FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 5, 1197

SECRETARY OF LABOR,:
MINE SAFETY AND HEALTH:
ADMINISTRATION (MSHA):
:
v.: Docket No. PENN 93-233
:
AMBROSIA COAL & CONSTRUCTION:
COMPANY:
:
SECRETARY OF LABOR,:
MINE SAFETY AND HEALTH:
ADMINISTRATION (MSHA):
:
v.: Docket No. PENN 94-15
:
WAYNE R. STEEN, employed by :
AMBROSIA COAL & CONSTRUCTION:
COMPANY:

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

DECISION

BY THE COMMISSION:

These civil penalty proceedings, arising under the Federal Mine Safety and Health Act of 1977 (AMine Act@ or AAct@), 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@), are before the Commission for a second time. The Commission previously remanded this matter to Administrative Law Judge William Fauver to reassess penalties against Ambrosia Coal & Construction Company (AAmbrosia@) and Wayne R. Steen. *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552 (September 1996) (A*Ambrosia I*@). On remand, the judge assessed penalties of $5,000 against Ambrosia and $3,500 against Steen. 18 FMSHRC 1874 (October 1996) (ALJ). The Commission granted Steen=s petition for discretionary review challenging the $3,500 penalty. The Commission also granted Ambrosia=s petition for discretionary review challenging the $5,000 penalty and stayed briefing on Ambrosia=s appeal. For the reasons that follow, we vacate the judge=s penalty assessment against Steen and remand for reassessment, and affirm the penalty against Ambrosia.

I.

Factual and Procedural Background

The background facts in this proceeding are fully set forth in *Ambrosia I*, 18 FMSHRC at 1553-56, and are summarized here. On June 3, 1992, during an inspection of the Ambrosia Tipple, Charles Thomas, an inspector trainee with the Department of Labor=s Mine Safety and Health Administration (AMSHA@), examined a highlift he had observed having difficulty stopping. *Id*. at 1553-54. Thomas was accompanying MSHA Inspector David Weakland during an inspection of the mine. *Id*. at 1553. Thomas asked the Ambrosia employee operating the highlift, William Carr, about the condition of the vehicle=s brakes. *Id*. at 1554. Carr replied that they were bad. *Id*. Thomas instructed Carr to test the highlift=s parking and service brakes on an incline, but when applied, neither set of brakes prevented the highlift from rolling down the incline. *Id*.

Thomas called Inspector Weakland, who, accompanied by Steen, joined Thomas at the highlift. *Id*. In response to Weakland=s questions about the brakes, Carr replied that they were not working. *Id*. At Weakland=s direction, Carr tested the highlift=s brakes on fairly level ground with the vehicle=s bucket raised, but both the service and parking brakes failed to prevent the highlift from drifting. *Id*. Carr informed Weakland that the highlift had not had brakes for several weeks, that he had notified Steen of this problem and recorded the bad brakes in a maintenance log. *Id*. Upon returning to the mine office, Weakland and Thomas confirmed that the bad brakes were noted by both Carr and Steen in a log entitled ADaily Work and Cost Record,@ and that the highlift had been operated for over a month with bad brakes. *Id*.

Weakland issued an order under section 104(d)(1) of the Mine Act, 30 U.S.C. ' 814(d)(1), alleging an S&S and unwarrantable violation of 30 C.F.R. ' 77.1605(b), later modified to charge a violation of 30 C.F.R. ' 77.404(a). *Id*. After further tests of the brakes in the presence of Carmen Ambrosia, the owner of the mine, the highlift was removed from service. *Id*. at 1555. Later that day, the brakes were successfully repaired and the order was terminated. *Id*. Several days later, Steen falsified the highlift maintenance records by adding entries noting the highlift=s bad brakes for May 30 and June 2 and 3, and stating that the highlift was being repaired on June 4. *Id*.

On the basis of an MSHA special investigation, the Secretary proposed that a $3,500 penalty be assessed against Steen individually under section 110(c) of the Act, 30 U.S.C. ' 820(c). *Id*. The Secretary also proposed that a $7,000 penalty be assessed against Ambrosia for

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[1] Section 77.404(a) provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe operating condition shall be removed from service immediately.

its alleged violation of section 77.404(a). *Id*. Ambrosia and Steen challenged the Secretary=s enforcement actions, and the matters were consolidated and proceeded to a hearing before Judge Fauver. *Id*.

