FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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November 13, 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 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

ORDER DENYING MOTION FOR PARTIAL SUMMARY DECISION

The Respondent, Panther Mining, LLC ("Panther" or "the company") has moved for partial summary decision in the proceeding docketed as KENT 2009-302-D on the grounds that certain alleged activities claimed as a basis for discrimination under the Mine Act are not protected and that certain acts claimed as adverse actions do not justify Mine Act remedies. The Claimant opposes the motion. Commission Rule 67 provides a judge may grant summary decision as to all or part of a proceeding if there is no genuine issue as to any material fact and if the moving party is entitled to such a decision as a matter of law. 29 C.F.R. § 2700.67. Because I conclude genuine issues as to material facts remain, I cannot grant the motion.

THE COMPLAINT

______Docket No. KENT 2009-302-D is a discrimination case based on a complaint brought under section 105(c)(3) of the Mine Act by Billy Brannon against Panther. The case has been consolidated with two related proceedings: KENT 2009-1225-D, a second section 105(c)(3) discrimination case brought by Brannon against Panther; and KENT 2009-1259-D, a section 105(c)(2) discrimination case brought by the Secretary on behalf of Brannon against Panther. The consolidated cases will be heard beginning on March 2, 2010.

In KENT 2009-302-D, Brannon charges he was discriminated against because he engaged in protected activity by: (1) having his attorney write to mine management of Black Mountain Resources (Black Mountain), the parent company of Cloverlick Coal Company, LLC (Cloverlick),where Brannon then worked, and inform management that Brannon would file a civil suit in Kentucky state court against Black Mountain and Cloverlick because Brannon was allegedly assaulted with a hammer by Robert Salyer, a Cloverlick foreman (Complaint at ¶ 6) [[1]]; (2) having his attorney write to the executive director of the Kentucky Office of Mine Safety and Licensing (OMSL) and ask the OMSL to file disciplinary charges against Salyer because of Salyer's alleged assault on Brannon (Complaint at ¶ 7); (3) filing a discrimination complaint with MSHA regarding Panther's alleged discriminatory treatment because of Brannon's alleged documentation of safety problems with a buggy Brannon was assigned to operate at Panther's mine (Complaint at ¶ 9); (4) having his attorney write to the MSHA district manager regarding the company's alleged failure to provide Brannon with required self-contained, self-rescue devices (SCSR's) (Complaint at ¶ 11); (5) filing the instant discrimination complaint with the Commission (Complaint at ¶ 14); (6) filing another discrimination complaint against the company at the MSHA field office in Harlan, Kentucky and reporting to MSHA various, unsafe conditions at the company's mine (Complaint at ¶ 15); and (7) telling an MSHA inspector about various, unsafe conditions at the mine, including safety problems with the buggy he was assigned to operate. (Complaint at ¶ 16). *See* also Complaint at ¶ 17.

Because of the way the complaint was worded, it was not clear to me whether Brannon was indeed claiming that all of the listed activities were protected under the Mine Act. I, therefore, requested he supplement the record by listing all of the activities for which he was claiming protection. Order to Supplement the Record (May 29, 2009). In response, Brannon revised his list of protected activities as follows:

1st Cause of Action:

[1] Complaining to management . . . about . . . Salyer assaulting him[;]

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[1]Cloverlick and Panther are sister companies. Both are controlled by Black Mountain. After the alleged assault, Brannon was transferred from Cloverlick's mine to Panther's mine, where he continued to work until he was discharged. Following his discharge, he was economically reinstated pending the outcome of these cases.

[2] Notifying Rick Raleigh that Brannon would be filing a civil lawsuit against Cloverlick Coal . . . , as set forth in ¶ 6 of the [c]omplaint[;]

[3] Requesting OSML to file disciplinary charges against . . . Salyer; as set forth in ¶ 7 of the [c]omplant[;] and

[4] The filing of Brannon's civil law suit as set forth in ¶ 9 of [the c]omplaint[.]

