FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 30, 1998

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, Verheggen, and Beatty, Commissioners

DECISION

BY: Marks, Riley, Verheggen, and Beatty, Commissioners:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977 (AMine Act@ or AAct@), 30 U.S.C. ' 801 et seq. (1994), is before the Commission a third time. The Commission has twice previously remanded this matter for reassessment of a penalty against Wayne R. Steen, employed by Ambrosia Coal & Construction Company (AAmbrosia@). *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552 (Sept. 1996) (A*Ambrosia I*@); *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819 (May 1997) (A*Ambrosia II*@). On second remand, the judge assessed a penalty of $2000 against Steen. 19 FMSHRC 1471 (Aug. 1997) (ALJ). The Commission granted Steen=s petition for discretionary review. For the reasons that follow, we vacate the judge=s penalty assessment and assess a penalty of $1200 against Steen.

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 in relevant part here. On June 3, 1992, during an inspection of the Ambrosia Tipple by the Department of Labor=s Mine Safety and Health Administration (AMSHA@), a highlift was found to have been operated for over a month with bad brakes. *Id*. at 1553-54. A section 104(d)(1) order was issued to Ambrosia alleging a significant and substantial (AS&S@) and unwarrantable violation of 30 C.F.R. ' 77.1605(b), later modified to charge a

violation of section 77.404(a).[1] *Id*. at 1554. On the basis of an MSHA special investigation, the Secretary also proposed that a $3500 penalty be assessed against Steen under section 110(c). *Id*. at 1555. Ambrosia and Steen challenged the Secretary=s enforcement actions, and the matters were consolidated and proceeded to a hearing before Administrative Law Judge William Fauver. *Id*.

In his first decision, Judge Fauver 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*. 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*. at 1555-56. 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 five days before the inspection, yet failed to repair them or remove the highlift from service. *Id*. at 1556. The judge assessed a $4000 civil penalty against Steen. *Id*.

On review, the Commission affirmed Judge Fauver=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). *Id*. at 1556-63. Regarding Steen=s penalty, the Commission concluded that the judge erred because he Afailed to set forth findings applying the statutory criteria [of section 110(i) of the Mine Act] to Steen as an individual,@ and remanded the case with instructions to reassess the penalty. *Id*. at 1565-66. On remand, the judge stated that he Aconsidered Respondent Steen=s financial situation in [his] original decision,@ and found that Steen=s financial obligations warranted amortizing the payment of a civil penalty which the judge assessed at $3500. 18 FMSHRC 1874, 1875, 1876 (Oct. 1996) (ALJ).

In *Ambrosia II* (19 FMSHRC at 823-25), the Commission vacated the penalty against Steen and remanded with the instruction to reassess the penalty after making specific findings on the section 110(i) criteria regarding ability to continue in business and size in accord with the Commission=s decision in *Sunny Ridge Mining Co.*, 19 FMSHRC 254 (Feb. 1997). In *Sunny Ridge*, the Commission held that its Ajudges must make findings on each of the [statutory penalty] criteria [of section 110(i)] as they apply to *individuals*.@ *Id*. at 272 (emphasis in original). In *Ambrosia II*, the Commission further explained that Athe 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. . . . With respect to the >size= criterion, . . . as applied to an individual, the relevant

[1] Section 77.404(a) provides: AMobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.@

inquiry is whether the penalty is appropriate in light of the individual=s income and net worth.@ 19 FMSHRC at 824.

On remand a second time, the parties submitted supplemental briefs, including financial information on Steen and his wife. 19 FMSHRC at 1472-73. In an unpublished prehearing order, Judge Fauver stated that A[s]ince Mr. Steen=s tax returns are jointly filed, his income and financial obligations will be considered on the basis of household income and financial obligations.@ Order at 1 n.1 (June 25, 1997). The case was then reassigned to Administrative Law Judge David F. Barbour, who made findings on Steen=s ability to continue in business and size. 19 FMSHRC at 1474-75.

