



In the Matter of:

**ADMINISTRATOR, WAGE AND HOUR
DIVISION, UNITED STATES
DEPARTMENT OF LABOR,**

PLAINTIFF,

v.

**MERLE J. ELDERKIN d/b/a ELDERKIN
FARM,**

RESPONDENT.

**ARB CASE NOS. 99-033
99-048**

ALJ CASE NO. 95-CLA-31

DATE: October 21, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

ORDER DENYING MOTION FOR NEW TRIAL

On June 30, 2000, the Administrative Review Board issued a Final Decision and Order in this case arising under the Child Labor Act, 29 U.S.C. §§ 212(c) and 213(c)(2) (1994), upholding the civil money penalty assessed by the Wage and Hour Administrator against Respondent Merle Elderkin. Almost three years later, on April 14, 2003, Elderkin filed a motion for a new trial on the basis of “new evidence,” namely an affidavit of the stepfather of the child injured on the Elderkin farm.

The Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (2001), provide that “the record [of a hearing] shall be closed at the conclusion of the hearing,” 29 C.F.R. § 18.54(a), and 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). In addition, the OALJ Rules of Practice provide that “[t]he Rules of Civil Procedure for the District Courts of the United States shall be applied in any situation not provided for or controlled by these rules, or by any statute, executive order or regulation.” 29 C.F.R. § 18.1(a). The Federal Rules of Civil Procedure provide, “[a]ny motion for a new trial shall be filed no later than ten days after entry of the judgment.” FED. R. CIV. P. 59(a).

Elderkin has not made any showing that the material he wishes to introduce at the requested new trial was not “readily available prior to the closing of the record” in this case. We note that the Board found that “Peter Gage was injured while he was helping his stepfather operate the feed mixer [on the Elderkin farm].” ARB Final Decision and Order at 7. The injured child’s stepfather obviously was known to Elderkin, who could have obtained the stepfather’s testimony for the hearing. Further, Elderkin submitted his motion almost three years after entry of judgment, that is, the Final Decision and Order of the ARB. For these reasons, the motion is **DENIED**.

SO ORDERED.

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge