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RONALD TOLBERT V. CHANEY CREEK COAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
April 27, 1990

RONALD TOLBERT

v. Docket No. KENT 86-123-D

CHANEY CREEK COAL CORPORATION

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

ORDER

BY: Ford, Chairman; Backley, Lastowka and Nelson, Commissioners

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) ("Mine Act" or "Act"), complainant Ronald Tolbert has filed with the Commission a Motion to Reopen and Remand. By previous order, we directed the filing of supplemental memoranda concerning the request. Tolbert and amicus Secretary of Labor have submitted such memoranda. Respondent Chaney Creek Coal Company ("Chaney Creek") has not filed any response to Tolbert's motion and the supplemental memoranda. Upon consideration of Tolbert's motion and supporting memoranda filed with us, and for the reasons explained below, we reopen this matter and remand it to Commission Administrative Law Judge Gary Melick for further proceedings consistent with this opinion.

The relevant procedural history may be summarized briefly. This case was commenced by Tolbert's discrimination complaint against Chaney Creek filed with the Commission pursuant to section 105(c)(3) of the Mine Act. 30 U.S.C. 815(c)(3). On March 16, 1987, Judge Melick issued a decision concluding that Chaney Creek had discriminated against Tolbert in violation of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), by refusing to rehire him from layoff status after he had testified on behalf of a complainant in another discrimination proceeding before the

Commission. 9 FMSHRC 580 (March 1987)(ALJ). The judge ordered Chaney Creek to offer Tolbert employment. In a subsequent remedial order, Chaney Creek also was directed to pay Tolbert $14,453 in back pay and interest through April 8, 1987, as well as any additional back pay and interest to date of reinstatement. Tolbert was awarded $16,900 in attorney's fees. 9 FMSHRC 929 (May 1987)(ALJ).

Because the Commission did not grant Chaney Creek's petition for discretionary review, the judge's decisions became final decisions of the Commission by operation of the statute. 30 U.S.C. 823(d)(1). Chaney Creek did not petition for review of these final Commission orders in a United States court of appeals. 30 U.S.C. 816(a).

On October 1 1987, Tolbert filed with the Commission a motion, opposed by Chaney Creek, to reopen the proceedings. Tolbert alleged that although Chaney Creek had reinstated him in May 1987, it had not paid him all the back pay and attorney's fees due. Tolbert further asserted that two other mining corporations and John Chaney individually were successors or alter egos of Chaney Creek and should be brought into this proceeding under applicable successorship doctrines. See, e.g., Secretary on behalf of Corbin v. Sugartree Corp., 9 FMSHRC 394 (March 1987), aff'd, Terco v. FMSHRC, 839 F.2d 236 (6th Cir. 1987). In an order issued on November 10, 1987, the Commission denied Tolbert's motion to reopen, stating:

> The essential nature of the remedy sought by Tolbert is collection of a judgment debt. This relief involves, inter alia enforcement and execution of the Commission s final decision in this matter. Such an enforcement request is properly directed to the Secretary of Labor. Under the Mine Act, the Secretary is empowered to seek compliance with Commission orders in the federal courts. See 30 U.S.C. 816(b) & 818. We need not and do not express any opinion as to other avenues of relief that may be available to Tolbert.

Tolbert v. Chaney Creek Coal Corp., 9 FMSHRC 1847, 1848 (November 1987).

Thereafter, Tolbert requested the Secretary of Labor to petition a United States court of appeals for summary enforcement of the judge's orders. See 30 U.S.C. 816(b). On January 25, 1988, the Secretary filed such a petition with the United States Court of Appeals for the Sixth Circuit. Tolbert also filed a motion to intervene, which was granted. On May 19, 1988, the Sixth Circuit granted the Secretary's enforcement petition and later certified its order as its mandate on June 22, 1988. Tolbert Motion Exhs. B & C (July 20, 1989)("Motion").

The next major procedural development in this matter occurred on July 20, 1989, when Tolbert filed the present motion to reopen. The motion seeks an additional amount of back pay and interest for the period April 9, 1987, through Tolbert's reinstatement in May 1987, an additional amount of attorney's fees for legal work performed after April 8, 1987, additional interest on back pay owed to the present time because of Chaney Creek's

failure to pay in full the back pay amounts awarded, and a determination of "whether Chaney Creek is the 'alter ego' of its owner, John Chaney ..., and whether Chaney should therefore be held personally liable for the relief due Tolbert." Motion at 1. Tolbert alleges that Chaney Creek has paid him only $7,000 of the back pay and interest owed and has paid counsel only $2,500 in attorney's fees, and further states that Chaney Creek is no longer operating any

mines. Motion at 3-4. Counsel for the Secretary of Labor also filed a Motion for Leave to File a Memorandum as Amicus Curiae in support of complainant's reopening motion.

