

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 NEW JERSEY AVENUE N. W., SUITE 9500

WASHINGTON, D.C. 20001

(202) 434-9980

November 18, 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 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 GRANTING IN PART AND DENYING IN PART
COMPLAINANT’S MOTION TO COMPEL

In Docket No. KENT 2009-1225-D, the Complainant, Billy Brannon (“Brannon”), moves to compel the Respondents, Panther Mining, LLC (“Panther” or the “company”) and Mark D. Shelton (“Shelton”), the superintendent of Panther’s No. 1 mine, to answer Interrogatory 16 of Brannon’s 1st Set of Interrogatories and to provide the documents sought in Request No. 16 of Brannon’s 1st Request for Production of Documents. According to Brannon, Panther and Shelton have improperly failed to identify and produce documents that may come within the interrogatory.

Panther and Shelton object to the interrogatory and request, and oppose the motion. They state Brannon's use of discovery is too broad and for the most part it is not directed at issues in the case. They also maintain they have already produced all documents relating to the allegations at issue and they need not produce more. For the reasons that follow, the motion **IS GRANTED IN PART AND DENIED IN PART.**

THE COMPLAINT

Docket No. KENT 2009-1225-D is a discrimination case based on a complaint brought under section 105(c)(3) of the Mine Act by Brannon against Panther. The case has been consolidated with two related proceedings: KENT 2009-302-D, another 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.¹ The consolidated cases will be heard beginning on March 2, 2010.

In Docket No. KENT 2009-1225-D, Brannon lists as activities leading to his alleged discriminatory treatment many of the activities set forth in his first filed complaint, Docket No. KENT 2009-302-D. He asserts, as he did in his first complaint, that these activities are "protected" under section 105(c) of the Act. What is new in Docket No. KENT 2009-1225-D is Brannon's assertion of additional discriminatory treatment at the hands of Panther and Shelton. (Shelton was not named as a respondent in the first-filed complaint.) Brannon alleges that on Saturday, February 28, 2009, he was underground when he was summoned to a meeting in Shelton's surface office. Those present were Shelton, the rest of the underground crew and others from mine management. Complaint at ¶¶ 18, 19. Brannon asserts he was the "main subject" of the meeting, and that during the meeting Shelton told Brannon that Brannon was "corrupting" the shift and the mine, that he was not doing his job satisfactorily and that he was the cause of all of the mine's problems. *Id.* at ¶ 20. Brannon also asserts Shelton "cussed" him, threatened to fire him, gave him a written warning about his alleged unsatisfactory job performance and transferred him to the second shift effective the next Monday, March 2, 2009. *Id.* at ¶ 21. Brannon quotes Shelton as telling him in effect that he would never return to the day shift because he was suing the company², and that from March 2 on, he would always work on the second shift.³ Finally, Brannon quotes Shelton as telling him that Shelton knew that Brannon had spoken with an MSHA inspector on the evening of February 27, and that he also knew

¹Docket No. KENT 2009-1225-D is the second-filed of the three cases.

²Brannon previously filed a civil suit against a sister company of Panther's (Cloverlick Coal Company) and a Cloverlick supervisor (Robert Salyer) over Salyer's alleged assault on Brannon at the Cloverlick mine where Brannon then worked. *See* Docket No. KENT 2009-302-D, Complaint at ¶¶ 6, 9.

³According to Brannon, Shelton knew that Brannon preferred to work on the first shift and considered second shift hours to be less desirable. Complaint at 7.

Brannon was related to the inspector. Of the inspector, Shelton allegedly said, "I can't stand the ground he walks on either."⁴ *Id.* at ¶ 22.

The discriminatory actions to which Brannon charges he was subjected because of his alleged protected activities are the "verbal abuse" and "threats" he received from Shelton on February 28 (Complaint, 1st Cause of Action at ¶ 24); the "written warning" he received from Panther and Shelton on February 28 (*Id.*; 2nd Cause of Action at ¶ 26); and his transfer to the second shift effective March 3, 2009. *Id.*; 3rd Cause of Action at ¶ 28.

INTERROGATORY, REQUEST, AND ANSWER

Interrogatory 16. With the exception of "the Shelton meeting," please state whether any Panther . . . employees made any contemporaneous or non-contemporaneous notes regarding Brannon's job performance or non-contemporaneous notes regarding Brannon's job performance or any other event involving Brannon at the No. 1 mine prior to February 28, 2009.

If the answer to this interrogatory is "yes," please see Request [No.] 16 in Brannon's 1st Request for production of Documents. Motion at 1-2.

Answer. Objection to the part of the interrogatory addressing "any other event at the No. 1 mine prior to February 28, 2009" as vague, overbroad and not reasonably calculated to lead to admissible evidence. Without waiving its objection Panther states that notes concerning Brannon's job performance were made on some occasions. Motion at 2.