Over the objections of Steen=s counsel, Judge Barbour followed Judge Fauver=s approach as to household income and financial obligations. *Id*. at 1474. Finding that Steen and his wife Ado not live economically discrete lives,@ the judge concluded:

> 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.

Id. The judge reduced Steen=s penalty from $3500 to $2000, and ordered him to pay the penalty in 10 monthly installments. *Id*. at 1475-76.

II.

Disposition

Both Steen and the Secretary agree that the judge erred in failing to segregate the income and financial obligations of Steen and his wife for purposes of making findings on the section 110(i) criteria regarding ability to continue in business and size. PDR at 4-7; S. Br. at 9-10. Both parties further agree that in so doing, the judge failed to abide by the Commission=s remand order to ascertain Steen=s individual income and net worth. PDR at 5; S. Br. at 9.

Analogizing to common law principles of property, Steen argues that the judge erred in attributing to Steen Asole ownership . . . of the property of the marital estate.@ PDR at 4-5. In addition, Steen argues that the judge=s findings are problematic for various reasons of public policy. *Id*. at 5-7. Finally, Steen argues that the judge=s penalty is excessive. *Id*. at 7; Steen Br., passim. The Secretary argues that Awhile the judge properly considered Steen=s family=s income, expenses, and assets, he improperly failed to then adjust his findings in order to reflect Steen=s *individual* financial position.@ S. Br. at 9 (emphasis in original). Notwithstanding her position on this issue, the Secretary argues Athat a proper penalty in this case should be no less than $2,000, and no more than $3,500, especially when the judge has amortized payment of the penalty over many months.@ *Id*. at 10.

The determination of the amount of the penalty that should be assessed for a particular violation is an exercise of discretion by the trier of fact, bounded by proper consideration of the statutory criteria and the deterrent purposes underlying the Act=s penalty assessment scheme. *Sellersburg Stone Co.*, 5 FMSHRC 287, 294 (Mar. 1983), *aff=d*, 736 F.2d 1147 (7th Cir. 1984).[2] While Aa judge=s assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal.@ *U.S. Steel Corp.*, 6 FMSHRC 1423, 1432 (June 1984).

At issue here is whether section 110(c) of the Mine Act, under which Steen has been found liable for violating section 77.404(a), applies to Steen as an individual or Steen=s household for purposes of determining the extent of his financial liability under section 110(i). Although section 110(i) cannot help us resolve this issue since it refers to operators rather than individuals, proper construction of the provision that forms the basis for Steen=s liability, section 110(c), does provide an answer.

Section 110(c) subjects Aany director, officer, or agent . . . to the same civil penalties . . . that may be imposed upon a person under [sections 110(a) and 110(d)].@ 30 U.S.C. ' 820(c).

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[2] 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).

The first inquiry in statutory construction is Awhether Congress has directly spoken to the precise question at issue.@ *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984); *Thunder Basin Coal Co.*, 18 FMSHRC 582, 584 *(*Apr. 1996). If a statute is clear and unambiguous, effect must be given to its language. *Chevron*, 467 U.S. at 842-43. *Accord Local Union 1261, UMWA v. FMSHRC*, 917 F.2d 42, 44 (D.C. Cir. 1990). For purposes of this case, Steen is Ambrosia=s agent (*Ambrosia I*, 18 FMSHRC at 1563) **C** but his wife clearly is not, nor has any party to the case even suggested that she be found an agent of Ambrosia. She thus cannot be subjected to financial liability under section 110(c), which is arguably the effect of the judge=s decision in this case.

The judge noted that, A[l]ike most domestic partners, [the Steens] function as an economic unit. They commingle economic resources and jointly assume economic responsibilities.@ 19 FMSHRC at 1474. After noting that he had to Amake findings based on fiscal reality not its artificial segmentation@ (*id*.), the judge found that Steen had Amonthly family expenses of $2,965 . . . [and] monthly family income of $3,156.@ *Id*. at 1475. But insofar as her earnings and share of the household net worth have been used explicitly by the judge as factors to adjust the assessed penalty, Mrs. Steen is arguably made to bear an additional and identical financial burden as that imposed by the Secretary=s enforcement action against her husband, an outcome that is at odds with the plain language of section 110(c).

