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E. L. BRUNO V. CYPRUS PLAREAU MINING
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
February 3, 1989

ERNIE L. BRUNO

v. Docket No. WEST 88-157-D

CYPRUS PLATEAU MINING
CORPORATION

BEFORE: Ford, Chairman; Backley, Doyle and Lastowka, Commissioners

ORDER

BY THE COMMISSION:

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1982) (the "Mine Act"), Commission Administrative Law Judge John J. Morris issued a decision dismissing Ernie L. Bruno's complaint of discriminatory discharge on the grounds that the complaint was filed with prejudicial untimeliness and that Mr. Bruno would have been fired in any event for the unprotected activity of fighting. 10 FMSHRC 1649 (November 1988)(ALJ). The Commission did not grant Bruno's subsequently filed petition for discretionary review, and Judge Morris' decision became a final decision of the Commission on January 8, 1989, by operation of the statute. 30 U.S.C. $ 823(d)(1).

In a letter to Judge Morris dated January 18, 1989, Bruno requested that this proceeding be reopened and that the judge's decision be reconsidered on the grounds of newly discovered evidence. (The newly discovered evidence was described in Bruno's letter.) Bruno's submission was received in the Commission's Denver, Colorado offices on January 26, 1989. By letter dated January 26, 1989, the judge informed Bruno that he did not have jurisdiction to entertain the request. See 29 C.F.R. $ 2700.65(c). The judge forwarded Bruno's

submission to the Commission's Washington, DC offices, where it was received on January 30, 1989. For the reasons set forth below, we deem Bruno's submission to constitute a motion for relief from a final Commission decision on the basis of newly discovered evidence, and we deny the motion.

The factual and procedural background of this case relevant to Bruno's motion may be summarized briefly. On April 4, 1988, Bruno filed a complaint with the Commission alleging that on December 12, 1983, he had been discriminatorily discharged by Cyprus Plateau Mining

Corporation ("Cyprus Plateau") in violation of section 105(c)(1) of the Act, 30 U.S.C. $ 815(c)(1). Bruno filed the complaint pro se and pursuant to section 105(c)(3) of the Act, 30 U.S.C. $ 815(c)(3), following a determination by the Department of Labor's Mine Safety and Health Administration ("MSHA") that Bruno had not been discriminatorily discharged. 1/ The complaint alleges that in being fired, ostensibly for fighting, Bruno was subjected to illegally disparate treatment. The case was scheduled to be heard before Judge Morris on September 13, 1988. On September 8, 1988, the judge received an entry of appearance from counsel for Bruno, in which counsel specifically requested the judge to note that "complainant does not request a continuance of this matter." Appearance of Counsel (September 6, 1988) (emphasis in original).

Following the hearing and the submission of briefs by the parties, Judge Morris issued his decision dismissing Bruno's complaint. The judge decided the case on alternative grounds. First, he held that the delay by Bruno of over four years in filing the complaint materially prejudiced Cyprus Plateau. Therefore, the judge concluded that Bruno's complaint was not timely filed and had to be dismissed. 10 FMSHRC at 1652. Second, the Judge held that although Bruno had engaged in protected activity in attempting to correct float coal dust conditions, his discharge by Cyprus Plateau, even if partly motivated by the protected activity, would have occurred in any event. In reaching this determination, the judge analyzed the evidence regarding management's knowledge of Bruno's protected activity, the coincidence in time between that activity and the adverse action, and disparate treatment. The judge concluded that Cyprus Plateau was motivated by Bruno's unprotected activity of fighting and would have fired him in any event for the fighting alone. 10 FMSHRC at 1655-59.

As part of the evidence regarding disparate treatment, the judge reviewed the evidence regarding fights at the mine. The judge credited Cyprus Plateau's evidence that Bruno was not the subject of disparate treatment and noted that Stan Warnick, Cyprus Plateau's Manager of Human Resources, testified that two other employees besides Bruno, Buddy Weaby and Dennis Craig, had been fired for fighting. 10 FMSHRC at 1658. The judge also noted that the fight for which Bruno was terminated was not Bruno's first "incident" and that Bruno had previously pushed another employee, an incident discussed during Bruno's termination interview. 10 FMSHRC at 1659.

On December 27, 1988, Bruno, by counsel, filed with the Commission a petition for discretionary review. On January 9, 1988,

the Commission issued a Notice stating that because no two members of the Commission had voted to grant Bruno's petition, the judge's decision had become a final decision of the Commission 40 days after its issuance, i.e., on January 8, 1989. 30 U.S.C. $ 823(d)(1).

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1/ Bruno complained to MSHA of the alleged discrimination on January 19, 1988. On March 19, 1988, MSHA advised Bruno of its determination that a violation of section 105(c) of the Act had not occurred. See 30 U.S.C. $$ 815(c)(2) & (3).

On January 19, 1989, Bruno's counsel informed the Commission of his withdrawal from the case. In his letter of January 18, 1989, to Judge Morris, Bruno stated that he was without counsel and requested, in effect, that the judge reopen the case and reconsider the decision, because of new evidence that "clearly shows ... disparate treatment" and because of certain discrepancies that Bruno had discovered in the testimony of Warnick. Bruno letter 1 (January 18, 1989)("B.L.").