In his first decision, the judge found that the lack of operable brakes on the highlift amounted to an unsafe condition and that the operator had failed to remove the equipment from service despite its knowledge that the brakes were bad. *Id*. at 1555-56. He concluded that Ambrosia violated section 77.404(a), and that the violation was S&S and the result of Ambrosia=s unwarrantable failure to comply with the standard. *Id*. The judge further concluded that, as foreman, Steen was a corporate agent under section 110(c) of the Mine Act, and that he had knowingly authorized Ambrosia=s violation because he knew that the brakes were bad for at least 5 days before the inspection, yet failed to repair them or remove the highlift from service. *Id*. at 1556. The judge assessed civil penalties of $11,000 against Ambrosia and $4,000 against Steen. *Id*. He based the penalties, in part, on his finding that Ambrosia=s vice-president for operations, Carmen Shick, participated in the falsification of the maintenance log, and that the attempted cover-up by Shick and Steen increased the need for deterrence provided by higher penalties. *Id*. at 1555-56.

On review, the Commission affirmed the judge=s findings of a violation of section 77.404(a), that the violation was S&S and unwarrantable, and that Steen was liable for the violation under section 110(c). 18 FMSHRC at 1556-63. The Commission further held that because the Secretary had not alleged any wrongdoing against Shick, the judge abused his discretion when he increased Ambrosia=s penalty for deterrence purposes based on *his* findings regarding the falsification of Ambrosia=s records by Shick. *Id*. at 1565. The Commission noted that Aalthough deterring future violations is an important purpose of civil penalties, deterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria.@ *Id*. (footnote omitted). Regarding Steen=s penalty, the Commission concluded that the judge erred because he Afailed to set forth findings applying the statutory criteria to Steen as an individual.@ *Id*. The Commission remanded the case to the judge with instructions to reassess the penalties. *Id*. at 1566.

On remand, with respect to Ambrosia, the judge reiterated the findings he made in his original decision on the six statutory penalty criteria. 18 FMSHRC at 1875. In reassessing a penalty against Ambrosia, the judge recognized that the Commission had instructed him not to increase the penalty based on a separate deterrence criterion, and concluded that a penalty of $5,000 was warranted against the company. *Id*. at 1875-76.

Regarding Steen, the judge stated:

> I also considered Respondent Steen=s financial situation in my original decision. He has a number of financial obligations, which I found would warrant amortizing the payment of a civil penalty. He has no record of prior violations charged under ' 110(c) of the Act.
>
> As stated, I have found that the violations . . . were

> significant and substantial and were due to high negligence and an unwarrantable failure to comply with the safety standard.

Id. at 1875. After noting that he was A[e]xcluding consideration of Respondents= false records and false statements to MSHA to cover up the violation,@ the judge reduced Steen=s penalty from $4,000 to $3,500 and ordered him to pay the penalty in 10 monthly installments of $350 each. *Id*. at 1876.

II.

Disposition

A. Ambrosia=s Penalty

In its petition for discretionary review, Ambrosia argues that the penalty assessed against it by the judge on remand Ais excessive in terms of the statutory criteria, and therefore contrary to law.@ A. PDR at 2. Maintaining that the judge=s penalty assessment against the company was affected by the judge=s findings with respect to the behavior of Steen and Carr, Ambrosia argues that it should not be unduly penalized for the negligence of its two employees. *Id*. at 3-6. Ambrosia also argues that the penalty assessed by the judge is excessive in light of the six statutory criteria. *Id*. at 6-10. The company asserts that the penalty should be reduced in light of the company=s modest history of previous violations and small size, the cooperation shown by the company during MSHA=s inspection of the highlift, and the small degree of risk associated with the violation, notwithstanding the judge=s S&S and unwarrantable failure findings. *Id*. Ambrosia suggests that a penalty of $3,500 would be appropriate. *Id*. at 10.

We find Ambrosia=s petition for discretionary review unpersuasive. On remand, the judge reduced Ambrosia=s penalty by $6,000 (from $11,000 to $5,000) in accordance with our remand instructions. The judge acted well within his discretion after proper consideration of the statutory criteria. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (March 1983), *aff=d*, 736 F.2d 1147 (7th Cir. 1984). Based on the facts developed in the adjudicative record, we cannot say that the penalty is inconsistent with the statutory criteria. Accordingly, we affirm the penalty assessed by the judge against Ambrosia.

B. Steen=s Penalty

Steen argues that the judge=s penalty assessment on remand lacks requisite factual findings on his income or net worth. Steen Br. at 2-3. Steen also argues that the penalty assessed by the judge is excessive in light of his net worth, income, and other penalties assessed against section 110(c) defendants. *Id*. at 3-9. He requests that the Commission reduce the penalty against him to $575. *Id*. at 9-10.

