

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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August 20, 1997

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	Docket No. PENN 94-15
Petitioner	:	A. C. No. 36-04109-03522 A
v.	:	
	:	Ambrosia Tipple Mine
WAYNE R. STEEN Employed by	:	
AMBROSIA COAL COMPANY,	:	
Respondent	:	

REMAND DECISION

BEFORE: Judge Barbour

In this civil penalty proceeding, the Secretary of Labor (Secretary), on behalf of her Mine Safety and Health Administration (MSHA), petitioned for the assessment of a civil penalty against Wayne R. Steen, a foreman of Ambrosia Coal & Construction Company (company). The petition was filed pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977 (Mine Act or Act) (30 U.S.C. ' 820(c)). The Secretary alleged Steen knowingly violated 30 C.F.R. ' 77.404(a) by allowing a highlift to be operated with defective brakes. (Section 77.404(a) in part requires mobile equipment to be maintained in safe operating condition and equipment in unsafe condition to be removed immediately from service.) Steen denied the allegations, and the case was heard and decided by Commission Administrative Law Judge William Fauver.

DECISIONS OF THE JUDGE AND THE COMMISSION

Judge Fauver held Steen was a corporate agent under section 110(c) of the Act and Steen knowingly authorized a violation of the standard. The judge found Steen knew for 5 or 6 days the highlifts brakes were defective, yet failed to repair them or to remove the highlift from service (16 FMSHC 2293, 2300, 2302 (November 1994)). Although the Secretary proposed a civil penalty of \$3,500, the judge assessed Steen \$4,000 for the violation (16 FMSHRC at 2303-06).

Judge Fauver based the penalty upon his findings that Steen exhibited high negligence in allowing the highlift to be operated without effective brakes (16 FMSHRC at 2304), the violation was reasonably likely to result in a serious injury (16 FMSHRC at 2305), and after being cited for the violation, there was instant action to comply with the standard (16 FMSHRC at 2305). The judge also believed the amount assessed was insufficient to deter ... [Steen], and others similarly situated, from committing a similar violation in the future (16 FMSRHC at 2305).

Steen appealed, and although the Commission upheld the judge's findings regarding Steen's liability under section 110(c) and Steen's knowing violation of the standard (*Ambrosia Coal & Construction Company (Ambrosia I)* 18 FMSHRC 1552, 1563 (September 1996)), it concluded the judge improperly considered the deterrent effect of penalty. (The Commission stated, "[d]eterrence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered" (18 FMSRHC at 1565).) The Commission also held the judge failed to set forth adequate findings when applying the statutory penalty criteria to Steen. The Commission remanded the matter for reassessment of the penalty (18 FMSHRC at 1555-56).

On remand, the judge noted he had found the violation to be a significant and substantial contribution to a mine safety hazard due to high negligence. He also noted Steen's financial situation justified amortizing the payment of a civil penalty and Steen had no record of previous violations. Putting aside the deterrent effect of the penalty with respect to Steen and others similarly situated, he concluded the six statutory civil penalty criteria warranted the assessment of a civil penalty of \$3,500 payable in ten consecutive installments of \$350 (18 FMSHRC 1874, 1875-76 (October 1996)).

Once again, Steen appealed. He argued the judge did not make necessary factual findings as to his income or net worth and that the penalty of \$3,500 was excessive in light of his financial situation. In Steen's view, a total penalty of \$575 was appropriate.

The Commission affirmed Judge Fauver's consideration of four of the six statutory civil penalty criteria (*Ambrosia Coal & Construction Company (Ambrosia II)* 19 FMSHRC 819, 823-824 (May 1997)). However, it concluded the judge's consideration of the criteria of "ability to continue in business" and "size" were incomplete, and it remanded the matter for further application of the criteria and reassessment (19 FMSHRC at 824-825).

POST REMAND PROCEEDINGS

On remand, the judge ordered the parties to confer to determine if they could stipulate to a statement of Steen's current income, net worth, and financial obligations, and to include in the stipulation copies of Steen's latest federal income tax return, his W-2 Form and a balance sheet. The judge also requested a statement whether or not Steen had the financial ability to pay a civil penalty of \$3,500 in 10 monthly installments of \$350 and continue to meet other financial

obligations. If Steen could not, the judge requested the parties to stipulate the civil penalty and the amount of the monthly installments he could pay (Order On Remand (May 9, 1997) (as modified May 30, 1997)).

