

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 25, 1999

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 95-333-M
Petitioner	:	A.C. No. 04-03425-05503 TIR
	:	
v.	:	Washington Mine
	:	
UNIQUE ELECTRIC,	:	
Respondent	:	

DECISION ON REMAND

BEFORE: Judge Manning

In my original decision in this civil penalty proceeding, I held that Unique Electric violated 30 C.F.R. ' 57.12025 and I assessed a civil penalty of \$400 for the violation, *Unique Electric*, 19 FMSHRC 783 (April 1997). In the decision, I found that Unique Electric was a sole proprietorship, without employees or assets, operated by Mr. Kim Warnock and that it was no longer performing work at any mine. The Secretary of Labor appealed my decision to the Commission on the basis that I improperly reduced the \$8,500 civil penalty proposed by the Secretary based on my analysis of the Ability to continue in business@ criterion in section 110(i) of the Federal Mine Safety and Health Act of 1997, (AMine Act@) (30 U.S.C. ' 820(i)). The Commission granted the Secretary=s petition for review. The single citation in this case was issued following a fatal accident, as described in my original decision.

I. DECISION OF THE COMMISSION

In its decision, the Commission vacated my \$400 penalty assessment in this case and remanded the case to me for further proceedings consistent with its decision. *Unique Electric*, 20 FMSHRC 1119 (October 1998). The Commission vacated the penalty I assessed based on concepts developed in its decisions in *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (February 1997) and *Ambrosia Coal & Construction Co.*, 19 FMSHRC 819, 823-24 (May 1997). These decisions discuss how penalties should be assessed against agents of corporate mine operators under section 110(c) of the Federal Mine Safety and Health Act of 1997, 30 U.S.C. ' 820(c). The \$8,500 penalty in this case was proposed by the Secretary under section 110(a) of the Mine Act. The Commission held that the present case is akin to one brought against an individual under section 110(c) of the Mine Act@ because Mr. Warnock, the owner of Unique Electric, was self-employed at the time the citation was issued. 20 FMSHRC at 1122.

In its decision, the Commission directed that I reconsider the penalty taking into consideration the six criteria set forth in section 110(i) of the Mine Act.¹ With respect to the ability to continue in business criterion, the Commission directed that I consider whether the proposed penalty would affect Warnock's ability to meet his financial obligations.² *Id.* With respect to the size of the business criterion, the relevant inquiry is whether the penalty is appropriate in light of the individual's income and net worth.³ *Ambrosia*, 19 FMSHRC at 824. In *Sunny Ridge*, the Commission set forth its analysis with respect to penalties brought against individuals as follows:

The criteria regarding the effect and appropriateness of a penalty can be applied to individuals by analogy, and we find that such an approach is in keeping with the deterrent purposes of penalties assessed under the Mine Act. In making such findings, judges should thus 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....⁴

19 FMSHRC at 272.

The Commission further analyzed how penalties should be assessed against individuals in *Wayne Steen, employed by Ambrosia Coal & Construction Co.*, 20 FMSHRC 381, 385-86 (April 1998). The Commission stated that four judges must engage in a two-step analysis...⁵ as follows:

First, they must determine [an individual's] household financial condition. Then they must make findings on the ... size⁶ and ability to continue in business⁷ criteria on the basis of the [individual's] share of his or her household's net worth, income, and expenses.

¹ The criteria are the [mine] operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.⁸ 30 U.S.C. § 820(i).

Id.

II. PROCEEDINGS ON REMAND

On October 26, 1998, I ordered Mr. Warnock to provide me with information concerning his income, financial obligations, and net worth. 20 FMSHRC 1241 (October 1998). I asked for a listing of his major assets and liabilities, indicating which assets were held jointly with his wife and which liabilities were joint obligations. I also asked him to describe his family support obligations. Finally, I asked for a copy of his Federal tax return so that I could verify the information submitted. This information was submitted to me. I sealed the tax returns submitted by Mr. Warnock.

1. Information Supplied by Mr. Warnock

The information submitted shows that all assets and liabilities of Mr. Warnock are shared jointly with his wife, as follows:

1. Major Assets

a. Home - The Warnocks own a home that is valued at about \$83,000. The present mortgage is about \$69,900 and the monthly payment is \$735. Thus, their equity in the home is about \$13,100.

b. Automobile - The Warnocks own a car that is valued at about \$8,500. The outstanding loan on the car is about \$8,000 and the monthly payment is \$250. Thus, their equity in the car is about \$500.

c. Trailer Recreational Vehicle (5th Wheel) - The Warnocks own an R.V. that is valued at about \$7,000. The outstanding loan on the R.V. is about \$6,000 and the monthly payment is \$120. Thus, their equity is about \$1,000.

d. Truck - The Warnocks own a truck that is valued at about \$5,700. The loan has been paid. Thus, their equity is about \$5,700.

