FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

October 16, 1998

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket No. WEST 95-333-M
UNIQUE ELECTRIC	:	

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

DECISION

BY: Jordan, Chairman; Marks, Riley, and Beatty, Commissioners

This civil penalty proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@ or AAct@). At issue is whether Administrative Law Judge Richard W. Manning abused his discretion by considering an operator=s cessation of business as a factor warranting a reduction in the penalty, in light of section 110(i) of the Mine Act, 30 U.S.C. ' 820(i), which requires that penalties should take into account Athe effect on the operator=s ability to continue in business.@ 19 FMSHRC 783, 792 (Apr. 1997) (ALJ). The Commission granted the Secretary=s petition for discretionary review challenging the judge=s penalty assessment. For the reasons that follow, we vacate the judge=s penalty assessment and remand for reassessment.

I.

Factual and Procedural Background

At the time of the fatal accident that was the subject of this proceeding, the Washington/Niagara Limited Partnership operated the Washington Mine, an underground gold mine in Shasta County, California. 19 FMSHRC at 784. Sub-level 2 of the mine contained

water in the drift[1] requiring continuous pumping. 19 FMSHRC at 785. On September 5, 1994, Henry E. Feutrier, the Washington Mine=s general manager, entered the mine alone to check a submersible pump on sub-level 2. *Id.* at 783, 785. The next day, two miners discovered Feutrier=s body under the water. *Id.* at 783.

Representatives of the Department of Labor=s Mine Safety and Health Administration (AMSHA@) and the California Division of Occupational Safety and Health investigated the fatality and determined that Feutrier had received an electrical shock and later drowned. *Id.* at 784. MSHA attributed Feutrier=s death to the failure of a circuit breaker to trip, resulting in the pump on which Feutrier was working being energized. *Id*. The circuit breaker failed to trip because a Aneutral bar inside [a] breaker panel enclosure was not bonded to the grounded enclosure . . . .@ *Id.* (quoting MSHA=s accident investigation report, Ex. S-1, at 77).

Kim Warnock, an electrician licensed by the State of California, provided electrical services to the Washington Mine through his sole proprietorship, Unique Electric. *Id.* at 785. Unique Electric Awas simply the name that Mr. Warnock used when he provided services to his customers [and] was not a separate legal entity.@ *Id*. Warnock=s sole proprietorship had no employees or assets, and was not incorporated. *Id.*; Tr. 360. Warnock, doing business under the name Unique Electric, performed electrical work for the mine between 1992 and 1994. 19 FMSHRC at 785-86. He performed all the electrical work required to open sub-level 2 in 1994, including installing the transformer and the electrical panel board containing the circuit breaker. *Id*. He also rewired and installed the submersible pump 1 month before the accident. *Id.*

On September 9, 1994, MSHA Inspector Arnold E. Pederson issued a citation under section 104(d)(1) of the Mine Act, 30 U.S.C. ' 814(d)(1), to Unique Electric, alleging a significant and substantial (AS&S@) and unwarrantable violation of 30 C.F.R. ' 57.12025.[2] 19 FMSHRC at 784. The Secretary proposed a civil penalty of $8,500. *Id.* Warnock contested the violation and special findings, appearing before Judge Manning pro se.

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[1] ADrift@ is defined as, inter alia, A[a] horizontal gallery . . . driven from one underground working place to another and parallel to the strike of the ore.@ American Geological Institute, *Dictionary of Mining, Mineral, and Related Terms* 169 (2d ed.1997).

[2] Section 57.12025 states in pertinent part: AAll metal enclosing or encasing electrical circuits shall be grounded or provided with equivalent protection.@

The judge found that Athe pump circuit was not properly grounded at the time Warnock installed the pump . . . about a month prior to the accident[,]@ and that it was not properly grounded at the time of the accident as a result. *Id.* at 790-91. Based on these findings, the judge concluded that Unique Electric violated section 57.12025. *Id.* at 791. The judge noted that A[s]tatements in MSHA=s accident investigation report and the amount of the proposed penalty@ indicated MSHA=s apparent belief that Warnock was solely responsible for Feutrier=s death. *Id*. The judge disagreed, finding that many events, some attributable to Washington/Niagara, led to the fatality, including serious damage to the pump=s cable resulting from its being pulled over rocks. *Id.* The judge concluded that the violation was S&S, but noting that the Secretary apparently abandoned her allegation of unwarrantable failure, vacated this allegation and modified the charging document to a citation under section 104(a) of the Mine Act, 30 U.S.C. ' 814(a). 19 FMSHRC at 791-92.

