

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 30, 1995

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

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 FM SHRC 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 recourted 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 regarding 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 FM SHRC 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 FM SHRC 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 regarding this matter to me, A... for a new determination based on

the entire record@ (L & J Energy Co., Inc., 17 FM SHRC 1515, 1517 (September 1955)). On November 1, 1995, the parties each filed a Brief on Remand.¹

Following the dictates of the Court of Appeals, as referred to by the Commission in its remand order, I make the following further explanations:

1. Why eyewitness testimony was discounted

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 FM SHRC supra, at 443. In addition, as set forth in my initial decision, 16 FM SHRC, 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.

2. The six statutory criteria

Upon reconsideration of the entire record, I reaffirm the findings and discussion relating to the statutory criteria of the gravity of the violations, the negligence of L & J, and the effect of a penalty on L & J's ability to continue in business.

I accept the Secretary's statements in his brief that L & J demonstrated good faith in attempting to achieve compliance after notification of the violations, and that there is no history of prior violations. L & J has not challenged the assertions by the Secretary that the size of its business is evidenced by the fact that it employs 15 miners, and has an annual revenue of one million dollars.

In evaluating the statutory criteria in determining the proper penalty to be assessed, I consider most significant the very high level of gravity of the violations found herein, and the more than moderate level of L & J's negligence. I reiterate herein the reasoning set forth in the original decision 16 FM SHRC supra. I further reaffirm my findings and reasoning set forth in the initial decision, 16 FM SHRC, supra, at 449-450, that L & J did not establish

¹To the extent that the arguments in the parties' briefs are inconsistent with this decision, or are beyond the scope of the remand order, they are rejected.

that the imposition of penalties would significantly impair its ability to continue in business. I further reaffirm my initial findings regarding the proper penalties for the violations found to have been established.

ORDER

It is ORDERED as follows:

1. Order No. 3490035 be sustained.
2. Order No. 3490201 be dismissed.
3. If L & J has not paid the civil penalty pursuant to the initial decision in this matter, then it shall, within 30 days of this decision, pay a civil penalty of \$87,500.00.

Avrar Weisberger
Administrative Law Judge

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