FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 4, 2014

MARK GRAY, Complainant v. NORTH FORK COAL CORPORATION, Respondent	DISCRIMINATION PROCEEDING Docket No. KENT 2010-430-D BARB-CD-2009-13 Mine ID: 15-18340 Mine: Mine No. 4

ORDER GRANTING IN PART RESPONDENT'S MOTION TO AMEND NOTICE OF HEARING; DENYING COMPLAINANT'S MOTION TO ALLOW PRESENTATION OF ADDITIONAL LAY AND EXPERT EVIDENCE AT RE-TRIAL; AND RESERVING RESPONDENT'S MOTION TO COMPEL DISCOVERY

Before: Judge Rae

This case is before me upon a Complaint of Discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). The Respondent has filed a Motion to Amend the Notice of Hearing and a Motion to Compel Discovery. The Complainant has filed a Response in Opposition to the Motion to Amend the Notice of Hearing, and a Motion to Allow Presentation of Additional Lay and Expert Evidence at Re-Trial.

Procedural History

Gray petitioned for remand of my decision issued on October 20, 2011 based upon my pre-trial order of December 8, 2011 in which I denied Gray's request to introduce the written reports and testimony of Larry Miller and Peter Belcastro, two handwriting experts. Gray's brief in support of his petition for remand filed with the Commission on January 17, 2012 states that "the ALJ improperly prohibited two expert witnesses from testifying ... about two purported written warnings" issued by North Fork to Gray. In his brief, Gray goes on to state that his case was "heavily dependent on the expert testimony" and that their exclusion was an abuse of discretion, their exclusion warranting a new trial. The only two witnesses identified or referred to in his assignment of error and request for remand at the Commission level were Miller and Belcastro. No issues other than the exclusion of this evidence were raised in Gray's brief or his petition for remand filed on November 29, 2011.

The issue of the exclusion of the two handwriting experts was accepted for discretionary review by the Commission. On August 22, 2013, the Commission issued a remand directing

further proceedings in accordance with its ruling. It agreed with Gray that "the excluded evidence is the 'centerpiece of [the] case.'" In its decision, the Commission went to great lengths to discuss the exclusion of the testimony of these two identified handwriting specialists as being improper. The majority hypothesized that potentially different credibility determinations would have been made by me with respect to management and non-management witnesses for North Fork and against Gray had there been evidence that the two written counseling warnings issued to Gray had involved forgery. Despite the fact that there was non-documentary evidence that supported the testimony of management and non-management personnel regarding verbal counseling as well as poor performance issues, the majority[1] opined that the expert testimony concerning a possible tracing of a signature on the written warnings would have led to a different outcome. In sum, the majority of the Commission issued a remand order on the sole issue of whether the two handwriting experts should have been allowed to testify which they answered in the affirmative. No other issue was accepted for remand, raised *sua sponte* or included in its remand order.

Following a conference call I held with counsel on January 13, 2014, counsel for North Fork raised the issue of the scope of the hearing to be held pursuant to the remand order. See Ex. 1 Trans. CC. During that conference, I stated that it was my intention to take the testimony of the two expert witnesses and any witness(es) North Fork deemed necessary to rebut the expert testimony. Counsel for Gray disagreed with this interpretation of the remand order and indicated that he wished to call additional lay and expert witnesses. Thereafter, North Fork submitted a motion on January 22, 2014 to amend the Notice of Hearing to state with more specificity that the issue for hearing will be limited to the expert testimony from Belcastro and Miller and any rebuttal North Fork may have thereto. On January 24, 2013, a second conference call was held with counsel during which Gray's attorney raised the issue of the scope of the hearing once again, indicating he had both a lay witness and one expert witness he wished to present at hearing. I informed counsel that a responsive pleading to North Fork's motion would suffice to raise the issue for a ruling by the court. He requested until February 12 to file his response. Counsel for North Fork agreed to extend the due date of the response until February 12 and I so ordered his response and any other motions to be filed by February 12, 2014. Ex. 2 Trans. of CC. Two days beyond the ordered due date, on February 14, 2014, Gray submitted his Response in Opposition to North Fork's Motion to Amend the Notice of Hearing and filed his own motion to allow the presentation of additional lay and expert testimony. Both Gray's Response and Motion raise the same issues and are consolidated in this Order.[2]

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[1] Chairman Jordan issued a dissenting opinion in which she opined that the majority's finding that a different result would have obtained had the handwriting experts testified was "highly speculative." She points out that Belcastro's opinion was equivocal at best as to whether there was a forgery. The opinion goes on to state that even the testimony of an individual involved in the alleged forgery could be credited as to other aspects of his testimony and that the alleged forgery has no relation to the testimony of management and non-management employees who are not linked to the written warnings, particularly as it relates to the consistent statements that no deep cuts were made at the mine or that Gray was a poor performer.

