

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

(202) 434-9980

November 6, 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 AND DENYING IN PART

RESPONDENT'S MOTION TO COMPEL

ORDER REQUIRING PRODUCTION OF DOCUMENTS

AND

PROTECTIVE ORDER

In Docket No. KENT 2009-1225-D the Respondent, Panther Mining LLC (“Panther Mining” or “the company”), moves to compel the Complainant, Billy Brannon, to respond to several interrogatories in the company’s First Set of Interrogatories and to produce certain

documents requested in the company's First Request for Production of Documents. According to the company, Brannon either has objected to the interrogatories and requests and/or has provided incomplete information. Brannon replies that the Respondent's motion is not well taken. In addition, he seeks specific protection from production for a particular document claiming it is shielded by attorney-client privilege. For the reasons stated below, the motion and request are granted in part and denied in part, and the claimant's invocation of attorney-client privilege is recognized in part.

INTERROGATORIES, ANSWERS AND RULINGS

Interrogatory 1. With regard to the allegations in paragraph 6 of the Complaint of Discrimination ("the Complaint")¹:

(a) Identify each document, including witness statements, which relates to the facts alleged. Motion; Exh. A at 1.

Answer: Brannon objects to this interrogatory as being overly broad and not reasonably calculated to lead to the discovery of admissible evidence. For example, as [the company] is well aware, Brannon has filed a civil lawsuit against Cloverlick Coal Company [(Brannon's then employer and a "sister" company of Panther)], and Robert Salyer[,] [a Cloverlick foreman ("Salyer"),] in Harlan [Kentucky] Circuit Court. Every document in that case arguably "relates to the facts alleged" in [paragraph] 6 of the instant Complaint of Discrimination. In addition, every document related to Black Mountain Resources' investigation of the incident "relates to the facts alleged."

Without waiving said objection, a "mine incident report" regarding Salyer's unprovoked assault of Brannon was also completed on 1/23/08. [The company] already has a copy of this

¹Paragraph 6 of the Complaint states:

On January 23, 2008, while he was working underground at Cloverlick Coal's No. 1 mine, Brannon was physically assaulted by a [Cloverlick] foreman, Robert Salyer ("Salyer"). After Brannon complained about said assault to officials of Cloverlick Coal and Black Mountain Resources, [(Black Mountain is the parent company of Cloverlick and Panther)], he was transferred to [Panther's] No. 1 mine by [Black Mountain]. Brannon worked at said mine until the discriminatory acts took place that form the bases of this case.

Complaint at 3.

document. Motion; Exh. C at 1-2.

The company states that Brannon's answer is not responsive, because the company asked Brannon to "identify" each document, including witness statements, relating to the facts alleged and Brannon "did not identify a single document in his possession, nor did he state he has none." Motion 2. The company maintains it is entitled to know the bases for Brannon's claims, and that Brannon knows he need not specifically identify documents filed in formal legal proceedings to which the company is a party, but that he can identify them generically and that Brannon is required to identify each document in his possession that relates to the facts alleged. *Id.*

Brannon responds that he attempted to answer Interrogatory 1 in good faith, that paragraph 6 was included in the complaint as background information, and that for Mine Act's purpose the important thing in the paragraph is not the allegation of assault, but that Brannon complained about the assault to officials of Cloverlick and Black Mountain. Resp. at 3. Moreover, because Panther's attorney represents Cloverlick in the civil suit, Panther is well acquainted with the basis of the suit. Further, since Cloverlick's attorney has deposed Brannon and interviewed everyone with knowledge of the assault, it is pointless to ask Brannon to identify each person about whom the company already knows.²

Ruling: The motion **IS GRANTED IN PART**. I agree with Brannon that the pertinent facts for Mine Act purposes are that Brannon complained to officials of Cloverlick and Black Mountain about the alleged assault and that Brannon was subsequently transferred to Panther's No. 1 mine, where he worked until his employment was terminated. Therefore, within 20 days of the date of this Order, Brannon shall respond to Interrogatory 1(a) by identifying each document, including witness statements, of which he is aware that relates to Brannon's complaint(s) about the alleged assault to Cloverlick and to Black Mountain officials, and he shall identify each document of which he is aware that relates to his subsequent transfer to Panther's mine.

(b) Identify each person who knows about the facts alleged. Motion; Exh. A at 2.

Answer: Brannon, Salyer, the miners who were in the buggy with Brannon at the time of the assault; Rick Raleigh . . . who interviewed the miners o/b/o Panther; Denise Davidson; Otis Doan; Steve Hodges . . . ; Tony Opegard . . . ; Tracy Stumbo (OMSL, P.O. Box 907, Martin, KY 41649); various unknown officials at Black Mountain. Motion; Exh.C at 2.