2. Major Liabilities

a. Loans - In addition to the home mortgage and loans listed above, the Warnocks owe about \$6,000 on a Visa charge card. They make a monthly payment of about \$300.

b. Monthly payments - The Warnocks= monthly payments for the assets listed above including the Visa bill is about \$1,400. In addition, they estimate that their monthly payments for other basic goods and services to be about \$1,100. These payments include the cost of utilities, phone service, life and health insurance, auto insurance, food, and gasoline. The total monthly payments are about \$2,500.

3. Income

The citation in this case was issued in September 1994. In that year, the Warnocks' household adjusted gross income was about \$32,000. Of this amount, about \$20,000 was from earnings by Mr. Warnock from Unique Electric.

In 1997, the most recent year for which tax returns are available, the household adjusted gross income was about \$70,000.

In September 1997, Mr. Warnock took a new job and his monthly gross income was about \$2,880. This new position is closer to home but it pays significantly less than the job he held before September 1997. As of the end of 1997, Mr. Warnock's gross annual income was about \$34,500. At the end of 1997, Mrs. Warnock's gross monthly income was about \$1,360, or about \$16,300 annually. Thus, as of December 1997, the Warnocks' gross annual income from employment was about \$50,800. As of December 1998, Mr. Warnock's gross monthly wage is \$2,400, about \$400 lower than in 1997.

4. Financial Condition

The household net worth of the major assets shown above is about \$20,300. The household monthly payment for loans, insurance, utilities, telephone, food, and gasoline is about \$2,500 per month or about \$30,000 per year. The household gross income is less than \$50,800.

The information supplied by the Warnocks indicates that all assets and liabilities are joint. There is no indication whether the Warnocks are supporting any children, so I assume that there is no such support obligation. In his submission, Mr. Warnock states that after paying taxes and monthly bills, the household had about \$700 of discretionary income per month to cover other essentials such as non-reimbursed medical expenses, as well as nonessential items and services.

2. Response of the Secretary of Labor

In her response to Mr. Warnock's submission, the Secretary contends that the information supplied is Amaterially incomplete with regard to Mr. Warnock's net worth. Specifically, she states that Mr. Warnock's submission does not indicate whether he owns Any additional assets, including any investments such as additional real estate, IRA's, 401(k)'s, [or] vested pension assets.... Counsel states that without such information, the Secretary cannot make any Ameaningful submission regarding the appropriate amount of penalty.... The Secretary provided an

affidavit that the Department of Labor uses to determine whether a civil penalty should be reduced due to financial hardship and suggests that Mr. Warnock should be required to fill it out or to provide a sworn statement that he has no interest in any additional assets.

III. ANALYSIS AND PENALTY ASSESSMENT

I find that Mr. Warnock provided sufficient information on which I can assess a civil penalty under the Commission's remand order. In its decision, the Commission stated that, when I evaluate the ability to continue in business criterion, I should consider whether the proposed penalty would affect Mr. Warnock's ability to meet his financial obligations, and that when I evaluate the size criterion, I should consider Mr. Warnock's income and net worth. I have reviewed the Warnocks' tax returns and I am satisfied that the information submitted is accurate and provides a good outline of his financial condition. The 1997 tax return shows that the Warnocks earned minimal interest, and no dividends or capital gains. My examination of the tax return also shows that they do not own any real estate other than their home. When assessing a penalty, I will assume that the Warnocks have a checking account and some tax sheltered savings for retirement in the form of an IRA, 401(k), or a vested retirement plan that is commensurate with their economic profile.

In assessing a civil penalty, I must consider all six penalty criteria. I review each of them below. For the criteria that are not at issue on remand, I incorporate my findings from my original decision.

1. The Operator's History of Previous Violations

Neither Unique Electric nor Mr. Warnock has any history of previous violations of the Mine Act or the Secretary's safety and health standards.

2. The Appropriateness of the Penalty to the Size of the Business of the Operator

There is no dispute that Unique Electric was a small electrical contractor operated by Mr. Warnock. Unique Electric was a sole proprietorship without any employees or assets. Unique Electric was simply the name that Mr. Warnock used when he provided services to his customers; it was not a separate legal entity. Mr. Warnock was a mine operator under section 3(d) of the Mine Act because he was an independent contractor performing ... services at [a] mine. 30

U.S.C. ' 802(d). I have considered Mr. Warnock's share of the household income and net worth when analyzing this criterion.