By order dated October 31, 1989, we granted the Secretary's amicus motion and accepted her memorandum. We noted that Tolbert "has failed to identify any specific basis or authority upon which the Commission can rely to reopen this proceeding to consider the merits of his request for relief." 11 FMSHRC 1942, 1943 (October 1989). We directed Tolbert and the Secretary to file supplemental memoranda addressing the jurisdictional authority supporting their request that this proceeding be reopened at this time. We also directed Tolbert to address the obvious question as to why the Sixth Circuit is not the "proper tribunal" before which he should pursue the alter ego issue. Id.

The chief question presented is whether the Commission possesses jurisdiction to reopen this proceeding. We answer that question in the affirmative. Tolbert's several requests for relief in his present motion are outgrowths of this case's prolonged procedural history. Tolbert heeded the Commission's order of November 10, 1987, and invoked the Secretary's representation to secure summary enforcement of the Commission's final orders in the Sixth Circuit. Tolbert now alleges that, despite this judicial enforcement, Chaney Creek has not complied with the judge's remedial order and that certain additional monetary matters relevant to the remedy require further adjudicative resolution.

Neither Tolbert nor the Secretary has pursued the possible course of prosecuting contempt proceedings in the Sixth Circuit to seek resolution of the remedial questions presented in the present reopening motion and to compel obedience to that Court's summary enforcement decree (see 30 U.S.C. 816(b)). However, as the memoranda before us demonstrate, the developin law concerning contempt proceedings in analogous contexts shows that were such proceedings to be initiated, the Court would likely remand the matter to the Commission for further necessary findings of fact. See, e.g., Aquabrom v. NLRB, 746 F.2d 334, 336-37 (6th Cir. 1984); see also NLRB v. FMG Industries, 820 F.2d 289, 291-94 (9th Cir. 1986). We are persuaded that we possess jurisdiction to act and, in the interest of judicial economy, we exercise our discretion to reopen the matter.

When the Sixth Circuit issued its mandate, the Commission reacquired the power to assert its own jurisdiction over this matter. See, e.g., Newball v. Offshore Logistics, Int'l, 803 F.2d 821, 826 (5th Cir. 1986). A lower tribunal may consider and decide any matter not expressly or implicitly disposed of by the appellate decision and may conduct further proceedings not inconsistent with the mandate. E.g., Bankers Trust Co. v.

Bethlehem Steel Corp., 761 F.2d 943, 949-50 (3rd Cir. 1985), and authorities cited. In granting the Secretary's petition for enforcement, the Sixth Circuit did not pass substantively on any of the matters asserted in complainant's motion and, accordingly, the Commission is not precluded from considering complainant's contentions.

Although the Mine Act specifically authorizes the Secretary of Labor to seek compliance with Commission orders in the federal courts

(30 U.S.C. 816(b) & 818), and the Commission possesses no direct authority under the Act with respect to enforcement of its own orders, section 105(c)(3) of the Act does empower the Commission to grant a successful section 105(c)(3) complainant "such relief as it deems appropriate, including, but not limited to, ... rehiring or reinstatement ... with back pay and interest or such remedy as may be appropriate." 30 U.S.C. 815(c)(3). As we have stated:

> The remedial goal of section 105(c) is to "restore the [victim of illegal discrimination] to the situation he would have occupied but for the discrimination." Secretary on behalf of Dunmire and Estle v. Northern Coal Co., [4 FMSHRC 126, 142 (February 1982)]. As we have previously observed, "'Unless compelling reasons point to the contrary, the full measure of relief should be granted to [an improperly] discharged employee.'" Secretary on behalf of Gooslin v. Kentucky Carbon Corp., 4 FMSHRC 1, 2 (January 1982), quoting Goldberg v. Bama Mfg. Co., 302 F.2d 152, 156 (5th Cir. 1962).

Secretary on behalf of Bailey v. Arkansas-Carbona Co., 5 FMSHRC 2042, 2049 (December 1983). See .also, e.g., Brock on behalf of Parker v. Metric Constructors, Inc., 766 F.2d 469, 472-73 (llth Cir. 1985).