[2] North Fork also raised the issue of discovery of documentation of Gray's attorney's fees at the conference calls and in its Motion to Amend as well as in a Motion to Compel. I reserve ruling on the issue of discovery at this time as more fully explained below.

Discussion and Analysis

Scope of Review

As set forth above, Gray filed a petition and supporting brief for discretionary review raising the exclusion of Miller and Belcastro as witnesses at hearing. Grays' requested relief was a reversal of the decision and remand "for the taking of additional evidence, including the testimony of Gray's expert witnesses" and a new trial. In support of his requested relief, Gray addresses squarely and solely the importance of the handwriting expert testimony to his case and the inability to present his case without it. This is the issue that the Commission accepted for review. While the majority opinion speculates on the possibility of a differing assessment of credibility of witnesses and outcome, it does so only to the extent that the two expert witnesses should have been permitted to testify and their reports admitted. The remand was issued in accordance therewith. No other issue was discussed or raised by the Commission *sua sponte.*

Commission Procedural Rule 2700.70(g) provides "review shall be limited to the issues raised by the petition, unless the Commission directs review of additional issues pursuant to §2700.71."[3] 30 U.S.C. §823(d)(2)(A)(iii). The Commission has held that the Mine Act and procedural rules preclude the consideration of issues raised even in briefs filed in support of review not included in the petition as outside the scope of review. *Saab v. Dumbarton Quarry,* 22 FMSHRC 491 (Apr. 2000). *See also Broken Hill Mining Co.,* 19 FMSHRC 673 (Apr. 1997); *Fort Scott Fertilizer-Cullor Inc.,* 19 FMSHRC 1511 (Sept. 1997) and *Rock of Ages,* 20 FMSHRC 106 (Feb. 1998). "Sweeping" language contained in a petition for review will not broaden the scope of review where the issue is exclusion of evidence. *Saab* at 495. Those issues not accepted for review or raised by the Commission are considered final as of the date of the ALJ's decision and become the final decision of the Commission within 40 days thereof if not accepted for review. 30 U.S.C. §823(d)(1).

Gray's petition for review was based upon the exclusion of the expert testimony. The first mention of presentation of any other specific evidence upon rehearing beyond that of the two handwriting expert witnesses was during the January 13, 2014 conference call. The new witnesses proposed by Gray in no way involve the issue of whether Gray's signature on the written counseling forms are forgeries which was the issue upon which the experts would have provided testimony and written reports. Thus, these additional witnesses relate to issues which became final 40 days after issuance of my decision of October 20, 2011, well over two years ago. In accordance with the decision in *Saab*, there is no rational analysis under which Gray's general

[3] Commission Procedural Rule 2700.71 provides: "[a]t any time within 30 days after the issuance of a Judge's decision, the Commission may, by the affirmative vote of at least two of the Commissioners present and voting, direct the case for review on its own motion. Review shall be directed only upon the ground that the decision may be contrary to law or Commission policy or that a novel question of policy has been presented. The Commission shall state in such direction for review the specific issue of law, Commission policy, or novel question of policy to be reviewed. Review shall be limited to the issues specified in such direction for review." 29 C.F.R. §2700.71.

prayer for a "new trial" broadens the scope of review beyond the issue of the inclusion of the expert witness testimony from Miller and Belcastro.

The lay witness who Gray specifically named and has provided an affidavit of his expected testimony, supposedly will now testify years later to the issues of whether Gray complained to management of deep cuts. Michael Creech will also supposedly testify as to whether Gray was a poor worker or whether management wanted to be rid of him for making safety complaints. Gray also seeks to introduce the expert testimony of Tracy Stumbo regarding "mine safety." There is a statement in Gray's motion that miners "ordinarily" do not tell inspectors about unsafe conditions and that deep cuts would be bolted before an inspector would know of them. However, lacking is an affidavit or statement of expected testimony confirming what exactly Stumbo would testify to.

