FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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August 24, 2009

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
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 GRANTING IN PART COMPLAINANT'S MOTION TO COMPEL
RULING ON MOTION FOR EXTENSION OF TIME TO COMPLETE DISCOVERY
RULING ON MOTION FOR CONTINUANCE OF TRIAL
AND
RULING ON MOTION TO CONSOLIDATE

I. THE MOTION TO COMPEL (DOCKET NO. KENT 200-302-D)

The Complainant, Billy Brannon, has moved to compel the Respondent, Panther Mining, LLC ("Panther Mining" or "the company"), to respond to several interrogatories in the Complainant's First Set of Interrogatories and to produce certain documents requested in

Complainant's First Request for Production of Documents. According to Brannon, the company either has objected to the interrogatories and requests or provided incomplete information.

INTERROGATORIES, ANSWERS AND RULINGS[1]

A.

Interrogatory 5. Please identify the person(s) who made the decision to transfer Brannon from Cloverlick Coal to Panther Mining [on] February 8, 2008, and state the precise date that said transfer was effectuated.

Answer: Rick Raleigh and Ross Kegan. March 3, 2008.

Complainant notes in his first set of interrogatories Brannon stated: "When an interrogatory asks you to 'identify' a person, please state the person's name and job title, and their last known mailing address, telephone number, and e-mail address." The Complainant states that Panther provided Raleigh's job title and contact information in response to another interrogatory, but that it did not provide Kegan's job title and contact information. Complainant asserts he is entitled to the information.

The company responds that it is providing Kegan's job title and contact information to the Complainant.

B.

Interrogatory 6. Please identify all of the employees, both management and hourly, who were assigned to the 2nd shift at Panther Mining's No. 1 mine *at any time* during the period that Brannon worked on said shift prior to his transfer to the day shift on or about June 26, 2008 (emphasis in original).

Answer: The Respondent objects to the interrogatory as overly broad and not relevant or reasonably calculated to lead to the discovery of admissible evidence.

The Complainant argues that the interrogatory is not overly broad, in that any employee who worked on the second shift at the mine might have information relevant to Brannon's claims. It further argues it is not unduly burdensome, since the information sought is within the knowledge and control of the company.

The company responds that the only protected activity Brannon alleges while he worked on the second shift is that he filed a civil suit based on an assault that occurred at the mine where

[1]The allegedly incomplete or unanswered interrogatories and requests are numbered as in the First Set of Interrogatories and First Request for Production of Documents.

he worked (the Cloverlick mine) before he was transferred to Panther's mine. According to the company, the other alleged protected activities occurred while the Complainant worked at the Cloverlick mine or on the day shift.

The information sought by the Complainant must be disclosed. The interrogatory, while broad, is not overly so. A mine is a confined environment in more ways than one, and second shift miners may well have heard or seen things bearing on the Complainant's claims.

The company **IS ORDERED** to provide the Complainant with the information requested in the interrogatory, and to do so within 15 days of the date of this order.

C.

Interrogatory 8. Please identify all of the employees, both management and hourly, who were assigned to the day shift at Panther Mining's No. 1 mine *at any time* during the period that Brannon worked on said shift through and including September 12, 2008 (emphasis in original).

Answer: Respondent objects to this interrogatory as overly broad and not relevant or reasonably calculated to lead to the discovery of admissible evidence.

For the same reasons as stated above, the Complainant maintains the interrogatory is not overly broad and is relevant.

The company contends Brannon already knows the names of day shift employees with information relevant to his claims and that he should not be allowed to use the Commission's litigation process to "shop for new claims, gain information for . . . pending claims, or cause unnecessary interference with [the company's] business or employees." Opposition to Motion to Compel 5.

For essentially the same reasons as stated with regard to Interrogatory 6, I agree with the Complainant that the information requested in the interrogatory should be disclosed. The company **IS ORDERED** to provide the Complainant with the information requested in the interrogatory, and to do so within 15 days of the date of this order.

D.