The judge assessed a $400 civil penalty against Unique Electric based on his findings[3] that the violation was serious and abated in good faith, and that Unique Electric had no history of previous violations, was Avery small,@ and was Anegligent in failing to ground the pump circuit.@ *Id*. at 792. Noting that AUnique Electric no longer exists[, and that, thus] Mr. Warnock will have to pay any penalty assessed,@ the judge reasoned:

> In *Basin Resources, Inc.*, 19 FMSHRC 211 (January 1997), I held that if a mine operator is no longer in business and does not intend to return to the mining business, this fact should be taken into consideration in considering the ability to continue in business criterion. I held that civil penalties are remedial, not punitive, and are designed to Ainduce those officials responsible for the operation of a mine to comply with the Act and its standards.@ *Id.* at 212 (citation omitted).

19 FMSHRC at 792.

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[3] Section 110(i) sets forth six criteria to be considered by Commission judges in the assessment of penalties under the Act: A[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 the violation.@ 30 U.S.C. ' 820(i).

II.

Disposition

The Secretary first asserts that the judge reduced Unique Electric=s penalty because Warnock was no longer a mine operator and had no intention of returning to the mining business. PDR at 5 (the Secretary designated her PDR as her brief). She argues that the judge erred in so doing under the Aability to continue in business@ criterion of section 110(i) because, A[b]y definition, a penalty cannot have an effect on an operator=s ability to continue in business if the operator is no longer in business.@ *Id.* at 7. Noting that the purpose of the criterion is Ato prevent, where appropriate, a penalty from driving an operator out of business,@ the Secretary argues that A[t]he plain language and purpose of [the] >ability to continue in business= criterion thus establish that Congress intended that the . . . criterion would have no effect on civil penalty assessments when an operator is not in business.@ *Id*. The Secretary further argues that, under the judge=s rationale, a valuable deterrent to comply with the Mine Act would be lost where an operator who expects to be going out of business knows that it will receive a reduction in penalty when it eventually goes out of business. *Id*. at 8-9. Finally, the Secretary argues that the judge himself implicitly acknowledged the deterrence provided by a penalty to an out-of-business operation by refusing to reduce Unique Electric=s penalty to a nominal amount. *Id.* at 9. Unique Electric did not file a brief.

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). 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).

The operator cited in this case, Unique Electric, presents us with an unusual set of circumstances. The judge found that Unique Electric was nothing more than a trade name Warnock used when he provided services at Washington/Niagara=s Washington Mine. 19 FMSHRC at 785. Unique Electric had no employees or assets, nor even any separate legal identity apart from Warnock himself. *Id.*; Tr. 360. In fact, Unique Electric no longer exists because AWarnock is now employed by an electrical contractor that works exclusively at state and federal installations.@ 19 FMSHRC at 792. The judge=s observation, therefore, that AWarnock will have to pay any penalty assessed,@ *id.*, was equally true when Unique Electric was still an ongoing business concern because in this case the line between Aoperator@ and Aindividual@ is virtually indistinguishable.

This case, therefore, is akin to one brought against an individual under section 110(c) of the Mine Act, 30 U.S.C. ' 820(c), and, for that reason, the judge did not err when he concluded that he needed to consider the effect of the penalty on Warnock as an individual. In the context of

an individual found liable under section 110(c), the Commission has construed Athe ability to continue in business@ criterion as requiring a judge to make findings regarding the effect of a penalty on the individual=s ability to meet his financial obligations. *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997); *Ambrosia Coal & Constr. Co.*, 19 FMSHRC 819, 824 (May 1997). Just as Congress determined that a penalty should not drive an operator out of business, we believe Congress likewise did not intend for a penalty to prevent an individual from meeting his or her financial obligations. Although Warnock was cited as an operator under section 104, and not as an individual agent under section 110(c), it was appropriate, nevertheless, for the judge to consider whether the proposed penalty would affect Warnock=s ability to meet his financial obligations. Because the judge made no finding in this regard, however, we find it necessary to vacate the judge=s penalty assessment and remand the case to him so he can make appropriate findings consistent with this decision, and consider such findings in assessing a new penalty.[4]