In his letter, Bruno asserts that Warnick's testimony that Weaby and Craig were fired for fighting, testimony credited by the judge, was not true. Bruno contends that a recently obtained statement from Gary McDonald, a retired company official, who was "responsible for the decision concerning the fight involving ... Weaby," establishes that Weaby quit and left the company for his own reasons and was not disciplined for fighting. B.L. 1-2. In addition, Bruno asserts that a statement from Craig, whom Bruno had "also found, establishes that Craig was fired for leaving the mine without permission, not for fighting. B.L. 3. (Bruno includes in his letter his own purported quotation of Weaby's and Craig's statements in non-affidavit form.) Finally, Bruno's submission argues that there are differences in the material facts as sworn to by Warnick in interrogatories from an earlier state trial involving Bruno's discharge and in Warnick's testimony before Judge Morris. B.L. 4-6. 2/

By letter dated January 26, 1989, Judge Morris informed Bruno that he no longer had jurisdiction and that "the matters raised in your letter ... should be presented to the ... Commission." ALJ letter to Bruno (January 26, 1989). Judge Morris forwarded to the Commission Bruno's submission and a copy of his letter to Bruno.

As noted above, Judge Morris' decision became final on January 8, 1989, 40 days after the decision was issued and because no two Commissioners had voted to grant review. We may consider the merits of Bruno's submission only if we construe it as a request for relief from a final Commission decision. See 29 C.F.R. $ 2700.1(b) (applicability of Federal Rules of Civil Procedure to Commission proceedings); Fed. R. Civ. P. 60(b) (relief from judgment or order). See generally M.M. Sundt Construction Co., 8 FMSHRC 1269, 1270 (September 1986): Henry L. Wadding v. Tunnelton Mining Co., 8 FMSHRC 1142, 1142.43 (August 1986).

A decision on a motion for relief from a final judgment calls for "a delicate adjustment between the desirability of finality and

the prevention of injustice." In re Casco Chemical Co., 335 F.2d 645, 651 (5th Cir. 1964). In general, once a case has been considered on the merits, the pendulum swings in the interest of finality. See 11 C. Wright, A. Miller, Federal Practice and Procedure $ 2857 (1973).

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2/ Bruno's discharge generated two actions. First, Bruno sued Cyprus Plateau in the State of Utah District Court seeking reinstatement. Bruno's claim was denied by the trial court and Bruno lost on appeal. Later, Bruno filed the subject discrimination complaint with the Commission. See 10 FMSHRC at 1651.

Fed. R. Civ. P. 60(b)(2) provides: "In motion and upon such terms as are just, the court may relieve a party ... from a final judgment, order, or proceeding for the following reasons: ... newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." (Fed. R. Civ. P. 59(b) provides that a motion for a new trial must be served no later than 10 days after the entry of the judgment.)

In order to prevail upon a Rule 60(b)(2) motion, the movant must establish that the newly discovered evidence was in existence at the time of the trial but not in the movant's possession; that even by exercising due diligence, the movant could not have obtained the evidence at the time of trial or in time to move for a new trial under Rule 59(b); and that the evidence is not merely cumulative and would change the result. See generally C. Wright, supra, at $ 2859.

Bruno's submission falls short of these criteria in several respects. While Bruno's submission has been filed within a "reasonable time" of the finality point of Judge Morris' decision, and the "new evidence" upon which he relies (the two "statements" and discrepancies in Warnick's testimony) was in discoverable existence at the time of the hearing before Judge Morris, Bruno has failed to satisfy the "due diligence" and "affecting outcome" tests.

Concerning due diligence, Bruno has made no showing why McDonald's and Craig's purported testimony regarding disparate treatment could not have been discovered and used at the hearing had Bruno exercised due diligence. Bruno states that he discovered McDonald's testimony "just recently" when he "decided to go over to [McDonald's] house." B.L. 1. Of Craig, Bruno only states that he has "also found" him. Id. In short, Bruno has not established that, by the exercise of due diligence, he could not have obtained McDonald's and Craig's testimony in time for the original proceeding. See 7 J. Moore, W. Taggart & J. Wicher, Moore,s Federal Practice Par. 60.29 (2d ed. 1985). We note also that Bruno obtained an attorney prior to the hearing, that his attorney specifically waived a continuance, and that he was represented by counsel at trial. Similarly, Warnick's interrogatories presumptively were available to Bruno prior to trial and thus were known to Bruno. Even so, they do not represent newly discovered evidence but are rather impeaching evidence, and thus fall outside the scope of a Rule 60(b)(2) motion. See, e.g., Harris v. Illinois California Express, Inc., 687 F.2d 1361, 1375 (lOth Cir. 1982).

Further, Bruno has made no showing that McDonald's and Craig's

purported testimony, even if proven, would change the outcome of the case. Their statements indicate only that each was involved in a single incident of fighting while, as the judge noted, Bruno's termination was based in part on his involvement in past incidents, including a shoving incident. 10 FMSHRC at 1659.

Disparate treatment is but one factor bearing upon an employer's motivation. The judge also noted that there was no showing that those personnel who fired Bruno knew of his protected activity in attempting to correct float coal dust conditions and that there was no coincidence

in time between Bruno's protected activity and his discharge. 10 FMSHRC at 1655. Thus, even if all of the evidence upon which Bruno now relies were assumed arguendo to be true, it would fall short of establishing the probability that the substantive merits of the decision reached by the judge would be affected. Cf. Wadding v. Tunnelton Mining, 8 FMSHRC at 1143 (failure to adduce clear and convincing evidence of fraud under Rule 60(b)(3)). In the final analysis, and upon review of the record, we regard Bruno's evidence as essentially cumulative of other evidence in his favor that was presented at trial.

Second, none of Bruno's "newly discovered evidence" affects the first basis for the judge's decision -- that Bruno's complaint was filed with prejudicial untimeliness. Accordingly, even were we to agree in all respects with Bruno, the outcome of the judge's decision would not be changed. Bruno's complaint would still be subject to dismissal on the basis of the complaint's untimeliness.

Accordingly, Bruno's request for reconsideration is denied.

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