

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

February 13, 1996

SECRETARY OF LABOR, :
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA) : Docket No. PENN 93-15
 :
v. :
 :
L & J ENERGY COMPANY, INC. :

BEFORE: Jordan, Chairman; Doyle, Holen, Marks and Riley, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act” or “Act”), involves citations and orders issued by the Department of Labor’s Mine Safety and Health Administration to L & J Energy Company, Inc. (“L & J”). Following an evidentiary hearing, Administrative Law Judge Avram Weisberger issued his decision sustaining six of the seven violations charged. 16 FMSHRC 424 (February 1994) (ALJ). L & J filed a petition for discretionary review of that decision, arguing that a stipulation as to certain testimony recounted in the judge’s decision did not reflect the parties’ agreement. The Commission granted the petition and remanded the matter to the judge to determine whether the stipulation accurately reflected the parties’ agreement. 16 FMSHRC 667, 667-68 (April 1994). The Commission also directed that the judge, upon so doing, reconsider his decision if necessary. *Id.* at 668.

The judge determined on remand that L & J was correct in its assertion that the stipulation did not reflect the parties’ agreement, which provided that the judge “would utilize the fact testimony from witnesses, other than [expert witnesses] Wu and Scovazzo, who observed the condition of the highwall.” 16 FMSHRC 796 (April 1994) (ALJ). The judge declined to reconsider his decision because “the decision takes cognizance of, and discusses, the testimony of witness (sic) other than Scovazzo and Wu, who had observed the highwall.” *Id.* The Commission denied L & J’s petition for review of the judge’s decision on remand.

L & J appealed the judge's decision on remand to the U.S. Court of Appeals for the District of Columbia Circuit. The court remanded the case to the Commission "for a new determination based on the full record." *L & J Energy Co, v. Secretary of Labor*, 57 F.3d 1086, 1088 (1995). The court determined that the judge's legal conclusion "disclaim[ing] reliance on anything but expert testimony" rendered "irrelevant" his statement that he had reviewed the testimony of other witnesses. *Id.* at 1087. 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 discounted in whole or in part." *Id.* The court also 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 September 5, 1995, the Commission remanded the case to the judge "for a new determination based on the entire record." 17 FMSHRC 1515, 1517 (September 1995).

In his second decision on remand, issued on November 30, 1995, the judge stated with respect to his evaluation of the non-expert testimony:

In evaluating the issue of whether dangerous conditions existed on the highwall prior to the accident, I discount the testimony of the eyewitnesses who testified on behalf of L & J, and instead rely upon the expert testimony due to the experience and expertise of the experts who testified. An evaluation of the experts' testimony is set forth in my initial decision, 16 FMSHRC *supra*, at 443. In addition, as set forth in my initial decision, 16 FMSHRC, *supra*, at 443, the testimony of L & J's witnesses is discredited because the inspector's testimony that on February 6, loose material covered at least 75 percent of the highwall, was not contradicted or impeached. Also, L & J's expert witness Scovazzo, and lay witnesses Todd and Woods recognized the depiction of some loose materials in photographs taken the morning of February 6.

17 FMSHRC 2133, 2134 (November 1995) (ALJ).

L & J again petitioned for review. The Secretary supported L & J's petition to the extent that it challenged the judge's failure to explain his decision to credit the testimony of the expert witnesses over that of the eyewitnesses. Review of that issue was granted by the Commission and briefing was stayed.

We conclude that the judge has not adequately explained his reasons for discrediting or discounting the eyewitness testimony. The "experience" and "expertise" of the experts upon whose testimony the judge relies do not explain why he discredited the eyewitness 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 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 witnesses' 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.

For the foregoing reasons, we remand this matter to the judge for further consideration consistent with this opinion.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner