FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, NW., SUITE 9500
WASHINGTON, D.C. 20001
January 22, 2010

BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2009-302-D
v.	:	BARB CD 2008-07
	:	
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198
	:	
BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2009-1225-D
v.	:	BARB CD 2009-07
	:	
	:	
PANTHER MINING , LLC and	:	
MARK D. SHELTON,	:	No. 1 Mine
Respondents	:	Mine ID 36-00017
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
on behalf of BILLY BRANNON,	:	
Complainant,	:	Docket No. KENT 2009-1259-D
	:	BARB CD 2009-09
	:	
v.	:	
	:	
	:	
PANTHER MINING, LLC,	:	No. 1 Mine
Respondent	:	Mine ID 15-18198
	:	
BLACK MOUNTAIN RESOURCES, LLC,	:	
Respondent	:	

ORDER DENYING MOTION TO COMPEL

Docket No. KENT 2009-1259-D is a discrimination case based on a complaint brought under section 105(c)(2) of the Mine Act by the Secretary of Labor ("Secretary") on behalf of Billy Brannon ("Brannon") against Panther Mining, LLC and its parent, Black Mountain Resources, LLC (collectively, "Panther"). While the party filing the section 105(c)(2) complaint is the Secretary, pursuant to Commission Rule 4(a), Brannon is a party in his own right. 29 C.F.R. § 2700.4(a). Brannon, as a party, is represented by counsel, Tony Oppegard. The section

105(c)(2) case has been consolidated with two related proceedings: KENT 2009-302-D, a section 105(c)(3) discrimination case brought by Brannon against Panther; and KENT 2009-1225-D, a second section 105(c)(3) discrimination case brought by Brannon against Panther.[1] The consolidated cases will be heard beginning on March 2, 2010.

On January 11, 2010, the Commission received and docketed Panther's Fifth Motion to Compel Discovery in Docket No. KENT 2009-1259-D. For reasons stated below, Panther's motion **IS DENIED.**

Panther seeks an order requiring Mr. Oppegard to submit to a deposition. Panther notes that in her Amended Complaint. the Secretary alleges Brannon "initiated" safety complaints to MSHA and to the Kentucky Office of Mine Safety and Licensing ("KOMSL"). Amended Complaint ¶ 8. However, according to Panther, Brannon actually reported the conditions by telephone to his attorney, Tony Oppegard, but told Oppegard that he, Brannon, did not consider the conditions to be dangerous. Panther asserts that Oppegard, not Brannon, reported the conditions to MSHA inspector Craig Clark and to KOMSL, and that Oppegard described the conditions to Clark as an imminent danger. Panther also states that another client of Oppegard, Scott Howard, was a party to both the telephone call from Brannon to Oppegard and to the call from Oppegard to Clark. Mot. at 1-2.

Panther further notes that on March 27, the day Brannon was fired, Oppegard wrote to Rick Raleigh, Black Mountain's personnel director, informing him that Brannon was the source of the previous day's imminent danger complaint. Brannon's subsequent complaint to MSHA indicated that Brannon believed Oppegard's letter to Raleigh caused Panther to terminate Brannon. Panther contends that Brannon did not believe a safety hazard existed when he called Oppegard and that the report he made to Oppegard was "part of an ongoing campaign to harass and intimidate his employer and mine management." Mot. at 2.

Panther wants to question Oppegard about these events. It states that it notified Oppegard of its intent to depose him on December 29, and that Oppegard lodged no objection. However, when the time came to be sworn and deposed, Oppegard refused. Mot. at 2. Therefore, Panther moves Oppegard be ordered to appear and to be deposed.

Brannon opposes the motion. He maintains that because the information Panther seeks can be obtained through other witnesses, Oppegard's deposition should not be allowed. He also maintains the information sought by Panther is irrelevant and that Panther is "attempting to harass Brannon and his counsel."[2] Response at 3.

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[1]Docket No. KENT 2009-1259-D is the last-filed of the three cases.

[2]Because I agree with Brannon's first assertion regarding Panther's ability to obtain the information it seeks through other sources, I do not reach the issue of relevance. Nor do I ascribe a motive to Panther's motion.

Granting a motion to order the deposition of opposing counsel would be an unprecedented and extraordinary act. I have never heard of such an order being issued in a matter brought under the Mine Act, and the parties have not directed me to; nor have I otherwise learned of any such order ever being issued by the Commission or its judges. I expect the reason is because allowing the deposition of opposing counsel is bad policy. It is bad for the legal system. It is bad for Commission litigants. It is bad for the Commission. As Brannon points out, the United States Court of Appeals for the 8th Circuit put it best:

> Taking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation. It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony.

Shelton v. American Motors Corporation, 805 F.2d 1323, 1327 (8th Cir. 1986). For these reasons I will be hard pressed to *ever* allow a party to depose opposing counsel, and this is doubly true where, as here, other persons who can be deposed were parties to the events in question.

David Barbour
Administrative Law Judge

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