

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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March 13, 1996

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. PENN 93-15 |
| Petitioner | : | A. C. No. 36-07270-03526 |
| v. | : | |
| | : | Garmantown Mine |
| L & J ENERGY COMPANY, INC., | : | |
| Respondent | : | |

DECISION ON REMAND

Before: Judge Weisberger

On February 24, 1994, I issued a decision in this civil penalty proceeding sustaining six of the seven violations charged. L & J Energy Company, Inc., 16 FMSHRC 424 (February 1994). L & J Energy Company, Inc. (L & J) filed a petition for discretionary review and/or motion for remand for correction of the record, arguing, inter alia, that a stipulation which was recounted in my decision did not reflect the parties' agreement. The Secretary also moved for remand. The Commission denied the motion, but granted the petition for review, and remanded the matter to determine whether the stipulation in question correctly represented the agreement of the parties, and to reconsider the decision, if necessary. On remand, I took cognizance of the parties' agreement, but declined to reconsider the initial decision. The Commission denied L & J's petition for review.

Subsequently, L & J filed its appeal in the U.S. Court of Appeals for the District of Columbia Circuit. On June 6, 1995, the Court issued its decision remanding the case to the Commission "for a new determination based on the full record." L & J Energy Co., Inc. v. Secretary of Labor, 57 F.3d 1086 (D.C. Cir. 1995). The Court determined that my legal conclusion "disclaiming reliance on anything but expert testimony," rendered "irrelevant" my statement that I reviewed the testimony of other witnesses. 57 F.3d, supra, at 1087, citing 16 FMSHRC at 441. The Court further stated that if, on remand, the Commission reaches the same conclusion, "it must simply explain why the eyewitness [i.e., non-expert] testimony is discredited or

disconnected in whole or in part." *Id.*, at 1087. Finally, the Court held that the Commission should address each of the six statutory criteria for determining civil penalties "before assessing a fine." *Id.*, at 1088, citing Sellersburg Stone Co., 5 FMSHRC 287, 292-93 (March 1983); 30 U.S.C. § 820(i). On August 8, 1995, the Court issued its Mandate and Judgment in this matter, returning the case to the Commission's jurisdiction. On September 5, 1995, the Commission issued an order remanding this matter to me, "... for a new determination based on the entire record." (L & J Energy Co., Inc., 17 FMSHRC 1515, 1517 (September 1995)).

On November 30, 1995, my decision on remand was issued. L & J filed a petition for review which was denied by the Commission on January 11, 1996. The Secretary filed a motion for reconsideration of the denial, and the motion was granted in part on January 25, 1996.

On February 13, 1996, the Commission issued a decision remanding this matter to me. The Commission set forth its conclusion as follows.

We conclude that the judge has not adequately explained his reasons for discrediting or discounting the eyewitnesses' testimony. The "experience" and "expertise" of the experts upon whose testimony the judge relies do not explain why he discredited the eyewitnesses' testimony. Further, the judge's reliance on the discussion of testimony in his earlier decision, which the court of appeals found to be insufficient, does not fulfill the remand instructions set forth by the court and this Commission that he explain the basis for his treatment of testimony. In addition, if the judge is of the view of that the inspector's testimony regarding loose material on the highwall on February 6 renders the eyewitness testimony not credible, he must explain why. The judge must also explain the significance, in terms of his evaluation of the eyewitness testimony, of his reference to lay and expert witness' recognition of loose materials in photographs taken on February 6. 17 FMSHRC at 2134. Finally, the judge must reach a determination on the record in light of his explanations.

Why the eyewitnesses' testimony is discredited

In essence, Respondent's witnesses testified that they did not observe any loose or hazardous materials on the highwall on

February 5. However, MSHA and DER inspectors, who observed the site the next day testified that they observed numerous loose materials, cracks, mudslips, and material falling from the highwall. I observed their demeanor, and found their testimony credible. There is no evidence of any bias or interest on the part of these witnesses which would dilute the credibility of their eyewitness testimony. Also, their testimony regarding conditions they observed on February 6 finds corroboration in the recognition by Scouazzzo, Todd, and Woods, of loose materials in photographs taken on February 6. For these reasons I accept the testimony of Petitioner's eyewitnesses regarding the conditions of the highwall on February 6. Given this conclusion, the testimony of Respondent's eyewitnesses must be considered to be lacking some credibility. Further, the eyewitness testimony of the conditions on February 5 can be considered trustworthy only if it is more likely than not that the conditions observed on February 6 occurred between when the site was observed by Respondent's witnesses, and when it was examined by the inspectors on February 6.

The parties elicited opinion testimony from non-expert witnesses regarding the likelihood of a significant change in the condition of the highwall between February 5 and February 6. These witnesses discussed in subjective terms the weather conditions in the relevant time period and their impact upon the highwall. Since the lay witnesses did not base their opinions upon empirical data, I choose to not accord these opinions any weight. In contrast, the expert witnesses, Scovazzo and Wu, based their opinions upon detailed empirical weather data set forth in the testimony and records maintained by Krise. I thus accord more weight to the testimony of the experts that the conditions observed on February 6, could have been caused by the freeze-thaw effect. The weather data does not indicate that a significant thaw had occurred overnight on February 5, or that there was any dramatic weather change in the 24 hour period preceeding February 6 (See, 15 FMSHRC 424 at 443). Indeed, Krise's data indicates that the high temperatures for February 3, 4 and 5 were 50 degrees, 56 degrees, and 58 degrees, respectively. The temperatures throughout these days were all above freezing. I thus accept Wu's opinion that, in essence, since there was not an extreme change between a freeze and a thaw in the two days preceeding February 6, it was not probable that the conditions depicted in photographs taken on February 6 had developed in one day. I thus find that it is more likely than not that the hazardous conditions observed on February 6 did not occur overnight, and that at least some of those conditions were in existence on February 5. I thus discredit the eyewitnesses' testimony regarding conditions observed on February 5.

Accordingly, I reiterate my initial findings regarding the citations and orders at issue, and penalties to be imposed (16 FMSHRC, supra, 444-451).

Avram Weisberger
Administrative Law Judge

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