FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

October 27, 1999

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf CLAY BAIER	:	
v.	:	WEST 97-96-DM
DURANGO GRAVEL	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen, and Beatty, Commissioners

ORDER

BY THE COMMISSION:

Before us is a Motion to Reopen Case filed by Durango Gravel ("Durango") on October 4, 1999. Mot. Durango seeks to reopen the above-captioned discrimination matter in which we determined that Durango's termination of complainant Clay Baier violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (1994) ("Mine Act"). 21 FMSHRC 953 (Sept. 1999). In its motion, Durango claims that, on September 26, 1999, Baier admitted to Jim Helmericks, owner of Durango, that "the reason he brought his action was to recover money [Helmericks] withheld from his pay to recover damages to . . . equipment, and had nothing to do with [Baier's] concern for safety." Mot. Durango states that this admission constitutes "new evidence" and requests that we reopen the above-captioned proceeding so that we may "discover what really took place in this incident." *Id.*

The Secretary of Labor opposes Durango's motion. The Secretary construes Durango's motion as one for relief from final judgment under the "newly discovered evidence" provision of Federal Rule of Civil Procedure 60(b). S. Opp'n at 1. The Secretary submits that Baier's alleged admission that he brought this discrimination proceeding to recover money Durango withheld from his paycheck was not in existence at the time of the hearing, and that such evidence would not produce a different outcome. *Id.* at 2, 5. She also maintains that Baier's motivation in bringing his 105(c) claim is irrelevant to the merits of the case and that the alleged admission is duplicative of evidence Durango produced at the hearing that Baier's filing of a discrimination claim was motivated by a desire to recover money withheld by Durango. *Id.* at 2-6.

Although Durango does not specify the basis for its motion, we construe Durango's motion as a request for relief from final Commission judgment based on newly discovered evidence under Fed. R. Civ. P. 60(b)(2). To establish that Rule 60(b)(2) relief is appropriate, the

newly discovered evidence must have existed at 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. 12 James Wm. Moore et al., Moore's Federal Practice § 60.42[2] (3d ed. 1998) ("Moore's Federal Practice"); *Bruno v. Cyprus Plateau Mining Corp.*, 11 FMSHRC 150, 153 (Feb. 1989).

Here, the evidence Durango seeks to introduce relates to its claim at the hearing that Baier filed his complaint to recover money withheld by Durango. Tr. 47-48, 53, 144-147, 154-55. Other evidence of Baier's motivation in bringing his discrimination claim existed at the time of the hearing. Tr. 144-47, 155. Accordingly, Durango has met the Rule 60(b)(2) requirement that the newly discovered evidence relate to facts in existence at the time of trial. *See* 12 Moore's Federal Practice § 60.42[2] (citing *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1075 n.3 (D.C. Cir. 1983) (stating that crucial inquiry is whether proffered evidence relates to facts in existence at time of trial, rather than whether the proffered evidence existed at time of trial)).

However, the evidence Durango seeks to introduce is not material to any of the issues tried. Our analysis of discrimination cases focuses on whether the adverse action an operator takes upon a complainant was motivated by the complainant's protected activity, and, if so, whether the operator would have subjected the complainant to adverse action notwithstanding the protected conduct. *See Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 & n.20 (Apr. 1981).

By contrast, the evidence Durango presents in its motion relates solely to Baier's motivation in filing his discrimination claim (Mot.), and is not related to any element of the Commission's discrimination framework. Moreover, while Baier's complaint initiated the Secretary's investigation, it was the Secretary who initiated the discrimination proceeding on Baier's behalf. 21 FMSHRC at 955. To the extent Durango seeks to use Baier's alleged admission to attack his credibility, Commission and federal caselaw interpreting Rule 60(b)(2) make clear that the newly discovered evidence may not be mere impeachment evidence. *See Bruno*, 11 FMSHRC at 153; *Baxter Int'l, Inc. v. Morris*, 11 F.3d 90, 93 (8th Cir. 1993) (evidence that defendant had used proprietary information to start his own business would have only been used to impeach defendant's character, it would not contradict trial testimony). Finally, given that Durango presented evidence at the hearing (Tr. 47-48, 53, 144-147, 154-55) that Baier was motivated to file his claim by a desire to recover money withheld from his paycheck, the purported newly discovered evidence is merely cumulative. *See, e.g.*, *Parrilla-Lopez v. United States*, 841 F.2d 16, 19 (1st Cir. 1988) (stating that proffered evidence "would be cumulative, and therefore is not newly discovered evidence"); *Trans Mississippi Corp. v. United States*, 494 F.2d 770, 773 (5th Cir. 1974) ("evidence merely cumulative or impeaching is not generally within the canon of 'newly discovered evidence' for . . . Rule 60(b) purposes").

In any event, Baier admitted at hearing that one of the major reasons he contacted MSHA was so that he could recover wages he felt Durango owed him. Tr. 144, 155. Thus, Baier's alleged admission is not of sufficient magnitude that it is likely to change the outcome of the case. *See Bruno*, 11 FMSHRC at 153-54; *see also Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211-12 (9th Cir. 1987) (denial of motion proper because "the [newly-discovered evidence], even if produced in a timely fashion, would not have propelled . . . [movant] over the hurdle of summary judgment.").

Accordingly, we reject Durango's request for relief from the Commission's decision.

Mary Lu Jordan, Chairman

Marc Lincoln Marks, Commissioner

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

Robert H. Beatty, Jr., Commissioner

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