We recognize, of course, that any penalty against an agent under section 110(c) will always have some impact on his or her spouse. But the spouse=s share of the household estate must not explicitly be used as a factor to *increase* a penalty assessed for a section 110(c) violation. On the other hand, we are *not* holding that a spouse=s share of the agent=s household finances is not at all relevant in assessing a penalty. In this respect, we agree with the Secretary that A[a]lthough Steen=s individual financial position must be analyzed within the context of the family=s financial position, Steen=s position and the family=s position are not the same thing.@ S. Br. at 9. This means that our judges must engage in a two-step analysis in cases such as this one. First, they must determine a section 110(c) defendant=s household financial condition. Then they must make findings on the section 110(i) Asize@ and Aability to continue in business@ criteria on the basis of the defendant=s share of his or her household=s net worth, income, and expenses. In sum, we conclude that the judge erred as a matter of law when he made findings on the basis of the financial condition of the Steen *household* rather than Steen=s individual share of the household=s income and financial obligations.

We disagree with our concurring colleague=s statement that Athe issue of how to view financial resources when setting a penalty transcends the civil/criminal distinction@ (slip op. at 10 n.3), a proposition for which no authority is cited. Here, we are construing section 110(i) of the Mine Act, which does not create criminal liability and is not subject to federal criminal sentencing guidelines. More importantly, as the D.C. Circuit noted in *Coal Employment Project v. Dole*, in the Mine Act, ACongress was intent on assuring that the civil penalties provide an effective

deterrent against all offenders.@ 889 F.2d 1127, 1133 (D.C. Cir. 1989).[3] A criminal fine, on the other hand, is *punitive* **C** Aa sum of money exacted of a person guilty of an offense as a pecuniary *punishment*.@ 21 Am. Jur. 2d *Criminal Law* **'** 613 (1981) (emphasis added). We thus find no relevant or appropriate guidance in cases involving criminal penalties because Congress did not intend section 110(i) to be a punitive measure.[4] *See* slip op. at 9-10 and cases cited.

Normally, having found that a judge erred as a matter of law in considering the section 110(i) penalty criteria, we would vacate the penalty and remand the matter to the judge for assessment of a new penalty. This case, however, has simply gone on too long. In interests of justice and a speedy resolution to this litigation, instead of remanding the case, we will enter the necessary findings based on the undisputed record evidence on Steen=s financial condition, and assess a new penalty. *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1153 (7th Cir. 1984).

First, we note that, with respect to Steen=s negligence and history of previous violations, the gravity of the violation, and whether the violation was abated in good faith, the findings made by Judge Fauver that were before the Commission in *Ambrosia II* were affirmed by the Commission and are thus the law of the case. 19 FMSHRC at 823-24. As to these criteria, the judge found that Steen=s violation was due to high negligence, that he had no record of prior violations, and that the violation was serious. 18 FMSHRC at 1875. In his initial decision, Judge Fauver also found that A[s]ince the inspector red-tagged the vehicle, the question of the operator=s abatement does not arise.@ *Ambrosia Coal & Constr. Co.*, 16 FMSHRC 2293, 2305 (Nov. 1994)

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[3] The Commission has also noted that Athe purpose of civil penalties [under the Mine Act] is to >convinc[e] operators to comply with the Act=s requirements.=@ *Ambrosia I*, 18 FMSHRC at 1565 n.17 (also citing *Consolidation Coal Co.*, 14 FMSHRC 956, 965 (June 1992), which recognized the importance of the deterrent effect of civil penalties).

