

CCASE:
HARRY L. WADDING V. TUNNELTON MINING
DDATE:
19860420
TTEXT:

FMSHRC-WDC
APR 20, 1986

Harry L. Wadding

v. Docket No. PENN 84-186-D

Tunnelton Mining Co.

BEFORE: Ford, Chairman; Backley, Doyle, Lastowka, and Nelson,
Commissioners

ORDER

BY THE COMMISSION:

On June 16, 1986, Harry L. Wadding filed with the Commission a Motion to Have the Judgment Set Aside in the above matter. The decision of Commission Administrative Law Judge Gary Melick in this proceeding, dismissing Mr. Wadding's discrimination complaint, was issued on June 18, 1985. 7 FMSHRC 896 (June 1985)(ALJ). Wadding failed to file a timely petition for discretionary review of Judge Melick's decision within the 30-day period prescribed by the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982). 30 U.S.C. § 823(d)(2)(A)(i). See also 29 C.F.R. § 2700.70(a). The Commission did not direct review on its own motion, and by operation of the statute the judge's decision became a final decision of the Commission 40 days after its issuance. 30 U.S.C. § 823(d)(1). Under these circumstances, we construe Wadding's motion as a request for relief from a final Commission order. 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply in absence of applicable Commission rule); Fed. R. Civ. P. 60 (Relief from Judgment or Order). See William A. Haro v. Magma Copper Co., 5 FMSHRC 9-10 (January 1983); Gerald D. Boone v. Rebel Coal Co., 4 FMSHRC 1232, 1233 (July 1982).

Wadding, who prepared his motion and supporting materials without the assistance of counsel, alleges that Tunnelton Mining Company engaged in fraud, through perjured testimony and other deception, during the hearing below. See Fed. R. Civ. P. 60(b)(3). We have reviewed Wadding's motion and related papers, the voluminous materials that Wadding has submitted in support of his motion, the operator's response and the judge's decision. The motion is denied for two reasons.

First, the motion is seriously untimely. A Rule 60 motion based on allegations of fraud "shall be made within a reasonable time, and ... not more than one year after the judgment, order, or proceeding was entered or taken." Fed. R. Civ. P. 60(b) (emphasis added). Although Wadding's motion falls within the one-year period, we do not find the lapse of time between the issuance of the judge's decision and the submission of his motion to be reasonable under the circumstances. Wadding's motion is not based on newly discovered material evidence, but rather on evidence and allegations pertaining to the merits of his discrimination complaint and contested at the hearing below. There is no apparent reason why Wadding could not have filed a timely petition for discretionary review challenging the judge's findings and credibility resolutions with respect to the matters that he now seeks to raise. Rule 60 is not a substitute for appeal, and under settled principles of finality and repose the present motion is untimely. See, e.g., *Central Operating Co. v. Utility Wkrs. of America*, 491 F.2d 245, 252-53 (4th Cir. 1974); 11 *Wright & Miller, Federal Practice and Procedure* § 2866 (p. 232) (1973).

Second, even were the motion to be entertained as timely, it is insufficient on the merits to justify relief. A movant under Rule 60(b)(3) must establish by clear and convincing evidence that the adverse party engaged in fraud or other misconduct, and that the wrongdoing prevented the moving party from fully and fairly presenting his case. E.g., *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1339 (5th Cir. 1978). Wadding has made no such showing but rather, as noted, merely attempts to relitigate evidentiary matters and assertions ruled upon by the judge. We also observe that Wadding was represented by counsel at the hearing below. We find no clear and convincing evidence of fraud, misconduct or illegality on this record.

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For the foregoing reasons, the motion is denied.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

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