



**In the Matter of:**

**WILLIAM T. KNOX,**

**ARB CASE NO. 03-040**

**COMPLAINANT,**

**ALJ CASE NO. 2001-CAA-3**

**v.**

**DATE: October 24, 2005**

**UNITED STATES DEPARTMENT  
OF THE INTERIOR,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

*For the Complainant:*

**Richard E. Condit, Esq., *Public Employees for Environmental Responsibility,*  
*Washington, D.C.***

**ORDER DENYING RECONSIDERATION**

This case was originally before us based on a whistleblower complaint William T. Knox filed alleging that his employer, the United States Department of the Interior (DOI), violated the employee protection provisions of the Clean Air Act (CAA), 42 U.S.C.A. § 7622 (West 1995) and the Department of Labor's (DOL) implementing regulations set out at 29 C.F.R. Part 24 (2005). To prevail on his CAA complaint, Knox must establish by a preponderance of the evidence that, when he expressed concerns or complaints to DOI management officials about asbestos, he had a reasonable belief that DOI was violating the CAA by emitting asbestos into the air outside of its buildings. Knox expressed his concerns to DOI management that employees, students, and contractors at a National Park Service Job Corps Center were exposed to asbestos. But because he did not bring to management's attention that asbestos was being emitted into the outside, ambient air, Knox did not engage in CAA-protected activity. Therefore, in a Final Decision and Order issued on September 30, 2004, we dismissed Knox's CAA complaint.

On July 27, 2005, Knox filed a Motion for Reconsideration based on new evidence. In his motion, Knox's counsel avers that after the Board rendered its decision and while preparing an appeal to the United States Court of Appeals for the Fourth Circuit, he discovered a letter that had not been made a part of the record in this case among the files of Knox's previous counsel, who represented Knox before the Office of Administrative Law Judges. The letter, dated April 14, 2000, indicates that Knox had submitted "material" to the West Virginia Division of Environmental Protection (WVDEP), prior to filing his complaint, and that the Asbestos Program Manager of the division was "of the opinion that the [DOI's] Harper's Ferry Jobs Corps Center *may very well have violated* that part of Section 112 of the Clean Air Act which deals with the handling of regulated asbestos containing material." *See* Motion for Recon., Exhibit A (emphasis added). Knox's current counsel researched this matter further and obtained a "Report of an Air Pollution Problem" regarding an investigation conducted by officials of the WVDEP and the Environmental Protection Agency of asbestos at the Harper's Ferry Jobs Corps Center. *See* Motion for Recon., Exhibit B.

Knox's counsel contends that this new evidence establishes that Knox had a reasonable belief that DOI was violating the CAA by emitting asbestos into the outside, ambient air and, therefore, that Knox engaged in CAA-protected activity. Knox asserts that he did not submit this evidence due to "factors beyond his reasonable control" and that the evidence establishes that the Board's holding was clearly erroneous and would work a manifest injustice. Thus, Knox urges that his failure to submit this evidence constitutes an "exceptional circumstance" warranting relief on reconsideration under the Federal Rules of Civil Procedure, Rule 60(b). Alternatively, even if Knox's failure to submit the evidence prior to the Board's decision was due to negligence, rather than factors beyond his control, Knox argues that the Board should nevertheless grant relief under Rule 60(b)(1) as Knox's failure should constitute "excusable neglect." Consequently, Knox requests that the Board reopen the record, admit Exhibits A and B, and, in light thereof, reconsider our September 30, 2004 Final Decision and Order.

The ARB is authorized to reconsider earlier decisions. *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002), *aff'g Macktal v. Brown and Root, Inc.*, ARB Nos. 98-112/122A, ALJ No. 86-ERA-23, slip op. at 2-6 (ARB Nov. 20, 1998). Moving for reconsideration of a final administrative decision is analogous to petitioning for panel rehearing under Rule 40 of the Federal Rules of Appellate Procedure. *See generally* 16A CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3986.1 (3d ed. 1999). Such a motion also is analogous to requesting reconsideration of a final judgment or interlocutory order under Federal Rules of Civil Procedure 59 or 60(b). Amending judgments may be appropriate under Rule 59 to permit the moving party to present newly discovered or previously unavailable evidence. 11 CHARLES ALLEN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2810.1 (2d ed. 1995). Rule 59 amendments may not be used to relitigate issues or to raise arguments. *Id.*; *see Sequa Corp. v. GBJ Corp.*, 156 F.3d 136, 144 (2d Cir. 1998) ("Rule 59 is not a vehicle for relitigating old issues.").

