

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 Pennsylvania Avenue NW, Suite 520N
Washington, D.C. 20004

January 16, 2015

SCOTT MCGLOTHLIN,
Complainant,

v.

DOMINION COAL CORPORATION,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. VA 2014-233-D
NORT-CD-2013-04

Mine: Dominion No. 7
Mine ID: 44-06499

**ORDER GRANTING COMPLAINANT'S
MOTION TO QUASH SUBPOENA FOR DEPOSITION**

This proceeding concerns a Complaint of Discrimination brought by Scott McGlothlin against Dominion Coal Corporation (“Dominion”), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (“Mine Act” or “the Act”). McGlothlin seeks redress under section 105(c)(3) for an adverse action allegedly motivated by his application for the protections afforded to miners afflicted with pneumoconiosis under 30 C.F.R. Part 90.¹

Before me is McGlothlin’s Motion to Quash Subpoena that opposes Dominion’s deposition of Sheila Kiser, a notary public who participated in the execution of a power of attorney given by McGlothlin’s to his wife, Alicia McGlothlin. The power of attorney is dated May 6, 2013.

The central issue is whether Dominion knew, or should have known, that McLaughlin filed, or intended to file, for Part 90 status when it reduced McGlothlin’s pay upon reassignment of his job duties in June 2013. Consistent with a January 13, 2015, conference call with the parties, this Order formalizes the granting of McGlothlin’s Motion to Quash. As discussed

¹ Under 30 C.F.R. Part 90, a miner determined by the Secretary of Health and Human Services to have evidence of the development of pneumoconiosis is given the opportunity to work without loss of pay in an area of the mine where the average concentration of respirable dust in the mine atmosphere during each shift to which that miner is exposed is continuously maintained at or below 1.0 milligrams per cubic meter of air (“mg/m³”).

below, the notary does not have personal knowledge that, either constitutes relevant admissible evidence, or could lead to the discovery of admissible evidence, as required by Commission Rule 56(b).²

As addressed in the January 13, 2015, telephone conference, Dominion seeks to discover whether McGlothlin's application for Part 90 status, dated June 14, 2013, was actually filed after that date. In addition, Dominion seeks to determine whether the signature executing the Part 90 application is the actual signature of McGlothlin. Dominion also seeks to determine, based solely on speculation, whether the notary, in concert with McGlothlin, pre-dated the execution of the power of attorney, dated May 6, 2013. If so, Dominion asserts that such action would have a bearing on McGlothlin's general credibility.

The deposition of Kiser cannot yield relevant admissible evidence. Significantly, Kiser did not notarize McGlothlin's application for Part 90 status. Consequently, Kiser has no knowledge of when the Part 90 application was signed, or by whom. Moreover, the filing of a Part 90 application is not the only relevant protected activity in this matter, inasmuch as requisite medical examinations and procedures sought in preparation for such filings are "preliminary step[s] [that come] within the statutory protection afforded to miners." See *Goff v. Youghioghney & Ohio Coal Co.*, 8 FMSHRC 1860, 1863 (Dec. 1986).

In addition, as discussed in the telephone conference, the Part 90 application does not require McGlothlin's actual signature in the absence of evidence that he did not authorize its signing. Thus, the power of attorney is not relevant to whether McGlothlin's application was validly filed.

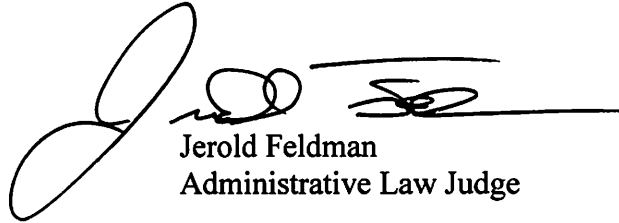
Finally, Dominion's assertion that Kiser's deposition may have a bearing on McGlothlin's credibility is unavailing. The question of the accuracy of the notarization date, and its impact on McGlothlin's credibility, if any, is a collateral issue, which is not subject to discovery. See *Order, Eagle Energy Inc.*, 21 FMSHRC 1176 (1180) (Oct. 1999) (ALJ) (citation omitted) (denying the Secretary's request for a subpoena as extrinsic evidence of untruthful acts are not admissible because they are deemed to be collateral in nature).

² Commission Rule 56(b) provides:

Scope of Discovery. Parties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence.

ORDER

In view of the above, **IT IS ORDERED** that McGlothlin's Motion to Quash the subpoena for the deposition of Sheila Kiser **IS GRANTED**.



Jerold Feldman
Administrative Law Judge

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