Our decision should not be interpreted to suggest that any mine operator can obtain a reduction in the penalty assessed against it for a Mine Act violation pursuant to the Aeffect on the operator=s ability to continue in business@ criterion by going out of business. On the contrary, we emphasize that our holding in this case is confined to the extraordinary circumstances presented herein, in which Unique Electric, the named operator, was nothing more than the trade name used by Warnock to provide his own services (electrical) to the Washington Mine, and had no separate legal identity or personnel apart from Warnock himself. Under these unusual circumstances, we find it appropriate to remand this case to the judge to determine whether the penalty would affect Warnock=s ability to meet his financial obligations irrespective of whether Unique Electric was still in business.

We also note that although the Secretary proposed a penalty of $8,500, the judge assessed a significantly lower penalty of $400. The judge concluded that a reduction in penalty was appropriate because, as he had noted in his *Basin* opinion: A[i]f an operator is no longer in the mining business, penalties do not have a deterrent effect on future compliance with the Mine Act and the Secretary=s safety and health standards.@ 19 FMSHRC at 213. We agree with the Secretary that a penalty assessed against an operator who is no longer in business nevertheless provides a deterrent against future violations of health and safety standards. Admittedly, there may be no need to deter this particular operator. However, as one Court of Appeals has noted in an analogous case under the Occupational Safety and Health Act, 29 U.S.C. ' 651 et seq., the failure to assess a penalty could cause other employers to Abecome complacent in the knowledge that future civil penalties could be avoided by ceasing operations on the eve of the Commission hearing.@ *Reich v. Occupational Safety and Health Review Comm=n*, 102 F.3d 1200, 1203 (11th

[4] Our dissenting colleague complains we are imposing an unreasonable Adegree of exactitude@ on the assessment process. Slip op. at 8. On the contrary, the Commission has long held that, while the Secretary=s penalty proposals are not binding on the Commission or its judges, when penalties Asubstantially diverge from those originally proposed, it behooves [our] judges to provide a sufficient explanation of the bases underlying the penalties@ to avoid Aan appearance of arbitrariness.@ *Sellersburg*, 5 FMSHRC at 293; *c.f. Dolese Bros. Co.*, 16 FMSHRC 689, 695 (Apr. 1994) (adequate findings are Acritical@ when a judge assesses a penalty that significantly departs from that proposed by the Secretary).

Cir. 1997). Indeed, as that court noted, we need to Aworry about creating an economic incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name.@ *Id.* Moreover, even Aemployers who were going out of business for ordinary commercial reasons would have little incentive to comply with safety regulations to the end if monetary penalties could be evaded once the business quit altogether.@ *Id.*

The judge=s erroneous determination that no deterrent purpose would be served by the penalty in this case provides another reason why we must vacate and remand for reassessment.

III.

Conclusion

For the foregoing reasons, we vacate the judge=s penalty assessment against Unique Electric and remand for further proceedings consistent with this decision.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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James C. Riley, Commissioner

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Robert H. Beatty, Jr., Commissioner

Commissioner Verheggen, dissenting:

I disagree with the majority=s remand order. I would affirm the judge because I find no abuse of discretion in his penalty determination. I therefore dissent.

This appeal is focused solely on the judge=s exercise of the Commission=s de novo Aauthority to assess all civil penalties@ for violations of the Mine Act pursuant to section 110(i), 30 U.S.C. ' 820(i). Specifically, the Secretary has raised the issue of whether the judge abused his discretion when, in assessing the $400 penalty against Unique Electric, he considered the fact that the company was no longer in business and had no intention of returning to the mining business under the Aability to continue in business@ criterion of section 110(i). PDR at 7. Relying on the purported Aplain language and purpose@ of the criterion, the Secretary argues that it should Ahave no effect on civil penalty assessments when an operator is not in business.@ *Id*.

