

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
2 SKYLINE, 10th FLOOR  
5203 LEESBURG PIKE  
FALLS CHURCH, VIRGINIA 22041

September 12, 1996

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.	:	
	:	L & J Energy Company
L & J ENERGY COMPANY, INC.,	:	
Respondent	:	

## DECISION ON REMAND

Appearances: Linda M. Henry, Esq., Office of the Solicitor,  
U.S. Department of Labor, Philadelphia,  
Pennsylvania, for the Petitioner;  
Robert G. Spencer, President, L & J Energy, Co.,  
Inc., Grampian, Pennsylvania, for the Respondent.

Before: Judge Weisberger

On April 22, 1996, the Commission issued a Direction for Review Order in which it granted L & J's Petition for Discretionary Review on the issue of its ability to continue in business. The Commission remanded the matter to me "for appropriate proceedings on this issue".

On May 3, 1996, in a telephone conference call with representatives of both parties, the latter were ordered to communicate with each other to determine whether the matter at issue could be resolved by a settlement agreement. On May 13, 1996, in a subsequent telephone conference call, the parties advised that they were unable to settle this matter but requested a one month extension to allow L & J to submit documentation to the Secretary in support of its position. In a follow-up telephone conference call on June 18, 1996, the parties advised that they were unable to settle this matter, and L & J requested an opportunity to present testimony. The Secretary did not object to this request. A hearing was scheduled for July 9, 1996, to allow L & J to present evidence on the issue of its ability to continue in business.

In general, the operator bears the burden of establishing that payment of civil penalty would adversely effect its ability

to continue in business (See, Sellerburg Stone Company v. FMSHRC 736 F2d 1147, 1153, n.14 (7th Cir. 1984) citing, Buffalo Mining Company, 2 IBMA 226, 247-48-251-252 (1973)). At the hearing, L & J offered in evidence financial statements covering the calendar years 1994 and 1995. A cover letter on the letterhead of Johnston, Nelson & Shimmel, Certified Public Accountants was attached to these statements. The cover letter indicates that the statements of income and earnings were reviewed, but that the review was ". . . substantially less in scope than an examination in accordance with generally accepted auditing standards . . . ." (Operator's Exh. A-1, pg. 1) It thus is not an audit, and accordingly is not entitled to any probative value. Further, the cover letter indicates that the information included was based on the representations of the management of L & J. No one having personal knowledge of the data set forth in the financial statements testified on behalf of L & J. Accordingly, there is no basis in the record to establish the veracity and trustworthiness of the figures set forth in the statements including reports of deficits of \$403,541 for 1994 and \$471,884 for 1995. Thus, these figures are not accorded any probative weight.

L & J also offered in evidence a statement from Debra A. Young, the Comptroller of Hepburnia Coal Company, indicating that the coal tonnage produced by L & J from October 1995 through March 1996 totalled 170,982.82 tons sold and that 33,000 tons "were needed to breakeven". (Operator's Exh. A-3). The statement contains the following opinion "An additional assessment resulting from this case could hinder if not completely halt his efforts to save this company." However, it is significant to note that Young, who testified, does not work for L & J, did not prepare any of the financial data proffered by L & J and did not have personal knowledge of this data. Accordingly, her statements are not accorded any probative weight. In the same fashion, no probative weight is accorded Operator's Exhibit A-5 listing the expenses of L & J, as Young indicated that the data contained therein were compiled by L & J's bookkeeper, who did not testify. Accordingly, in the absence of testimony from persons having personal knowledge to authenticate the data in this exhibit, I do not accord any probative value to this data.

Respondent relies on Operator's Exhibit A-6 setting forth expenses and income for the period December 1995 through May 1996 which shows a total loss for this period of \$156,923.68. However, there was no testimony presented to provide a basis to establish the veracity of the figures set forth in that document. The statement was prepared by the bookkeeper, who did not testify. Accordingly no probative weight is assigned to the figures set forth in this statement.

In view of all these facts, I conclude that L & J has not proffered competent evidence to establish that the imposition of civil penalties would significantly impair its ability to continue in business. I reiterate my earlier findings regarding the factors set forth Section 110(i) of the Act (16 FMSHRC supra at 449-450), and reiterate my prior finding that a civil penalty of \$87,500 is appropriate.

ORDER

It is ORDERED that if Respondent has not already paid the total civil penalty of \$87,500, then Respondent shall pay \$87,500 within 30 days of this decision.

Avram Weisberger  
Administrative Law Judge

Distribution:

Linda M. Henry, Esq., Office of the Solicitor, U.S. Department of Labor, Room 14480 Gateway Bldg., 3535 Market St., Philadelphia, PA 19104 (Certified Mail)

Robert G. Spencer, President, P.O. Box I, Main Street, Grampian, PA 16838 (Certified Mail)

/ml