The company objects that "the miners who were in the buggy with Brannon at the time of

²Counsel for Brannon also makes unflattering observations about the way the company's interrogatories are framed and about opposing counsel's "lawyering" skills. Resp. at 3. Counsel is requested to desist from such observations. Those appearing before the Commission are expected to treat one another with civility at all times. If comments are necessary concerning an attorney's manner of practice, they are made by the Commission and its judges, not by opposing counsel.

the assault” and “various unknown officials at Black Mountain” are vague statements. Motion at 2. It asserts that Brannon should “identify these persons by names[,] or[,] if not by name, in some other manner.” Motion at 3

Brannon responds, *inter alia*, that Interrogatory 1(b) seeks “virtually pointless information.” Resp. at 5.

Ruling: As stated above, as I read the interrogatory, for Mine Act purposes it asks Brannon to identify each person who knows about Brannon’s complaints to officials of Cloverlick and Black Mountain officials about the assault and to identify each person who knows about his subsequent transfer to Panther’s No. 1 mine. The motion **IS GRANTED** as follows: Within 20 days of the date of this Order, Brannon shall identify those of whom he is aware (both miners and company officials) who have knowledge of his complaint(s) and subsequent transfer.

Interrogatory 2: With regard to the allegations in paragraphs 7 and 8 of the Complaint [³] [,]please:

(a) Identify each document, including witness statements, which relates to the facts alleged. Motion; Exh. A at 2.

Answer: Brannon objects to this interrogatory as being overly broad and not reasonably

³Paragraphs 7 and 8 of the complaint state:

7. On April 29, 2008, Brannon’s attorney wrote to Johnny Greene, the Executive Director of the Kentucky Office of Mine Safety & Licensing (“OMSL”), and asked OMSL to file disciplinary charges against Salyer – with the Kentucky Mine Safety Review Commission (“MSRC”) because of Salyer’s assault of Brannon. Brannon, through his attorney, asked OMSL to seek the revocation of Salyer’s foreman’s certificate.
8. As a result of the letter . . . OMSL conducted an investigation of Salyer’s assault of Brannon, OMSL’s chief accident investigator, Tracy Stumbo (“Stumbo”) subpoenaed and interviewed the witnesses to the assault, and Stumbo also subpoenaed and interviewed Salyer, who was still employed by [Black Mountain.] [Footnote deleted].

Complaint at 3-4.

calculated to lead to the discovery of admissible evidence. For example every document in OMSL's investigatory file regarding Salyer arguably 'relates to the facts alleged' in ¶¶ 7-8.

Without waiving the objection, the letter of Johnny Greene referenced in ¶ 7 is being provided. Motion; Exh. C at 2-3.

The company notes that aside from the Greene letter, Brannon merely referred to "every document in OMSL's investigatory file" and that Brannon "should be required to identify and produce every document in his possession relating to the facts alleged." Motion at 3.

Brannon responds that he views the letter of April 28, 2009, as a "protected activity" under § 105(c) of the Mine Act and that he already has provided the letter to the company, despite the fact the company's attorney has a copy. As far as the identities of each person who knows about the facts alleged, Brannon asks why his attorney should "waste his time listing people whom the company already knows – i.e. [Oppegard;] [Brannon;] Johnny Greene; Tracy Stumbo; Salyer and Raleigh." Resp. at 7.

Ruling: The motion **IS GRANTED IN PART**. The company asks Brannon to identify each document, including witness statements, relating to the facts alleged in paragraphs 7 and 8 of the complaint. The pertinent facts alleged in Paragraph 7 are that on April 29, 2009, Oppegard wrote the letter to Greene asking OMSL to file disciplinary charges against Salyer because of the alleged assault. The document relating to the facts alleged is the letter, which the Complainant has identified. Therefore, Brannon has complied with this part of the interrogatory. However, he has not complied with the interrogatory as it relates to Paragraph 8 of the Complaint. As I read the interrogatory, the pertinent facts alleged are that Stumbo subpoenaed and interviewed the witnesses to the assault and that Stumbo subpoenaed and interviewed Salyer. The interrogatory requires Brannon to identify the documents of which he is aware relating to Stumbo's interview of the witnesses and Stumbo's subpoena and interview of Salyer. Within 20 days of the date of this Order, Brannon is ordered to comply by sending the company a list of the documents of which he is aware that relate to Stumbo's interview of the witnesses and Stumbo's subpoena and interview of Salyer. If known, Brannon must describe each document by type (e.g., letter, statement, affidavit, etc.) date, author, and subject matter (a brief summary is sufficient).