Interrogatory 11. Please state whether anyone from Panther Mining or Black Mountain Resources investigated the allegations made in Brannon's complaint of discrimination after Brannon filed Case No. BARB-CD-2008-07 with MSHA. If the answer is "yes," please identify who conducted said investigation and identify every person to whom he spoke during the investigation.

Answer: Yes, Rick Raleigh and Panther's counsel. Except as stated, Panther objects to

this interrogatory as calling for information that is protected from disclosure by the attorney-client privilege and/or work product doctrine.

The Complainant states he is not asking for copies of notes taken by Panther's counsel, but that he is entitled to know to whom Rick Raleigh, the company's personnel director, spoke during the investigation. The Complainant asserts notes taken by Raleigh during his investigation are much closer in time to the events forming the basis for the discrimination proceeding, and that the Complainant cannot obtain their equivalent by any other means. The Complainant further notes that in response to a motion to compel filed by the company, I ruled that copies of notes and logs made by Brannon at the behest of his counsel should be made available to the Respondent, provided appropriate redactions were made to protect the identity of miner witnesses and to exclude material relating to the company's attorney's thought processes and litigation strategies. Order 5 (May 29, 2009).

The company answers that Raleigh's notes were not contemporaneous with the events at issue, but were made after the Complainant filed his complaint with MSHA and as part of the company's "after the fact" investigation of the Complainant's charges. As such, they are protected by the work product doctrine. Opposition to Motion to Compel 6-7.

While there is no gainsaying the fact that the information the Complainant seeks can be viewed as coming within the work product doctrine, the doctrine is not sacrosanct and there are times when it must must yield to more weighty concerns. In my view, one such concern is the paramount need for full or nearly full disclosure prior to trail. The need originally engendered the federal rules governing discovery and in administrative proceedings such as this adherence to the original purpose can help parties resolve their differences short of trial or, failing that, can greatly enhance the likelihood of a just resolution. As I have noted elsewhere, it is for these reasons that many administrative law judges, myself included, have little sympathy for claims of privilege. *See* Order 5 (May 29, 2008). Here, because the information could reasonably be expected to lead to the discovery of relevant evidence, I hold that the names of the persons to whom Raleigh spoke and Raleigh's notes of the conversations are discoverable.

The company **IS ORDERED** to provide the Complainant with the information requested in the interrogatory within 15 days of this order. Any material in the information relating to the company's attorney's thought processes and/or its attorney's litigation strategies must be redacted.

E.

Interrogatory 17. In ¶ 8 of Panther Mining's Answer, the company alleges that "there was only one regular head drive operator whose drives were much further in the mine that those assigned to complainant." Please identify said head drive operator.

Answer: Joe Yeary.

The Complainant states the company did not provide Mr. Yeary's contact information.

The company agrees, and states it is sending the information to the Complainant.

F.

Interrogatory 23. Please identify each and every person whom Panther Mining intends on calling as a witness at the trial of this action, and provide a summary of the expected testimony of each said person.

Answer: Panther Mining has not determined who it intends to call as a witness, but they will probably include Mark Shelton [and nine others who are named] and may include some or all of the following: Justin Adams [and seven others who are named].

The Complaint states that although Panther did not object to the interrogatory, it failed to provide a summary of the expected testimony of each person. It notes that such summaries routinely are required by Commission judges in their pre-hearing orders and that the summaries may indicate to the Complainant that deposition of a witness or witnesses is unnecessary, thereby saving the Complainant considerable expense.

The company asserts it presently intends to call 17 witnesses. It states it "should not be required to summarize the testimony of so many witnesses covering so much detailed information" and that any required responses should "be limited to general topics of expected testimony[,] not full details." Opposition to Motion to Compel 8.

Interrogatory 23 and the company's objection to it have been overtaken by events. Under the April 20, 2009, Notice of Hearing as amended below, the parties are required to provide one another with the names of their intended witnesses and with synopses of the witnesses' testimony on or before January 26, 2010. Therefore, the company is under no obligation to do so now. However, all of the parties are required to exchange the names and the synopses. While the synopses must describe the subjects about which the witnesses will testify, they need not describe the details of the expected testimony.