I do not accept the Secretary=s interpretation of the Aability to continue in business@ criterion of section 110(i). The first inquiry in statutory construction is Awhether Congress has directly spoken to the precise question in 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). The Commission has held that under various circumstances, the penalty criteria of section 110(i) are anything but clear in operation. *See, e.g.*, *Sunny Ridge Mining Co.*, 19 FMSHRC 254, 271-72 (Feb. 1997) (although some criteria do not apply to individuals on their face, judges must consider them in such contexts by analogy). Here, Congress clearly did not address assessment of penalties against operators who are no longer in business in section 110(i). The first sentence of section 110(i) grants the Commission exclusive authority to assess civil penalties under the Mine Act. 30 U.S.C. ' 820(i). As the agency thus charged with administering section 110(i), the Commission must interpret the provision to give it Athe most harmonious, comprehensive meaning possible.@ *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 631-32 (1973).

Keeping in mind that it is the Commission=s function to authoritatively interpret section 110(i), I view the Aability to continue in business@ criterion as setting forth a broad mandate to consider the effect of penalties on the economic well-being of those held liable under the Act, however situated. No other criterion serves this important purpose. Were I to follow the Secretary=s suggestion here, the Commission=s penalty assessment would be made in the absence of any consideration of the effect of the penalty on Warnock, a result I find inconsistent with the criterion=s broad mandate. I am not prepared to render the criterion a nullity by interpreting it in such a way as to render it moot. *See* 2A Norman J. Singer, *Sutherland Stat. Constr.* ' 46.06 (5th ed. 1992) (AIt is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.@). Indeed, if the Commission were to remand this case to the judge and instruct him to ignore the facts surrounding the dissolution of Unique Electric and Warnock=s assumption of its liabilities, which the Secretary essentially urges and which the majority declines to do, this could result in an artificially high penalty being assessed that would be more punitive than remedial in nature. I would thus hold that when assessing a penalty under

section 110(i), Commission judges must examine the economic effect of the penalty, be it against a large corporate operator, a corporate operator in bankruptcy, or, as in this case, a sole proprietorship that has dissolved.

The question remains as to whether the judge properly considered the effect of the penalty he assessed against Unique Electric.[1] I agree with the majority that, because "Unique Electric was nothing more than a trade name Warnock used when he provided services, . . . [t]his case . . . is akin to one brought against an individual under section 110(c)." Slip op. at 4. But this is precisely the view taken by the judge when he found that "Warnock will have to pay any penalty assessed." 19 FMSHRC 783, 792 (Apr. 1997) (ALJ). Nevertheless, the majority insists on remanding this case to the judge with the direction that he "consider whether the proposed penalty would affect Warnock's ability to meet his financial obligations." Slip op. at 4.

I find a remand here unnecessary for several reasons. First, in the case on which the majority relies, *Sunny Ridge*, the judge had failed to make *any* findings on several of the section 110(i) criteria when he assessed penalties against two individuals. 19 FMSHRC at 272, 274. In contrast, the judge here made findings on all six criteria. 19 FMSHRC at 792. The majority's remand order essentially requires the judge to supplement the record with evidence of Warnock's financial situation. Slip op. at 4-5. Such supplementation of the record assumes that penalty assessments require a degree of exactitude I find simply unsupported by the language of section 110(i). In assessing penalties, the Commission need only "consider" the penalty criteria, and the Act specifically provides that the Secretary, in providing information on the criteria, "shall not be required to make findings of fact concerning" the criteria. 30 U.S.C. ' 820(i). Instead, she "may rely upon a summary review of the information available to [her]." *Id*. The majority's remand order strays far beyond this mandate of simplicity. More to the point, I believe that the judge's finding that "Warnock will have to pay any penalty assessed" (19 FMSHRC at 792), in the absence of any evidence adduced by either party on the question of his finances, satisfies the Act's requirement to "consider" the effect of the penalty on Warnock.

