# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

September 30, 1996

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| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. WEVA 94-381 |
| CANNELTON INDUSTRIES, INC. | : | |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. WEVA 95-100 |
| CHARLES PATTERSON, employed by<br>CANNELTON INDUSTRIES, INC. | : | |
| SECRETARY OF LABOR,<br>MINE SAFETY AND HEALTH<br>ADMINISTRATION (MSHA) | : | |
| v. | : | Docket No. WEVA 95-101 |
| GEORGE RICHARDSON, employed by<br>CANNELTON INDUSTRIES, INC. | : | |

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners[1]

ORDER

BY: Jordan, Chairman; and Riley, Commissioner

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). On April 29, 1996, Administrative Law Judge Todd Hodgdon issued a decision in which he concluded that Cannelton Industries, Inc.

[1] Commissioner Holen participated in the consideration of this matter, but her term expired before issuance of this order. Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

("Cannelton") violated 30 C.F.R. § 75.400 by failing to clean up an accumulation of coal under a conveyor belt, that the violation was significant and substantial ("S&S") and the result of unwarrantable failure, and that Charles Patterson and George Richardson, employed by Cannelton, knowingly authorized the violation by failing to have the accumulation cleaned up. 18 FMSHRC 651, 654-61 (April 1996) (ALJ). The judge ordered Cannelton, Patterson, and Richardson to pay civil penalties of $3,600, $500, and $500, respectively. 18 FMSHRC at 661-62. The Commission granted the petition for discretionary review filed by counsel for Cannelton, Patterson, and Richardson, challenging the judge's determinations.

On July 15, 1996, counsel for Cannelton, Patterson, and Richardson filed a motion to remand and reopen the record and motion to stay review proceedings. Counsel explains that the movants' counsel at the hearing, an inexperienced attorney within the same law firm, failed to present certain relevant evidence because its existence "slipped his mind." Mot. at 5 & Att. B. He asserts the failure to present the evidence was not the result of culpable conduct by the movants and the evidence establishes a defense that would have altered the outcome of the case had it been admitted. *Id.* at 9. Attached to the motion are photocopies of the evidence and the affidavit of the hearing counsel. Atts. A & B. Counsel requests that, pursuant to Fed. R. Civ. P. 60(b),[2] the Commission remand the matter to the judge, order the record to be reopened for the taking of additional evidence, and stay review proceedings pending the judge's decision on remand.[3] Mot. at 9-10. He asserts that the Secretary of Labor would not be prejudiced by the granting of the motion. *Id.* at 9.[4]

On July 18, 1996, the Secretary filed an opposition to the motion and a motion to strike. He argues that the movants have not established a basis for relief under Rule 60(b) and that he would be prejudiced by the granting of relief and requests that the Commission deny the motion. S. Opp. at 4-13. In addition, the Secretary requests that the evidentiary material attached to the

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[2] Rule 60(b) states, in part:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment.

[3] Counsel also requests that briefing be stayed pending the Commission's consideration of the motion. Mot. at 3. On July 17, 1996, the Commission issued an order staying the filing of briefs until further notice.

[4] On July 18, 1996, counsel filed a supplemental statement to the motion, contending that the judge incorrectly stated the date on which the citation was issued and that, in view of the correct date, the additional evidence is relevant to whether Cannelton had notice of the accumulation. Supp. Statement at 1.

motion and all references thereto be stricken from the record because it was not properly introduced. *Id.* at 13-14.

On August 2, 1996, counsel for Cannelton, Patterson, and Richardson filed an opposition to the Secretary's motion to strike. Counsel argues that submission of the evidentiary material is necessary to justify reopening the record and requests that the Commission deny the motion to strike. C. Opp. at 3-5.

