

CCASE:
LEO KLIMCZAK V. GENERAL CRUSHED STONE
DDATE:
19861230
TTEXT:

FMSHRC-WDC
DEC 30, 1986

LEO KLIMCZAK

v. Docket No. YORK 82-21-DM

GENERAL CRUSHED STONE CO., INC.

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

ORDER

BY THE COMMISSION:

Leo Klimczak has filed with the Commission a motion seeking a new hearing in this matter. On April 6, 1983, Commission Administrative Law Judge Gary Melick issued a decision dismissing Mr. Klimczak's discrimination complaint; that decision became a final order of the Commission by operation of the statute, and on March 9, 1984, the United States Court of Appeals for the Second Circuit affirmed the judge's decision. 5 FMSHRC 684 (April 1983)(ALJ), aff'd mem., No. 83-4122 (2d Cir. March 9, 1984). For the reasons that follow, the motion for a new hearing is denied.

The basis of Klimczak's motion is an assertion that he has obtained new evidence, which he claims establishes his complaint of discrimination. Once a petition for review of a final Commission decision is filed in a federal court of appeals, the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1982), provides that jurisdiction to entertain a motion for leave to adduce additional evidence rests exclusively with the court while the petition is pending before it. 30 U.S.C. § 816(a). As noted above, this matter was reviewed in the Second Circuit, and Klimczak did not seek permission during that proceeding to adduce additional evidence.

Even assuming that the Commission has jurisdiction in this

matter, this motion, filed more than two and one-half years after the court's decision, is seriously untimely (cf. Fed. R. Civ. P. 60(b), which provides a one-year time limit for motions requesting relief from a final judgment on the basis of newly discovered evidence). Further, Klimczak fails to demonstrate why this alleged new evidence could not have been discovered earlier with the exercise of due diligence.

~1872

Accordingly, the motion for a new hearing is denied.

Ford B. Ford, Chairman

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

Distribution

Mr. Leo Klimczak
210 West Adsworth Avenue
Avon, New York 14414

General Crushed Stone Company
No. 6 County Road
Honeoye Falls, New York 14472

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041