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via e-mail: malecki.mark@dol.gov

Mark R. Malecki
Counsel for Trial Litigation
Mine Safety & Health Administration
1100 Wilson Boulevard, 22nd Floor
Arlington, Virginia 22209

RE: Billy Brannon v. Panther Mining, LLC
Discrimination Complaint No. BARB-CD-2008-07
renewed FOIA request for witness statements

Dear Mr. Malecki:

On October 22, 2008, MSHA issued a negative determination letter to my client, Billy Brannon, regarding the above-numbered §105(c) discrimination complaint against Panther Mining.

On October 28, 2008, I filed a standard FOIA request for MSHA's investigation file, "including, but not limited to, copies of all witness statements and all memoranda of interviews compiled by MSHA".

On November 20, 2008, Wes Addington and I filed a Complaint of Discrimination on Mr. Brannon's behalf with the Federal Mine Safety & Health Review Commission, pursuant to §105(c)(3) of the Mine Act (Docket No. KENT 2009-302-D). That case has been assigned to Judge Barbour and the parties are currently engaged in discovery. We do not yet have a trial date. However, Mr. Brannon was recently discharged by Panther Mining, and that discharge is the subject of another discrimination complaint (Case No. BARB-CD-2009-09).¹

On November 24, 2008, MSHA sent to me the agency's response to my FOIA request of October 28, 2008. Suffice it to say that it was the most disappointing response to a FOIA request regarding a safety discrimination case that I have ever received in my many years representing coal miners in these important cases.

¹ In fact, Mr. Brannon filed two other discrimination complaints against Panther (BARB-CD-2009-06 and BARB-CD-2009-07) between his filing of BARB-CD-2008-07 and BARB-CD-2009-09.

Specifically, MSHA withheld from my client **EVERY WITNESS STATEMENT** taken in the case except for that of Mr. Brannon (which I had prepared). I have litigated about 135 or so discrimination cases under §105(c), and have made dozens of similar FOIA requests, yet MSHA had never before refused to provide me with copies of statements made by **MANAGEMENT PERSONNEL**.

It appears from the little information I did receive from MSHA that the agency withheld eight witness statements (Exhibit #s 4-11) from my client. According to MSHA's letter, these statements were withheld pursuant to exemptions 7(C) ("information compiled for law enforcement purposes") and 7(D) ("information ... which... could divulge the identities of confidential sources" who could then be subjected to "harassment and intimidation"). Both of the cited reasons for withholding the statements of management personnel are utter rubbish.

To claim that these statements were taken for law enforcement purposes is complete nonsense. There was never a §110 criminal investigation regarding this matter, which, in my view, would not even qualify for the "law enforcement" exemption. And to claim that the Panther Mining's management personnel - who no doubt will testify against Mr. Brannon at the §105(c)(3) trial - are "confidential sources" who might be "harassed and intimidated" if their statements were produced turns the concept of informants on its head.

Unfortunately, what has happened in this instance is yet another attempt by MSHA to tie the hands of a coal miner who is attempting to prove his case - as is his legal right granted to him by the U.S. Congress - under §105(c)(3) of the Mine Act. It is extremely sad to see the agency that is charged with protecting miners' safety ignoring its duty and instead going out of its way to protect an outlaw coal company such as Panther. Indeed, MSHA should be ashamed of itself.

Miners can only hope - and trust - that when the new Assistant Secretary takes office, he will put a quick end to the agency's blatant attempts to protect operators who have been charged with discrimination by miners.

When President Obama took office, he directed all federal agencies to usher in a new era of openness in government with regard to FOIA requests. Therefore, I ask you to review under this "new" standard MSHA's refusal to provide Mr. Brannon with the statements to which he clearly is entitled - and which MSHA had routinely provided for at least the previous 25 years - and to right this wrong by providing those statements to my client.

In addition to all statements of Panther Mining management personnel, I believe we are also entitled to the statements of any hourly employees who allowed management personnel to sit in on their interview. If that was done, those hourly employees have waived any confidentiality to which they otherwise might be entitled.

Because our §105(c)(3) case is proceeding rapidly toward trial, I also request that we be provided with the previously-withheld investigative statements (and/or memoranda of

interviews) on an expedited basis.

Thank you for your consideration of this matter. Please feel free to call me if you have any questions.

Sincerely,

Tony Oppegard

TONY OPPEGARD
Attorney for Billy Brannon

cc (via e-mail): Billy Brannon
Wes Addington
Kevin Stricklin