2nd Cause of Action:

[1] [A]ll of the protected activities set forth in the "1st Cause of Action"[;]

[2] [A]ccurately completing the forms and checklists set forth ¶ 12 of . . . [the c]omplaint[;[2]]

[3] Complaining to . . . management officials about having to walk from head drive to head drive, during which he did not have access to two SCSR's, as set forth in ¶ 15 of the [c]omplaint.[3]

Supplementation of Record (June 15, 2009).

MOTION FOR PARTIAL SUMMARY DECISION

Following the receipt of Brannon's supplementation of the record, the company filed its motion for partial summary decision. For the purposes of the motion, the company accepts as true the following facts as stated in the complaint and in the supplement:

1. [On January 23, 2008,] Brannon was physically assaulted . . . by a mine foreman, Salyer, while working at a mine operated by a Panther affiliate, [Cloverlick]. Complaint at ¶ 4.

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[2]Paragraph 12 of the complaint asserts that Brannon completed pre-printed company checklists regarding the condition of the battery operated buggy he was assigned, as well as the condition of the head drives and belt take up areas that he was responsible for maintaining and that in completing the forms he documents unsafe conditions on several occasions. Complaint at 3.

[3]Paragraph 15 of the complaint asserts that having to walk from head drive to head drive was hazardous because Brannon was not always within 25 feet of two SCSR's as required by the company's SCSR storage plan and that Brannon complained about the hazard to the mine superintendent and to the mine foreman. Complaint at 4.

> 2. On April 25, 2008, Brannon's attorney informed Cloverlick's representative, Raleigh, that Brannon intended to file suit against Cloverlick over the Salyer incident. Complaint at ¶ 6.
>
> 3. On April 29, 2009, Brannon's attorney wrote . . . [the OMSL] requesting that it take certain actions against Salyer for the alleged assault, and OMSL conducted an investigation. Complaint at ¶ 7.
>
> 4. On June 26, 2009, Brannon filed a civil suit against Cloverlick and Salyer in a Kentucky state court for compensatory and punitive damages for assault and battery and intentional infliction of emotional distress. Complaint at ¶ 9.

In addition, the company notes Brannon's assertions that[,] because he engaged in protected activity, the company discriminated against him when company officials "spoke disparagingly" about him, encouraged his co-workers "to shun him," and imposed "more onerous[,] unsafe working conditions on him." Complaint at ¶¶ 21, 22. The company argues that neither of the alleged protected activities nor the alleged discriminatory acts are covered by the Mine Act.

THE PARTIES' ARGUMENTS

THE ASSAULT AND THE RESULTANT STATE MATTERS

In the company's view, the fact that Brannon's attorney wrote to the OMSL, advised it of Salyer's assault and requested state disciplinary action against Salyer, as well as the fact the letter triggered an investigation of the incident by the OMSL, are not activities protected under the Mine Act. Motion at 3. Therefore, even if they resulted in management personnel speaking disparagingly about Brannon, urged his shunning and imposed unsafe working conditions on him (Complaint at ¶¶ 20, 22), the company's actions would not violate the Act, because the actions in which Brannon (and through Brannon, his attorney) engaged are not protected. The company states that section 105(c)(1) of the Act bars discrimination because, *inter alia*, a miner has filed or made a complaint "under or related to the Act" (30 U.S.C. § 815(c)(1))[,] and Brannon's asserted protected actions arise under state law[,] not under the Mine Act. Motion at 3. Therefore, the threat to file a suit in state court based on the January 23, 2008, assault and the filing of the suit are not protected. Nor is writing to the state agency requesting it discipline Salyer and asking for and being granted an investigation of the Salyer/Brannon incident by the agency. In fact, according to the company, "None of Brannon's actions alleged in the complaint's paragraph 4 [(Salyer's assault on Brannon)]; paragraph 6 [(Brannon's attorney

informing the company that Brannon would sue the company and Salyer over the assault)]; paragraph 7 [(the April 29, 2008 letter of Brannon's attorney to OMSL and the state agency's subsequent investigation)] are 'complaints under or related to' the Mine Act." Motion at 5; *see also* Resp.'s Supplemental Memo. at 2-3 (September 29, 2009).