The Commission made clear in its decision remanding the case that the issue on review was that Gray should have been permitted to pursue the issue of credibility of North Fork's witnesses "**by presenting the expert testimony at the hearing.**" (Emphasis added.) Assuming Stumbo would testify regarding the issue of deep cuts and complaints made to inspectors generally, these issues as well as the ones raised by the proposed lay witness are not within the scope of review directed by the Commission and must be denied.

F.R.C.P. 59 and 60(b)

In addition to asserting that the scope of the remand order embraces the right to call additional witnesses, Gray argues that Federal Rules 59 and 60(b)(2) should allow for a new trial based upon newly discovered evidence.[4] Gray's Mot. at 6.

Fed. R. Civ. P. 59(a) empowers the judge to grant a new trial, to take additional testimony, amend findings of fact or conclusions or make new ones. In order to seek a new trial, the movant must file a motion with affidavits within 28 days of entry of judgment. The opposing party is then provided 14 days to file opposing affidavits. Fed. R. Civ. P. 59(b). My decision was issued on October 20, 2011. Gray's motion to allow additional witnesses was filed on February 14, 2014, 28 months later. Gray's petition for discretionary review was filed on November 21, 2011, also more than 28 days after my decision was issued. Even if one were to interpret the rule to mean that the motion could be filed within 28 days to the Commission rather than the trial court, Gray's petition for review would not have met the statutory requirements of a motion for new trial under Rule 59. Not only was it filed more than 28 days after the decision was issued but it did not include affidavits from the proposed witnesses from whom Gray would elicit new evidence. Gray's motion fails under Fed. R. Civ. P 59.

Rule 60(b) affords grounds for relief from a final judgment or order under certain circumstances. Gray seeks relief under Rule 60(b)(2) for newly discovered evidence not discovered in time to move for a new trial under Rule 59(b). One of the requisite elements of filing for a new hearing under Rule 60(b)(2) is that the request is made no more than one year after the entry of judgment or order or the date of the proceeding. Fed. R. Civ. P. 60(c)(1). The

[4] Gray also cites Commission Procedural Rule 54 in support of reopening the hearing. That rule pertains to providing notice of hearing at least 20 days prior to hearing and is not applicable here.

Commission and federal case law interpret the time limitation as an absolute requirement. *Tolbert v. Cheney Creek Coal Corp.*, 12 FMSHRC 615 (Apr. 1990); *Warren v. Garvin,* 219 F.3d 111, 114 (2d Cir. 2000).

The testimony Gray seeks to introduce at rehearing, other than that of Belcastro and Miller, addresses issues not raised in his request for review or embraced within the scope of the Commission's order for review. It is, therefore, time-barred as final judgment as to all other issues was entered 40 days after the issuance of the October 20, 2011 decision by operation of law. 30 U.S.C. §823(d)(1). *See also Pittsburg & Midway Coal Mining Co., Supra.*

In addition to the time requirement, Rule 60(b) imposes several other statutory requirements to obtain a new trial based upon newly discovered evidence. The evidence must have been in existence at the time of trial but not in the movant's possession. It could not have been obtained in time for trial or in time to move for a new trial under Rule 59 even by exercising due diligence, the evidence must not be merely cumulative and, finally, it must be shown that it would change the result. Fed. R. Civ. P. 60(b)(2); *Darwin Stratton & Son, Inc.*, 26 FMSHRC 787 (Oct. 2004).

Michael Creech is the lay witness named in Gray's motion. Creech states in his affidavit that he was employed by North Fork for 2 years and worked with Gray for some time before Gray was fired, had seen deep cuts being taken and had been told to bolt faster than Gray to make him look "bad." He "heard" an unidentified member of management say they wanted to be rid of Gray because of his complaints. Creech stated he did not come forward with the information at the time Gray was discharged because he was still working at the mine and he was in fear of losing his job. Creech Aff. Gray states in his motion that he spoke with Creech and other unidentified employees prior to trial who "would not tell the truth about deep cuts." Gray's Mot. at 5 n.4. Examining these facts, it appears that Gray was likely in possession of this information prior to trial, particularly Creech's information.

