

CCASE:
MICHAEL E. HOLLAND v. CONSOLIDATION COAL
DDATE:
19910426
TTEXT:

Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
2 Skyline, 10th Floor
5203 Leesburg Pike
Falls Church, Virginia 22041

MICHAEL E. HOLLAND,
COMPLAINANT

v.

CONSOLIDATION COAL COMPANY,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. WEVA 90-315-D

HOPE CD 90-17

Amonate No. 31 Mine

ORDER

I. Motion to Compel

On December 28, 1990, Respondent served Petitioner with a First Set of Interrogatories. On January 24, 1991, Respondent filed a Motion to Compel Discovery. On March 7, 1991, an Order was issued granting the Motion to Compel Discovery on the ground that Complainant had not filed any opposition to the Motion. On March 8, 1991, Complainant served Respondent with Answers to its First Set of Interrogatories. On March 14, 1991, Respondent filed a Second Motion to Compel Answers to the First Set of Interrogatories, requesting an order compelling Complainant to answer completely and fully Interrogatories Nos. 3, 5 through 11, 13 (Footnote 1) and 14. On April 2, 1991, Complainant filed his response to the Motion.

Interrogatory No. 3

Interrogatory No. 3 provides as follow: "Please provide the names, address, telephone number, and identity of the present employer of each and every person you expect may be called as an expert witness at any hearing held in this matter." Complainant as a response stated as follows: "See response to Interrogatory No. 2 above." Interrogatory No. 2 had requested the name, address, employer, and current telephone number for each person

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". . . you intend to call as a witness at the hearing in this matter." Complainant, in response thereto, had furnished Respondent with a list of 22 persons.

In its response to Respondent's Motion, Complainant, in essence, to the best of my understanding, argued that he made a general referral to Interrogatory No. 2, because of the uncertainty as to who might be called as an expert witness. The Interrogatory does not seek a listing of those experts whom Respondent, of certainty, intends to call as witnesses, but only those he expects "may be called." Fed. R.CIV.P 26(b)(4)(A), in essence, provides that a Party through interrogatories may require identification of persons whom the other Party ". . . expects to call as an expert witness at trial." (Emphasis added). Hence, Complainant shall be required to provide Respondent, within 5 days of this Order, the identity of each person it expects to call as an expert witness. (Footnote 2)

Interrogatory No. 5

Interrogatory No. 5 provides as follows: "For those witnesses listed in response to Interrogatory No. 3, please provide a summary of the testimony each witness is expected to render and the facts and circumstances upon which such expert's testimony will be based, along with references to any publications, documents, treatises or other written works the expert is expected to rely upon in rendering any opinion."

In essence, Complainant's Counsel in his response, alleges that he has not spoken to any physicians about the merits of Complainant's claims, and that, "at the time of the responses," he did not know who would be an expert witness. Petitioner has been ordered, *infra*, to identify those person that he "expect may be called" as in expert witness. As to these persons, Complainant shall, pursuant to Rule 26(b)(4)(a)(1), *supra*, provide their names to Respondent. If Complainant has not decided which expert witnesses, if any, will testify at the hearing, then Complainant shall comply with the request contained in Interrogatory No. 5, when he makes such a decision, but not later than 14 days prior to the date of the hearing. Failure by Complainant to comply with this Order subjects it to possible sanctions pursuant to Fed. Rul. Civ. P. 37(b)(2), upon a proper Motion to be made by Respondent. Further, Complainant shall fully comply with the request for divulgence of the circumstances upon which the expert's testimony will be based, along with references to written works the expert is expected to rely upon in rendering his opinion, as these matters are within the scope of Rule 26(4)(A)(i), *supra*, which requires divulgence of a summary of the grounds for each opinion of an expert witness.

Interrogatory No. 6

Interrogatory No. 6 provides as follows: "Identify each and every person(s), by name and address, who has been retained or employed to participate in this litigation, or for hearing preparation purposes in this matter, who is not expected to be called to testify as an expert witness in any proceeding in this matter." Complainant argues that the information is privileged and protected under Fed. R. Civ.P. 26(b)(4)(B).