REQUESTS FOR PRODUCTION OF DOCUMENTS, RESPONSES, AND RULINGS

A.

Request 1. A copy of the official mine map for the Panther No. 1 mine . . . that was in effect during September 2-12, 2008.

Response: See the attached map dated November 19, 2008, document no. 000101 [i.e., Panther Mining "Bates-stamped" numbers on the documents it provided to the Complainant].

The Complainant states that the company did not object to this request, but nonetheless did not provide the map. Instead, it sent only the bottom, right-hand corner of the map.

The company responds that its failure to provide the Complainant with a complete copy of the map was the result of a clerical error and that the requested copy has been sent.

B.

Request 4. Copies of all statements given to [MSHA] by management personnel from Panther Mining during MSHA's investigation of Brannon's discrimination complaint (Case No. BARB-CD-2008-07), which preceded the filing of the instant Complaint of Discrimination with [the Commission].

Response: See attached statements from Mark Shelton and Herschel [sic] Napier, documents no. 000301-000309.

The Complainant asserts, based on information available to him, the company's section foreman, Justin Adams, gave a statement to MSHA, and that a copy of the statement, which was not included in the materials the company made available, should have been provided.

The comapny states that it does not have a copy of Mr. Adams's statement. Opposition to Motion to Compel 8-11.

For the reasons set forth with regard to Request 5, the Motion to Compel **IS DENIED** with regard to Request 4.

C.

Request 5. Copies of all statements given to MSHA by hourly employees from Panther Mining during the agency's investigation of Brannon's discrimination complaint (Case No. BARB-CD-2008-07), in which management personnel from Panther or Black Mountain Resources were allowed to sit in on said witness interviews.

Response: Panther has none.

The Complainant asserts that, in response to one of his interrogatories, the company stated that Darrell Cohelia, the company's safety directory, sat in on the MSHA interviews of Jonathan Whitehead, Shawn Daniels and Joe Yeary, each an hourly employee. It further states that Cohelia and Rick Raleigh, the company's personnel director, sat in on the MSHA interview of hourly employee Jim Lamb. The Complainant argues that by allowing the company officials to sit in, the hourly employees waived any claim of confidentiality they might otherwise have asserted. Because the company knows what the employees told MSHA, Panther Mining should be required to obtain the statements and produce them. The Complainant also describes his efforts to obtain

the statements from MSHA via a FOIA request. Thus far, the effort has resulted in MSHA's sending the Complainant copies of the requested statements, but with the names, job classifications, signatures, addresses and social security numbers of the interviewed hourly employees redacted. The Complainant describes the redacted statements as "worthless." Motion 11.

The company again responds it does not have any of the statements the Complainant seeks. Opposition to Motion to Compel 9-11.

The Complainant's motion to compel the company to produce the statements of Whitehead, Daniels, Yeary and Lamb **IS DENIED.** 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 of the statements by those who were interviewed, he can depose the miners and/or call them as witnesses.

D.

Request 7. Any employee handbooks, personnel policies or other compilations of Panther Mining's personnel rules or policies that were in effect during Brannon's employment with the company prior to September 12, 2008.

Response: The [company] objects to this request as vague and overbroad and not calculated to lead to the discovery of admissible evidence. Without waiving this objection, see the attached attendance policy and drug policy, documents no. 000501-000509.

The Complainant states there is nothing "vague" or "overbroad" about its request and that the company either has employee handbooks, etc., or it does not. The Complainant wants the company to identify and produce all such documents that exist, and if the company objects to producing any of the specific documents, the Complainant wants the company to lodge specific objections.

The company states, if the Complainant needs the requested materials, he should "[identify] the subjects of the policies he seeks so that [the company] and . . . the [Administrative Law Judge will] have some basis to assess their discoverability." Opposition to Motion to Compel 10.