Gray makes no claim, nor is there any evidence that he attempted to subpoena Creech at hearing or secure his presence or testimony in any other manner. Moreover, since Creech was employed by North Fork for 2 years and was working at the mine prior to Gray's discharge which occurred on May 15, 2009, he would no longer have been employed there by May 2011, at the latest. His fear of reprisal would no longer have been present. His date of departure from North Fork preceded the date of my decision of October 20, 2011 by approximately 5 months. Gray still had 28 days thereafter to file for a new hearing under Rule 59 based upon Creech's information. Gray makes no claim that he attempted in any way to secure an affidavit from Creech within this time frame or at any other time prior to his signing his February 11, 2014 affidavit - just 2 days before Gray submitted his motion. Not only does it appear that Gray failed to exercise due diligence in procuring Creech's testimony for hearing, but he also failed to exercise due diligence in procuring it in a timely manner to seek a new trial under Rule 59 after the decision was issued. No explanation is given by Gray for this failure. It also appears that the information was in his possession at the time he sought discretionary review with the Commission in November 2011 and he did not raise the issue there either in support of his request for a new trial. It appears on its face that the need for Creech's testimony, including hearsay statements, is an idea that bloomed as an afterthought in view of the court's and

Commission's decisions. Reopening of litigation on the grounds that the Complainant could not have foreseen a claim made by him would be rejected by the court without an absent witness is inappropriate. *See Hoyt R. Matise Co. v. Zurn*, 754 F.2d 560, 568 n.14 (5th Cir. 1985); *Washington v. Patlis,* 916 F.2d 1036 (5th Cir. 1990).

A motion for a new trial is an extraordinary form of relief. *Washington v. Patlis, Supra.* Assuming Creech's testimony was deemed admissible, it cannot be concluded that it would change the outcome. There are no indicia of reliability attached to Creech's affidavit. It does not indicate when the purported deep cuts were made that he observed, who in management was aware of them, who ordered them, or on what shift they occurred. Similarly, he does not indicate which member of management purportedly told him to work faster than Gray or to whom or when Gray made safety complaints. The hearsay statement that he "heard a member" of management say the company wanted to fire Gray for his complaints also lacks sufficient specificity. The affidavit as a whole lacks any specific information or facts that would lend it any credibility despite the fact that Creech made his affidavit long after any fear of reprisal was removed and for the specific purpose of assisting Gray in seeking the extraordinary relief of a new trial.

Aside from the issue of credibility, Creech's information would not necessarily change the outcome for other reasons. I did not assess the credibility of North Fork's witnesses over Gray's based solely on the fact that they testified consistently with one another. Without reiterating my findings in detail here, some of the facts that I looked at were that each of the miners who would have been involved in making and/or bolting the alleged deep cuts denied one had been made, that Gray's bolting partner had been verbally counseled along with Gray for his poor performance, that Gray had told his partner that he had been counseled in the past for poor performance not related to slow bolting, that his partner had never heard Gray make any safety complaints or fail to perform unsafe work, that based upon the geological conditions cuts were not made in excess of 20 feet, and that the very day Gray was terminated he did not make a complaint to MSHA Inspector Doan who was inspecting Gray's bolter on Gray's shift. Five of the witnesses who testified for North Fork had no involvement with the alleged forgery or the counseling warnings. There was independent documentary evidence that Gray was counseled for poor performance not only limited to slow bolting. Additionally, Gray made statements to his roof bolting partner that he had an attorney who would file discrimination charges if he was fired and denied unemployment benefits, providing motive to falsely report deep cuts. In sum, there is no indication that Creech's testimony would change any of my credibility determinations or the ultimate outcome either on the issue of whether Gray engaged in protected activity or on North Fork's affirmative defense.

For the foregoing reasons, I find that Gray's request to present the testimony of Creech (or any heretofore unnamed miners) under Rule 60(b) must be denied.