I am constrained to follow *Ager v. Jane C. Stormont Hospital and Training*, 622 F.2d 496, (10th Cir. 1980), wherein the Court of Appeals held that a Party may not require the other Party to compel discovery of the identity of a nonwitness expert retained and specially employed in an anticipation of litigation in the absence of "exceptional circumstances under which it is unpractical for the Party seeking discovery to obtain facts or opinions on the same subject by other means." (*Ager*, *supra*, at 503). The Court further held, citing *Hoover v. United States Department of Interior*, 611 F.2d. 1132, 1142, n.13 (5th Cir. 1980), that a Party seeking disclosure under Rule 26(b)(4)(b), *supra*, "carries a heavy burden." Respondent asserts in this connection that Complainant is solely and exclusively in control of information relevant to the issue of his medical condition and that his response is the only way to obtain this information. Hence, only Complainant and or his Counsel has knowledge of the

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identity of an expert retained or specially employed. Hence, exceptional circumstances have been found to exist and discovery of the identity of these experts is required. Thus, Complainant shall comply with all terms of Interrogatory No. 5.

Interrogatory No. 7

Interrogatory No. 7 requires as follows: "Please identify all documents that you intend to introduce as exhibits at the hearing in this matter. For each such document, describe its present location and custodian, and identify the person(s) through whom you intend to introduce each document at any hearing or deposition in this matter."

The request falls within Fed R. Civ. P. 26(b)(1) and hence, a clear identification of the documents intended to be introduced as exhibits is required, as well as the identity of the persons through whom the document is to be introduced. Accordingly, Complainant shall specifically comply with all the terms of this interrogatory.

Interrogatory No. 8

Interrogatory No. 8 requires as follows: "Describe with specificity and in detail the facts and circumstances upon which you rely in contending that Michael Holland engaged in protected activity as defined under 105(c) of the Mine Act. In responding, please identify:

- a. The names and addresses of each and every person who will be called upon to provide testimony in support of your position and summarize the anticipated testimony of each such person; and
- b. Identify each and every document and/or piece of evidence which is or will be relied upon to support your position."

Complainant argues that Respondent did not seek discovery within 60 days after the Complaint was filed, as is required by 29 C.F.R. 277.55(b).

The Complaint herein was filed on September 26, 1990, and Respondent served a Request for Interrogatories on December 28, 1990.

In order to allow the Parties to prepare for trial and to eliminate surprise, the rules of discovery should be broadly applied (See, *Hickman v. Taylor*, 329 U.S. 495 (1947)). Complainant has not alleged any legal harm as a result of the

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late request for discovery. Hence, the request in Interrogatory No. 8 is to be complied with, as, in general, the material requested falls within Rule 26(b)(1), supra.

It is further ORDERED that Complainant shall, within 5 days of this Order, file with me, for an in camera inspection, all material he claims as subject to either an informant's privilege, or a work product privilege.

Interrogatory No. 9

Interrogatory No. 9 requests as follows: "Describe with specificity and in detail the adverse action or discrimination you allege has occurred as a result of his alleged protected activity under 105(c) of the Mine Act. In responding, please identify:

- a. The names and addresses of each and every person who will be called upon to provide testimony in support of your position and summarize the anticipated testimony of each such person; and
- b. Identify each and every document and/or piece of evidence which is or will be relied upon to support your position."

In its response, Complainant essentially referred to its response with regard to Interrogatory No. 8. The request set forth in Interrogatory No. 9 falls within the purview of Rule 26(b), supra. Hence, Complainant shall comply in detail to this interrogatory and within 5 days of this Order file with me, for an in camera inspection, any material that he claims is subject to the work product privilege or informant's privilege.

Interrogatory No. 10

Interrogatory No. 10 requests as follows: "Describe in detail and with specificity the facts upon which you rely in contending that the adverse action or discrimination complained of was motivated, in whole or in part, by alleged protected activity under 105(c) of the Mine Act. In responding please identify:

- a. The names and addresses of each and every person who will be called upon to provide testimony in support of your position and summarize the anticipated testimony of each such person; and
- b. Identify each and every document and/or piece of evidence which is or will be relied upon to support your position."

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As a response, Complainant merely made reference to his response to Interrogatory No. 8. My ruling with Interrogatory No. 10 is the same as the ruling I made with Interrogatory No. 8 for the same reasons.

Interrogatory No. 11

Interrogatory No. 11 provides as follows: "Explain in detail the remedies sought by you in this 105(c) proceeding. If back pay is included in this request, please identify specifically the time periods for which you claim back pay." As a response, Complainant set forth the follow: "If Respondent will provide the work record at the time, Petitioner should be willing to provide this information." The information sought by this interrogatory is within the scope of Rule 26, supra, and hence, it is ORDERED that Complainant shall answer and comply with the interrogatory in full detail.