A final Commission judgment or order may be reopened under Rule 60(b)(1) & (6) in circumstances such as mistake, inadvertence, excusable neglect, or other reasons justifying relief. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). Rule 60(b) motions are committed to the sound discretion of the judicial tribunal in which relief is sought. *Randall v. Merrill Lynch*, 820 F.2d 1317, 1320 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988). Rule 60(b) is "the mechanism by which courts temper the finality of judgments with the necessity to distribute justice" and "is a tool which trial courts are to use sparingly. . . ." *Randall*, 820 F.2d at 1322. *See also Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615, 619 n.1 (April 1990).

In *Midwest Minerals, Inc.*, 12 FMSHRC 1375 (July 1990), the Commission denied an operator's motion to remand and reopen the record for the taking of additional evidence where its non-attorney representative failed to introduce evidence relevant to its defense. The Commission reasoned:

> Because the adequacy of a party's representation at hearing is linked to the party's choice of its representative, we must look askance at any request that Rule 60(b) relief be granted because the party's chosen representative is claimed to have performed ineffectually at the hearing before the judge resulting in an adverse decision. Routinely granting such relief would . . . unfairly provide a losing party "a second turn at bat."

*Id.* at 1377. Similarly, in this case, the attorney's failure to present evidence at the hearing does not provide a basis for reopening the record.

In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993), the Supreme Court reaffirmed the principle that "clients must be held accountable for the acts and omissions of their attorneys." *Id.* at 396 (citing *Link v. Wabash R.R.*, 370 U.S. 626, 633-34 (1962), *United States v. Boyle*, 469 U.S. 241 (1985)). The Court further explained that whether a party's neglect is excusable is an equitable determination in which consideration should be given to "all relevant circumstances surrounding the party's omission." *Id.* at 395. The Court emphasized that the focus is upon the neglect of both the clients and their counsel. *Id.* at 397. Here, counsel for Cannelton, Patterson, and Richardson asserts that the movants had provided the evidentiary material to the attorney, who was in possession of it during the hearing. Mot. at 5 & Att. B. Thus, knowledge of the evidentiary material can be charged upon both the movants and

their attorney.

We conclude that movants have not met the criteria for relief under Rule 60(b). Although it is unfortunate that the evidentiary material "slipped the attorney's mind," the movants must be held accountable for the failure of counsel. Accordingly, we deny the motion to remand and reopen the record and the motion to stay review proceedings.

With regard to the motion to strike, the Secretary points out that the evidentiary material in question was not part of the record before the judge and was not subject to cross-examination or rebuttal. S. Opp. at 13. He correctly asserts that the Commission's consideration on review of this extra-record evidentiary material would contravene section 113(d)(2)(C) of the Mine Act, 30 U.S.C. § 823(d)(2)(C).[5] S. Opp. at 13-14. Therefore, we grant the motion to strike the evidentiary material and references to it from the motion insofar as it addresses the merits of the case. *See Midwest*, 12 FMSHRC at 1377 n.3.

Cannelton, Patterson, and Richardson are hereby ordered to file opening briefs within 30 days of the date of this order. Other briefs shall be filed in accordance with 29 C.F.R. § 2700.75(a).

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

[5] Section 113(d)(2)(C) states, in part:

> For the purpose of review by the Commission . . . the record shall include: (i) all matters constituting the record upon which the decision of the administrative law judge was based; (ii) the rulings upon proposed findings and conclusions; (iii) the decision of the administrative law judge; (iv) the petition or petitions for discretionary review, responses thereto, and the Commission's order for review; and (v) briefs filed on review. No other material shall be considered by the Commission upon review.

Commissioner Marks, concurring in part and dissenting in part:

With respect to the Secretary's motion to strike, I concur with the disposition of the majority to grant the motion.

However, I find that the circumstances supporting Cannelton's motions to remand and reopen the record and stay review of these proceedings sufficiently demonstrate excusable neglect under Fed. R. Civ. P. 60(b)(1). Accordingly, I would grant Cannelton's motions.

Marc Lincoln Marks, Commissioner