[4] Our colleague cites *FTC v. Hughes* as an example of a civil penalty being assessed on the basis of the household income of a defendant and his wife. Slip op. at 10 (citing 710 F. Supp. 1524, 1530 (N.D. Texas 1989), *appeal dismissed as untimely*, 891 F.2d 589 (5th Cir. 1990)). We do not find the *Hughes* case relevant, however, because the propriety of the penalty calculation made in that case was not at issue; in fact, the wife=s financial situation is not mentioned at all.

(ALJ).

As to the two remaining criteria, size and ability to continue in business, we find that Steen=s share of his household=s net worth of $49,410 amounts to one half of the total, or approximately $25,000. Stipulation of the Parties, Ex. C. We further find that Steen=s share of the household=s net monthly income of $3156 amounts to roughly 54 percent of the total, or approximately $1700, and the Steen=s share of the household=s expenses of $2965 also amounts to 54 percent of the total, or approximately $1600. *Id*. at Ex. B-2; 19 FMSHRC at 1474-75.

Having considered these findings, we find that a penalty of $1200 will not adversely affect Steen=s ability to meet his financial obligations, and is appropriate considering the gravity of the violation and Steen=s income and net worth, negligence, and lack of any previous violations. We further find that in light of Steen=s financial obligations, payment of the penalty may be amortized over a year, with no interest accrued other than on any late payments. *See* 30 U.S.C. ' 820(j). Our penalty assessment is made on the narrowest of grounds. Our findings on the penalty criteria of size and ability to continue in business as they relate to Steen, and our ultimate penalty assessment, are based on the particular facts and circumstances of this case, and may not be applicable to the apportionment of the household finances of all married individuals found liable under section 110(c) in other cases.

III.

Conclusion

For the foregoing reasons, we vacate the judge=s penalty assessment and assess Mr. Steen a penalty of $1200 for his violation of 30 C.F.R. ' 77.404(a), to be paid as directed by the Secretary in twelve consecutive monthly installments of $100 each, with no interest accrued other than on any late payments.

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan, concurring:

Although I agree in result with the majority=s decision to reduce Steen=s penalty to $1200, I write separately because I reach this conclusion based on a completely different rationale. Unlike my colleagues, I believe the judge applied the correct analysis to determine Steen=s Aability to continue in business,@ properly using his household income and liabilities as a touchstone. However, for reasons entirely independent from the majority=s, I find that the judge abused his discretion in setting the penalty at $2000, and agree that it should be reduced to $1200.

My colleagues insist on considering Steen=s income, assets and expenses as if he were a solitary financial entrepreneur instead of a family man whose assets and liabilities are hopelessly commingled with those of his wife. The majority holds that the penalty in 110(c) cases must be based on an individual=s share of his or her household=s assets, income and expenses.[1] This ignores the judge=s undisputed finding that:

> [T]he 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 . . . . They jointly hold real property. . . . Personal property, such as automobiles and household property, is titled jointly. . . . They have a joint personal checking account . . . . Moreover, as may be inferred from the list of expenses, they are equally liable for most, if not all, of their debts . . . . I must make findings based on fiscal reality not its artificial segmentation.

19 FMSHRC 1471, 1474 (Aug. 1997) (ALJ).

[1] My colleagues state that they are in agreement with the Secretary=s position. Slip op. at 5. Frankly, I find it somewhat difficult to ascertain what that position is since she claims that A[a]lthough Steen=s individual financial position must be analyzed within the context of the family=s financial position . . . an adjustment is necessary to refocus the analysis on the financial position of Steen, the individual.@ S. Br. at 9. By insisting on taking both family and individual financial matters into account, without an explanation of how one should relate to the other, the reasoning of the Secretary remains fairly opaque.