Employee handbooks and written personnel policies are discoverable, unless a sustainable objection is raised. Therefore, within 15 days of the date of this order, the company **IS ORDERED** to identify for the Complainant the handbooks and written personnel policies in effect during the Complainant's employment and to provide the complainant with copies of the

handbooks and policies in effect during the Complainant's employment. If such materials exist, but the company has privileges to assert or other objections to raise, the company must seek a protective order. In its motion, the company should describe the material(s) with specificity and state its position(s) against disclosure. If the Complainant wishes to respond, he must do so within five days of the date of his receipt of the company's motion.

E.

Request 11. If anyone from Panther Mining or Black Mountain Resources investigated Brannon's allegations after he filed his discrimination complaint (Case No. BARB-CD-2008-07) with MSHA, copies of any and all interview notes and other documents compiled by said person during his investigation.

Response: The [company] objects to this request, as it calls for information that is protected from disclosure by attorney-client privilege and/or the work product doctrine.

The Complaint reiterates the arguments he made with regard to Interrogatory 11, the company reiterates its objections, and I reiterate my ruling. The company **IS ORDERED** to provide the Complainant with the information requested within 15 days of this order. Any material on the information relating to the company's attorney's thought processes and/or litigation strategies must be redacted.

II. MOTION FOR EXTENSION OF TIME TO COMPLETE DISCOVERY (DOCKET NO. KENT 2009-302-D)

III. MOTION FOR CONTINUANCE OF THE TRIAL (DOCKET NO. KENT 2009-302-D)

IV. MOTION FOR CONSOLIDATION OF PROCEEDINGS (DOCKETS NO. KENT 2009-302-D, KENT 2009-1225-D AND KENT 2009-1259-D)

Docket No. KENT 2009-302-D was assigned to me on March 6, 2009. On April 20, 2009, I scheduled the case to be heard on August 11, 2009, in Barbourville, Kentucky. At the same time, I ordered the Complainant to respond to the company's First Set of Interrogatories no later than May 8, and I stated I expected counsels "to cooperate to ensure all discovery is . . . completed by July 10, 2009." Order and Notice 1 (April 20, 2009). Thereafter, I ruled on the company's motion to overturn the Complainant's objections to written discovery requests and to compel discovery (May 29, 2009). Now, I have before me the Complainant's motion to compel.

Obviously, July 10 has come and gone, and discovery has not been completed, at least to the satisfaction of the Complainant. The Complainant, therefore, moves for a 120-day extension of time to complete discovery and for a commensurate continuation of the trial date. Complicating the matter is the fact that the Complainant has filed an additional discrimination

complaint against the company (*Billy Brannon v. Panther Mining, LLC and Mark D. Shelton*, Docket No. KENT 2009-1225-D), and the Secretary of Labor has filed a discrimination complaint on the Complainant's behalf (*Secretary of Labor, on behalf of Billy Brannon v. Panther Mining, LLC*, Docket No. KENT 2009-1259-D). The company has moved to consolidate the two "new" cases with the instant case.

As I noted when ruling on the Complainant's first motion to compel, judges, especially administrative law judges, liberally construe discovery rules in order to provide parties with the information needed at trial. Order 5 (May 29, 2009). However, there is no denying the fact that unfettered discovery can consume a great deal of time. As a result, there exists an inherent tension between a judge's duty to hear and decide a case promptly and his or her duty to further discovery's ideal result, ensuring a party "see[s] many, if not all, of his or her opponent's cards before proceeding through the courthouse door." *Id*. The tension has become particularly acute for the Commission's judges, who face an ever mounting backlog of cases and a potential breakdown of the agency's ability to provide timely decision making.