I also believe that the majority's remand is based on a misunderstanding of the judge's opinion. The majority states:

> The judge concluded that a reduction in penalty was appropriate because, as he had noted in his *Basin* opinion: "[i]f an operator is no longer in the mining business, penalties do not have a deterrent effect on future compliance with the Mine Act and the Secretary's safety and health standards."

[1] The Commission reviews a judge's penalty assessment under an abuse of discretion standard. *Westmoreland Coal Co.*, 8 FMSHRC 491, 492 (Apr. 1986).

Slip op. at 5 (citing *Basin Resources, Inc.*, 19 FMSHRC 211, 213 (Jan. 1997)). This is not,

however, what the judge did here. Instead, he stated:

> [I]f a mine operator is no longer in business and does not intend to return to the mining business, this fact should be taken into consideration in considering the ability to continue in business criterion. . . . [C]ivil penalties are remedial, not punitive, and are designed to Ainduce those officials responsible for the operation of a mine to comply with the Act and its standards.@

19 FMSHRC at 792 (citing *Basin Resources*, 19 FMSHRC at 211-12). In fact, there is no mention in the judge=s opinion that any single factor alone led him to reduce the penalty.

I recognize that the penalty the judge assessed was significantly lower than that proposed by the Secretary. But, in view of the particular facts and circumstances of this case, I am not prepared to say that the judge abused his discretion or that the penalty is inconsistent with the statutory criteria or the Act=s deterrent purposes. The demise of Unique Electric and Warnock=s peculiar situation are factors that could have warranted a significant reduction in the penalty. I also note that a lower penalty could reflect the judge not finding the violation unwarrantable as the Secretary had alleged in the citation. *See* 19 FMSHRC at 792. The judge was under no obligation to adopt the penalty proposed by the Secretary **C** his penalty assessment was de novo. *Wallace Bros., Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996). Nor was he required to follow any sort of formula in assessing a penalty. As the Commission has recognized, Athere is no requirement that equal weight must be assigned to each of the penalty assessment criteria.@ *Thunder Basin Coal Co.*, 19 FMSHRC 1495, 1503 (Sept. 1997).

I agree with the majority that penalties under the Mine Act are intended to have both a specific and a general deterrent effect, and that even when Athere may be no need to deter [a] particular operator,@ a general deterrent still must be considered. Slip op. at 5. But I find nothing in the judge=s decision indicating that he failed to consider the general deterrent effect of the penalty he assessed. I find his decision consistent with Commission precedent, which states that Adeterrence is achieved through the assessment of a penalty based on the six statutory penalty criteria,@ and that A[d]eterence is not a separate component used to adjust a penalty amount after the statutory criteria have been considered.@ *Ambrosia Coal & Constr. Co.*, 18 FMSHRC 1552, 1565 (Sept. 1996).

I do not find the majority=s reliance on the Eleventh Circuit=s decision in *Reich v. Occupational Safety and Health Review Comm=n* convincing. Slip op. at 5 (citing 102 F.3d 1200, 1203 (11th Cir. 1997)). In that case, the court vacated the decision of an administrative law judge dismissing as moot a case against a corporate shipyard operator because the operator was in the final stages of going out of business. 102 F.3d at 1201. The effect of the judge=s opinion was to absolve the operator of any and all liability under the Occupational Safety and Health Act, 29 U.S.C. ' 651 et seq., for an incident that had led the Secretary to fine the company $692,000. 102 F.3d at 1201. In contrast, Unique Electric (in the guise of Warnock) still faces liability for its

negligence. Moreover, I certainly do not believe that this is the sort of case where affirming the judge would create an "incentive to avoid a penalty by going out of business and, perhaps, then reincorporating under a different name." Slip op. at 5 (quoting 102 F.3d at 1203).

As stated above, I recognize that the degree of Warnock's liability is significantly less than that originally proposed by the Secretary. But even if I disagreed with the amount of the penalty assessed against Warnock, even if I believed that under the facts of this case, a far higher penalty should have been imposed, any such opinion is irrelevant. This penalty determination was committed to Judge Manning's discretion, and I find no indication that he abused that discretion. Accordingly, I would affirm the judge's assessment of a $400 penalty against Unique Electric.

Theodore F. Verheggen, Commissioner

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