(b) Identify each person who knows about the facts alleged, including those who were interviewed by Stumbo. Motion; Exh. A at 2.

Answer: Oppegard; Brannon; Johnny Greene; . . . Stumbo; Raleigh; Salyer. The employees of Cloverlick Coal, a subsidiary of Black Mountain . . . who were interviewed by Stumbo are known to Raleigh. Motion; Exh. C at 3.

The company objects to that part of Brannon's response which states: "[T]he employees of Cloverlick . . . who were interviewed by Stumbo are known to Raleigh." The company

asserts that Brannon should be required to identify the persons if he knows their identities. Motion at 3.

Brannon responds that it is a waste of time for his attorney to identify people who the company already knows, that the only other persons who would have knowledge of those interviewed are the interviewees themselves, and that Brannon “does not actually know who was interviewed.” Resp. at 7-8. Brannon goes on to state his “understanding” that the “miners who were interviewed were the same miners that Raleigh already interviewed.” Resp.at 7.

Ruling: The motion **IS GRANTED**. The statement to which the company objects is a non-response. The interrogatory asks Brannon to identify each person who was interviewed by Stumbo, and Brannon must respond to the interrogatory as asked. This means he must identifying by name (assuming he knows the name) each person he knows who was interviewed by Stumbo. If Brannon cannot identify the person(s), he should so state. Within 20 days of the date of this Order, he is directed to answer the interrogatory as asked.

Interrogatory 3. With regard to the allegations in paragraph 9 of the complaint[,] [⁴] please:

(a) Identify each document[,] including witness statements, which relates to the facts alleged. Motion; Exh. A at 2.

Answer: Brannon objects to this interrogatory as being overly broad and not reasonably calculated to lead to the discovery of admissible evidence. For example, every document in MSHA’s investigation file arguably “relates to the facts alleged” in ¶ 9, which Panther already has in its possession. Motion; Exh. C at 3.

The company asserts that “Brannon should be required to produce the documents in his possession, [and] not refer generally to broad categories of documents.” Motion at 4.

Brannon responds that every document in MSHA’s investigatory file “relates to” Brannon’s discrimination complaint [filed with MSHA], but that Brannon does not have access

⁴Paragraph 9 of the Complaint states:

On September 7, 2007, while Brannon was working in the Panther mine, he filed a discrimination complaint with MSHA . . . regarding [Panther’s] discriminatory treatment of him because, among other things, he had documented safety problems regarding the buggy he was assigned to operate.

Complaint at 4.

to the file and cannot identify each document therein. Further, every document in Brannon's §105(c)(3) complaint arguably "relates to" the initial discrimination complaint, and Brannon asks what purpose is served to identify every pleading in a case file the company already has. Resp. at 4.

Ruling: The motion **IS GRANTED**. Brannon's answer is a non-answer. Paragraph 9 of the complaint states that Brannon engaged in protected activity at the mine by filing a discrimination complaint with MSHA. It further asserts that Brannon was subjected to discrimination because of prior protected activity regarding his documentation of safety problems with his assigned buggy and "other things." Within 20 days of the date of this Order, Brannon shall respond to the interrogatory as asked by identifying each document of which he is aware that relates to the fact he filed the September 7 complaint with MSHA and to the allegations within it. Obviously, he should identify the complaint. He also should identify any documents, including witness statements, filed with the complaint and any documents, including witness statements, that relate to Brannon's assertions of discrimination due to his documentation of safety problems associated with his assigned buggy and other protected activities that he maintains form the bases for the company's alleged discrimination.

(b) Identify each person who knows about the facts alleged. Motion; Exh. A at 2.

Answer: Opeppard, Wes Addington . . . , Brannon, Hodges, Raleigh; Gary Harris, various other MSHA personnel. Motion; Exh. C at 3.

The company states that Brannon should be required to identify the "various other MSHA personnel." Motion at 4.

Brannon responds that the requirement is "frivolous." Resp. at 9.

Ruling: The motion **IS GRANTED**. Brannon must answer the interrogatory as asked. The interrogatory does not require him to speculate as to whom might know he filed a September 7 complaint or who might be aware of the nature of his complaints about the buggy or his other unspecified protected activities, it asks him to identify those he "knows." Within 20 days of the date of this Order, Brannon shall identify those he knows are aware of (1) his filing of the September 7 complaint; (2) his documentation of the safety problems associated with his assigned buggy; and (3) other protected activities that he alleges form the bases for the discrimination he asserted on September 7.

