

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 27, 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	:	

DECISION ON REMAND

Before: Judge Hodgdon

On July 27, 1998, the Commission vacated my determinations that Cannelton's violation of section 75.400, 30 C.F.R. § 75.400, was the result of an unwarrantable failure to comply with the regulation and that Patterson and Richardson, Cannelton foremen, were liable under section 110(c) of the Act, 30 U.S.C. § 820(c), for the violation, and remanded the case for further consideration consistent with its opinion. *Cannelton Industries, Inc. et al*, 20 FMSHRC 726 (July

1998). For the reasons set forth below, I conclude that the violation did result from the operator's unwarrantable failure and that Patterson and Richardson are liable under section 110(c).

Factual Setting

The situation, which is set out more fully in my original decision, *Cannelton Industries, Inc. et al*, 18 FMSHRC 651 (April 1996), and the Commission's decision, can briefly be summarized. MSHA Inspector Michael Hess discovered an accumulation of dry, loose coal and coal dust that was approximately 10 feet square and 4 feet deep under the V-scraper on the No. 3 belt. The Secretary's witnesses, two fire bosses who examined the belt every day for the 2-weeks preceding the violation and a laborer who observed the belt a few days prior to the violation, testified that the accumulation began on February 14, 1994, and grew steadily until it had reached the height of the belt where it was discovered by the inspector on March 1. One of the examiners, who accompanied the inspector during the inspection, specifically testified that the accumulation found by the inspector was the one he had observed growing steadily.

On the other hand, Patterson, Richardson and a third foreman, Elkins, postulated that the accumulation discovered by Hess was the result of a shuttle car hitting the spill board at the belt feeder which in turn knocked the belt out of alignment and caused most of the coal to fall directly onto the bottom belt on which it traveled until it reached the V-scraper where it was knocked off onto the floor. *Id.* at 655. They stated that if an accident such as they described occurred, an accumulation like the one found by the inspector could occur in two to three minutes. (Tr. 255, 331, 385.)

Discussion

Obviously, the two versions of events are mutually inconsistent. They cannot be reconciled. In my original decision, I stated that I believed the three witnesses presented by the Secretary because nothing was offered at the hearing to show that any of them had any reasons not to tell the truth. Nor was there any indication at the hearing that they were not credible. *Cannelton* at 655. In addition, I would add that their testimony is mutually corroborative and is further supported by their entries in preshift-onshift reports. It follows that I did not believe the three foremen. On reconsideration, I adhere to that determination.

The Third Foreman

In its remand, the Commission directed that I consider Elkins' testimony and make a credibility determination with respect to Elkins. 20 FMSHRC at 732. They specifically directed that I address his testimony that, 32 hours prior to the inspection, the accumulation was smaller than when the inspector cited it. *Id.* For the reasons that follow, I do not find Elkins' testimony credible.

Elkins testified that at about 7:00 a.m. on the morning that the inspector made his inspection he observed an accumulation under the belt which he deemed to be abnormal. He described it as follows: "Now these are all approximates, okay? An accumulation of possibly four foot by four foot - although it was not a square. It would not fall that way - and I would say a depth of, just using judgment, 18 to 24 inches deep." (Tr. 322.) He said that he made this observation at a distance of "maybe two, two-and-a-half breaks which would be probably less than 200 feet . . . with my cap light." (Tr. 324.)

There are three possible explanations for this testimony. First, the testimony could be absolutely correct. Second, what he saw was the accumulation described by the Secretary's witnesses, but he misjudged its size as a result of the distance from which he observed it and the fact that the only available light was his cap light. Or third, the testimony is a complete fabrication.

If the testimony is true, it means that, despite Elkins' characterization of it as abnormal, a sizable accumulation was already under the V-scraper, which he did nothing to alleviate. The testimony also undercuts the foremen's theory that the accumulation occurred during a 2 to 3 minute time period shortly before the inspector discovered it.

On the other hand, the testimony could well be a complete falsehood. Curiously, this was the only thing that Elkins specifically remembered in his entire testimony. He could not remember when the No. 3 belt line, with its movable feeder, was set up; he could not remember when the feeder had previously been jarred by a shuttle car dumping coal onto the belt resulting in a large spill; he could not recall which miners he had shovel the belt line, when he had them shovel it, or on how many occasions he assigned miners to shovel it.

However, giving Elkins the benefit of the doubt, I find that the most reasonable explanation for this testimony is that he saw the accumulation discovered by the inspector, and misjudged its size. He certainly did not bother to make a close investigation of the accumulation. Viewing it from 200 feet by cap light is not conducive to accurate observations and estimates.

Corroboration

Besides the testimony of the three foremen, no evidence supports their hypothesis that the accumulation resulted from a shuttle car dumping coal on the belt, hitting the spill board at the feeder, knocking the belt out of alignment, and causing most of the coal to fall directly onto the bottom belt until it was knocked off of the belt by the V-scraper in a 2 to 3 minute time period shortly before the inspector discovered it. The section boss, Steve Dean, the man Richardson allegedly called and told to shut down the belt and reset the feeder after the accumulation was discovered presumably could have presented such evidence. Unfortunately, he was not called as a witness.