The facts speak for themselves. This month cases pending before the Commission will surpass 13,000, an increase of 600% since the passage of the Miner Act. From fiscal year 2000 through fiscal year 2005, the average number of cases filed per year was approximately 2,300. However, in fiscal year 2008, the number was approximately 8,900, and, at the current rate, the projected total backlog will be over 18,000 cases by the end of fiscal year 2010. Barring a large increase in staffing – an increase that is not on the horizon – the keeping of trial dates becomes vital if the Commission is to maintain even a semblance of timeliness in the decisional process.

The present motion for a continuance illustrates the problem. Docket No. KENT 2009-302-D was given priority on my calendar because, in general, the nature of discrimination complaints calls for their prompt resolution. In setting an August 11 trial date, I gave the case precedence over other cases that had been pending far longer. Now, the next open date on my trial calendar is March 2, 2010, and it is when the subject case will be heard. This seems an inordinately long time to wait for a trial, especially when the company is paying the Complainant not to work.[2] Yet, discovery is ongoing in the instant case, and it may not have begun yet in KENT 2009-1225-D and KENT 2009-1259-D. In my opinion, the need for full or nearly full disclosure prior to trial outweighs the economic and managerial inconvenience of a long delay. Therefore, the Complainant's motion for a continuance **IS GRANTED** and the trial **IS RESCHEDULED** to begin on **MARCH 2, 2010**. There is simply no more immediate date available without "bumping" others. Having given the parties precedence once, I am not inclined to do so again.

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[2]On May 14, 2009, Commission Administrative Law Judge Jacqueline Bulluck ordered Brannon's temporary reinstatement (KENT 2009-988-D). The order was based on the parties'\ agreement that Brnnon would be economically reinstated pending a final ruling on a complaint of discrimination the Secretary of Labor would file on Brannon's behalf. As discussed below, that complaint, Docket No. KENT 2009-1259-D, is now before me.

The parties' inability to meet the original discovery schedule and the resultant continuance means in all likelihood August 11 is lost as a trial day to the Commission. Lost trial days have adverse consequences for the agency, because they mean an increase in the Commission's burgeoning case backlog. For this reason, the parties are advised, as will be all appearing before me hereafter, that the days of liberal continuances are over. I no longer will grant them, except under the most dire of circumstances. The parties will meet the trial discovery schedule as originally set and go to trial on the date(s) scheduled, or they will risk default.

Docket No. KENT 2009-302-D will be called for trial on **March 2, 2010**, in **Barbourville, Kentucky**. The trial will commence at **8:30 a.m.** In addition, counsel for the company's motion to consolidate **IS GRANTED**, and Docket No. KENT 2009-1225 and KENT 2009-1255-D **ARE CONSOLIDATED WITH** Docket No. KENT 2009-302-D for hearing and decision. The latter two cases will be called for hearing on **March 2, 2010**, with Docket No. KENT 2009-302-D. I understand the Complainant's objections to consolidation, but, by scheduling the testimony, the evidence relating to KENT 2009-1255-D can be identified and kept fairly contiguous in the record. Further, if the need arises, attorney's fees issues can be sorted out after the trial. I have a duty to minimize disruption to the parties and their witnesses. Consolidation of the cases does that. I also have a duty to prevent even more delay in the cases than has already occurred, and consolidation assists in that regard. While the mechanics of presiding over the consolidated cases may be complicated, with the assistance and cooperation of the parties they can be mastered.

The parties are advised the requirements of the April 20, 2009, Notice of Hearing **ARE EXTENDED** to Docket Nos. KENT 2009-1225-D and KENT 2009-1259-D, except that all discovery must be completed by **January 15, 2010**. On or before **January 26, 2010**, the Complainant and the Respondent will file their prehearing reports, including their witness lists and testimony summaries.

Counsels are reminded Commission Rule 10(c) requires the moving party to confer or make reasonable efforts to confer with the other parties prior to filing a non-dispositive motion and to state in the motion if any other party opposes or does not oppose the motion. 29 C.F.R. § 2700.10(c). Compliance with the rule is expected. Unless a statement indicating compliance is included in future non-dispositive motions, the motions will not be accepted for filing and will be returned.

David F. Barbour
Administrative Law Judge

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