Interrogatory 4. With regard to the allegations of paragraph 11 of the Complaint [⁵][,]

⁵Paragraph 11 states:

On September 23, 2008, Brannon's attorney wrote a letter on Brannon's behalf to Ivan T. Hooker, the

please:

(a) Identify each document which relates to the facts alleged. Motion; Exh. A at 3.

Answer: Brannon objects to [the] interrogatory as “overly broad and outside . . . his knowledge.” For example, “every document regarding the issuance of a citation as a result of the letter arguably “relates to the facts alleged” in ¶ 11. If Panther contested said, citation, then every document related to that contest proceeding is arguably “related to the facts alleged.”

Without waiving said objection, the letter referenced in [paragraph] 11 (a copy of which was mailed to Raleigh on 9/23/08), [C]itation [No.] 7496827 issued by MSHA to Panther . . . and the accompanying MSHA inspection notes.⁶ Motion; Exh. C at 4.

The company asserts that Brannon’s response is “vague” and that Brannon “should be required to identify and produce responsive documents. Motion at 4.

Brannon states the crux of the allegation in paragraph 11 is that Brannon engaged in a protected activity through his attorney when the attorney wrote to Hooker, and that even though the interrogatory is “overly broad,” Brannon nonetheless identified three documents, all of which are in the company’s possession. Resp. at 10.

Ruling: The motion **IS DENIED**. As I read the Complaint, the pertinent facts alleged are that Brannon’s attorney wrote a letter on September 23 to the MSHA District Manager regarding the company’s alleged failure to provide Brannon with SCRS’s. As Brannon notes, the company does not deny that it was sent and presumably still has a copy of the letter. Brannon identified the citation that was issued as a result of the inspection and the inspector’s notes associated with the citation. He need not do more.

(b) Identify each person who knows about the facts alleged. Motion; Exh. A at 3.

Answer: Opegard; Wes Addington . . . ; Brannon; Hodges; Gary Harris; other MSHA personnel. Motion; Exh. C at 4.

MSHA District Manager responsible for regulating
the Panther mine, regarding Panther’s Mining’s
failure to provide Brannon with the required
SCSR’s.

Complaint at 4.

⁶Brannon asserts Citation No. 7496827 and the accompanying MSHA inspector’s notes already have been given to the company as a result of the company’s production of documents request in Docket No KENT 2009-1259-D.

The company states that Brannon should be required to identify the “other MSHA personnel.” Motion at 4.

Brannon responds he does not know who the “other MSHA personnel” are, but he “assumes” there are unnamed employees of MSHA who know about the letter. Resp. at 10.

Ruling: The motion **IS DENIED**. I conclude Brannon has answered the interrogatory to the best of his ability. His reference to “other MSHA personnel” is based on his assumption that there are other MSHA employees who know about the September 23 letter, but that he does not know this for a fact. Brannon’s assumption is reasonable, and I find that he has done what he could to respond to the interrogatory.

Interrogatory 5. With regard to the allegations in paragraph 13 of the Complaint [7][,] identify all facts, persons with knowledge and documents, including witness statements, regarding the investigation conducted by Guy Fain. Motion; Exh. A at 3.

Answer: Brannon objects to this interrogatory as being overly broad and outside the scope of his knowledge. Without waiving said objection, Brannon states that . . . [the company] sat in on the interviews of numerous witnesses who were interviewed by [Fain], including the interview of Shelton, whereas Brannon did not attend any of these interviews. Motion; Exh. C at 4.

The company states that Brannon should be required to identify the persons known to him, as well as the facts and documents that support the allegations in paragraph 13, that it is not responsive for Brannon to assume that Panther has all of the information requested. Motion at 4. According to the company, although Brannon refers to statements he gave to MSHA, he gave “numerous” such statements and he should be required to identify them.

⁷Paragraph 13 states:

As a result of Brannon’s filing of the safety discrimination complaint referred to in ¶ 9, MSHA assigned a special investigator, Guy Fain (“Fain”), to investigate the case. As part of his investigation, Fain interviewed employees of Panther Mining, including Shelton, regarding Brannon’s allegations of discrimination and unsafe mining practices.

Complaint at 4-5.

Brannon does not specifically respond to the company's assertions.

