

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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October 9, 1998

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 94-381
Petitioner	:	A.C. No. 46-06051-03689
v.	:	
	:	Stockton Mine
CANNELTON INDUSTRIES, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-100
Petitioner	:	A.C. No. 46-06051-03698-A
v.	:	
	:	Stockton Mine
CHARLES PATTERSON, Employed by	:	
CANNELTON INDUSTRIES, INC.,	:	
Respondent	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 95-101
Petitioner	:	A.C. No. 46-06051-03697-A
v.	:	
	:	Stockton Mine
GEORGE RICHARDSON, Employed by	:	
CANNELTON INDUSTRIES, INC.,	:	
Respondent	:	

**FINAL DECISION ON REMAND**

Before: Judge Hodgdon

On August 27, 1998, I issued a remand decision in these cases finding that the company unwarrantably failed to comply with section 75.400 of the regulations, 30 C.F.R. ' 75.400, and that company foremen Patterson and Richardson knowingly authorized the violation, subjecting them to individual liability under section 110(c) of the Act, 30 U.S.C. ' 820(c). *Cannelton Industries, Inc. et al*, 20 FMSHRC 880 (August 1998). However, because information

concerning Patterson's and Richardson's income, family support obligations or ability to pay a penalty had not been presented at the hearing, the parties were given an opportunity to present such evidence before I issued a final decision. *Id.* at 887. That evidence has now been submitted and the parties have had an opportunity to comment on it.

### **Motion for Reconsideration and to Reopen the Record and Motion to Stay Remand Proceedings**

In addition to submitting financial information, the Respondents have also filed a Motion for Reconsideration and to Reopen the Record and Motion to Stay Remand Proceedings. These motions are based on two pieces of evidence which were in the possession of Respondent's counsel during the hearing, but which he neglected to offer into evidence. Stating that this case was counsel's first before the Commission and citing Rule 60(b) Fed. R. Civ. P., the Respondents request that I reconsider my decision, reopen the record to take additional evidence and stay the remand proceedings to do so. For the reasons set forth below, the motions are denied.

Respondents attempted to have the same evidence considered by the Commission when the case was before it on appeal. The reasons offered for seeking such consideration were the same ones now presented to me. The Commission denied the request. *Cannelton Industries, Inc. et al*, 18 FMSHRC 1597 (September 1996). Thus, that decision is the law of this case.

Furthermore, even if the Commission's decision were not binding, I would deny the motions. As the Secretary has forcefully demonstrated in her brief opposing the motions, the evidence is not admissible. Finally, even if the evidence were admissible, it would not change my decision. While it may have some tendency to support the company's case, it falls far short of rebutting the Secretary's case. Accordingly, the motions to reconsider, reopen and stay are **DENIED**.

### **Civil Penalty Assessments**

Both Patterson and Richardson have submitted their employment and financial status in the form of affidavits. Patterson states that he is 53 and still employed in the coal mining industry, although he believes that he may have to retire because his job security is reduced due to developments that may lead to mine closure. Affidavit of September 18, 1998. He relates that in addition to his wife, he is also providing financial assistance to his mother, mother-in-law, daughter, son and brother. *Id.* Patterson asserts that his current income, after taxes, is \$3,700.00 per month and that he has monthly expenses of \$3,545.00 per month. *Id.*

Richardson states that he is 54 and has not worked in coal mining employment since April 27, 1994 and cannot return to such employment due to my medical disabilities. Affidavit of September 17, 1998. He claims that his only income is \$2,943.00 per month from Social Security Disability payments and a Long Term Disability Program and that he has monthly expenses of \$3,106.09 per month. *Id.*

The Secretary states that AMSHA has no evidence that either of the named individuals has any prior history of knowingly violating the Mine Act or its regulations. Letter of September 21, 1998. The Secretary did not file any comments on the submissions of Patterson and Richardson.

Following the guidance in *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997), I find that the gravity of this violation was serious, that the Respondents' negligence was very high, that the violation was abated in good faith, that neither Patterson nor Richardson has any previous history of 110(c) violations and that both were shift foremen. With respect to Patterson, I find that his income and family support obligations are as set out in his affidavit.

I have more trouble making a finding concerning Richardson's income and support obligations. His affidavit does not state whether or not he is married. Moreover, it contains a statement which seriously affects his credibility. He states that he was last employed in mining on April 27, 1994. However, at the hearing on October 12, 1995, he testified that at that time he was employed as an Acting shift foreman by Cannelton Industries. (Tr. 247.) Consequently, the accuracy of his affidavit is questionable and raises the concern of whether his failure to reveal his marital status, which could have been an innocent omission, may have been deliberate.

In this regard, I note that Richardson claims to have two car payments of \$385.00 and \$487.00, respectively. Affidavit of September 17, 1998. If he is not married and he is, in fact, spending more each month than he takes in, such expenditures would appear to be an unessential extravagance.

The significance of this omission is that if he is married, I cannot perform the two step analysis of his financial position required by the Commission in *Wayne R. Steen*, 20 FMSHRC 381, 385 (April 1998), because I cannot determine either Richardson's household financial condition or his share of the household's net worth, income and expenses. Thus, I cannot make any findings on his size or ability to continue in business. *Id.*

The remedy for this circumstance is not to further delay this case by requesting additional information, but to find that, by failing to submit accurate information when given the opportunity to do so, his ability to continue in business will not be affected by the imposition of an authorized penalty in this case. The Commission has previously held with respect to operators that [i]n the absence of proof that the imposition of authorized penalties would adversely affect [an operator's] ability to continue in business, it is presumed that no such adverse effect would occur. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), aff'd. 736 F.2d 1147 (7<sup>th</sup> Cir. 1984); accord *Broken Hill Mining Co.*, 19 FMSHRC 673, 677 (April 1997); *Spurlock Mining Co.*, 16 FMSHRC 697, 700 (April 1994). There does not appear to be any reason that the same presumption should not also apply to 110(c) respondents.

Therefore, I find that, since Richardson has not credibly established his income and family support obligations, his ability to pay or the affect a penalty will have on them, he will not be

adversely affected by the imposition of a penalty. Considering all of the penalty factors, I conclude that a civil penalty of \$300.00 is appropriate.

Returning to Patterson, I find that a civil penalty of \$300.00 is also appropriate for him.. This finding is based on the fact that his affidavit indicates a surplus of \$155.00 per month and that he attributed expenditures of \$100.00 per month to recreation, @ \$166.00 per month as contribution to saving for yearly vacation to the beach @ and \$100.00 per month as contribution to saving for yearly vacation to the lake, @ which indicate that payment will not require him to forego the necessities of living.

It is apparent that both Respondents are of limited financial means. Accordingly, I will direct that the penalties be paid in instalments consistent with their individual circumstances.

### **ORDER**

Cannelton Industries, Inc. is **ORDERED TO PAY** a civil penalty of **\$3,600.00** within 30 days of the date of this order. Charles Patterson is **ORDERED TO PAY** a civil penalty of **\$300.00** in six monthly instalments of \$50.00 per month, the first payment to be made within 30 days of the date of this order. George Richardson is **ORDERED TO PAY** a civil penalty of **\$300.00** in 12 monthly instalments of \$25.00 per month, the first payment to be made within 30 days of the date of this order. With respect to Patterson and Richardson, failure to make any payment as scheduled will result in the entire, unpaid balance becoming immediately due and payable, together with such court costs as may be incurred by the U.S. Department of Labor in collecting such amounts. On receipt of payment by Cannelton and receipt of final payment by Patterson and Richardson, these cases are **DISMISSED**.

T. Todd Hodgdon  
Administrative Law Judge

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