In light of the remedial purposes of section 105(c), we conclude that the Commission, in appropriate cases and on such terms as are just, may reopen a discrimination case for reasonable supplemental proceedings in aid of compliance. Indeed, the Commission has acted similarly without challenge in the past. In Secretary on behalf of Boone v. Rebel Coal Co., 5 FMSHRC 615, 615-16 (April 1983), the Commission granted the Secretary's post-enforcement motion to reassume jurisdiction in order to resolve a back pay compliance problem and remanded the matter to an administrative law judge "for expedited proceedings in compliance with the Court's [summary enforcement] order." Similarly, in Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506, 508-09 April 1988), upon a complainant's motion, we reopened a section 105(c)(3) discrimination case, which had been dismissed on the basis of the judge's approval of the parties' settlement agreement, to confirm the enforceability of the settlement agreement and the judge's order in view of respondents' abrogation of the agreement.

In reopening closed cases, the Commission has sought guidance in, and has applied "so far as practicable" and "as appropriate," Fed. R. Civ. P. 60(b) ("Rule 60(b)"), dealing with relief from judgments. See Commission Procedure Rule 1(b), 29 C.F.R. 2700.1(b). See also. e.g.,

M.M. Sundt Constr. Co., 8 FMSHRC 1269, 1270-71 (September 1986). Thus, in reopening the Danny Johnson case in aid of post.judgment compliance, the Commission relied on Rule 60(b)(6) ("any other reason justifying relief from the operation of the judgment"). 10 FMSHRC at 508. While usually the Commission has utilized Rule 60(b) analysis to relieve defaulting respondents from Commission decisions entered against them, the terms of Rule 60(b) do not apply solely to losing parties, and 60(b) relief also may be sought by the prevailing party where, as here, a

problem in relief arises. See Danny Johnson, supra; 7 J.W. Moore & J.D. Lucas, Moore's Federal Practice Par. 60.22[1] (p. 60-174)(2d ed. 1987); Gray v. John Jovino Co., Inc., 84 F.R.D. 46, 47 (E.D. Tenn. 1979). See also, e.g., Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044, 1051-52 (2d Cir. 1982) (even non-parties, in appropriate circumstances, may possess standing to invoke Rule 60(b)(6) where they are sufficiently connected and identified with a successful party's suit). Thus, we conclude that Rule 60(b)(6) also supports the reopening of this matter because we find that "such action is appropriate to accomplish justice" here. Klapprott v. United States, 335 U.S. 601, 614-15 (1949). 1/

Accordingly, we reopen this matter so that we may turn to consideration of the substantive relief requested in complainant's motion. As to complainant's requests regarding additional sums of back pay, interest, and attorney's fees assertedly due, factual findings may be necessary; therefore, we remand this matter to Judge Melick (the originally presiding judge) for determination of whether the requested monetary relief is properly due and, if it is, for calculation of the amounts in question. See Robert Simpson v. Kenta Energy, 11 FMSHRC 1638, 1639 (September 1989).

Complainant's request for a determination as to John Chaney's possible alter ego status and, hence, derivative liability, may prove more troublesome. Discrimination litigation under the Mine Act, like other litigation, must reach finality. While the remedial goal of section 105(c) is to make whole victims of discrimination, that worthy purpose is not to be realized at the expense of fair litigation procedure or due process. The party whom Tolbert now seeks to add has never individually been a party to this proceeding, and we cannot finally determine from the present record whether John Chaney may properly be brought into this proceeding at this stage.

Given the present record on this issue, we therefore remand this matter to the judge for needed factual findings and legal analysis as to whether John Chaney may appropriately be joined in this matter at this late date. Specifically, and as a threshold issue, the judge is directed to determine whether the complainant should have determined John Chaney's alleged alter ego status at a more timely and seasonable juncture of this litigation and to determine the precise legal theory and authority upon which any such joinder may now be justified. John Chaney shall be afforded opportunity to be specially heard on these issues. If the judge concludes that John Chaney may properly be made party to these supplemental compliance proceedings, he shall continue to

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1/ We caution, however, that reopening motions are committed to the sound discretion of the Commission. Cf. Randall v. Merrill Lynch, 820 F.2d 1317,

1320-21 (D.C. Cir. 1987). Given that the primary use of this rule in Commission practice is to relieve defaulting parties from default, such motions by prevailing parties will be examined carefully on a case-by-case basis. As the Court stated in Randall: "Rule 60(b) is the mechanism by which courts temper the finality of judgments with the necessity to distribute justice. It is a tool which ... courts are to use sparingly...." 820 F.2d at 1322.

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be afforded full opportunity to participate on any and all liability or remedial issues possibly affecting him. Cf. generally Golden State Bottling Co. v. NLRB. 414 U.S. 168, 180 (1973); FMG Indus., supra, 820 F.2d at 291-92.