I agree with the judge that the only equitable method of setting the penalty in this case is to acknowledge Steen=s actual financial state of affairs and consider him and his wife as an economic unit, rather than pretending that he is economically independent. To evaluate the statutory penalty criteria of Asize@ and Aability to continue in business@ (which I translate, in a 110(c) case against an individual, to mean the ability to remain solvent), one must take into account the individual=s *access* to income and assets, as well as all of his or her financial liabilities. The pertinent inquiry in determining how a penalty under 110(c) will affect an individual must include an assessment of the financial resources under his or her control.[2]

The majority=s rationale for using only Steen=s individual financial resources as a basis for the penalty is that 110(c) refers to Aagent of such corporation@ and it is Steen **C** and not his wife **C** who is Ambrosia=s agent. I can hardly disagree. However, determining the identity of Ambrosia=s agent **C** a fairly uncomplicated task **C** begs a far more intricate question: what is the most equitable way of determining that agent=s penalty?

Contrary to the views of the majority, treating the Steens as the economic unit they really are does not in any way imply that Mrs. Steen has, through some sleight of hand, miraculously become an agent of Ambrosia. Slip op. at 4-5. Rather, it simply recognizes what the majority itself acknowledges: Athat any penalty against an agent under section 110(c) will always have some impact on his or her spouse.@ *Id*. at 5. This is precisely right, and is the sole implication of the judge=s decision. Under the judge=s analysis, Mrs. Steen will undoubtedly bear some effect of the penalty; this does not in any way mean that she is somehow Asubjected to financial liability under section 110(c),@ as the majority contends. Slip op. at 4. By merging these two concepts, the majority has inexplicably intertwined the notions of an individual=s statutory liability with the determination of the *effect* of that liability (the penalty) on others.

Congress, on the other hand, has had no difficulty in recognizing the difference between these two concepts. When it enacted criminal sentencing provisions regarding payment schedules for restitution, for example, it stated that a criminal defendant, in describing his or her financial resources for a presentence report, must include Athe financial needs and earning ability of the

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[2] The Seventh Circuit, in affirming a $100,000 criminal fine, based in part on an evaluation of assets titled in the name of the defendant=s putative common-law wife, held that it would be Acontrary to the intent of Congress and the Sentencing Commission to exclude from consideration property that, although titled in another=s name, in fact remains within the defendant=s dominion and control.@ *United States v. Granado*, 72 F.3d 1287, 1294 (7th Cir. 1995).

defendant *and the defendant=s dependents*.@ 18 U.S.C. ' 3664(a) (1994). This statutory language hardly converts the family of a criminal defendant into convicted criminals. Rather, it is a simple recognition that a dependent=s assets and liabilities are relevant in determining restitution payment schedules. *See United States v. Castner*, 50 F.3d 1267, 1278 (4th Cir. 1995) (court takes spouses= income into account in determining appropriateness of restitution orders and criminal fines).

In *United States v. Fabregat*, 902 F.2d 331 (5th Cir. 1990), the court of appeals explicitly considered the question of whether the district court erred in considering the wealth of a criminal defendant=s family when setting a $50,000 fine. In this case the defendant was convicted of conspiring to possess drugs and possessing drugs with the intent to distribute. In interpreting the federal sentencing guideline factor concerning Athe ability of the defendant to pay the fine . . . in light of his earning capacity and financial resources@ (*id*. at 333), the Fifth Circuit stated that A[w]e cannot say as a matter of law that the wealth of an individual=s family is never a financial resource which can be considered in determining defendant=s ability to pay a fine. . . . [I]n reality, the wealth of a defendant=s family can be a very significant asset to the defendant in particular cases.@ *Id*. at 334. The Court took note of the presentence report, stating that the defendant was a member of a wealthy upper class family with significant financial resources, and that his family paid for his college education, legal expenses and other expenses. *Id*. The Fifth Circuit did *not* find that this appreciation of the family=s broader financial picture somehow turned the defendant=s relatives into convicted drug dealers. Instead, the Court simply took a pragmatic approach which recognized the family=s Awillingness to share their significant resources@ with the defendant. *Id*. It appears that this approach has also been adopted by at least one court in the civil penalty context.[3] *See FTC v. Hughes*, 710 F.Supp. 1524, 1530 (N.D. Texas 1989), *appeal dismissed*, 891 F.2d 589 (5th Cir. 1990) (in determining a defendant=s ability to pay a civil penalty, pursuant to the FTC statute, judge takes into account the adjusted gross income of the defendant *and his wife*).