In response, the parties submitted a statement of the income of Steen and his wife (Stip., Exh. A), a statement of the monthly expenses of the Steen family (Id., Exh. B) (excepting from the agreement the claim of \$400 in monthly medical and dental expenses), a statement of the assets of Steen and his wife (Id., Exh. C), a copy of the 1996 joint U. S. Individual Income Tax Return of Steen and his wife (Id., Exh. D), and a copy of the 1996 W-2 forms of Steen and his wife (Id., Exhs. E and F). Steen submitted a separate statement of dental expenses (Statement Concerning Dental Expenditures (June 19, 1997)).

Judge Fauver offered the parties an opportunity to request a hearing on the remanded issues. If they did not want one, he stated he would consider the information submitted as evidentiary and decide the issues on the record (Order (June 25, 1997)). The Judge also stated "Since . . . Steen's tax returns are jointly filed, his income and financial obligations will be considered on the basis of household and financial obligations" (Id., n.1).

The parties declined a hearing and submitted briefs. On July 25, 1997, the matter was reassigned to me.

ASSESSMENT OF A CIVIL PENALTY **THE UNDERLYING PRINCIPLES**

I have a narrow duty on remand to assess a civil penalty based upon Judge Fauver's prior findings regarding four of the six civil penalty criteria set forth in section 110(i) of the Act (30 U.S.C. § 820(i)) and my findings regarding the remaining two criteria, "ability to continue in business" and "size." In assessing the penalty, I am instructed by the Commission to make specific findings and be guided by principles set forth in *Sunny Ridge Mining Co.* (19 FMSHRC 254 (February 1997) (*see Ambrosia II.*, 19 FMSHRC at 823-824).

In *Sunny Ridge*, which was decided after Judge Fauver's October 1996 decision, the Commission held that when assessing a civil penalty in a section 110(c) case, a judge must make findings on the penalty criteria as they apply to the individual who has been found liable and must be mindful of facts such as "the individual's income and family support responsibilities, the appropriateness of a penalty in light of the individual's job responsibilities, and an individual's ability to pay" (19 FMSHRC at 272).

When applying these principles to the criterion of "ability to continue in business," the Commission stated the relevant inquiry is whether the penalty "will effect the individual's ability to meet his [or her] financial obligations" (*Ambrosia II.*, 19 FMSRHC at 824). With respect to the criterion of "size," the Commission directed an inquiry into "whether the penalty is appropriate in light of the individual's income and net worth" (Id.).

Because section 110(c) places liability upon individual corporate directors, officers, or agents and because the Commission has emphasized the effect of the penalty upon the individual who has been found liable under section 110(c), Steen argues it was an error for Judge Fauver to state that he would consider Steen's financial information on the basis of household income and financial obligations. Steen also maintains it would be an error for me to consider any part of Mrs. Steen's income in assessing the penalty. Rather, I should consider ~~only~~ ... Steen's income, net worth and financial obligations and explain how they affect the penalty. (Reply Brief Following Commission's Second Remand 3 (emphasis added)). In other words, Steen would have me exclude from consideration all income earned by his wife and a percentage of household liabilities equal to the percentage of her contribution to household income.

I decline to do so. Implicit in Judge Fauver's decision to consider Steen's income and financial obligations on the basis of household income and financial obligations is the fact the Steens do not live economically discrete lives. Like most domestic partners, they function as an economic unit. They commingle economic resources and jointly assume economic responsibilities. They file a joint federal income tax return (Stip., Exh. D). They jointly hold real property (Stip., Exh. C). Personal property, such as automobiles and household property, is titled jointly (Id.). They have a joint personal checking account (See Statement Concerning Dental Expenses). Moreover, as may be inferred from the list of expenses, they are equally liable for most, if not all, of their debts (Stip., Exh. B). I must make findings based on fiscal reality not its artificial segmentation. Therefore, I will consider their joint income as Steen's income, their joint property as his property, and their joint liabilities as his liabilities.