3. Whether the Operator was Negligent

The citation in this case was issued under section 104(d)(1) of the Mine Act and charged that the violation was caused by the unwarrantable failure of Unique Electric to comply with section 57.18025. At the hearing, the Secretary did not present any evidence with respect to the unwarrantable failure allegation in the citation. Accordingly, I vacated the unwarrantable failure allegation and modified the citation to a section 104(a) citation. I found that Mr. Warnock was negligent in failing to ground the pump circuit in accordance with his normal practice.

4. The Effect on the Operator's Ability to Continue in Business

The Commission held that I should consider *whether the proposed penalty would affect Warnock's ability to meet his financial obligations* when analyzing this criterion. 20 FMSHRC at 1122 (emphasis added). Given the financial profile provided by Mr. Warnock, which I believe to be reasonably accurate, I find that a \$8,500 penalty would affect his ability to meet his financial obligations. If I determined that such a penalty was appropriate after considering all six of the penalty criteria, I would allow Mr. Warnock to pay the penalty in installments over a period of time. As discussed below, however, I find that such a penalty is not appropriate.

5. The Gravity of the Violation

I found that the violation was serious and was of a significant and substantial nature.

6. Demonstrated Good Faith of the Person Charged in Attempting to Achieve Rapid Compliance after Notification of the Violation

I found that the violation was abated in good faith. The violation was abated by replacing the electric pump with a compressed air pump. Because it is not clear to what extent Warnock was involved in the abatement, this criterion is not a major factor in my penalty assessment. Mr. Warnock testified that he recommended that an air pump be used instead of an electric pump when he was originally asked to install the pump. (Tr. 75, 372-73).

7. Determination of an Appropriate Civil Penalty

In determining an appropriate penalty, I take into consideration my findings with respect to all six of the criteria. As directed by the Commission, I have not assumed that because Kim Warnock no longer provides services to the mining industry, no deterrent purpose would be served by the penalty proposed by the Secretary or any other penalty. 20 FMSHRC at 1123.

I find that the Secretary's proposed penalty is not appropriate for a number of reasons. First, Unique Electric was an extremely small business, as described above and in my original decision. The proposed penalty was not appropriate given Mr. Warnock's income and net worth. Second, Unique Electric had no history of previous violations. Third, the Secretary did not establish that the violation was a result of Unique Electric's unwarrantable failure. This fact directly relates to the negligence criterion and it was a major factor in my assessment of a penalty in my original decision and in this decision. Fourth, the proposed penalty would affect Mr. Warnock's ability to meet his financial obligations.

As stated above, the **Good faith** criterion was not a major factor in my penalty assessment. Finally, I considered the gravity criterion. This criterion is extremely important because it takes into consideration the hazards created by the violation. I reemphasize my finding that the violation was serious and was of a significant and substantial nature.

The penalty proposed by the Secretary was **Aspecially assessed** under 30 C.F.R. ' 100.5. The Secretary usually proposes civil penalties for S&S violations using the formula set forth in section 100.3. Section 100.5 gives the Secretary wide discretion to **Aspecially assess** penalties. Penalties proposed under section 100.5 are generally higher than penalties proposed under section 100.3. Among the factors that the Secretary considers when deciding whether to specially assess a penalty are whether the violation involves a fatality or serious injury and whether the citation alleges an unwarrantable failure. (30 C.F.R. ' 100.5(a) & (b)). As stated above, I vacated the Secretary's unwarrantable failure determination. At the hearing, the Secretary maintained that Mr. Warnock was **Not being charged with responsibility for** the fatality. (Tr. 414, 28).

If the Secretary had proposed the penalty in 1995 under the **Regular assessment** formula in section 100.3, the proposed penalty would have been \$292 (41 points) using Inspector Pederson's high gravity and high negligence determinations,

without a 30% reduction for good faith abatement. I am not bound by the Secretary's penalty regulations. I present this information solely to show that establishing an appropriate civil penalty using the criteria is not an exact science and that different techniques yield different penalties.

I find that a penalty of \$400 is appropriate for the citation in this case; Citation No. 3910427 issued September 9, 1994. I reach this conclusion taking into consideration all six penalty criteria. The criteria that resulted a lower assessment than that proposed by the Secretary are: (1) history of previous violations; (2) appropriateness of the penalty to the size of the business (income and net worth); (3) the negligence of the operator; and (4) the effect of the penalty on the ability to stay in business (ability to meet financial obligations).

IV. ORDER

Mr. Kim Warnock, acting on behalf of Unique Electric, is **ORDERED TO PAY** the Secretary of Labor the sum of \$400.00 within 60 days of the date of this order, if he has not already done so. Upon payment of this penalty, this case is **DISMISSED**.

Richard W. Manning
Administrative Law Judge

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