In my original decision, I did not intend to imply that the accumulation was not caused by spillage from the feeder or the belt onto the bottom belt. Some spillage is normal and is the reason the bottom belt has a V-scraper. What I found was that the accumulation did not occur over a short period of time as suggested by the foremen. While Inspector Hess testified that there was some spillage coming down on the bottom belt and hitting the V-scraper when he discovered the accumulation, he indicated that it was not a significant amount, a five-gallon bucket out of the 15 tons of coal which would be dumped by a shuttle car. (Tr. 47.)

In this connection, Inspector Hess also testified that he walked by that area which is in by where the V-scraper is. There was no noticeable accumulation or spillage in this area where the third right feeder is and the backboard or the spill board where the third right feeder dumps on the 3 right belt. (Tr. 87.) He also stated that if most of the coal were being deposited on the bottom belt: There would be coal scattered out from the feeder back to the scraper board. To get approximately 10 tons of coal piled up in one area, there would be several tons of coal scattered out from area A, let's call it the feeder, back to where area B would be at the [scraper] board. (Tr. 88.) He declared that he did not see any such accumulations in the area between the feeder and the V-scraper.

In conclusion, none of the three foremen actually saw a shuttle car knock the feeder and belt out of alignment, saw coal being dumped directly onto the bottom belt or saw the accumulation until the inspector directed Richardson's attention to it. No one else testified that such an incident occurred and there is no other evidence to suggest that the accumulation occurred as insinuated by the foremen. On the other hand, the evidence of the two fire bosses, the laborer and Inspector Hess directly contradicts such an occurrence. Accordingly, I find that the accumulation was caused by normal spillage being scrapped off the bottom belt by the V-scraper over a 2-week period of time.

Unwarrantable Failure

The Commission vacated my finding that Cannelton did not make efforts to eliminate the violative condition, and remand[ed] the matter for further consideration of the evidence adduced during the hearing on this issue. 20 FMSHRC at 734. After further considering the evidence, I conclude that Cannelton in general, and the three foremen specifically, made no efforts to clean up the accumulation in this case.

Consistent with their theory in this case, the foremen denied that an accumulation, beginning on February 14 and steadily growing until March 1, ever existed. Thus, Richardson declared: I never seen a condition at that scraper and I was by there. If there was a mound of coal there, it presented no problem. (Tr. 307.) Patterson testified: A. Okay. Now, during the two weeks in question, did you ever observe a buildup in the rollers of the No. 3 belt? A. No, sir. (Tr. 388.) And Elkins answered: A. Q. Do you think there was a problem with accumulations at the No. 3 belt V-scraper during the period from February 14th to March the 1st? A. No more

so than normal. (Tr. 337.) Consequently, their testimony about cleaning up accumulations did not go to the specific accumulation in question, but to cleaning up accumulations in general.

Furthermore, it is apparent that their general practice was not very rigorous. Richardson testified: **Q.** Do you recall during that two-week period going to check the V-scraper and the No. 3 belt to see if it had been cleaned up? **A.** As far as going to specifically check that, no. (Tr. 284-85.) He stated further:

Q. And you're sure that men worked on the No. 3 belt near the V-scraper during the two week period before the citation?

A. Yes, ma'am. I'm sure *if it's in that book*. I give them a piece of paper to clean that area because they would clean from the feeder to the V-scraper, because when you got the V-scraper full you've got -- you had trails of coal down each side of the belt where part of the coal fell off.

Q. Can you tell me when these men were working on it?

A. No, ma'am.

Q. Can you tell me how often during that two-week period they worked on it?

A. No, ma'am.

(Tr. 298-99.) (emphasis added.) Since there was nothing in the preshift book indicating that the V-scraper had been cleaned during the two week period in question, Richardson was *not* sure that the area had been cleaned. In fact, Richardson's testimony indicated that he never checked to make sure that it had been cleaned.

In the same vein, Elkins testified:

A. At various times I had people go down there and shovel some.

Q. Is this in the two-week period preceding the citation being issued?

A. *I cannot give you an exact time frame. I would say yes, it is. But, then again, I am not certain of that.*

Q. Do you recall who you sent down to shovel?

A. No, ma'am. I do not.

Q. Do you recall when you sent them to shovel?

A. No.

Q. Do you recall on how many occasions you sent them to shovel?

A. It would depend, I guess, on the depth of the what they call
Ahay stacks,@ which is the way the material forms when it drops off
the belt.

Once it got to a height that concerned me, then I would have
someone go down and -- they might not -- they wouldn't clean
maybe the whole thing up.

(Tr. 338) (emphasis added.)

Patterson testified similarly: AWell, like I said previously, the men were assigned that area
every day somewhere on the list. So I felt that it would be cleaned up.@ (Tr. 390.) The foremen
assumed that any accumulations were being cleaned up; not one of them ever bothered to check
or even to ask one of the fire bosses or the men assigned to clean up whether anything had been
done.