Brannon responds that the activities with which the company takes issue are protected under the Act and that Brannon "need not invoke the Mine Act to be protected under it." Response at 2. Brannon cites several Commission decisions which he argues establish the proposition that a miner's contacting of state agencies regarding health or safety hazards is protected. *Id.* at 2-3.

THE ALLEGED ADVERSE ACTIONS

The company also takes issue with Brannon's charge in ¶ 20 of the complaint that Brannon was discriminated against when company officials "spoke disparagingly" of him and "encouraged [his] co-workers to shun him" because of the above alleged, protected activities. Even if Brannon's activities are protected – and the company maintains they are not – in the company's view, speaking disparagingly and encouraging shunning are not types of conduct prohibited by section 105(c). This is because section 105(c) does not "address every slight or negative action which can occur in the workplace, especially those which are vague and subjective[,] such as encouraging shunning and talking disparagingly. Motion at 6-7; *see also* Resp.'s Supplemental Memo. at 3.

Brannon, citing to *Secretary of Labor on behalf of Jenkins v. Hecla-Day Mines Corporation*, 6 FMSHRC 1842, 1847-1848 (August 1984), argues that such actions can indeed constitute prohibited discriminatory actions in that they can subject a miner to a detriment in his employment relationship. Resp. at 6-7. He also notes that the Act should be construed liberally. *Id.* at 7-8 (*quoting Secretary of Labor on behalf of Mark Gray v. North Star Mining, Inc.*, 27 FMSHRC 1 (January 2005)).

RULING

PROTECTED ACTIVITY

As the company correctly points out, the Act bars discrimination because, *inter alia*, a miner has filed or made a complaint "under or related to the Act" (30 U.S.C. § 815(c)(1)). Beginning with its seminal case, *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (October 1980), the Commission made clear that when an alleged protected activity is not expressly protected under the language of section 105(c)(1) of the Act – for example, when the complaint does not assert he or she suffered discrimination because the complainant filed or made a safety complaint related to the Act and its implementing regulations, instituted proceedings or testified in proceedings brought under or related to the Act or suffered discrimination because of any other activity expressly permitted by the Act – the activity still

may be protected if it furthers the purpose of the Act, always being mindful that the Act "is remedial legislation, and is[,] therefore[,] to be liberally construed." 2 FMSHRC at 2789.

In legislative findings set forth at the beginning of the Act, Congress stated that the first priority of the mining industry must be the "health and safety of [the industry's] most precious resource – the miner" (30 U.S.C. § 801(a)) and that there is an "urgent need to provide more effective means and measures for improving . . .practices in the Nation's mines in order to prevent . . . serious physical harm [to miners]" 30 U.S.C. § 801(c). Congress sought to implement these findings by directing the Secretary of Labor and the Secretary of Health Education and Welfare to develop and promulgate mandatory safety and health standards with which operators and miners must comply. 30 U.S.C. § 801(g). It further afforded miners specific protections. It did not, however, afford miners protection from all workplace hazards. In this regard it is significant that under the Mine Act, unlike the OSH Act, operators are under no obligation to provide equipment and a place of employment "free from recognized hazards that are causing or are likely to cause . . . serious physical harm." 29 U.S.C. § 654(a)(1). As a consequence, conditions or practices may exist at a mine that are likely to cause or that actually cause serious physical harm yet, which do not contravene the Act. In like manner, miners may engage in activity that is arguably related to safety but, because the activity is not "under or related to the Act," the activity is not protected. 30 U.S.C. § 815(c)(1). Thus, when ruling on whether an activity is protected, the question before a judge is not whether the activity is related to safety, *per se*, but, as *Pasula* teaches, whether it is related to the activities specified in section 105(c)(1) or whether the activity furthers rights granted miners by the Act or otherwise furthers the purposes of the Act.

