

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

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August 31, 2009

BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. KENT 2009-302-D
v.	:	BARB CD 2008-07
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	:	
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
Respondent	:	Mine ID 15-18198
	:	
	:	
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

ORDER DENYING MOTION TO RECONSIDER DISCOVERY RULING

_____ On July 24, 2009, I granted in part and denied in part Complainant’s motion to compel the Respondent to answer certain interrogatories and to produce certain documents. Order Granting in Part and Denying in Part Complainant’s Motion to Compel (“Order”). Among the documents sought were “Copies of all statements given to [MSHA] by management personnel . . . during MSHA’s investigation of Brannon’s discrimination complaint (Case No. BARB-CD-2008-07), which preceded the filing to the instant Complaint of Discrimination with [the Commission]” (i.e., Docket No. KENT 2009-302-D). Order 6. Also sought were “Copies of all

statements given to MSHA by hourly employees [of the company] during the agency's investigation of [the same] . . . complaint . . . in which management personnel from Panther or Black Mountain Resources [(Panther's parent company)] were allowed to sit in on . . . [the] interviews." *Id.* In his motion to compel, the Complainant described his efforts to obtain copies of the statements from MSHA via a FOIA request. The request resulted in the agency sending the Complainant copies of the statements, but with the names, job classifications, signatures, addresses and social security numbers of the interviewed employees redacted. The Complainant described the redacted statements as "worthless." *See Id.* at 6-7. The company responded to the request it provide the Complainant with complete copies by stating it has no such copies. *Id.* at 6.

In denying the Complainant's motion to compel production of the copies, I stated in part:

The company states it has no such copies, and I cannot order a party to produce something it does not have. The Complainant knows the names of the persons whose statements it wants. He can ask the persons. The Complainant also can and has followed an appropriate route for obtaining the statements by filing a FOIA request with MSHA. This has resulted, as the Complainant admits, in [his] obtaining redacted copies of the statements. If the Complainant is denied complete copies . . . by those who were interviewed, he can depose the miners and/or call them as witnesses.

Order at 7.

The Complainant now asks me to reconsider this ruling. He states the company's section foreman, Justin Adams, gave a statement to MSHA and that although the company claims it does not have a copy of the statement, "clearly it can obtain that statement, whereas [the Complainant] cannot." Mot.1. The Complainant wants me to require the company to instruct Adams to get the company a copy of his statement and then to require the company to provide that copy to the Complainant. *Id.*

The Complainant further states that although the company "may be telling the truth" about not having copies of the statements of four of its hourly employees (Jonathan Whitehead, Shawn Daniels, Joe Yeary and Jim Lamb), the company actually is saying that "it doesn't want [the Complainant] to have copies of the statements, so it will not do anything – absent a court order – to obtain [them]." Mot. 2. The Complainant adds that, because the employees allowed company officials to attend their interviews, the employees obviously will be "adverse witnesses" if they are called to testify, and that as a matter of "fundamental fairness" he needs the statements to effectively examine and/or cross-examine the employees. *Id.* at 3.

The company responds that the Complainant is merely repeating arguments that already have been made and rejected. The company notes that the Federal Rules of Civil Procedure sanction requests for documents “which are in the possession, custody or control of the party upon whom the request is served” (Fed. R. Civ. P. 34), and that Rule 34 does not permit a court to order a party to an action to force a person to acquire something the party does not have. Response 2.

The company’s contention is not entirely accurate. Nor was I entirely accurate to state that “I cannot order a party to produce something it does not have.” Order 7. There have been situations in which the courts, acting under Rule 34, ordered parties to produce documents and other items that were not in the parties’ physical possession. However, in those situations the parties objecting to producing the materials were held to have constructive control of the materials, a situation that is decidedly not the case here. In no sense is the company in constructive control of the statements of Messrs. Adams, Whitehead, Daniels, Yeary and Lamb. When the individuals gave the statements to MSHA, the individuals were acting on their own behalf and at the behest of the agency. They were not acting for the company. The company does not have an ownership interest in the statements no matter how liberally “control” is construed, and were I to order the company to instruct the employees to give it copies of the statements, and were the employees to refuse, there would be no way for the Commission to compel production. The order would essentially be unenforceable, and, as matter of sound policy, the Commission should eschew unenforceable orders. In addition, other valid policy concerns relating to the effectiveness of the Secretary’s investigations of alleged discrimination militate against ordering production.

For all of these reasons, the Complainant’s motion to reconsider the order **IS DENIED**.

David Barbour
Administrative Law Judge

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