If any efforts were made to clean up the accumulation, it was in spite of, not because of,
anything the foremen did. Furthermore, it defies credulity to think that work could be done on
the accumulation and yet nobody, not the foremen, not the fire bosses, not anyone who testified
ever saw it being done, or saw the results of the work. If anything had been done, surely the fire
bosses would have noticed that the accumulation had stopped steadily growing.

I find that the accumulation was extensive, that the operator, through its foremen, was put
on notice that greater efforts were necessary to take care of accumulations in the area of the
V-scraper, that the violation existed for 2 weeks and that little or no efforts were made to
eliminate the accumulation. Accordingly, I conclude that the violation resulted from Cannelton's
unwarrantable failure to comply with the regulation.

Section 110(c) Liability

The Commission vacated my determination that Patterson and Richardson were liable
under section 110(c) and remanded Afor findings of fact related to the foremen's cleanup efforts.@
20 FMSHRC at 737. Since the Commission has already concluded that Athe record supports the
judge's finding that Patterson and Richardson, agents of Cannelton, possessed actual knowledge
of the accumulation problem by way of the preshift-onshift reports,@*Id.* at 736 (footnote omitted),
and I have already found that the foremen made little or no effort to cleanup the accumulation, I
conclude that they are liable under section 110(c).

Conclusion

Resolution of this case depends on who is believed. The Secretary's case is that an accumulation began developing on February 14, 1994, when it was first reported, and gradually increased in size until it was 10 feet square, 4 feet high and was touching the belt and rollers when discovered by Inspector Hess on March 1. Cannelton's case, based on the testimony of its three foremen, is that nothing other than normal accumulations existed until March 1 when the jarring of the feeder and the belt by shuttle cars dumping coal must have resulted in the accumulation developing over a very short period of time shortly before it was discovered. The two versions cannot be reconciled. It is not possible to find that all of the witnesses are credible.

I believe the Secretary's witnesses for the reasons I have previously given. It follows that I do not believe the foremen. Their version is not what someone actually saw happen, but what they believe happened. No other evidence corroborates this theory. In fact, the direct evidence of Inspector Hess contradicts it. There are inconsistencies in their testimony. For instance, Patterson believed that a spill similar to the one in this case had occurred right around February 14. The other two said that such a spill had happened some time prior to the 2-week period in this case. All three had reasons to testify as they did, since to admit that the accumulation occurred the way I have found that it occurred would be to admit that they were not doing their jobs. In addition, Richardson and Patterson had the further reason that they faced 110(c) liability.

Accordingly, I conclude that the accumulation resulted from the operator's unwarrantable failure to comply with section 75.400. I further conclude that Richardson and Patterson are liable under section 110(c) of the Act for this violation since they knowingly allowed the accumulation to exist and grow for 2 weeks without taking any significant action to clean it up.

Civil Penalty Assessment

Since I have found that this violation resulted from the company's unwarrantable failure, I adopt my evaluation of the penalty criteria set out in my original decision and assess a penalty of \$3,600.00. 18 FMSHRC at 661-62.

In its decision, the Commission directed that in the event I find the foremen liable under section 110(c), I should reassess the civil penalty or penalties based on the section 110(i) criteria as they apply to individuals. *Ambrosia Coal and Constr. Co.*, 19 FMSHRC 819, 823 (May 1997); *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (Feb. 1997).@ 20 FMSHRC at 737. *Sunny Ridge* counsels that in making findings concerning the penalty criteria as they apply to individuals, the judge should

consider such facts as an individual's income and family support obligations, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay.

Similarly, judges should make findings on an individual's history of violations and negligence, based on evidence in the record on these criteria. Findings on the gravity of a violation and whether it was abated in good faith can be made on the same record evidence that is used in assessing an operator's penalty for the violation underlying the section 110(c) liability.

Id. at 272.

In this case, neither Richardson nor Patterson presented any evidence concerning his income, family support obligations or ability to pay. Similarly, the Secretary did not present any evidence on the foreman's history of violations and negligence. In *Sunny Ridge*, because there was no evidence in the record on these criteria, the Commission remanded the case to the judge to institute further proceedings as necessary to obtain evidence that will enable him to make findings pertinent to . . . individual liability. @ *Id.* Since *Sunny Ridge* was issued after the original decision in this case, I conclude that the parties should be given an opportunity to present evidence on these criteria.

Accordingly, this decision will not be final with regard to any civil penalty to be assessed against Richardson and Patterson. Instead, Richardson and Patterson have until September 11, 1998, to submit evidence on their income and family support obligations, the appropriateness of a penalty in light of their job responsibilities and their ability to pay. Likewise, the Secretary will have until September 11, 1998, to submit evidence on each individual's history of violations and negligence. Any evidence submitted must be sent to the opposing party. Comments or objections to a party's submission must be filed by September 18, 1998. After reviewing the submissions, I will issue a final decision on civil penalties for Richardson and Patterson.

ORDER

Citation No. 4195028 issued to Cannelton Industries, Inc., and the civil penalty petitions alleging that George Richardson and Charles Patterson knowingly authorized the violation in the citation are **AFFIRMED**.

T. Todd Hodgdon
Administrative Law Judge

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