Turning to the motion at hand, the Complainant lists as its first cause of action that Brannon complained to mine management about Salyer's alleged assault. Supplement (June 15, 2009). As noted, the company accepts the allegation as true. Therefore, the question is whether complaining to management about the assault is a protected activity. It may be or it may not be. Because I cannot determine the answer on the basis of the record as it now stands, I must deny the motion as it relates to the allegation and Brannon's first cause of action. In denying the motion, I am nonetheless cognizant that, in the abstract, complaining to mine management about an assault does not necessarily relate to complaining about a violation of a mandatory standard, instituting and testifying in a proceeding brought under the Act, being the subject of medical evaluations and potential transfer under a mandatory health standard, or to the exercise of any other right specifically granted by the Act or to furthering the Act's purposes. However, without hearing the evidence, I cannot rule out the fact that Brannon might be able to show that his complaint about the assault is related to his espousal of a specific right afforded by the Act; or that his complaint furthers rights guaranteed miners by the Act or furthers the Act's purposes. If he can do any of these things, he will establish he engaged in protected activity when he complained to management about the assault. If he cannot, his assertion of protected activity related to the assault complaint will fail. Trial of the issue is necessary.

THE STATE COURT SUIT AND CONTACTING THE STATE AGENCY

In like manner, I conclude that while filing a civil suit in state court against a sister company and its foreman based on an assault and seeking state disciplinary action against the foreman because of the assault – actions the company accepts as true – are not activities specifically protected under the Act, at trial Brannon might be able to show that filing the suit against Salyer and Cloverlick and seeking state disciplinary action by the OMSL against Salyer for the assault is related to Brannon's espousal of a specific right afforded by the Act; or, alternatively, that filing the suit and seeking state discipline furthered rights guaranteed miners by the Act or otherwise furthered the Act's purposes. If he can do any of these things, he will establish he engaged in protected activity when he complained to management about the assault. If he cannot, his assertion of protected activity related to the assault and his complaint to OMSL will fail. The issue must be tried before it can be properly decided.

In reaching this conclusion, I have fully considered the fact the Complainant brought suit in a *state* court and complained to a *state* agency and have not found either way of proceeding to run afoul of Brannon's claim of protected activity. It is not the venue that is determinative. It is whether the activity relates to an activity specifically protected by the Act, whether the activity relates to an alleged violation of a mandatory safety or health standard, or whether the activity otherwise furthers rights guaranteed miners by the Act or furthers the Act's purposes. There is nothing novel or unprecedented in this conclusion. Commission judges long have held that otherwise protected activities does not lose Mine Act protection if it takes place in at a site not regulated or authorized by the Act. *See, e.g.*, *Johnson v. Boren, Inc.* 3 FMSHRC 926, 933 (April 1981) (Judge Lasher) (*complaint to county health department protected*); *see also*, *Response at 3, n.2*.

ADVERSE ACTIONS

While I agree with the company that section 105(c) does not "address every slight or negative action which can occur in the workplace" (Motion at 6-7), I disagree that actions such as "encouraging shunning" or "talk[ing] disparagingly" necessarily fall outside of the Act's parameters. *Id*. They might or they might not. Although there is some disagreement in the federal circuits on this point, I concur with Brannon that the better view is, if the actions are motivated by a complainant's protected activity, they can constitute prohibited behavior if they subject a miner to a detriment in his or her employment relationship or if they chill the exercise of protected rights by a reasonable complainant and/or by the complainant's reasonable co-workers. Resp. at 6-7 (*and cases cited therein*). As with determining protected activity, the factual context within which the actions take place is vital. Therefore, on the basis of the present record, it would be premature to rule the actions of which the company complains are outside the boundaries of the Act.

ORDER

For all of these reasons, the company's motion for partial summary decision **IS DENIED**.

David Barbour
Administrative Law Judge

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