Gray also requests the appearance of Tracy Stumbo who he identifies as an expert in mine safety. While an affidavit of Stumbo's testimony is not offered, Gray alludes to his testifying that deep cuts could have been made in the mine despite the geologic conditions. In the conference call of January 13, 2014, counsel stated that there was no evidence on the issue from the complainant at trial and they wish to call an expert witness "just generally about taking

deep cuts and whether or not that means you will have a roof fall." Trans. of CC Jan 14, 2014. Again, this appears to be an afterthought of Gray's in light of the decision that perhaps he should have addressed that issue at hearing. This is not a proper basis for granting extraordinary relief. Furthermore, there is nothing in Gray's motion regarding his proposal to tender Stumbo as a witness that meets the requirements of Rule 60(b). Gray does not address the issue of whether he was in possession of Stumbo's expected testimony prior to trial or why he could not have presented this testimony at hearing through Stumbo or another witness had he exercised due diligence. There is nothing offered to lead to the belief that the information Gray seeks to introduce now is unique and known only to Stumbo. Counsel's representations during the conference call suggest his information would be general in nature and known to any person familiar with the geologic conditions and mining practices in Kentucky. This issue could easily have been addressed at trial. There is also no reason to find that the information would have changed the result. The information is only one basis upon which I made credibility determinations of the witnesses who appeared at trial. Even assuming taking a deep cut would not have caused a roof fall, it would not affect my credibility determinations or relate to whether Gray engaged in protected activity or that North Fork presented a substantiated affirmative defense. It would serve, at most, only to impeach testimony on a non-determinative point. Evidence offered only for impeachment purposes is not the type of newly discovered evidence upon which to grant a new trial. *See Bruno*, 11 FMSHRC at 153; *Baxter Int'l, Inc. v. Morris*, 11 F.3d 90 (8th Cir. 1993); *Durango Gravel*, 21 FMSHRC 1079 (Oct. 1999).

In sum, Gray has not met the requirements of Rule 59 or Rule 60(b) granting a new trial to present additional testimony or evidence from any witness other than Miller and Belcastro. The scope of the remand was limited to the testimony (and written reports) of these two handwriting experts based upon a finding that their exclusion was improper. It allows for additional discovery and further proceedings directly related to the testimony of Belcastro and Miller. I interpret that to include the identification and discovery pertaining to any witnesses North Fork may offer in rebuttal to Belcastro's and Miller's testimony as well as introduction of any experts' written reports. All other issues became final after 40 days of issuance of the October 20, 2011 decision.

North Fork has requested an Amended Notice of Hearing to specify that the scope of the rehearing is limited to the testimony of Miller and Belcastro. North Fork also requests that Gray be held to a requirement that he state with certainty within 60 days of hearing whether or not Belcastro will testify. It also asks for an order to compel a response to discovery propounded upon Gray.

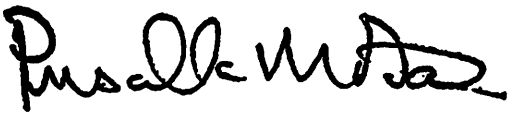
ORDER

For the foregoing reasons, Gray's Motion to Allow Presentation of Additional Lay and Expert Evidence at Re-Trial and his general request for a new trial or trial de novo is DENIED.

North Fork's Motion to Amend the Notice of Hearing to limit the trial to the testimony of Miller and Belcastro and their written expert reports being offered by Gray and evidence in rebuttal thereto by North Fork is GRANTED.

North Fork's request that Gray be compelled to confirm that Belcastro will testify at hearing 60 days prior to hearing is GRANTED.[5]

North Fork's request in its Motion to Amend and its Motion to Compel discovery is RESERVED at the present time in view of this decision and order.[6]



Priscilla M. Rae
Administrative Law Judge

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[5] The hearing is currently scheduled to commence on May 6, 2014. In order to afford both parties ample opportunity to complete discovery and preparation, the hearing may be continued upon motion by either party.

[6] Because this Order limits the issues at hearing to the handwriting experts and rebuttal thereto, discovery shall also be so limited. The Respondent may desire to tailor its discovery accordingly. I will withhold ruling on that portion of Respondent's Motion to Amend and its Motion to Compel and Complainant's Response thereto until this Order becomes final. Respondent may renew its motion to compel thereafter. The issue of penalties, should Gray prevail, will be addressed post-hearing, however, I tend to agree with Complainant that his attorney's fees at this stage of the proceedings are not discoverable unless Respondent can offer authority to the contrary.