For the foregoing reasons, this matter is reopened and remanded to the judge for proceedings consistent with this opinion.

Commissioner Doyle, concurring in part @nd dissenting in part:

The administrative law judge's May 12, 1987, decision in this matter became a final order of the Commission in June 1987. In October 1987, Complainant Ronald Tolbert filed a motion before the Commission seeking to reopen this matter. He requested that it be remanded to the administrative law judge for a determination of whether, among other matters, John Chaney was liable to Tolbert because Chaney Creek and its owner were "alter egos," thus making Chaney liable for Tolbert's judgment against Chaney Creek. The Commission denied the motion because:

> [t]he essential nature of the remedy sought by Tolbert is collection of a judgment debt....Such an enforcement request is properly directed to the Secretary of Labor. Under the Mine Act, the Secretary is empowered to seek compliance with Commission orders in the federal courts.

9 FMSHRC 1847, 1848 (November 1987).

Tolbert then requested the Secretary of Labor ("Secretary") to petition a United States Court of Appeals for enforcement of the judge's order against Chaney Creek. The Secretary so petitioned the Sixth Circuit and Tolbert intervened in the proceeding. The Sixth Circuit granted the enforcement petition against Chaney Creek and certified its order as a mandate in June 1988.

In July 1989, Tolbert again moved the Commission to reopen its final order of June 1987 and remand the matter for a determination of whether owner John Chaney is the alter ego of Chaney Creek and thus personally liable for the relief due Tolbert, a determination of the additional back pay and interest due Tolbert and a determination of the additional attorney's fees due Tolbert.

The majority has granted Tolbert's motion based on its determination that the "developing law" indicates that, if a proceeding were initiated before the Sixth Circuit, "the Court would likely remand the matter to the Commission for further necessary findings of fact." Slip op. at 3. (emphasis added.) They are, therefore, persuaded that the Commission possesses jurisdiction in the first instance to reopen the matter and, "in the interest of judicial economy [the majority] exercise[s] [its] discretion to reopen the matter. Slip op. at 3. I disagree that the Commission has jurisdiction to reopen this matter, at this juncture, to determine the personal liability of a non-party, absent a remand from the court of appeals.

I am also of the opinion that an updated recalculation of the back pay and interest due Tolbert is unnecessary. I would grant Tolbert's motion to assess additional attorney's fees.

Section 106(b) of the Mine Act provides that the Secretary of Labor may obtain "enforcement of any final order of the Commission by filing a petition for such relief in the United States court of appeals... and the provisions of subsection (a) shall govern such proceedings to the extent applicable." 30 U.S.C. 816(b). Subsection (a) of section 106 provides, in relevant part, that:

> If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be made a part of the record. The Commission may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings... The Commission may modify or set aside its original order by reason of such modified or new findings of fact ..."

30 U.S.C. 816(a). (emphasis added.)

I believe that the statutory language is clear to the effect that, with respect to enforcement of a final order of the Commission, application must be made to the court of appeals for leave to adduce additional evidence. The language is also clear that it is the court that is to determine, in the first instance, whether there were reasonable grounds for the failure to adduce such evidence in the hearing before the Commission. 1/

1/ The cases relied on by the majority do not support its theory that the Commission "reacquired the power to assert its own jurisdiction over this matter." Slip op. at 3. Bankers Trust Co. v. Bethlehem Steel Corp., 761 F.2d 943 (3rd Cir. 1985), deals specifically with the effect of a remand order previously issued by the appellate court. 761 F. 2d at 949-950. This case has not been remanded to the Commission. In Newball v. Offshore Logistics Int'l., 803 F.2d 821 (5th Cir. 1986), the district court had concluded on remand that the appellate court's mandate had not addressed some of the provisions of an order and had modified that order. (Subsequently, the appellate court concluded that the district court's modification of a final order, more than a year after its entry, was unauthorized.) 803 F.2d at 826, 827.