Interrogatory No. 13

Interrogatory No. 13 provides as follows: "If you contend that you have been subjected to discrimination and/or adverse consequences prohibited under 105(c), list each date on which such alleged discriminatory activity took place and identify the persons other than you present or otherwise involved in the alleged incident."

The information sought is within the scope of Rule 26, supra. Complainant shall fully and specifically comply with this request identifying specific dates of alleged discriminatory activity and the specific identity of persons present when such activity allegedly occurred. In complying with this request, names of miners who are expected to testify shall not be disclosed until 2 days prior to the hearing. Names of informants who are miners shall not be disclosed.

Interrogatory No. 14

Interrogatory No. 14 alleges as follows: "Do you contend that it is hazardous or unsafe for you to wear metatarsal protection? If your answer is in the affirmative, please identify with specificity:

- a. Each and every fact upon which you rely in support of this position;
- b. The name and address of each and every person who will be called upon to provide testimony in support of this position and summarize the testimony of each such person; and

- c. Each and every document and/or piece of physical evidence which is or will be relied upon to support this position."

The information sought is clearly within the purview of Rule 26, supra, and hence, it is ORDERED that Complainant shall comply fully with the request and shall identify persons with information of the facts requested, shall summarize the testimony of such persons and shall specifically identify the documents that will be relied upon. In complying with this Order, Complainant shall not be required, until 2 days prior to the hearing, to disclose the names of miners who are expected to testify, neither shall Complainant be required to disclose the name of an informant who is a miner.

II. Motion for Sanctions

In a Motion filed on March 14, 1991, Respondent seeks an order sanctioning Complainant's Counsel on the ground that he violated Fed. R. Civ P. 11 by refusing to answer interrogatories and by providing vague and unresponsive answers. Clearly the imposition of sanctions against an attorney is an extraordinary remedy. The rules of the Commission, 29 C.F.R. 2700 et seq. do not provide any authority to sanction an attorney by ordering him to pay the reasonable expenses another Party has incurred because of a filing of a Motion that was responded to in a fashion in violation of Rule 11, supra.

In *Rushton Mining Company*, 11 EMShrc 759 (1989), the Commission considered the question of whether the monetary sanctions provided by Rule 11, supra, apply to Commission proceedings. In *Rushton*, supra, the operator had sought reimbursement of its litigation expenses from the Secretary under Rule 11, alleging that the Secretary engaged in the type of litigation abuse covered by Rule 11, supra. The Commission held that the Operator did not have a right under Rule 11, supra, to reimbursement of its litigation expenses.

Respondent argues that *Rushton*, supra, dealt solely with the issue of imposing monetary sanctions on the government, and should not bar an injured Party from seeking Rule 11, supra, sanctions against a private Party. For the reasons that follow, I reject Respondent's argument.

In *Rushton*, supra, the Commission dealt solely with the issue of whether Rule 11 should be applied by the Commission in ordering sanctions against the Federal Government where it allegedly violated Rule 11, supra. However, guidance may still be found in the Commission's decision that is helpful in resolving the issue herein, i.e., whether Rule 11 should be applied in ordering sanctions against a private Party who allegedly violated Rule 11. In this connection, I note, that at

the outset of its analysis, the Commission, in *Rushton*, supra, at 763, took cognizance of the fact that the operator therein was seeking attorney's fees and costs against the government, not as a prevailing Party, but as "alleged victim of litigation abuse," but "nevertheless" noted that ". . . we have strictly interpreted the Act when determining whether such awards are due to prevailing Parties." Further, the caution of the Commission in providing relief in the form of an award of attorney's fees and costs can be seen in its statement in *Rushton*, supra, at 764 with regard to its underlining philosophy. "Thus, as we have observed in a number of analogous contexts, the absence of specific statutory authorization for an asserted form of relief under the Mine Act "dictates cautious review. . . ." *Counsel of So. Mtns. v. Martin County Coal Corp.*, 6 FMSHRC 206, 209 (February 1984), aff'd, 751 F.2d 1418 (D.C. Cir. 1985). See also *Kaiser Coal Corp.*, 10 FMSHRC 1165, 1196-70 (September 1988)." Also, the Commission in *Rushton*, supra, at 765, was clear to state that the Federal Rules of Civil Procedure are not dictated by Commission Rule 1(b), (29 C.F.R. 2700.1(b)) to be "reflexively applied on procedural questions not regulated by the Mine Act, Administrative Procedures Act, or our own procedural rules." Hence, in the absence of clear authority in either the Mine Act, Commission Rules, or Commission precedent, I am reluctant to sanction Complainant's Counsel and conclude that I do not have clear authority to do same.

