14-0381

IN THE CIRCUIT COURT OF TUCKER COUNTY, WEST VIRGINIA

THE WEST VIRGINIA DEPARTMENT OF TRANSPORTATION, DIVISION OF HIGHWAYS, a public corporation; **Petitioner,**	**Project No.** **X347-H-64.85 APD-0484(182)C** **Parcel No.** **1-5 (Surface and Mineral)**
v.	**UPON PROCEEDINGS TO CONDEMN LAND FOR PUBLIC USE PURSUANT TO W.VA. CODE §54-2-14a**
WESTERN POCAHONTAS PROPERTIES, L.P., a Delaware Limited Partnership; WWP, LLC, a Delaware Limited Liability Company; BEACON RESOURCES, INC.; METTIKI COAL (WV), LLC.; and the TUCKER COUNTY SHERIFF/TREASURER, for any unpaid and owing property taxes., **Respondents.**	**Case No. 12-C-46** **Judge Lynn A. Nelson**

CV 2014 FEB -4 PM 3:00 29 PAGE NO. 27 BOOK NO. JEAN BAYA CLERK CIRCUIT COURT TUCKER CO. WVA ADMITTED TO RECORD

ORDER DENYING PETITIONER'S MOTION FOR NEW TRIAL and RESPONDENT'S MOTION TO ENFORCE JUDGMENT

Now comes this Court, the Honorable Lynn A. Nelson presiding, being in receipt of *Petitioner's Motion for New Trial* and the *Responses* thereto and Respondent Beacon Resources' *Motion to Enforce Judgment*, and does hereby make the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1. This matter was a condemnation proceeding instituted by the Petitioner against the owners of certain parcels of real estate for the purpose of the Corridor H construction project through Tucker County, West Virginia. A jury trial on this matter was held on July 16 through July 18, 2013 as to the just compensation owed by the Petitioner for the property interests owned by Western Pocohontas Properties, L.P.; WWP, LLC; and Beacon Resources, Inc[1]. which were subject to the take. The jury fixed the award of just compensation at $24,000,000.00 for the

[1] Western Pocahontas Properties, L.P. and WWP, LLC, were the land owners of the property. Beacon Resources, Inc. was the lessee of the property. The property was being actively surface mined by Beacon at the time of the taking.

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property interests of Western Pocohontas Properties, L.P.; WWP, LLC; and Beacon Resources, Inc. on the parcel which was taken by the Petitioner for the highway.

2. At the conclusion of the trial, the Court directed counsel for the Respondents to prepare and submit a judgment order. Ms. Dawkins, Lead Counsel for Beacon Resources, volunteered to prepare same. The proposed order was prepared and circulated and the Court received several objections to the Order. The Court was aware that immediately after the trial, Ms. Dawkins was going to be out of her office and the Court did not sign the proposed order or any other proposals sent to the Court during this time. The Court wanted to be sure that Ms. Dawkins and other counsel had the opportunity to work out any objections to the final order that existed between the parties.

3. On August 13, 2013, the *Petitioner's Motion for New Trial* was filed in the absence of entry of a final judgment order. Responses were likewise filed by the Respondents. A hearing on the motion was scheduled for August 27, 2013. During this hearing, the Court heard oral argument from counsel and verbally denied the Motion for New Trial. The Court likewise inquired as to the status of the judgment order inasmuch as a final version had not yet been presented to the Court for signature. The Court directed that the judgment order be prepared and that the denial of the new trial motion be included therein.

4. A judgment order was entered by this Court on September 5, 2013.

5. On January 10, 2014, a *Motion to Enforce Judgment* was filed by Beacon Resources, Inc. In its motion, Beacon alleges that it is entitled to the balance of its judgment (less the amount deposited previously with the Court at the time of the take) in the amount of $18,136,900.00 plus interest. Beacon further alleges that these funds are immediately due inasmuch as the appeal period has expired for the Petitioner.

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6. Petitioner contends that the appeal period is presently tolled awaiting entry of an Order on its Motion for New Trial.

7. Upon review of the September 5, 2013 Order, it would appear that no mention of the Court's denial of the Motion for New Trial was made by the order preparer. The West Virginia Supreme Court of Appeals has previously found, with respect to motions for new trial under Rule 59(a) of the West Virginia Rules of Civil Procedure that the date of an appeal "begins to run from the date of entry of the order disposing of the motion." Syl. pt. 4, *in part*, McCormick v. Allstate Insurance Co., 194 W.Va. 82, 459 S.E.2d 359 (1995). In this case, no such order was ever entered by the Court, and therefore, the Petitioner's appeal period has been tolled pending the entry of this Order

8. Having disposed of the procedural issues surrounding the Motion for New Trial, the Court will now examine the substance of the motion. Petitioner alleges four grounds of error with the trial, specifically: (1) Petitioner's expert Thomas Gray was precluded from testifying as to the value of Beacon's interest; (2) Respondents' witnesses were allowed to present an income approach argument to the jury regarding value of the take; (3) Petitioner's jury instruction number 8 – instruction on business opportunity cost - was refused; and (4) the jury awarded funds for property not in the take, specifically one million tons of coal in the residue.