While Fed. R. Civ. P. 60(b) has previously been used by the Commission to reopen final orders, I believe that the majority's reliance on Rule 60(b)(6) to reopen this matter to allow Tolbert to pursue his alter ego theory is inappropriate. What is sought by claimant here is not relief from a final judgment but the extension of that judgment to a new respondent (John Chaney) pursuant to a new theory of liability (alter ego). Motion to Reopen and Remand at 13. No analogy can be drawn between reopening a case, pursuant to Rule 60(b), to confirm the enforceability of a settlement agreement that one of the parties is abrogating, as was done in Danny Johnson v. Lamar Mining Co., 10 FMSHRC 506 (April 1988), relied on by the majority, and reopening this case in order to bring in a new party under a new theory of liability. Nor do I see any analogy between a case where non-parties adversely affected by a judgment were permitted to invoke Rule 60(b) against a party as was permitted in Dunlop v. Pan American World Airways, Inc., 672 F.2d 1044 (2d Cir. 1982), also relied on by the majority, and this case where a party seeks to assert a new claim against a non-party. 2/

I am also of the opinion that it is unnecessary to reopen this matter for an updated calculation of the back pay and interest due to Tolbert at this time. As the Commission stated in Robert Simpson v. Kenta Energy, Inc., 11 FMSHRC 1638 (September 1989):

> ... given the back pay formula in the judge's remedial order and the principles announced in Clinchfield, infra the precise amounts of back pay and interest may be determined in any tribunal of competent jurisdiction and it is not necessary to return to the Commission for periodic updatings of these amounts if collection difficulties are encountered.

11 FMSHRC at 1639.

2/ It should be noted that, while Rule 60(b)(6) motions need only be made within "a reasonable time," that clause cannot be used to extend the one year limitation applicable to clauses (b)(1)-(b)(3). Before turning to subsection (b)6, the court in Dunlop v. Pan American concluded that "[t]he claim clearly does not fall within the specific terms of subsections (b)(1)-(5)". 672 F.2d at 1051. "Where the reason for relief is embraced in Clause (b)(1), the one year limitation cannot be circumvented by use of clause...(b)(6)." Newball, 803 F.2d at 827, quoting Gulf Coast Building and Supply Co. v. Local No. 480, 460 F.2d 105, 107 (5th Cir. 1972). The "one year limitation would control if no more than 'neglect' was disclosed by the petition." Klapprott v. United States, 335 U.S. 601, 613 (1949). It should also be noted that, under Rule 60(b)(2), the one year limit

applies even when the additional evidence is newly discovered, which is not asserted here.

With respect to Tolbert's request for a supplementary award of attorney's fees, I agree with the majority that the matter should be remanded to the trial judge, but on different grounds than those advanced by the majority. Tolbert's motion in this respect is in the nature of a petition for the award of additional attorney's fees for time spent after the administrative law judge's award. A fee award petition is independent of and distinct from the decision on the merits. 2 Derfner Court Awarded Attorney Fees, Par. 18.04 at 18-34 (1989). "... a request for attorney's fees ... raises legal issues collateral to the main cause of action..." White v. New Hampshire Department of Employment Security, 455 U.S. 445, 451 (1982). "Regardless of when attorney's fees are requested, the court's decision of entitlement to fees will therefore require an inquiry separate from the decision on the merits.' Id at 451, 452. A motion for a fee award is not designed to alter or amend a judgment, "but merely seeks what is due because of the judgment." Id at 452, quoting Knighton v. Watkins, 616 F.2d 795, 797 (5th Cir. 1980). (emphasis added.) Thus, Tolbert s motion for assessment of additional attorney's fees is not governed by either section 106 of the Mine Act or the time constraints of Rule 60(b), but only by a "reasonable time" standard (455 U.S. at 454), and I would grant his motion with instructions to the judge to determine, as a threshold matter, whether the petition was filed within a reasonable time. 3/

I agree with the majority that the Commission is, in fact, the appropriate forum for any further fact finding that is required or appropriate in this matter. I must disagree, however, that the Commission possesses jurisdiction to conduct such fact finding on the alter ego issue, where Rule 60(b) does not apply, absent a remand from the court of appeals. Accordingly, I would deny Tolbert's motion to remand for a determination of this issue. I would also deny his motion for an updated calculation of back pay and interest due to Tolbert. I would grant his motion to remand for a determination with respect to additional attorney's fees due him.

3/ While the courts of appeals for other circuits have determined otherwise, the Sixth Circuit has decided that "the tribunal that ultimately upholds the claim for benefits is the only tribunal that can approve and certify payment of an attorney fee" and in "making this award can consider all services performed by the attorney from the time the claim was filed with the [agency]." Webb v. Richardson, 472 F.2d 529, 536 (6th Cir. 1972). But see Gardner v. Menendez, 373 F.2d 428 (1st Cir. 1976); Whitt v. Califano, 601 F.2d 160 (4th Cir. 1979); Fenix v. Finch, 436 F.2d 831 (8th Cir. 1971); MacDonald v. Weinberger, 512 F.2d 144 (9th Cir. 1975).