Further, even if Rule 11, supra, or Fed. R.Civ. P. 26(g), supra, applies to the Commission's proceedings, the standards for an award thereunder have not been met. In general, as noted by the Commission in *Rushton*, supra, at 767 ". . . under Rule 11, monetary sanctions may be imposed if a reasonable inquiry discloses that a litigant's pleading or other paper is not well grounded in fact, is not warranted in law, or has been interposed for any improper purpose. See, e.g., *Westmoreland v. CBS Inc*, 770 F.2d 1168, 1174-80 (D.C. Cir. 1985)."

In general, it is the position of Respondent that Complainant's responses to the various interrogatories are "irresponsive and evasive," demonstrate a lack of good faith, are not well grounded in fact or warranted by existing law, and are obviously intended to harass or cause unnecessary delay or needless increase in cost in this litigation. I conclude that if responses to interrogatories are vague and incomplete a proper remedy is a motion to compel, which has been made herein, but that these deficiencies do not fall within the preview of those actions deemed by Rules 11 and 26(g), supra, to provide a basis for the imposition of sanctions.

Respondent, in its Motion, argues that the response of Complainant to various interrogatories constitute the basis for the imposition of sanctions under Rule 11, supra. Each of these are discussed below.

a. Interrogatory No. 3

Interrogatory No. 3 requested the identity of expert witnesses whom Complainant intended to call. As a response, Complainant referred to his response to a previous interrogatory, in which he set forth the names of persons he indicated that he might call as witnesses. Petitioner clearly has the obligation to respond to this interrogatory in a complete fashion. However, the failure to do so, is not evidence of any improper purpose, inasmuch as a complete list of witnesses were set forth in the previous interrogatory.

b. Interrogatory No. 5

Interrogatory No. 5 sought a summary of expected testimony of expert witnesses. As a response, Complainant indicated that, inasmuch as the request called for speculation as to what the persons will testify to under oath, it was not complied with. He also maintained the request was inconvenient, unduly burdensome and unduly expensive.

Complainant clearly has the obligation to reply to this interrogatory in detail as set forth above, I., infra in my ruling on the Motion to Compel. However, failure to do so under color of an argument that to comply would be inconvenient, burdensome and expensive, does not, per se, establish any ground for the imposition of sanctions.

c. Interrogatory No. 7

Interrogatory No. 7 requested Complainant to identify documents which he intends to introduce as exhibits at the hearing, and to set forth the identity of the person thorough whom Complainant intends to introduce the document. Complainant's response does not describe with specificity an identification of the document intended to be introduced, nor does it identify individual documents, nor the witnesses that would be used to introduce these documents. As such the response can be characterized as vague and unresponsive. Complainant has been ordered above, I., infra, to fully comply with the interrogatory. However, the vague nature of the response and the failure to fully comply with the terms of the interrogatory does not per se establish conduct that falls within the criteria set forth in Rules 11 and 26(g) for the imposition of the sanctions.

d. Interrogatory No. 8

Interrogatory No. 8 requested, in essence, the facts and circumstances upon which Complainant relies in contending that he was engaged in protected activities. Respondent asserts that there was no good faith basis for Complainant's objection based upon work product privilege. I have ordered Complainant to

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furnish, for an in camera inspection, any material alleged to be subject to a work product privilege. (See above, I., infra). As such, I certainly can not find at this point, without having examined the material in question, that any claim of a work product privilege was not warranted in law.

Respondent also argues that Complainant's responses are vague, incomplete, and do not identify particulars. These defects are the subject of the Motion to Comply, and have been dealt with above, I., infra, but do not fall within the preview of activities causing liability for sanctions.

