FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 10, 2009

BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 2009-302-D
	:	BARB CD 2008-07
PANTHER MINING, LLC,	:	
Respondent	:	
	:	No. 1 Mine
	:	Mine ID 15-18198
	:	
	:	
BILLY BRANNON,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. KENT 2009-1225-D
	:	BARB CD 2009-07
PANTHER MINING , LLC and	:	
MARK D. SHELTON,	:	
Respondent	:	No. 1 Mine
	:	Mine ID 15-18198
	:	
	:	
SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
ON BEHALF OF BILLY BRANNON,	:	
Complainant,	:	Docket No. KENT 2009-1259-D
v.	:	BARB CD 2009-09
	:	
PANTHER MINING, LLC,	:	
Respondent	:	No. 1 Mine
	:	Mine ID 15-18198

ORDER GRANTING COMPLAINANT'S MOTION TO AMEND COMPLAINT

The Complainant, Billy Brannon, moves for leave to amend his initial complaint of discrimination (Docket No. KENT 2009 302-D). The complaint is scheduled to be heard, along with the two other discrimination cases with which it is consolidated, on March 2, 2010. Brannon's amendment would include two additional protected activities that were not specified in his initial complaint, namely: "(1) Brannon's refusal to travel underground without a cap light after Robert Salyer . . . assaulted him and smashed his cap light on January 23, 2008 . . . and (2) Brannon's. . . [completion of] a 'mine incident report' on January 23, 2008, regarding Salyer's assault of him and his subsequent refusal to travel underground." Motion For Leave to File Amended Complaint of Discrimination ("Motion") at 2. The amended complaint also would

amplify an allegation that Brannon included in his June 15, 2009, Supplementation of the Record ("Supplementation"); namely that Brannon complained to Rick Raleigh, the personnel director for Black Mountain Resources, about Salyer's assault of him. The proposed amendment would flesh out Brannon's previous allegation that Brannon complained "to management of Cloverlick Coal/Black Mountain Resources about . . . Salyer assaulting him with a hammer." Supplementation at 2.

BRANNON'S ASSERTIONS IN SUPPORT OF THE MOTION

Brannon states that although he did not specifically plead the additional protected activities in his original complaint, the incidents were among those pleaded by Brannon in a civil suit he filed against Cloverlick Coal Company and Salyer, pleadings that were attached to his initial complaint. Therefore, according the Brannon, the company, a subsidiary of Cloverlick, "is well aware" that Brannon complained about the cap light incident. In addition, in Brannon's view, the company also is aware that he filled out the incident report about the assault. Thus, the company cannot credibly assert the proposed amendments come as a surprise, and the company would not be "prejudiced in any way" if the amendments are allowed. Motion at 2-3.

THE COMPANY'S RESPONSE

The company disagrees. The company notes that the facts set forth in the proposed amendments were not mentioned in the complaint Brannon originally filed with MSHA. It also notes that on December 16, 2008, in one of its interrogatories it requested that Brannon describe each protected activity on which he based his claim of discrimination and that it also requested Brannon produce copies of all of the documents pertaining to the alleged protected activities for which he claimed discrimination. Brannon's responses did not mention the protected activities he now seeks to include in his complaint. Moreover, when the company later deposed Brannon about his alleged protected activities at no time did Brannon mention the "new" ones. Nor did Brannon mention them in response to the order to supplement the record except to state as Brannon noted in his motion that he "complain[ed] to management of Cloverlick Coal/Black Mountain Resources about . . . Salyer assaulting him with a hammer." Memorandum In Opposition to Motion for Leave to File Amended Complaint ("Opposition") at 3 (August 14, 2009) *(quoting* Supplementation 2).

The company also views the proposed amendments as untimely because as of the date the motion was filed, the case has been pending for almost five months and Brannon has failed to explain why the alleged additional protected activities were not pleaded earlier. Opposition at 4. Brannon "should not be allowed to add claims . . . when he had ample time and opportunity to raise them previously and states no reason for not having done so." *Id*. at 5. Granting the motion would cause additional expense to the company by requiring it to amend its defenses, depose Brannon again and possibly amend its pending motion for partial summary decision, and file a supplemental brief in support of the motion. *Id.* at 5.

Finally, the company argues the "new" allegations have not been investigated by MSHA as required by section 105(c) of the Act and that a "miner cannot present claims on his own unless and until the Secretary has made a finding of no discrimination under section 105(c)(3) [of the Act]." Opposition at 6.

RULING

The amendments **WILL BE ALLOWED**. The Commission has taken a liberal view when it comes to such amendments, especially when, as here, they do not prejudice a party in preparing its defenses. I agree with Brannon that the amendments should come as no surprise to the company. The allegations arise out of the Brannon/Salyer altercation, an incident that triggered Brannon's initial claims. The company was and is well aware of the incident and the events surrounding it. Further, a careful reading of the company's opposition fails to reveal an assertion of actual prejudice. While it is true the company may feel compelled to amend its answer, conduct additional discovery, amend its pending motion and supplement its brief in support of the motion, the expenses inherent in such activities are the necessary consequences of litigation, costs the company (and any litigant) must be prepared to bear. Moreover, because the "new" protected activities arise out of the Brannon/Salyer incident there is no need for Brannon to "restart" the section 105(c) investigatory process by "re-complaining" to MSHA. Were another complaint required the subject cases could be even more delayed than is now the case. There are occasions when related but "new" allegations must be allowed in order to end serial litigation, and this is one. *See e.g.*, *Sec. of Labor o/b/o Lawrence Pendley v. Highland Mining Co.*, 30 FMSHRC 459, 496, n.44 (May/June 2008); *aff'd* 31 FMSHRC 61 (January/February 2009); *appeal docketed*, No. 09-3213, (6th Cir. March 3, 2009).

This stated, fairness requires that the company not be faced with continuously shifting and augmented allegations. Accordingly, while Brannon's motion **IS GRANTED**, his assertions of protected activities now are regarded as fixed. Absent extraordinary circumstances, further such amendments to his complaint will not be allowed.

The company has 20 days from the date of this order should it decide to amend its answer, its motion for summary decision and its memorandum in support of its motion. Brannon will have 15 days from the date of any such amendment(s) to respond. The parties are reminded discovery ends on January 15, 2010. Order Granting In Part Complainant's Motion to Compel (July 24, 2009) at 10. Additional interrogatories, requests for production and depositions must be served and/or conducted by that date.

David Barbour
Administrative Law Judge

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