9. As to Petitioner's expert Mr. Gray, the Court disallowed his testimony as to value of the take based on a comparable value approach because of the nature of his comparables, not because the Court found the comparable value approach to be an impermissible measure of damages. Mr. Gray's use of comparables in foreign countries and comparables obtained by unverified news reports of lease sales made his testimony unreliable as it related to assigning a comparable value for the lease in question. The West Virginia Supreme Court of Appeals has

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previously recognized that "[w]hether a witness is qualified to state an opinion is a matter which rests within the sound discretion of the trial court and its ruling will not ordinarily be disturbed unless it clearly appears that its discretion has been abused." Syl. pt. 5, Jordan v. Bero, 158 W.Va. 28, 210 S.E.2d 618 (1974). In this case, the Court did not find Mr. Gray to be unqualified to render an opinion, but rather was concerned by the use of the questionable comparables he utilized in arriving at same. The West Virginia Supreme Court of Appeals has recognized that "a witness qualified to give his opinion on the value of the land involved in condemnation proceedings cannot use inadmissible facts to support his opinion." W. Va. Dept. of Highways v. Bellomy, 169 W.Va. 791, 793, 289 S.E.2d 511, 512 (1982) "And '[i]f there is no substantiating evidence to fortify the opinion or if the elements considered by the witness in reaching his opinion are irrelevant, speculative and conjectural, or otherwise incompetent, the opinion should be excluded." Bellomy, 169 W.Va. at 793, 289 S.E.2d at 512. Finding that the opinion itself was based on incompetent evidence, the Court refused to allow the testimony as to his valuation of the take using the comparable approach.

10. With respect to Petitioner's argument that it was error to allow the Respondents to present an income approach valuation of the property, the Court finds no merit in this argument. The West Virginia Supreme Court of Appeals has recognized that the income approach is one method which is appropriate in valuing property with the purpose of the approach being the ascertainment of what a "willing buyer, desirous of buying but under no compulsion to buy would pay to a willing seller, desirous of selling but under no compulsion to sell". W. Va. Dept. of Highways v. Sickles, 161 W.Va. 409, 410, 242 S.E.2d 567, 569 (1978). The Court committed no error in allowing presentation of the income approach valuation of the take to the jury. Finally, it was not an error to allow Mr. Stagg to rebut the opinion of the Petitioner's experts.

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The income approach is a recognized method for appraisal of property, specifically as the Bellomy Court observed,

> "The first of these approaches is known as the market approach and involves, essentially, an evaluation of similar pieces of property in the general area and the prices paid for each. The second approach is the cost approach and is used primarily where there are recently constructed improvements whose cost of construction or cost of replacement is readily ascertainable. The third is the income approach, and this is used where the property has a rental value which can be capitalized to give some fair indication of what an investor would pay for the privilege of receiving that income over some foreseeable period of time."
>
> Bellomy, 169 W.Va. at 793, 289 S.E.2d at 512.

The jury was not instructed that the only appropriate method of valuation was the income approach and therefore, the testimony of Mr. Stagg stating his opinion to the appropriate method was not binding on the jury and was not inappropriately presented.

11. The Petitioner's claim that the Court abused its discretion by refusing to give Petitioner's jury instruction number 8 is without merit. Petitioner's instruction was based upon the West Virginia Supreme Court of Appeals decision in Gauley & Eastern Railway Co. v. Conley, 84 W.Va. 489, 100 S.E.290 (1919) and Shenandoah Valley Railroad Co. v. Shepherd, 26 W.Va. 672 (1885). The Gauley case was a condemnation of a store and livery stable wherein the property owners sought to prove value of the land based upon their past business profits. This measure of damages was rejected by the Court. The Shenandoah decision dealt with a property owner that objected to the building of a railroad bridge over a small section of property claiming that it would do significant damage to the business conducted on the residue of the property for which the owner should be compensated. The Court rejected this argument for several reasons and the case is not applicable to the case at bar. No specific evidence was presented regarding

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the business profits of Respondents. The Court did allow testimony as to the income approach but that was limited to placing a value on the coal being mined on the property and did not involve testimony as to the net proceeds the Respondents received as a result of the mining operation. Accordingly, the proposed Petitioner's instruction number 8 was not relevant to the evidence presented at the trial and was properly refused.

12. The Petitioner's assertion that the Respondents were improperly awarded proceeds for damages to residue not actually taken is likewise without merit. The Court was quite frankly surprised that the Petitioner did not submit special interrogatories to the jury, given the unusual posture of the take in this case, to ascertain what funds the jury was awarding for what type of damage and whether or not the jury found the coal in the residue to be mineable by the landowner. As it stands, both the Petitioner and the Respondents agreed to provide the jury with a verdict form that allowed only requested the entry of one lump sum amount of just compensation. Had special interrogatories been presented to the jury, this Court and the parties would have a better understanding of the jury's rational in arriving at the just compensation amount awarded. As it stands, this Court will not second guess the deliberations or decision of the jury and will not grant a new trial on this issue.

13. Upon reviewing the Order entered on September 5, 2013, it would appear that there is some confusion regarding the judgment. Accordingly an amended judgment order will be prepared and entered by this Court.

ACCORDINGLY, it is hereby ORDERED:

1. *Petitioner's Motion for New Trial* is DENIED.

2. Respondent Beacon Resources's *Motion to Enforce Judgment* is GRANTED, however, same ruling is automatically stayed for 30 days pending the appeal of this matter.

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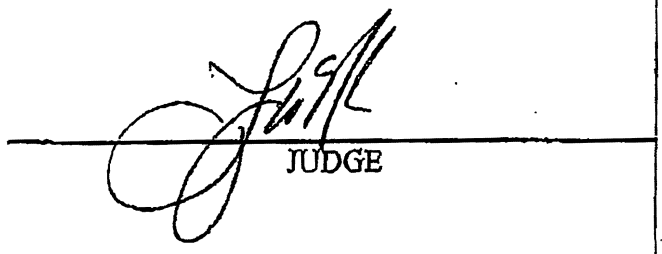
3. Objections to any adverse decisions of the Court are hereby SAVED.

4. The Circuit Clerk shall provide a copy of this Order to all counsel of record.

5. This matter, having been completed, shall be removed from the docket and placed among the actions ended.

ENTERED this 4 day of ~~January~~ FEB 2014.



JUDGE

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