Request No. 16. With the exception of notes regarding "the Shelton meeting," copies of any and all contemporaneous or non-contemporaneous notes made by any Panther employee prior to February 28, 2009, regarding Brannon's job-performance or any other event involving Brannon at the No. 1 mine. Motion at 2

Answer. Objection as to "any other event involving Brannon at the No. 1 mine" as overly broad, unduly burdensome and not reasonably calculated to lead to admissible evidence. Further objected to . . . the extent it would include communications between Panther's managers and their attorney. Further, this request overlaps with other requests. Without waiving its objection, Panther is providing herewith notes made by Panther's employees prior to February 28 . . . regarding Brannon's job performance as documents 000801-000836. Motion at 2-3.

⁴Brannon maintains that on February 27, he went to the MSHA office in Harlan, Kentucky, to file a discrimination complaint with MSHA, and while at the office he spoke with an MSHA inspector for about one half hour. The alleged topic of their discussion was "various unsafe conditions" at the mine. Complaint at ¶ 16.

ARGUMENTS

Brannon states that upon receipt of the company's answer to the interrogatory, his attorney "e-mailed" the attorney for Panther and Shelton and asked that his clients answer the interrogatory and provide all of the requested documents or "at least state the specific nature of the documents that you are withholding." Motion at 3. When the company's and Shelton's attorney did not respond by the date Brannon's attorney specified, Brannon filed the motion to compel.

Brannon argues it is relevant whether the company and/or its employees were keeping notes about Brannon – regardless of whether or not they were job-related– prior to the date of the February 28 meeting. According to Brannon, he is "entitled to know whether Panther was 'building a case' against him in order to discharge him." Motion at 4. Brannon states he "would want to further delve into why employees were keeping notes about him (and at whose instruction)." *Id.* He also asserts he is entitled to know whether the company was keeping notes about other employees – or whether Brannon was being singled out for this treatment. *Id.*

The company and Shelton argue the motion should be denied. They object to answering the parts of the interrogatory and request relating to "any other event involving Brannon at the No. 1 mine." Interrogatory 16. They point out that nowhere in his complaint does Brannon assert he was discriminated against by having notes taken about him by Panther employees. By asking for notes taken by anyone at the mine at any time prior to February 28, on any subject involving Brannon, the Complainant is casting a "dragnet" that would include things beyond the scope of the complaint, which is about Brannon being "written up" and transferred after the February 28 meeting. Opposition to Motion at 3-4. Finally, the company notes it already has provided Brannon with 48 pages of notes taken by various employees concerning Brannon's job performance. *Id.* at 5.

RULING

_____ Interrogatories must be reasonably related to the issues at hand. The issues as set forth by Brannon are whether he was discriminated against when he was "verbally abused and threatened" by Shelton at the February 28 meeting, was issued a "written warning" by Panther and Shelton, and was transferred to the second shift (a less desirable shift that Brannon did not want) all because of his alleged protected activities. A topic discussed at the February 28 meeting was Brannon's allegedly unsatisfactory job performance. One result of the meeting was a written warning issued to Brannon by Shelton about Brannon's performance. It is clear that Brannon's work performance and the company's and Shelton's perception of it are at issue in Docket No. KENT 2009-1225-D. To the extent the interrogatory asks the company and Shelton to identify and produce employees' notes referring to Brannon's work performance before February 28, 2009, the interrogatory is proper and must be answered. Further, any written notes identified in response to the interrogatory must be produced pursuant to Request 16.

Therefore, within **15 days of the date of this Order**, notes made by Panther's employees relating to Brannon's job performance that the company and/or Shelton have **MUST** be described by the company for Brannon. Pursuant to Request 16, copies of the described notes **MUST** be produced to Brannon. If the company already has described and turned over all of said notes, it may comply with the interrogatory and request by stating as much.

If there are notes made by company employees that relate to Brannon's pre-February 28 job performance that the company claims are exempt from production because they are privileged, **within 15 days of the date of this Order** the company **MUST** identify the notes and submit copies to me for my review and state the grounds on which the company is claiming exemption from production. After reviewing the notes and considering the grounds, I will rule as to whether or not the notes are subject to production. Any copies that I conclude are protected from production, I will place under seal in the record, where they will be subject to review by only the Commission or another reviewing body.

As for the part of Interrogatory 16 that asks the company to state whether its employees made notes as to "any other event involving Brannon at the No. 1 mine prior to February 28, 2009" and the part of Request 16 that asks the company to produce any such notes, the Motion to Compel **IS DENIED**. The interrogatory and request are not targeted at issues alleged by Brannon in his complaint and, thus, are not reasonably related to the complaint. The company is right to describe the interrogatory and request as "overbroad." Opposition to Motion at 3. I agree with the company that Brannon should not be allowed to use discovery as a "dragnet" (*Id.*) to obtain every note in the company's and Shelton's possession relating to "any other event involving Brannon." Interrogatory 16. Were such discovery allowed, the case would soon be unmanageable.

The company **IS ORDERED** to respond to Interrogatory 16 and Request 16 **ONLY** as set forth above.

David Barbour
Administrative law Judge

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

Tony Oppegard, 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

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