

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

October 26, 1998

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	:	

**ORDER TO SUBMIT INFORMATION**

I issued my decision in this case on April 23, 1997. The Federal Mine Safety and Health Review Commission (the Commission) vacated the \$400 penalty I assessed against Unique Electric and remanded the case to me for further proceedings consistent with the Commission's decision. 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 Kim Warnock, the owner of Unique Electric, was self-employed at the time the citation was issued. *Slip op. at 4.*

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.<sup>1</sup> 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. *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. *Ambrosia*, 19 FMSHRC at 824.

---

<sup>1</sup> 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. 30 U.S.C. ' 820(i).

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 gravity of a violation and whether it was abated in good faith can be made on the same record evidence....@

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...@as follows:  
*Id.*

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

In order to perform this analysis, Mr. Warnock shall provide me with the following information on or before **November 17, 1998**:

1. A statement of Mr. Warnock's income in 1997. The statement should indicate whether there has been a major change in income since December 1997.

2. A statement of Mr. Warnock's net worth and financial obligations. This information should be in the form of a balance sheet showing his major assets and liabilities. The statement should indicate which assets are held jointly with his wife or any other individual and which liabilities are joint obligations. Mr. Warnock shall also describe his @family support obligations@ and his share of his @household's net worth, income and expenses.@

3. Any argument that Mr. Warnock wishes to make concerning the facts and issues involved in this case.

A copy of these statements should also be sent to Ms. Coplick at the Department of Labor. In conjunction with information request No. 1, Mr. Warnock shall also send me a copy of

his 1997 Federal Tax return. He need not send the tax return to Ms. Coplick. I will place my copy under seal so that it is not available to the public.

The Secretary of Labor shall file any response to Mr. Warnock's filing on or before **December 4, 1998.**

The parties should understand that, based on my review of the record in this proceeding and the information provided by Mr. Warnock, the penalty I assess may be higher, lower, or the same as the \$400 penalty I assessed in my April 23, 1997, decision. The parties are encouraged to confer in an attempt to reach agreement on a penalty or to enter into stipulations regarding the penalty criteria or the financial information submitted by Mr. Warnock. If the parties wish to hold a conference call with me to discuss these issues, they are invited to do so.

Richard W. Manning  
Administrative Law Judge

Distribution:

Jan M. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, 71 Stevenson St., Suite 1110, San Francisco, CA 94105-2999

Mr. Kim Warnock, 1136 Cedar Street, Shasta Lake City, CA 96019

RWM