In response, the Secretary asserts that the judge properly considered the six statutory penalty criteria. S. Br. at 3-6. Regarding the appropriateness of the penalty to Steen=s Asize,@ the Secretary contends that the judge considered this criterion when he reviewed the evidence on Steen=s financial situation and concluded that Steen=s financial obligations warranted amortizing

the payment of the penalty. *Id*. at 4. The Secretary further argues that the cases on which Steen relies are irrelevant because of the fact-specific nature of penalty assessment, and that Steen=s argument for uniform penalties is, in effect, a plea for adopting a new criterion that Athe penalty in every case shall ultimately be adjusted so that it comports with penalties assessed in other cases against individuals similarly situated economically.@ *Id*. at 6-10. The Secretary asserts that the penalty assessment against Steen was within the sound discretion of the judge. *Id*. at 9-10.

Section 110(i) of the Mine Act requires the Commission to consider six criteria in assessing appropriate civil penalties:

> [1] the operator=s history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator=s ability to continue in business, [5] the gravity of the violation, and [6] 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). Findings of fact on each of these statutory criteria must be made. *Sellersburg*, 5 FMSHRC at 292. Such findings Anot only provide the [individual] with the required notice as to the basis upon which [he or she] is being assessed a particular penalty, but also provide the Commission and the courts, in their review capacities, with the necessary foundation upon which to base a determination as to whether the penalties assessed by the judge are appropriate, excessive, or insufficient.@ *Id*. at 292-93. We have recently reiterated that with respect to individual respondents under section 110(i), ACommission judges must make findings on each of the criteria as they apply to *individuals*.@ *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 272 (February 1997) (emphasis in original). In keeping with these principles, in *Ambrosia I* we instructed the judge Ato set forth [on remand] findings applying the statutory criteria to Steen as an individual.@ 18 FMSHRC at 1565.

In his remand decision, the judge made findings on Steen=s negligence, the gravity of the violation, and Steen=s history of previous violations. 18 FMSHRC at 1875. The judge made no findings with respect to good faith abatement, but in his earlier decision, he found that A[s]ince the inspector red-tagged the vehicle, the question of the operator=s abatement does not arise.@ 16 FMSHRC 2293, 2305 (November 1994) (ALJ). The Commission affirmed the judge=s finding on this criterion in *Ambrosia I*. 18 FMSHRC at 1565. The judge=s findings on each of these criteria, although terse, meet the minimum requirements of the Act and our *Sellersburg* decision.

In light of the amount of the penalty relative to Steen=s income, the judge=s findings on the criteria of the penalty=s effect on the ability to continue in business and the appropriateness of the penalty to the size of the business are inadequate. Under our *Sunny Ridge* decision issued after the judge=s decision on remand, the relevant inquiry with respect to the criterion regarding the effect on the operator=s ability to continue in business, as applied to an individual, is whether the penalty will affect the individual=s ability to meet his financial obligations. 19 FMSHRC at 272. The judge ordered that, A[i]n light of his financial obligations,@ Steen should pay his

penalty in 10 monthly installments of $350 each. 18 FMSHRC at 1876. However, the judge did not make *specific findings* as to the extent and nature of these obligations. On remand, the judge must make the requisite findings and explain how they affect the penalty.

With respect to the Asize@ criterion, we held in *Sunny Ridge* that, as applied to an individual, the relevant inquiry is whether the penalty is appropriate in light of the individual=s income and net worth. 19 FMSHRC at 272. Although the judge stated that he Aconsidered Respondent Steen=s financial situation@ (18 FMSHRC at 1875), he failed to make any *specific findings* on Steen=s income and net worth. On remand, the judge must make the requisite findings and explain how they affect the penalty.

In the case of an individual, consideration of these criteria is especially critical in light of the legislative history of section 110(i), which was carried over with no significant changes from section 109 of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. ' 801 et seq. (1976) (amended 1977) (ACoal Act@). The drafters of the Coal Act did not intend to tie an individual=s liability under sections 110(c) and 110(i) to an operator=s conduct and financial resources; instead, Congress intended that Athe agent stand on his own.@ H.R. Rep. No. 563, 91st Cong., 1st Sess. 11-12 (1969), *reprinted in* Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., Part I *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, at 1041-42 (1975). But Congress also did not intend that agents Abear the brunt of corporate violations.@ *Id*. at 1042. The Commission has thus held that inordinately high penalties should not be assessed against individuals under sections 110(c) and 110(i). *Sunny Ridge*, 19 FMSHRC at 272.

III.

Conclusion

For the foregoing reasons, we affirm the judge=s assessment of a $5,000 penalty against Ambrosia. We vacate the penalty assessed against Steen and remand a second time for reassessment.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner