CCASE:
RONALD McCRAKEN V. VALLEY CAMP COAL
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

RONALD H. McCRACKEN,	COMPLAINANT	Complaint of Discharge, Discrimination or Interference
v.		
		Docket No. WEVA 79-116-D
VALLEY CAMP COAL COMPANY,	RESPONDENT	Valley Camp No. 1 Mine

DECISION DENYING REQUEST FOR NEW HEARING

On April 18, 1980, I issued a decision dismissing a Complaint of Discharge and Discrimination filed by Ronald McCracken finding insufficient evidence that his discharge was the result of any discrimination proscribed by the Federal Mine Safety and Health Act of 1977. McCracken subsequently filed a timely petition for discretionary review with the Federal Mine Safety and Health Review Commission claiming, inter alia, that newly discovered evidence warranted reopening of the case and further proceedings. On May 28, 1980, the Commission remanded the case to me for a ruling on that specific claim. No hearing was held inasmuch as there is no genuine issue as to any material fact. U.S. v. Cheramie Bo-Truc No. 5, Inc., 538 F.2d 696 (1976), reh. den., 559 F.2d 1217; Independent Bankers Assoc. of Georgia v. Bd. of Governors or Federal Reserve Systems, 516 F.2d 1206, 170 U.S. App. D.C. 278 (1975). All essential evidence is a matter of record in the form of transcripts and affidavits and the accuracy of those documents is not disputed. The issue here is the interpretation to be given that evidence.

In the absence of specific provisions for consideration of newly discovered evidence in the Commission Rules of Procedure or in the Administrative Procedure Act, my consideration of the question presented will be governed by Rule 60(b)(2) of the Federal Rules of Civil Procedure and as that rule has been judicially construed. Commission Rule 29 C.F.R. 2700.1(b). In essence, Federal Rule 60(b)(2) provides that a party may be relieved from a final judgment, order or proceeding on the basis of newly discovered evidence. Such relief is considered extraordinary, however, and may be granted only where extraordinary circumstances are present. Posttape Associates v. Eastman Kodak Co., 387 F.Supp. 184, 68 F.R.D. 323 (E.D. Pa. 1975), rev'd. on other grounds, 537 F.2d 751. Thus, a motion under Rule 60(b)(2) asserting newly discovered evidence as a basis for a new trial will not be granted unless (1) the evidence was discovered following the trial; (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material, and (5) the evidence is such that a new trial would

probably produce a new result. A. G. Pro, Inc. v. Sakraida, 512 F.2d 141 (5th Cir. 1975); Ledet v. United States, 297 F.2d 737 (5th Cir. 1966). These requirements must be strictly met. Strauss v. United States, 337 F.2d 853 (5th Cir. 1964).

McCracken has proffered as "newly discovered evidence" certain testimony from an unrelated proceeding given by Ronald Ernest, a foreman employed by the Valley Camp Coal Company (Valley Camp), which he claims "clearly demonstrates that witnesses of the Respondent testified falsely or incorrectly" at the hearing on the discrimination complaint previously before me. While McCracken does not, in his motion, make reference to the precise testimony of these witnesses that the claims to be false or incorrect, it appears that he is referring to the testimony of James Litman, then vice president for operations at Valley Camp. Although he also names John Gotses, then Valley Camp's industrial relations manager, as the other witness contradicted by Ernest, Gotses in fact did not testify as to the precise subject area now at issue.

James Litman testified, in essence, that in order to enable a person unfamiliar with the hazards unique to underground coal mining to learn to work safely in that environment, it had been the company policy since at least 1974, that underground experience in areas where coal is being extracted was a prerequisite to immediate employment in such areas. He observed that such employees were first required to work with an experienced miner in the underground workings for 6 months as an apprentice or "red hat" to learn of the mine hazards. Litman testified that company requirements in this regard were even more stringent than those of the West Virginia Department of Mines. This testimony was relevant to the case in that it established one basis for showing that McCracken was not qualified, at the time of his layoff, for immediate alternative employment in the underground workings of the mine where coal is extracted.

McCracken contends that the testimony of Ronald Ernest at a deposition on April 24, 1980, establishes, contrary to the testimony of Valley Camp's witnesses, that Valley Camp had in fact adopted the same requirements as the West Virginia Department of Mines in that any coal miner who was qualified and recognized by that department was thereby automatically eligible to work in all underground sections of the mine regardless of his previous experience. Although he submits four pages of transcript from the testimony of Ronald Ernest in support of his claim it is apparent that only the following passage is directly on point:

> Q. Does Valley Camp Coal Company have any requirements in addition to those of the State of West Virginia?
>
> A. We run them through an 80-hour course.
>
> Q. That is done during the--
>
> A. Prior to this employment [as a trainee for the first 90 days and as an apprentice "red hat" for the

next 30 days].

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Q. Allright, sir. Other than that requirement and the taking of the test, are there any additional requirements for qualification as an underground laborer?

A. Not to my knowledge.(FOOTNOTE 1)

According to the uncontested affidavit submitted by Ernest he construed the last question in the above extract in the context of the requirements of the State of West Virginia and not the requirements of Valley Camp. I find this interpretation of the question to be reasonable and responsive in the context in which it was asked. His testimony is therefore wholly consistent with that of Litman and other witnesses at the hearing. Complainant's allegations are thus without basis in fact. The alleged newly discovered evidence is therefore merely cumulative in nature and as such cannot afford a basis for a new hearing. (FOOTNOTE 2) The evidence clearly is not of such a nature that would probably produce a new result after a new hearing. Sakraida, supra; Kolstad v. United States, 262 F.2d 839 (9th Cir. 1959); Philippine National Bank v. Kennedy, 295 F.2d 544 (App. D.C. 1961).

In connection with his various pleadings and letters filed in this case McCracken also cites other excerpts from Ernest's testimony as being "noteworthy" or "interesting". Although I do not consider these offhand comments to be a part of the motion filed herein I nevertheless have examined those excerpts in the context of that motion. I do not find that any of these references would afford any basis for relief under Rule 60(b)(2).

Under the circumstances, McCracken does not meet the criteria necessary to succeed on a Rule 60(b)(2) motion asserting newly discovered evidence. I therefore conclude that his claim of "newly discovered evidence" does not warrant reopening of the record or further proceedings. His motion in that regard is therefore denied.

Gary Melick
Administrative Law Judge

~FOOTNOTE_ONE

1 Transcript page 16 from the deposition of Ronald Ernest in the case of Cherich v. The Valley Camp Coal Company, in the Circuit Court of Ohio County, West Virginia, Civil Action No. 79-C-730TA.

~FOOTNOTE_TWO

2 Since this evidence could hardly be considered as "hidden" at the time of the decision in this case it would, for this additional reason, not afford a basis for relief under Rule 60(b)(2). Ryan v. U.S. Lines Company, 303 F.2d 430 (2nd Cir. 1962).