

CCASE:
JUAN PENA (MSHA) V. EISENMAN CHEMICAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
November 30, 1989

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
on behalf of JUAN G. PENA

v.

Docket Nos. CENT 85-47-DM
85-68-DM

EISENMAN CHEMICAL COMPANY

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

ORDER

BY THE COMMISSION:

Juan G. Pena has filed with the Commission a letter requesting that this discrimination proceeding be reopened and a previously approved settlement be set aside. For the reasons that follow, Pena's request is denied.

On April 15, 1985, the Secretary of Labor filed a discrimination complaint on behalf of Pena alleging that Eisenman Chemical Company ("Eisenman") unlawfully discriminated against Pena in violation of section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. 815(c). Eisenman denied the allegation, and the matter was assigned to Commission Administrative Law Judge Roy Maurer.

On December 18, 1985, at an evidentiary hearing, the Department of Labor attorney representing Pena and counsel for Eisenman stated to the judge that the parties agreed to settle the matter. Tr. 2. Counsel for Pena read the proposed settlement into the record, and the attorneys jointly moved the judge to approve the settlement. The judge asked Pena if

he agreed to the settlement as stated, and when Pena answered "yes," the judge granted the motion and stated that upon receipt of the transcript he would issue an order incorporating the terms of the settlement, requiring compliance therewith, and dismissing the case. Tr. 5.

Subsequently, the judge issued a written decision, approving the settlement. 8 FMSHRC 142 (January 1986)(ALJ). In his decision the judge repeated the settlement agreement, which, in pertinent part, required Eisenman to pay the sum of \$13,000 "in full and complete satisfaction of back wages," and which stated that "[t]he intent ... is to settle all claims Complainant may be due under the provisions of Section 105(c) of the Act." 8 FMSHRC at 143 (quoting Tr. 3). The judge stated, "I conclude and find that [the settlement] reflects a reasonable resolution of the complaint. Further...all of the parties, including Mr. Pena personally, are in accord with the agreed upon disposition of the complaint." 8 FMSHRC at 143. The judge ordered Eisenman to fully comply with the terms of the agreement and dismissed the complaint. 8 FMSHRC at 142, 144.

On October 30, 1989, the Commission received a letter from Pena requesting that the matter be "re-open[ed] for trial because of breach of contract on the settlement concerning my claim." Pena letter 1. Pena states that although Eisenman paid him \$13,000, the company did not pay "taxes, withholding, and etc.," as promised. Id. 1, 2. Pena alleges that he has been "defrauded...by my representatives from the U.S. Dept[ment] of Labor and [by my] ex-employer," and Pena requests "triple damages for fraud, and breach of contract at my new trial." Id.

Pena did not file a timely petition for discretionary review of the judge's decision approving the settlement within the 30-day period prescribed by the Mine Act. 30 U.S.C. 823(d)(2)(A)(i). See also 29 C.F.R. 2700.70(a). Nor did the Commission direct review on its own motion within this 30 day period. Thus, by operation of statute the judge's decision became a final decision 40 days after its issuance. 30 U.S.C. 823(d)(1). Under these circumstances, Pena's submission must be construed 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 rules); Fed. R. Civ. P. 60 (Relief from Judgment or Order). See *Danny Johnson v. Lamar Mining Co.*, 10 FMSHRC 506, 508 (April 1988); *Kelley Trucking Co.*, 8 FMSHRC 1867, 1868-69 (December 1986).

Relief from a final judgment or order on the basis of fraud, misrepresentation, or other misconduct is available to a movant under Fed. R. Civ. P. 60(b)(3) and Fed. R. Civ. P. 60(b)(6).

To the extent that Pena is claiming that Eisenman, the adverse party, defrauded him, the motion is seriously untimely. Pena's submission was received by the Commission almost four years after the settlement was agreed to and the decision was issued. Rule 60(b)(3) states that a motion for relief due to fraud, misrepresentation or misconduct by an adverse party must be made within a reasonable time and must be made not later than

"one year after the judgment." This limit is an extreme limit, and a motion made under clause (3) must be denied as untimely if made more than one year after judgment regardless of whether the delay was reasonable. The limit may not be extended. C. Wright & A. Miller, *Federal Practice and Procedure* 2866 at 233..34 (1973).

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Under either clause (3) or (6) of Rule 60(b), a movant must establish by clear and convincing evidence that the alleged fraud or misconduct occurred. Pena fails to meet this test. Pena's submission contains only his unsupported allegation of fraud. The record contains no evidence of fraud or misconduct by the attorneys representing the parties. At the hearing, counsel representing Pena stated that the parties agreed that Eisenman's payment of \$13,000 to Pena would represent "full and complete satisfaction of back wages" and that the intent of the agreement was to "settle all claims [Pena] may be due under the provisions of section 105(c) of the Act." Tr. 3. When asked by the judge if he understood the settlement, if it was in accord with what he had been told, and if he agreed to it, Pena responded affirmatively and without constraint. Tr. 4-5

Accordingly, the motion to reopen this proceeding is denied.

Richard V. Backley, Commissioner

Joyce A. Doyle, Commissioner

L. Clair Nelson, Commissioner

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