Respondent also refers to Complainant's refusal to identify and summarize anticipated testimony of witnesses. Complainant alleges that this request is burdensome and inconvenient. The failure to respond to the request has been dealt with above, I., infra, but Complainant's failure in this regard does not justify the imposition of sanction.

e. Interrogatory No. 9

Interrogatory No. 9 required Complainant to describe the adverse action which he alleged, and to provide the identity of witnesses and documents which are relied upon. In essence, Respondent argues that Complainant's responses are vague, evasive, and unresponsive. Respondent is correct in its characterization of Complainant's response and this has been dealt with above, I., infra, in my ruling on the Motion to Compel. However, providing a vague unspecific response is not an activity set forth in either Rules 11 or 26(g), supra, which provides a basis for the imposition of sanctions.

f. Interrogatory No. 10

Interrogatory No. 10 required Complainant to detail the facts relied upon in his allegation that adverse action was motivated in whole or part by protected activities, to identify the persons whose testimony will be offered in support of his position, and to identify those documents that are relied upon. Complainant did not provide any response other than stating as follows: "See answers No. 8 and No. 9." The lack of response has been noted above, I., infra, in my ruling on the Motion to Compel. However, failure to answer an interrogatory is not one of the actions set forth in Rules 11 and 26(g), supra, to warrant an imposition of sanction.

g. Interrogatory No. 11

Interrogatory No. 11 requested Complainant to explain in detail the remedies sought and to identify specifically the time period for which he claims back pay. Respondent argues that Complainant's response that he was seeking all remedies provided

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under Section 105(c) including back pay, constitutes a refusal to provide the requested information. This issue has been dealt with above, I., infra, in my ruling on the Motion to Compel. However, although the response is vague and does not provide the specificity requested, it does not fall within the scope of actions set forth in Rules 11 and 26(g), supra, which constitute a basis for the imposition of sanctions.

h. Interrogatory No. 13

Interrogatory No. 13 requested Complainant to list dates on which alleged discriminatory activity occurred, and to identify the persons present or involved in the incidents. Complainant responded that the discrimination occurred over a period of from 1988 to the present, and indicated that those persons whom he intends to call as witnesses are identified in the answer to a previous interrogatory. In essence, Respondent argues that the response, being vague, evasive, and unresponsive, is the basis for sanctions. While the response is vague, unspecific and not responsive, that issue has been dealt with above, I., infra, in my ruling on the Motion to Compel. However, the fact that the response is vague and not responsive to the interrogatory, does not form the basis for the imposition of sanctions as per Rules 11 and 26(g), supra.

i. Interrogatory No. 14

Interrogatory No. 14 requested Complainant to state the facts relied on supporting his contention that it is either hazardous or unsafe to wear metatarsal protection and to identify the witnesses and documents, which will be offered in support of his claim. Respondent, in essence, argues that Complainant's response is vague and attempts were not made to identify the information. Although the response is not specific and is not responsive to the interrogatory, these issues are discussed above, I., infra, in my ruling in the Motion to Compel. However, I find that Complainant's response does not fall within the activities delineated in Rules 11 and 26(g), supra, as forming the basis for the imposition of sanctions.

Wherefore, taking into account all the above, it concluded that Respondent's Motion for Sanctions is without merit, and is DENIED

Avram Weisberger
Administrative Law Judge
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Footnotes start here:-

1. In the first page of its Motion, Respondent indicated that it sought to compel a response to interrogatory No. 12. However, in setting forth those interrogatories for which there is a Motion to Compel, Respondent set forth Interrogatory No. 12, but did not set forth any Motion to Compel a response to this interrogatory. In contrast, Respondent did set forth a Motion to Compel a response to Interrogatory No. 13.

2. In a written statement dated March 28, 1991, Complainant's Counsel notified me that he ". . . will withdraw from this case." However, as of the date of this Order, Counsel has not withdrawn. In this connection, included in Counsel's statement to me of March 28, 1991, is the following: "We do not, however, feel comfortable formally withdrawing until resolution of the pending Motion to Compel and the pending Motion for Sanctions." Hence, since Counsel is still representing Complainant at this point, at least with regard to the instant Motion, it has an obligation to respond to Respondent's Discovery as ordered herein. Furthermore, should Counsel formally withdraw from representing Complainant in this case, Complainant, appearing pro se or substitute Counsel, will of necessity be involved in the preparation of his case scheduled for hearing on May 14-16, 1991. Further, the fact that Complainant's Counsel "will withdraw," should not operate to defeat Respondent's right to discovery by way of interrogatories upon a Party. 29 C.F.R. 2700.57. This rationale applies to all orders contained herein.