Ruling: The motion **IS GRANTED**. Brannon must respond to the interrogatory as asked. This means that within 20 days of the date of this Order, Brannon must identify facts and documents within his knowledge regarding Fain's investigation. For example, if Brannon has a letter from MSHA informing him of Fain's appointment as the investigator, it must be identified. If Brannon knows the names of persons who assisted Fain in his investigation, the persons must be identified, and if Brannon or anyone he knows provided a written statement(s) to Fain as part of Fain's investigation, the statement(s) must be identified. If Brannon has no knowledge of such facts and/or documents, he must so state.

Interrogatory 6. With regard to the allegations of paragraph 14 of the Complaint [⁸][,] please;

(a) Identify each document, including witness statements, which relates to the facts alleged. Motion; Exh. A at 3.

Answer: Brannon objects to this interrogatory as being overly broad. For example, all documents filed in said case - which already are in the possession of Panther - arguable "relates to the facts alleged." in ¶ 14. Motion; Exh. C at 5.

The company asserts that Brannon should be required to identify responsive documents relating to the allegations in paragraph 14 and produce them. It also notes that Panther advised Brannon he can "generically identify" and need not produce officially filed documents in identified legal proceedings. Motion at 5.

Brannon does not specifically respond to the company's assertions.

Ruling: The motion **IS GRANTED**. Within 20 days of the date of this Order, Brannon must respond to the interrogatory as asked. Paragraph 14 states that on November 20, 2008, Brannon filed a complaint of discrimination with the Commission. Brannon's response should identify the complaint, any documents filed with it, and any documents upon which the

⁸Paragraph 14 states:

On November 20, 2008, while Brannon was still working at the mine, he filed a Complaint of Discrimination against Panther Mining - with the . . . [Commission] - under § 105(c)(3) of the Mine Act, regarding the matters set forth ¶[¶] 10-12 herein.

Complaint at 5 (footnote deleted).

complaint was based.

(b) Identify each person who knows about the facts alleged. Motion; Exh. A at 3.

Answer: Opegard; Brannon; Hodges; Chief Judge Lesnick; Judge Barbour; Raleigh; various other employees of Panther Mining. Motion; Exh. C at 5.

The company asserts that Brannon should be required to identify the “various other employees of Panther Mining.” Motion at 5.

Brannon does not specifically respond to the company’s assertions.

Ruling: The motion **IS GRANTED**. If Brannon knows the identity of the any of the “various other employees,” within 20 days of the date of this Order, he must provide Panther with the names of said employees. If Brannon does not know the identity of any of the “various other employees,” within 20 days of the date of this Order, he must so state.

Interrogatory 7: With regard to the allegations in paragraphs 15 and 16 of the complaint [⁹][,] please:

⁹Paragraph 15 of the complaint states:

On Friday, February 27, 2009, at the end of Brannon’s work shift, he drove to the MSHA field office in Harlan, Kentucky[,] to file another safety discrimination complaint against Panther Mining, pursuant to § 105(c) of the Mine Act, and to report to MSHA various unsafe conditions at [the company’s] No. 1 mine. Brannon arrived at the MSHA office at approximately 4:30 p.m.

Complaint at 5.

Paragraph 16 of the complaint states:

After he filed the discrimination complaint [footnote deleted], Brannon spoke with Craig Clark, a[n] MSHA coal mine inspector, for about ½ hour outside the MSHA office. During this conversation, Brannon told Inspector Clark about various unsafe conditions at the mine.

(a) Identify each document, including witness statements, which relates to the facts alleged. Motion; Exh. A at 4.

Answer: Brannon objects to this interrogatory as being overly broad. For example, every document filed or produced in said case, including witness statements taken by MSHA (the interviews of which Panther sat in on)[,] arguably “relate to the facts alleged in ¶¶ 15-16.

Without waiving said objection, the complaint referenced in ¶ 15 . . . already is in the possession of Panther. Motion; Exh. C at 5.

The company argues that Brannon “should be required to identify and produce the requested documents or make clear reference to documents filed in specific legal proceedings.” Motion at 5-6.

Brannon does not specifically respond to the company’s assertions.

Ruling: The motion **IS GRANTED**. Brannon has not responded fully to the interrogatory. Brannon identified the complaint. However, it seems likely there are other documents relating to the February 27 complaint that Brannon has not identified and/or documents relating to the reporting of alleged unsafe working conditions. Within 20 days of the date of this Order, Brannon must identify any documents filed with the complaint. He also must identify any documents that relate to the allegedly unsafe working conditions upon which the complaint is based. If no such documents exist, he must so state. In addition, he must identify any documents that relate to his half-hour discussion with Inspector Clark about alleged unsafe conditions at the mine. If Brannon gave Clark any such documents, he must so state and identify them. If Brannon discussed any such documents with Clark, he must so state and identify them.