Similarly, relief from a judgment under Rule 60(b) is available under limited circumstances, e.g., newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59. WRIGHT, MILLER & KANE, *supra* §§ 2858-2864. Rule 60(b) relief is extraordinary, granted only in exceptional circumstances. *Bud Brooks Trucking, Inc. v. Bill Hodges Trucking, Inc.*, 909 F.2d 1437, 1440 (10th Cir. 1990); *C.K.S. Eng'rs, Inc. v. White Mountain Gypsum Co.*, 726 F.2d 1202, 1205 (7th Cir. 1984).

In the absence of our own rule, we have adopted principles federal courts employ in deciding requests for reconsideration. We will reconsider our decisions under similar limited circumstances, which include: (i) material differences in fact or law from that presented to a court of which the moving party could not have known through reasonable diligence, (ii) new material facts that occurred after the court's decision, (iii) a change in the law after the court's decision, and (iv) failure to consider material facts presented to the court before its decision. *See, e.g., Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995); *Virgin Atl. Airways, Ltd. v. National Mediation Bd.*, 956 F.2d 1245, 1255 (2d Cir. 1992); *Weinstock v. Wilk*, 2004 WL 367618, at \*1 (D. Conn. Feb. 25, 2004); *Motorola, Inc. v. J.B. Rodgers Mech. Contractors, Inc.*, 215 F.R.D. 581, 582-586 (D. Ariz. 2003).

A similar standard is contained in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2005), which provides that “[o]nce the record is closed, no additional evidence shall be accepted into the record except upon a showing that new and material evidence has become available which was not readily available prior to the closing of the record.” 29 C.F.R. § 18.34(c); *see e.g., Williams v. Lockheed Martin Energy Sys., Inc.*, ARB No. 98-059, ALJ No. 95-CAA-10, slip op. at 6-7 (ARB Jan. 31, 2001).

Knox's burden is to prove that when he expressed concerns about asbestos, he had a reasonable belief that the Job Corps Center was emitting asbestos into the ambient air outside the Center's buildings, thereby posing a risk to the general public. But even if Knox did not submit Exhibits A and B to the ALJ because of factors beyond his reasonable control or because of excusable neglect, this new evidence is not material on the issue of whether Knox complained about asbestos emissions into the ambient air.

In Exhibit A, Mr. Womble, West Virginia's Asbestos Program Manager, opines that the “material” Knox sent to him “may very well have” indicated that the Harper's Ferry Job Corps Center was emitting asbestos into the ambient air. But Knox has not submitted this “material” with his Motion. Therefore, since we have not seen this “material” upon which Womble based his opinion, we attach no weight to it. Exhibit B, the investigation report from the WVDEP and EPA, is not material new evidence because it contains nothing to indicate whether the Center was emitting asbestos into the ambient air outside the Center's buildings. Finally, we have examined Knox's June 2005 Affidavit, attached to his Motion, wherein he testifies that he “complained to my management ... about asbestos being released into the air ... inside and outside the various buildings at the Center.” *See* Motion for Recon., Knox Affidavit at 1-2. But just

as we gave no weight to Knox's similarly self-serving, contradictory statement contained in his affidavit dated May 14, 2001, Complainant's Exhibit 100, we give no weight to this affidavit because Knox previously admitted in his March 21, 2001 testimony that he did not raise a concern with management officials about asbestos escaping into the outside air. *See* Hearing Transcript at 2597, 2605.

Therefore, since Knox has not presented material new evidence that he engaged in CAA-protected activity by complaining about asbestos being emitted into the ambient air, the Motion for Reconsideration is **DENIED**.

**SO ORDERED.**

**OLIVER M. TRANSUE**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**