FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

July 26, 2002

NATHAN B. HARVEY	:	
	:	
v.	:	Docket No. WEVA 2001-38-D
	:	
MINGO LOGAN COAL COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman; Jordan, Commissioner

This discrimination proceeding arose under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). On June 24, 2002, the Commission received from Nathan B. Harvey a request to reopen a decision issued by Administrative Law Judge T. Todd Hodgdon on January 8, 2002. 24 FMSHRC 71 (Jan. 2002) (ALJ). In his decision, Judge Hodgdon dismissed a discrimination complaint brought by Harvey against Mingo Logan Coal Company ("Mingo") because he determined that Harvey had not engaged in protected activity and had been discharged based solely on his poor work attitude. *Id.* at 73-80.

Harvey bases his request on unsworn statements he contends he obtained from eight of his co-workers after the decision was issued[1] and which Harvey alleges are inconsistent with the testimony of the operator's witnesses at hearing. Mot., Attachs. Mingo opposes Harvey's request on the grounds that these statements are not new evidence and could have been obtained with due diligence prior to the hearing. M. Mot. at 4-5.

The judge's jurisdiction in this matter terminated when his decision was issued on January 8, 2002. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). Harvey's request was received by the

[1] We note that one of these co-workers, Darren Hatfield, testified at the trial.

Commission's Office of Administrative Law Judge's on June 24, 2002, several months past the 30-day deadline. Because the Commission did not direct review of the case sua sponte, the decision became a final decision of the Commission on February 18, 2002.

Relief from a final Commission judgment is available to a party under Rule 60(b) of the Federal Rules of Civil Procedure. *F. W. Contractors, Inc.*, 17 FMSHRC 247, 248 (Mar. 1995); *see* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). Grounds for relief from a final judgment under Rule 60(b) include in pertinent part: "(2) 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. 60(b)(2).

We conclude that Harvey has failed to allege sufficient grounds to reopen the proceedings under Rule 60(b)(2). All of the information contained in the signed statements attached to Harvey's request pertain to whether he had a bad work attitude. None of the information in the statements directly counters the judge's initial finding that Harvey did not engage in protected activity. Thus, the information in the statements would not have changed the judge's determination that no discrimination occurred. 12 James Wm. Moore et al., Moore's Federal Practice ¶ 60.42[9] (3d ed. 1997) ("movant must show [for Rule 60(b)(2) relief] that the evidence was 'of such magnitude that the production of it earlier would have been likely to change the disposition of the case.'") (quoting *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211-12 (9th Cir. 1987)). Moreover, the statements simply raise issues tangential to the operator's affirmative defense, and do not even bring into question most of the evidence on which the judge based his finding that Harvey was fired because of his poor attitude. 24 FMSHRC at 77-80. In sum, even if the statements Harvey submitted were true and served to refute the operator's witnesses on this one discrete point, the judge's finding that Harvey was not discharged for engaging in protected activity would still stand.

Our dissenting colleague would remand this case because he believes the unsworn statements submitted by Harvey may constitute evidence of perjury, warranting the reopening of the proceedings under Rule 60(b)(3). Slip op. at 4-5. The dissent acknowledges, however, that this type of claim merits relief "only when it is also shown that the perjury at trial somehow prevented the innocent party from fully and fairly presenting his or her case." *Id*. at 4 (citations omitted). The statements obtained by Harvey contradict company testimony that Harvey's co-employees did not want to work with him. That testimony, however, related only to a tangential point in the operator's evidence regarding Harvey's poor work attitude. Notably, the judge found that, in addition to testimony that miners did not want to work with Harvey, the record was "replete with evidence . . . of Harvey refusing to speak to supervisors, even going so far as not acknowledging receipt of work assignments, of his failing to check back with supervisors to find out his next assignment after completing one, of supervisors having to check up on him to make sure he was doing his job and of his otherwise uncooperative attitude." 24 FMSHRC at 78. Thus, the alleged perjury in no way thwarted Harvey's presentation of his case, nor does it undermine the central underpinnings of the operator's defense. *See Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 832 (7th Cir. 1985) (an adverse party's fraud or

subornation of perjury permits relatively free reopening of the judgment when the perjury goes to the heart of the issue).

In *Metlyn*, the Seventh Circuit noted the importance of "protect[ing] the finality of judgments against efforts to turn the vicissitudes of litigation into grounds for more litigation still." *Id*. The Commission adopted this principle in *Wadding v. Tunnelton Mining Co.*, 8 FMSHRC 1142 (Aug. 1986), cited by our colleague, when it denied a Rule 60(b)(3) motion alleging perjured testimony and other deception during trial as "merely attempts to relitigate evidentiary matters and assertions ruled upon by the judge." *Id*. at 1143. *See also* 11 Charles Alan Wright et al., Federal Practice and Procedure, § 2860 at 314 (2d ed. 1995) (Rule 60(b)(3) motion will be denied if it is merely an attempt to relitigate a case).

