

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 5, 1995

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

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Docket No. PENN 93- 15

v.

L & J ENERGY COMPANY, INC., :

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

ORDER

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. (1988) ("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 a decision sustaining six of the seven violations charged. *L & J Energy Company Inc.*, 16 FMSHRC 424 (February 1994).

L & J timely filed a petition for discretionary review and/or motion for remand for correction of the record, arguing, inter alia, that a stipulation recounted in the judge's decision did not reflect the parties' agreement. In response, the Secretary also moved for remand. The Commission denied the motions but granted the petition for review. *L & J Energy Company, Inc.*, 16 FMSHRC 667 (April 1994). Upon consideration, the Commission remanded the matter to the judge to determine whether the stipulation in question is complete and correctly represents the agreement of the parties. The Commission also directed the judge to reconsider his decision if necessary. 16 FMSHRC at 667-668.

On remand, the judge determined 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. *L & J Energy Company, Inc.*, 16 FMSHRC 796 (April 1994). 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.

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., v. Secretary of Labor*, No. 94-1454, slip op. at 4. The court determined that the judge's legal conclusion disclaim[ing] reliance on anything but expert testimony, rendered irrelevant his statement that he reviewed the testimony of other witnesses. Slip op. at 3., *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 discounted in whole or in part. *Id.* at 3-4. Finally, the court held that the Commission should address each of the six statutory criteria for determining civil penalties before assessing a fine. *Id.*, *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.

Pursuant to the court's order, we remand this matter to the judge for a new determination based on the entire record.

Mary Lu Jordan, Chairman

Joyce A. Doyle, Commissioner

Arlene Holen, Commissioner

Marc Lincoln Marks, Commissioner