In determining an individual=s Aability to continue in business@ for purposes of setting a penalty under 110(c), the relevant inquiry must be: what is the individual=s discretionary income? This determination is inevitably affected by his family situation: does the individual=s spouse work? Are there dependent children? What are the household expenses? If his wife did not have any income, yet incurred sizeable expenses, would the majority insist on recognizing only Steen=s individual expenses? Conversely, what if his wife earned five times the amount of annual income as Steen, and he continued to have access to all of her funds? Wouldn=t a penalty that failed to take her financial situation into account provide him with a windfall discount? For these very practical reasons, therefore, I decline to place the income and expenses of an individual=s family

[3] Although I recognize, of course, that this 110(c) proceeding is a civil one, the issue of how to view financial resources when setting a penalty transcends the civil/criminal distinction. Consequently, for purposes of determining whether a penalty should be based on individual or household income, both civil and criminal cases are relevant. Both types of laws permit an adjudicatory body to order monetary sanctions against the *named* civil or criminal defendant. Neither type was enacted with the intent to adversely affect the individual=s family.

under a shield when reviewing a penalty under section 110(c).[4]

Moreover, I fundamentally disagree with the majority=s interpretation of the Commission=s decision in *Sunny Ridge Mining Co.*, 19 FMSHRC 254 (February 1997). When we held that judges must make findings on the section 110(i) penalty criteria as they apply to Aindividuals@ (*id* at 272), we meant A*individuals*@ *as opposed to* A*operators*@ (to whom the statutory criteria were clearly directed), not individuals as opposed to families. Our opinion in *Sunny Ridge* did not give judges the green light to strip an individual of his or her joint assets and expenses when setting a penalty. It simply delineated the clear difference between applying the statutory criteria to a person as opposed to a business. Similarly, when we remanded this case with instructions that, pursuant to *Sunny Ridge*, the relevant inquiry was Awhether the penalty will affect the individual=s ability to meet his financial obligations@ (*Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 824 (May 1997)), we meant personal obligations as opposed to the business obligations of the operator.

For the foregoing reasons, I cannot find as a matter of law that the judge erred in taking Steen=s household financial situation into account when setting the penalty. Nonetheless, I agree with the majority, although for different reasons than those relied on by my colleagues, that the penalty set by the judge was excessive.

In assessing Steen=s financial situation, the judge determined that after meeting household expenses, Steen had available a monthly family income of $191. 19 FMSHRC at 1475. He ordered Steen to pay a $2000 penalty, at a rate of approximately $166 per month for 12 months. *Id*. at 1476. This represents approximately 90% of the Steen family=s discretionary monthly income. For the Steen family, which has virtually no savings (Stipulation, Ex. C), this penalty leaves no safety net in case of a financial emergency. Even if no exigent circumstances occur, the penalty will have a severe impact not only on Steen, but on his entire family.

Although Aa judge=s assessment of a penalty is an exercise of discretion, assessments lacking record support, infected by plain error, or otherwise constituting an abuse of discretion are not immune from reversal.@ *Secretary of Labor on behalf of Carroll Johnson v. Jim Walter Resources, Inc.*, 18 FMSHRC 552, 556 (April 1996) (citations omitted). Here, the judge abused his discretion in setting a penalty so excessive that it would inevitably lead to great hardship for Steen and his family. Accordingly, I would reduce the penalty, and agree with the majority that a

[4] Moreover, the majority=s approach could encourage some individual mine directors, officers or agents to convert the title of assets they own or control from their names into the names of family members, so that such assets will not be considered in assessing a penalty under 110(c).

reduction of the penalty to $1200 is appropriate.

Mary Lu Jordan, Chairman

Distribution

Frank G. Verterano, Esq.
Verterano & Monolis
2622 Wilmington Road
New Castle, PA 16105-1530

Jerald S. Feingold, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Administrative Law Judge David Barbour
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041