Accordingly, Harvey's request to reopen these proceedings is denied.

Theodore F. Verheggen, Chairman

Mary Lu Jordan, Commissioner

Commissioner Beatty, dissenting:

While I agree with my colleagues that Harvey's request to reopen these proceedings fails to allege sufficient grounds to reopen under Rule 60(b)(2), that is not the only provision of Rule 60(b) relevant to Harvey's allegations. Grounds for relief from a final judgment under Rule 60(b) also include "(3) fraud . . ., misrepresentation, or other misconduct of an adverse party." Fed. R. Civ. P. 60(b)(3).

Review of the signed statements accompanying Harvey's request discloses information that contradicts some of the testimony given by the operator's witnesses during the hearing. For example, maintenance foreman Robert Tillery and maintenance superintendent Gary Griffith both testified that electrician Kelly Dingess told them that he did not want to work with Harvey. Tr. Vol. I 297, 345-46. Maintenance foreman John Morgan also testified that Harvey's co-workers Don Tharp, Ronnie Mullins, and Dave VanMeter informed him that they did not want to work with Harvey. Tr. Vol. I 249. The judge relied on this hearsay testimony in determining that Harvey was not discharged for any protected activity. 24 FMSHRC at 78, 80. However, in their signed statements attached to Harvey's request, Dingess, Tharp, Mullins, and VanMeter state that they never made these statements to management. H. Mot., Attachs.

A demonstration of perjured testimony can be grounds for relief under Rule 60(b)(3). *See Harre v. A.H. Robins*, 750 F.2d 1501, 1504-05 (11th Cir. 1985) (holding that perjury can constitute fraud under Rule 60(b)(3)). The Commission has noted that fraudulent conduct under Rule 60(b)(3) must be proven by clear and convincing evidence. *Secretary of Labor on behalf of Pena v. Eisenman Chem. Co.*, 11 FMSHRC 2166, 2167-68 (Nov. 1989) (denying miner's request for relief because it failed to provide "clear and convincing evidence" of fraud or misconduct where miner alleged that operator defrauded him in the settlement of his discrimination suit); *Wadding v. Tunnelton Mining Co.*, 8 FMSHRC 1142, 1143 (Aug. 1986) (finding that miner failed pursuant to Rule 60(b)(3) to provide "clear and convincing evidence" of operator's alleged fraud during hearing). Further, "when the claim of perjury at trial is raised under Rule 60(b)(3), relief is granted only when it is also shown that the perjury at trial somehow prevented the innocent party from fully and fairly presenting his or her case." 12 James Wm. Moore et al., Moore's Federal Practice ¶ 60.43[1][c] (3d ed. 1997) ("*Moore's*"); *see also Wadding*, 8 FMSHRC at 1143 ("movant under Rule 60(b)(3) must establish that wrongdoing prevented moving party from fully and fairly presenting his case."). Under Rule 60(b)(3), "the moving party does not have to prove that he or she would prevail in a retrial in order to secure relief from judgment on the basis of fraud of an adverse party." *Moore's* at ¶ 60.43[1][d]; *see also Lonsford v. Seefeldt*, 47 F.3d 893, 897 (7th Cir. 1995) ("A determination of whether the alleged misrepresentation altered the result of the case is unnecessary because Rule 60(b)(3) protects the fairness of the proceedings, not necessarily the correctness of the verdict.").

If the signed statements Harvey has submitted are accurate, they may constitute evidence of perjury which under Rule 60(b)(3) would warrant reopening these proceedings. On the basis of the present record, however, I am unable to evaluate whether the proceedings should be reopened under Rule 60(b)(3). Instead, the judge who presided at the hearing and heard the

witnesses is in the best position to determine whether the proceedings should be reopened. Accordingly, in the interests of justice, I would vacate the judge's decision and remand the matter to him for the limited purpose of reviewing the statements in the context of the testimony previously presented by Mingo Logan's witnesses.[1] After that, the judge would be able to determine whether sufficient grounds exist to fully reopen the proceedings under Rule 60(b)(3).

Robert H. Beatty, Jr., Commissioner

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[1] The majority correctly points out that the judge found a number of reasons other than the opinions of Harvey's co-workers for his dismissal by the company. Slip op. at 2. What my colleagues fail to acknowledge, however, is that these findings were all predicated on the judge's crediting of the company's witnesses, whose overall veracity may be called into question by the statements of the co-workers. *See* 24 FMSHRC at 77-80. Given that the judge, and not the Commission, is in the best position to determine witness credibility in light of the statements, remand is called for here. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

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