (Mar. 1998). Judges must consider each

of these factors in light of the evidence in order to reach a determination as to whether a citation is an unwarrantable failure.

As stated in my negligence analysis above, the Secretary did not adequately prove her assertion that the violation had lasted four days. I credit Childress's testimony that the majority of accumulation in the primary plant area occurred on the morning of March 22, 2013, as the inspection was occurring. Thus, the accumulation that actually caused the violative condition had only lasted, at most, an hour and a half. Tr. 70-71; Gov't Exhibit 1. However, the violation was extensive, as indicated by the photographs of the violation submitted into evidence as well as Childress's own testimony that rocks were flying out of the hole in the surge chute at a rate of roughly 1000-1200 tons per hour. Gov't Ex. 6, 7; Tr 74.

The Secretary did not present any evidence as to whether the operator had been placed on notice that greater efforts were necessary for compliance, and the operator's violation history does not indicate previous violations of this standard. Gov't Exhibit 11. In addition, testimony of both the foreman and the inspector indicate that the condition was abated as soon as the operator was made aware of the problem, and that Childress responded quickly by radioing the operator to shut everything down so the condition could be cleaned up. The Secretary has the burden of showing this violation rose to an unwarrantable failure, and did not present any evidence at hearing that the operator took longer than a normal time to abate the violation.

Both the testimony on the record and Conn's designation of this violation as unlikely to cause injury or illness indicate that it did not pose a high degree of danger. There was a lack of footprints in the area or of any other indicia that employees had tried to access the grease line during the time the violation existed, and the path to the grease line was cleaned up quickly after the operator noticed a problem.

With respect to the operator's knowledge of the violation, the negligence analysis above makes it clear that the violation this operator was cited for was not one that mine management had known of until the morning of the inspection. While Conn testified that one of the factors influencing his unwarrantable failure designation had been his reading of the workplace examination notes, I find that he misinterpreted the term "housekeeping" when he took it to refer to a broader spillage problem that could cause the violation, rather than to smaller issues with skirting that were remedied by the operator as they were discovered. After considering all of the above six factors, I find that several of the factors weigh in favor of the operator, such that I cannot find that the violation was a result of Respondent's unwarrantable failure to comply with the cited standard.

IV. PENALTY

Commission Administrative Law Judges (ALJs) have the authority to assess penalties under the Mine Act *de novo*, as stated in Section 110(i) of the Mine Act, which delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act requires Commission ALJs to consider the following six penalty criteria when assessing penalties:

> [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). In keeping with this statutory requirement, the Commission has held that "findings of fact on the statutory penalty criteria must be made" by its judges. *Sellersburg Stone Co.*, 5 FMSHRC 287, 292 (Mar. 1983), *aff'd*, 736 F.2d 1147, 1155 (7th Cir. 1984). Once findings on the statutory criteria have been made, a judge's penalty assessment for a particular violation is an exercise of discretion, which is "bounded by proper consideration of the statutory criteria and the deterrent purpose[s] . . . [of] the Act. *Id.* at 294; *Cantera Green,* 22 FMSHRC 616, 620 (May 2000).

The operator's history of previous violations indicates that they have had no violations of this particular standard, and they were issued only seventeen 104(a) violations in the two year period between March 2010 and March 2012. Gov't Exhibit 11. In addition, Inspector Conn testified that he considered Respondent to be a generally safe operation. Tr. 36. The penalty is appropriate to the size of the business, and the parties have stipulated that a reasonable penalty will not affect Respondent's ability to stay in business. Joint Stip. at 1. As noted in my negligence analysis above, I consider the operator's negligence to be moderate, as opposed to high as the Secretary proposed. The gravity of the violation is not in dispute and has been established to be low. In addition, I find that this was not an unwarrantable failure to comply with the cited standard, and that Respondent rapidly abated the violation in good faith.

V. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. 820(i), I assess the penalty listed above for a total penalty of $400.00 for the citation decided after hearing. Winn Materials, LLC, is hereby **ORDERED** to pay to the Secretary of Labor the sum of $400.00 within 30 days from the date of this decision.[3]

/s/ David P. Simonton
David P. Simonton
Administrative Law Judge

[3] Payment should be sent to the Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

Distribution: (via certified mail)

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