(b) Identify each person who knows about the facts alleged. Complaint; Exh. A at 4.

Answer: Brannon; Craig Clark . . . ; Opegard; Addington; Raleigh; Ross Kegan . . . ; Hodges; Gary Harris . . . ; and other MSHA personnel. Motion; Exh. C at 5.

The company asserts that Brannon should identify the “other MSHA personnel.” Motion at 5.

Brannon does not specifically respond to the company’s assertions.

Ruling: The motion **IS GRANTED**. Within 20 days of the date of this Order, if Brannon knows the identities of any of the “other MSHA personnel,” he must so state. If he does not know the identities, but simply assumes there are “other MSHA personnel” who know about the facts alleged, he must so state.

Complaint at 5.

Interrogatory 8: With regard to the allegations in paragraphs 18-23 of the Complaint [10][,] please:

(a) Identify each document[,] including witness statements, which relates to the facts alleged. Motion; Exh. A at 4.

Answer: Brannon objects to this interrogatory as being overly broad. For example, every document in MSHA's investigatory file and every document in this discrimination proceeding arguably "relate to the facts alleged" in ¶¶ 18-23. Motion; Exh. C at 6. In addition, Panther's interviews of the employees who were present during all or part of the meeting between Shelton and Brannon "relate to the facts alleged." *Id.*

The company argues that Brannon should be required to identify the documents as requested and should produce them. Motion 6.

With regard to production, Brannon responds he does not have MSHA's investigatory file, and he does not have the statements Panther took of its employees who were present during the meeting on February 28. Response 12.

Ruling: The motion **IS GRANTED**. Brannon has not responded fully to the interrogatory which simply asks that Brannon identify each document, including witness statements, which relates to the facts alleged in paragraphs 18-23 of the Complaint. If there are documents within his knowledge that he can identify arising out of or related to the February 28 meeting, Brannon must identify them within 20 days of the date of this Order. For example,

¹⁰Paragraphs 18 - 23 of the Complaint relate to the alleged events of Saturday, February 28, 2009. Brannon asserts he went underground at 5:55 a.m. While traveling to his work area, Brannon was told by a mine foreman that Shelton, the mine superintendent, wanted to have a crew meeting, and Brannon returned to the surface. The meeting began at 6:40 a.m. in Shelton's office. Management officials and hourly employees were present. Brannon asserts that Shelton stated Brannon was "corrupting . . . [the] day shift and . . . [the] mine, that he wasn't performing his job satisfactorily, and that he was causing all of the mine's problems." Complaint at 6. The complaint further states that during the meeting, Shelton cursed Brannon, gave him a "written warning" for his alleged unsatisfactory job performance, threatened to fire him, and transferred him from the day shift to the second shift effective Monday, March 2. *Id.* The Complaint quotes Shelton as telling Brannon, "Whenever a day shift job comes open, you can think to yourself, 'If I wasn't suing this company, that job might have been mine'"(*Id.*) and that as long as he worked for Panther or another Black Mountain company, he would remain on the second shift. Complaint at 6-7. Finally, the Complaint states that during the February 28 meeting, Shelton mentioned Craig Clark, the MSHA inspector with whom Brannon had spoken in the Harlan MSHA office on February 27, and that Shelton said he knew Brannon and Clark were related. Complaint at 7. The Complaint asserts that Shelton also said of Clark, "I can't stand the ground he walks on either." *Id.*

Brannon asserts Shelton gave him a “written warning”; yet he does not mention it in his answer to the interrogatory.

(b) Identify each person who knows about the facts alleged. Motion; Exh. A at 4.

Answer: Brannon; Shelton; all of the miners who were present during the “meeting”; Oppegard; Addington; Hodges; Harris; MSHA’s special investigators. Motion; Exh. C at 6.

The company argues that Brannon should be required to identify the miners at the meeting, as well as the special investigators. Motion at 6.

Brannon responds that he has produced the names of those he knows who were present at the meeting and who are not miners, and that those he knows who are miners are protected by the miner witness rule, Commission Rule 62 (29 C.F.R. §2700.62), and that under the rule he is not required to identify the miners until two days prior to the hearing. Resp. at 13.

Ruling: The motion **IS GRANTED IN PART**. If Brannon knows the names and addresses of any MSHA special investigators who know about what allegedly happened during the February 28 meeting, he must state as much. He also must state the names of the investigators. He must do these things within 20 days of the date of this Order.

