

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1331 PENNSYLVANIA AVENUE N. W., SUITE 520N
WASHINGTON, D.C. 20004-1710
Telephone No.: 202-434-9933
Telecopier No.: 202-434-9949

April 17, 2018

WILL WILLIS,
Complainant

v.

JEFFREY TYLER for HEART OF
NATURE (NV), LLC,
Respondents

DISCRIMINATION PROCEEDING

Docket No. WEST 2018-0218-DM
MSHA No. WE-MD-2017-10

Mine: Silver Peak Mine
Mine ID: 26-02599

ORDER

In this discrimination proceeding brought under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3), (“Mine Act” or “Act”), the Court is endeavoring to obtain essential information relating to the four corners of the complaint brought by the Complainant, Will Willis. For the reasons which follow, it is **ordered** that by **Friday, April 20, 2018**, the Secretary inform the Court whether she will provide **to the Complainant** a copy of the complaint filed by Willis and the interview which MSHA conducted in connection Complainant’s discrimination complaint filed during August 2017. An email from the Secretary’s counsel regarding this matter, dated April 11, 2018, advises “[i]f the Complainant, or any party, files a FOIA or Privacy Act request, MSHA will take prompt action on it and respond appropriately.” Sec’y Email of April 11, 2018. This response is equivocal about whether the Secretary *will* provide a copy of the complaint and the interview to the Complainant, assuming that a FOIA or Privacy Act request is made by the Complainant. If the Secretary refuses to supply the Complainant a copy of the complaint and the interview, the Secretary is directed to explain all reasons for such refusal, together with the authority for such refusal.

By **Friday, April 27, 2018**, the Secretary is also **ordered**, as expressed by the Secretary’s Counsel, to “formally lay[] out the FOIA, Privacy Act, and Touhy requirements and legal barriers,” which the Secretary asserts make her unable to comply with the Court’s direction to provide a copy of the interview to it. Indirectly, Counsel for the Secretary acknowledges that this refusal to provide the MSHA interview is a new approach, as she states, “[t]o the extent that this sort of thing has ever been provided, it was an error.” Sec’y Email of April 9, 2018.

Subject to considering the Secretary’s Response to the Court’s Order, the Court is presently of the view that the Secretary is obligated to provide a copy of the interview conducted by MSHA in connection with the Complainant discrimination complaint, which is also identified as “WE-MD-2017-10.” As most recently noted by Administrative Law Judge Alan Paez in

Justice v. Rockwell Mining, No. WEVA 2018-48-D, 2018 WL 816284 (Jan. 31, 2018) (ALJ):

Section 105(c)(3) of the Mine Act provides that if the Secretary determines that no discriminatory violation occurred, “the complainant shall have the right, within 30 days of notice of the Secretary’s determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(1)].” 30 U.S.C. § 815(c)(3). Thus, the statutory scheme provides to miners an administrative investigation and evaluation of an allegation of discrimination, as well as the right to private action in the event that the administrative evaluation results in a determination that no discrimination occurred. *Hatfield v. Colquest Energy*, 13 FMSHRC 544, 545 (Apr. 1991).

Justice, 2018 WL 816284, at *3.

This is the nature of Complaint brought by Mr. Willis, a proceeding under section 105(c)(3). Upon being assigned this case, the Court held a conference call with the parties, whereupon it was learned that Mr. Willis does not have a copy of the Complaint he filed with MSHA and that he also does not have a copy of the interview he gave to the MSHA investigator.

Judge Paez’s decision in *Justice* also speaks to this issue, as he noted:

In order for the statutory prerequisites for a section 105(c)(3) complaint to be met, the written discrimination complaint filed with MSHA must contain specific allegations that are investigated by MSHA and considered in the Secretary’s determination of whether the Mine Act has been violated. *See Hatfield*, 13 FMSHRC at 546 (vacating order denying dismissal and remanding for consideration of whether alleged protected activities were part of Secretary’s investigation). However, the Commission has recognized that it is the scope of the Secretary’s investigation, rather than the initiating complaint, that governs the permissible ambit of the complaint filed with the Commission. *Sec’y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997).

Justice, 2018 WL 816284, at *4.

This Court made similar observations about section 105(c)(3) discrimination proceedings, noting that:

In *Hatfield*, the Commission recognized that a miner cannot expand his *pro se* claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA. 13 FMSHRC at 546. In *Sec. v. Hopkins County Coal, LLC*, 38 FMSHRC 1317, June 24, 2016, the Commission expounded upon its *Hatfield* decision, stating that “the miner’s complaint establishes the contours for subsequent action.” *Hopkins* at 1340. It noted in *Hopkins* that “*Hatfield*’s original complaint was general in nature and contained no indication of the new matters apparently alleged for the first time in the amended complaint.” *Id.* at 1341 (citing *Hatfield* at 546). The Commission held that the initial complaint formed the basis of MSHA’s investigation. *Id.* After MSHA refused to act on that initial complaint, the miner *could not expand his pro se claim by alleging matters not within the scope of the initial complaint and never investigated by MSHA.*

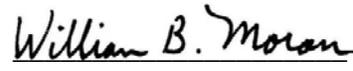
Hopkins at 1342 (emphasis added). The key element in these matters is that the determination of the scope of the complaint is not constrained entirely by the four corners of the miner's complaint, *but is also informed by MSHA's ensuing investigation*:

“The Commission has previously held that ‘the Secretary’s decision to proceed with a complaint to the Commission, as well as the content of that complaint, is based on the Secretary’s investigation of the initiating complaint to [him], and not merely on the initiating complaint itself.’ *Sec’y o/b/o Callahan v. Hubb Corp.*, 20 FMSHRC 832, 837 (Aug. 1998); see *Sec’y o/b/o Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997); *Hatfield*, 13 FMSHRC at 546. If the content of a discrimination complaint filed with the Commission is based on that which is uncovered during the Secretary’s investigation, then it follows that the Secretary’s authority to investigate in the first instance cannot be circumscribed by the early and often uninformed statements made by a miner in his charging complaint. [*Hopkins*], at 1326, n. 15.”

Mulford v. Robinson Nevada Mining, 39 FMSHRC 1957, 1959-1960, (Oct. 2017) (second emphasis added).

Accordingly, because of the centrality of the Complainant’s complaint and the interview conducted by MSHA in its investigation of that complaint, it is the Court’s present position that this information may not be withheld.

SO ORDERED.


William B. Moran
Administrative Law Judge

Distribution:

Jason Grover, Esq., Office of the Solicitor, U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202

Jeffery Ward, Esq., 1543 7th Street, Suite 300, Santa Monica, CA 90401

Will Willis, 740 Brockman Lane, Bishop, CA 95314

Jerry Tyler, Heart of Nature, LLC, 34710 7th Standard Rd., Bakersfield, CA 93314