ABILITY TO CONTINUE IN BUSINESS

The parties stipulated to monthly family expenses of \$2,715 (Exh. B-1) (\$3,115 less medical and dental expenses of \$400) and Steen submitted documentation to substantiate the dental balance owed or to be incurred (Stipulation 2; Statement Concerning Dental Expenses). The dental statement details expenses paid from August 12 1996 through June 16, 1997 (\$2,276). It also indicates two additional appointments scheduled for Mrs. Steen in late June 1997, and August 1997, for an examination of work already performed. The statement declares as of June 19, 1997 A[a]ll of ... [Mrs. Steen's] major work appears to have been completed. The statement does not indicate an existing balance is due.

With no major dental work anticipated, and with no existing balance, it appears that as of June 19, Steen and Mrs. Steen have paid most of her past due dental bills, and her future dental expenses will be for forthcoming appointments and routine dental work. Recognizing unexpected medical and dental expenses can arise and estimating future expenses is to some extent an exercise in imprecision, I conclude allocating \$250 a month to medical and dental expenses is reasonable.

Therefore, based upon the parties' stipulations and Steen's statement concerning dental expenses, I find Steen has monthly family expenses of \$2,965 (\$3,115 less \$400 plus \$250).

To meet these expenses, Steen has available to him monthly family income of \$3,156 (Stip., Exh. A). This leaves a balance of \$191 per month. Presently Steen is meeting his financial obligations with money to spare.

SIZE

The parties stipulated that Steen's annual net income is \$20,300 and his combined annual net income is \$37,873 (Stip., Exh. A). Steen's net income is well above the poverty level for a family of three (\$12,517 in 1996 according to the U.S. Department of Commerce (<http://www.census.gov/hhes/poverty/threshld/thresh96.html>)). Moreover, Steen has significant equity in his home (\$43,610) and he has automobiles and other personal property worth \$5,500 (Stip., Exh. C). In light of his income and net worth, I conclude Steen is well able to pay a penalty of at least moderate size, provided the penalty is amortized.

THE PENALTY

Judge Fauver concluded that Steen exhibited high negligence in authorizing the violation of section 77.404(a). He also found the violation was serious, and that the criteria of good faith abatement did not apply (18 FMSHRC at 1875). These findings were affirmed by the Commission (*Ambrosia II*, 19 FMSHRC at 823-824). Judge Fauver also found, and the Commission affirmed, Steen's employer, Ambrosia, had an average history of previous violations and he noted there was no indication Steen previously violated section 110(c) of the Act (18 FMSHRC at 1875; *Ambrosia II*, 19 FMSRHC at 823-824).

Weighing these factors, along with Steen's income, family support responsibilities, and net worth, I conclude that a total penalty of \$2,000 is warranted and that it should be paid in installments for 12 consecutive months. I recognize the penalty and payments will not be inconsequential for Steen, given his obligations and income, but then neither was his knowing and egregious violation of section 77.404(a).

It bears repeating the highlift was operating with brakes that could not hold on a 30 to 40 degree ramp, through a tippie yard with unobstructed access to a nearby highway, and with an operator who did not have a seatbelt (16 FMSHRC at 2299). Steen had full knowledge of all these conditions, yet he allowed the highlift of operate for at least 5 and possibly 6 working days (16 FMSHRC at 2302), endangering himself (Steen actually operated the highlift while it had defective brakes (*Id.*)), the highlift operator, other miners, and the public.

It also bears repeating, as Judge Fauver pointed out originally, that section 110(c) is included in the Act to deter this kind of violation.

TWO LESSONS

Two cautionary lessons attend this case. First, a foreman of a corporate operator who knows of existing violations of the Mine Act or its standards must promptly remedy them. A foreman who fails to act does so at his or her fiscal peril.

Second, through *Sunny Ridge*, the Secretary is on notice concerning the type of information the Commission deems necessary to establish the Ability to continue in business and size penalty criteria. The burden of proof is on the Secretary. Failure to offer the evidence through stipulation or documentation prior to the closing of the evidentiary record will result in a judge being unable to consider the criteria and, most likely, in a much lower civil penalty. This will necessitate more intensive prehearing preparations by the Secretary, since, in all probability, judges will not look favorably on requests to submit the information post hearing.

ORDER

Steen shall pay a civil penalty of \$2,000. Payment shall be made in 11 consecutive installments of \$166.66 each and the 12th installment of \$166.74. Payments will begin on November 1, 1997, and continue on the first day of each succeeding month until the full amount has been paid. Upon full payment of the penalty, this proceeding is **DISMISSED**.

David F. Barbour
Administrative Law Judge

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