With regard to the identity of miners, the names of those miners who Brannon knows have knowledge of the facts relating to the February 28 meeting and who he does not intend to call as witnesses must be disclosed to the company by December 15, 2009, which is 30 days before the close of discovery. Between receiving the disclosure and the end of discovery, the company must complete any additional discovery with regard to the named miners.

If there are miners who Brannon believes have knowledge of the facts relating to the February 28 meeting and who he intends to call as witnesses, he must disclose the names and contact information of the witness miners to the company two business days before the hearing convenes.¹¹ 29 C.F.R. § 2700.62.

Interrogatory 9: With regard to the allegations in paragraphs 24-25 of the Complaint [12][,] please:

¹¹The hearing is presently scheduled to begin on March 2, 2010, which means the names must be disclosed by 8:30 a.m., Friday, February 26, 2010.

¹²Paragraphs 24 and 25 of the Complaint state the complaint’s “1st Cause of Action”: to wit, that the company “verbally abused and threatened Brannon on February 28, 2009, because of Brannon’s ‘protected activities’ as set forth in paragraphs 6, 7, 9, 11, 14, 15 and 16 of the complaint,” and that the “verbal abuse” and “threats” were “discriminatory and retaliatory” and in violation of section 105(c)(1) of the Act. 30 U.S.C. § 815(c)(1). Complaint at 7.

(a) Identify each document, including witness statements, which relates to the facts alleged. Motion; Exh. A at 4.

Answer: Brannon objects to this interrogatory as being overly broad and redundant. Motion; Exh. C at 6.

The company argues Brannon has not responded to the interrogatory as asked and should be required to do so. Motion at 7.

Brannon responds he rests on his previous responses. Resp. at 13.

Ruling: The motion **IS DENIED**. Paragraphs 24 and 25 of the Complaint do not raise factual assertions new to the case. Rather, they present the legal conclusion that the company alleges results from previously asserted facts. Those facts have been the subject of prior interrogatories and rulings, and Brannon is correct in describing Interrogatory 9(a) as redundant.

(b) Identify each person who knows about the facts alleged. Motion at 5.

Answer: Brannon objects to this interrogatory as “overly broad and redundant.” Motion; Exh. C at 6.

The company argues Brannon has not responded to the interrogatory as asked and should be required to do so. Motion at 7.

Brannon responds that he rests on his previous responses. Resp. at 13.

Ruling: For the reason given regarding Interrogatory 9(a), the motion **IS DENIED** with regard to Interrogatory 9(b).

(c) State all facts and identify all documents and persons with knowledge that support your allegations that Shelton verbally abused or threatened you because of “protected activities.” Motion; Exh. A at 5.

Answer: Brannon objects to this interrogatory as being overly broad and redundant. Without waiving said objection, Brannon states that the “persons . . . who support [his] allegations are unknown at this time. In addition, the names of any such witnesses need not be provided . . . until two days before the hearing, pursuant to 20 C.F.R. § 2700.62.” Motion; Exh. C at 6-7.

The company argues that Brannon has not responded to the interrogatory as asked and should be required to do so. Motion at 6-7.

Brannon responds that he rests on the answers and objections given in his original

response. Resp. at 13

Ruling: The motion **IS DENIED** with regard to Interrogatory 9(c). Like Interrogatories 9(a) and 9(b), Interrogatory 9(c) is redundant and need not be answered further.

Interrogatories 10 and 11. The interrogatories will be ruled on together.

Interrogatory 10: With regard to the allegations in paragraphs 26-27 of the Complaint [13][,] please:

(a) Identify each document, including witness statements, which relates to the facts alleged.

(b) Identify each person who knows about the facts alleged.

(c) Identify all facts, documents, and persons which have knowledge that support your allegations that Shelton gave you a written warning because of alleged “protected activities.” Motion; Exh. A 4-5.

Interrogatory 11: With regard to the allegations in paragraphs 28-29 of the Complaint [14][,] please:

(a) Identify each document, including witness statements, which relates to the facts alleged.

(b) Identify each person who knows about the facts alleged.

(c) Identify all facts, documents and persons with knowledge that support your allegations that Shelton transferred you to the 2nd shift because of the alleged protected activities.” Motion; Exh. A at 5-6.

¹³Paragraphs 26 and 27 state the Complainant’s “2nd Cause of Action”: to wit, that the company and Shelton issued a “written warning” to Brannon on February 28 because of alleged “protected activities” as set forth in paragraphs 6,7, 9, 11, 14, 15, and 16, and that the “written warning” was “discriminatory and retaliatory” and violated section 105(c)(1) of the Mine Act. Complaint at 7.

