FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE, NW
SUITE 9500
WASHINGTON, DC 20001

October 6, 2004

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket Nos. WEST 2001-528-M
v.	:	WEST 2001-538-M
	:	WEST 2001-557-M
DARWIN STRATTON & SON, INC.	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"). On April 29, 2002, Administrative Law Judge Richard Manning issued a decision, concluding in part that the Department of Labor's Mine Safety and Health Administration ("MSHA") has jurisdiction over the Airport Pit operated by Darwin Stratton & Son, Inc. ("Darwin Stratton") and that Darwin Stratton violated section 103(a) of the Mine Act, 30 U.S.C. § 813(a), by refusing an authorized MSHA representative entry to its pit. 24 FMSHRC 403, 407-09 (April 2002) (ALJ).

The judge's jurisdiction in this matter terminated when he issued his decision on April 29, 2002. 29 C.F.R. § 2700.69(b). Under the Mine Act and the Commission's procedural rules, relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2); 29 C.F.R. § 2700.70(a). Darwin Stratton did not file a petition for discretionary review, nor did the Commission direct review sua sponte. 30 U.S.C. §§ 823(d)(2)(A) and (B). Thus, the judge's decision became a final decision of the Commission on May 29, 2002. 30 U.S.C. § 823(d)(1).

On August 26, 2002, the Commission received from Darwin Stratton a motion to reopen Judge Manning's decision under Fed. R. Civ. P. 60(b)(2).[1] In evaluating requests to reopen final

[1] Rule 60(b) provides in pertinent part that a party may be relieved from a final order by reason of "newly discovered evidence which by due diligence could not have been discovered in

orders, the Commission has found guidance in Rule 60(b) of the Federal Rules of Civil Procedure. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"); *Jim Walter Res., Inc.*, 15 FMSHRC 782, 787 (May 1993).

In its motion, Darwin Stratton states that it has "recently been made aware of . . . documentation and information and could not [have] brought this evidence before this Administrative Court before now." DS Mot. at 2. Darwin Stratton does not, however, describe or include copies of any newly discovered evidence in the motion. Rather, Darwin Stratton makes arguments relating to legal issues that were before the judge. *Id.* at 2-19. On September 27, 2002, the Secretary of Labor filed a motion opposing Darwin Stratton's request, asserting that the operator had failed to meet the requirements of Rule 60(b)(2) because it does not provide any newly discovered evidence to support its request. S. Opp'n at 7-10.[2]

We conclude that Darwin Stratton's motion of August 26, 2002, does not satisfy the requirements of Rule 60(b)(2). The Commission has recognized that in order to obtain relief under Rule 60(b)(2), the movant must establish that newly discovered evidence "was in existence at the time of 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 . . .; and that the evidence is not merely cumulative and would change the result." *Bruno v. Cyprus Plateau Mining Corp.*, 11 FMSHRC 150, 153 (Feb. 1989); *see also Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 1079, 1079-80 (Oct. 1999) (citations omitted) ("the newly discovered evidence must have existed at the time of trial or concern facts that were in existence at time of trial, and must be sufficiently significant that it is likely to change the outcome of the case"). Darwin Stratton does not describe or set forth copies of any newly discovered evidence; it does not explain why, using due diligence, such evidence could not have been brought before the judge; nor does it describe newly discovered evidence that would have changed the outcome of the proceedings. *See Harvey v. Mingo Logan Coal Co.*, 24 FMSHRC 699, 699-701 (July 2002) (denying miner's request to reopen under Rule 60(b)(2) because miner did not provide newly discovered evidence that would change outcome of decision). Accordingly, we deny Darwin Stratton's August 26, 2002, request for relief under Rule 60(b)(2).

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time to move for a new trial under Rule 59(b)." Fed. R. Civ. P. 60(b)(2).

[2] On May 14, 2003, the Commission received from Darwin Stratton a document making allegations of judicial misconduct. The Commission has investigated these allegations and found them to be baseless.

For the foregoing reasons, we deny Darwin Stratton's request for relief under Rule 60(b).

Michael F. Duffy, Chairman

Mary Lu Jordan, Commissioner

Stanley C. Suboleski, Commissioner

Michael G. Young, Commissioner

Distribution

Jack Powasnik, Esq.
Office of the Solicitor
U.S. Department of Labor
1100 Wilson Blvd., 22nd Floor
Arlington, VA 22203

Clayton Stratton, Vice President
Darwin Stratton & Son, Inc.
720 W. State Street, Suite 71-7
Hurricane, UT 84737

Johnpartick Morgan
General Post Office
Fredonia, AZ 86022

Administrative Law Judge Richard Manning
Federal Mine Safety and Health Review Commission
1244 Speer Boulevard, Suite 280
Denver, CO 80204-3582