¹⁴Paragraphs 28 and 29 state the complainant’s “3rd Cause of Action”: to wit, that effective March 2, 2009, the company and Shelton transferred Brannon to the second shift, that the second shift is a “less desirable shift,” a shift that Brannon had told the company he preferred not to work, that the transfer took place because of “protected activities” set forth in paragraphs 6, 7, 9, 11, 14, 15 and 16, that the transfer was “discriminatory and retaliatory” and that it violated section 105(c)(1) of the Mine Act. Complaint at 7-8.

Answer: Brannon objects that the interrogatories are “very broad and redundant.” Motion; Exh. C at 7.

The company asserts that Brannon should be required to respond to the interrogatories as asked. Motion at 7.

Brannon responds that he rests on his previous answers and objections. Resp. at 13.

Ruling: The motion **IS DENIED** with regard to Interrogatories 10 and 11. Paragraphs 26, 27, 28 and 29 of the Complaint do no raise facts or assertions new to the case. Rather, they summarize the legal conclusions the Complainant alleges result from previously asserted “facts.” Those “facts” have been the subject of prior interrogatories and rulings, and Brannon is right to describe Interrogatories 10 and 11 as redundant.

PRODUCTION OF DOCUMENTS

The company has moved for the production of all documents “identified or referred to” in the Complainant’s answers to the interrogatories. Motion at 7; *see* Motion; Exh. B. Pursuant to the rulings set forth above, within 20 days of the date of this Order, the Complainant shall produce all documents in his possession that are identified or referred to in the responses he has been ordered to give. The documents shall be produced at the company’s office: 158 Central Street, Benham, Kentucky.

PRODUCTION OF E-MAILS

Brannon, through his attorney, Tony Oppegard, seeks to exclude from production an e-mail message Brannon sent to Oppegard on February 28, 2009. Oppegard maintains the message, a copy of which he has submitted for my review, memorializes Brannon’s recollection of what was said during the meeting between Shelton and Brannon on the morning of February 28. Oppegard invokes attorney-client privilege for the e-mail and essentially seeks an order barring its production.

I have reviewed the message, the first part of which is dated February 28, 2009. In it Brannon describes a meeting, presumably on February 27, that he had with others at the mine. He describes his version of who said what to whom and he hypothesizes about actions the company might take. Later in the e-mail, Brannon states his understanding of the relationships of various miners. Finally, in the penultimate part of the e-mail, Brannon gives his recollection of a topic discussed on February 28 and who said what to whom about it. The e-mail closes with Brannon telling his attorney to call if his attorney has any questions.

I conclude a majority of the February 28 e-mail is, as Complainant’s attorney maintains, protected by the attorney-client privilege. The message relates to the confidential communication of information by a client to his lawyer to facilitate the rendering of legal services by the

attorney. The information is in the form of the client's recollection of conversations and facts that relate to issues in the case the attorney is presenting on the client's behalf. These parts of the e-mail are not subject to disclosure.¹⁵

However, three small portions of the e-mail fall outside the attorney-client privilege. They are Brannon's description of his understanding of the relationships of various persons who may or may not be involved in the case, Brannon's suggestion his attorney call him if his attorney has questions, and Brannon's closing words and "signature." These are subject to disclosure and must be produced.

Accordingly, within 20 days of the date of this Order, Brannon **SHALL PRODUCE** for the company at its Benham, Kentucky, office a redacted copy of the February 28 e-mail. Parts of the copy that are not redacted shall be: (1) the paragraph beginning with the name "Josh Napier" and ending with the sentence, "So where's that leave me at lol"; (2) two sentences in the last paragraph, the first beginning "If you need any help. . ." and the second beginning, "Tony . . ."; and (3) the last four words of the e-mail, those being Brannon's closing words and name.

David F. Barbour
Administrative law Judge

Distribution:

MaryBeth Bernui, U.S. Department of Labor, Office of the Solicitor, 618 Church Street,
Suite 230, Nashville, TN 37219-2456

Tony Opegard, Esq., P.O. Box 22446, Lexington, KY 40522

Wes Addington, Esq., Appalachian Citizens Law Center, 317 Main Street, Whitesburg, KY
41858

Stephen M. Hodges, Esq., Penn, Stuart & Eskridge, P. O. Box 2288, Abington, VA 24212

¹⁵I have placed the copy of the February 28 e-mail in the record under seal, where it is subject to review only by the Commission or another reviewing body.