FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 15, 2015

DANIEL B. LOWE, Complainant, v. VERIS GOLD USA, INC., Respondent.	DISCRIMINATION PROCEEDING Docket No. WEST 2014-614-DM WE-MD 14-04 Mine: Jerritt Canyon Mill Mine ID: 26-01621

Appearances: Daniel B. Lowe, *pro se*, Elko, Nevada, for Complainant
David M. Stanton, Esq.,[1] Goicoechea, DiGrazia, Coyle, and Stanton, Elko, Nevada, for Respondent

Before: Judge Moran

DECISION AND REQUEST FOR DIRECTION FROM THE COMMISSION

In this section 105(c)(3) action under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act" or "Act"), Complainant, Daniel B. Lowe, has asserted that he was fired by Veris Gold USA, Inc., because of safety and health complaints he voiced related to his job at Veris' Jerritt Canyon Mill. A hearing was held in Elko, Nevada, on June 18, 2015. The Court finds that Veris was motivated to fire Lowe because of his safety and health complaints to Veris management and that the record contains no evidence that Complainant's termination was based on any non-safety or health basis. Accordingly, for the reasons which follow, Mr. Lowe's complaint of discrimination is upheld.

The Elements of a 105(c) Discrimination Claim

The basics of a discrimination claim under the Mine Act are well-established and clear. In order to establish a prima facie violation of section 105(c)(1) of the Mine Act, Complainant must prove, by a preponderance of the evidence, (1) that he engaged in protected activity; (2) that he suffered an adverse action; and (3) that the adverse action taken against him by the mine operator was motivated in any part by that protected activity. In order to rebut a prima facie case, the operator must either show that no protected activity occurred or that the adverse action

[1] As explained *infra*, Veris' attorney, private counsel David Stanton, moved to withdraw from representation of Respondent Veris Gold USA, Inc. Attorney Stanton appeared on the morning of the first day of the hearing and reiterated his request to withdraw from representing Veris, a request made by Veris. The Court had no option but to grant the request and it did so at the commencement of the hearing.

was in no part motivated by the miner's protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981). If the operator cannot rebut the miner's prima facie case in this manner, it nevertheless can defend affirmatively by proving that (1) it was also motivated by the miner's unprotected activity and (2) it would have taken the adverse action in any event for the unprotected activity alone. The operator bears the burden of proof in such an affirmative "mixed motive" defense. *Haro v. Magma Copper Co*., 4 FMSHRC 1935 (Nov. 1982).

The current action is brought under section 105(c)(3) of the Mine Act. That section provides that if the Secretary determines that a violation of section 105(c)(1) has not occurred, "the [C]omplainant shall have the right . . . to file an action in his own behalf before the Commission, charging discrimination." 30 U.S.C. § 815(c)(3). As the Commission stated in *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007), "[t]he Mine Act, the Administrative Procedure Act ('APA'), and the Commission's Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation."

Findings of Fact

At the outset of the hearing, Attorney David Stanton, privately retained legal counsel for Veris Gold, appeared. The Court noted that Attorney Stanton filed a motion for his withdrawal as the Respondent's representative. Tr. 6. The Court had previously received word of Attorney Stanton's motion to withdraw at the conclusion of the prior week, one day after another section 105(c)(3) hearing against Veris, *Matthew Varady v. Veris Gold USA, Inc.*, WEST 2014-307-DM, had concluded. This Court presided in the *Varady* discrimination case. That case involved the *pro se* discrimination claim brought Matthew Varady against Veris Gold, and a decision finding for Mr. Varady was issued on September 2, 2015. Attorney Stanton represented Veris in the Varady discrimination matter for the entirety of the hearing. As noted, *infra*, the Varady hearing did not go well, evidentiary-wise, from Respondent's perspective, and it was obvious that Attorney Stanton correctly gauged the adverse evidentiary consequences of the proceeding, owing to the poor credibility of Respondent's various witnesses. Therefore, it was not a surprise to the Court that the attorney moved to withdraw from representation. As the Varady and Lowe matters are closely linked, it followed that withdrawal would be sought in the Lowe matter as well.

Due to the indefinite nature of Attorney Stanton's initial email request to withdraw his representation of Veris, it was not clear whether the attorney's request was confined to the Lowe and Varady matters or whether the attorney was withdrawing completely from all representation of Veris. Attorney Stanton was equivocal about his continuing role, in that he indicated that it would continue until the bankruptcy monitor in Canada acts. Tr. 6. At the time of and prior to the hearing's start, Veris had been involved in a bankruptcy proceeding. Attorney Stanton confirmed that mining would continue at the Veris site and it was his understanding that Veris would continue as a legal corporate entity and he represented that the Veris entity would "remain in existence for some period of time while the monitor addresses some . . . lingering issues," although he did not know exactly what those issues were. Tr. 8. Emphasizing that the mine

would be a continuing operation, albeit under a successor, "White Box" or the debtor in possession, Attorney Stanton hoped that his legal representation would continue with the new ownership. Tr. 9. Thus, it is fair to state that the mining operation and attorneys representing it would continue to move along nicely, while apparently simultaneously attempting to evade responsibility, through bankruptcy legal mechanisms, for acts of discrimination under the Mine Act.

The Court then announced that testimony would be received from Mr. Lowe in this matter, as Complainant still had an obligation to present a *prima facie* case. With Attorney Stanton withdrawing from representation of Veris, an act made at the request of Veris, the Court advised that it could then find Veris to be in default. Tr. 10. Attorney Stanton stated that he had communicated to *Veris and to the bankruptcy monitor* about the risk of being held in default and therefore, he noted, their decision to have him withdraw as counsel was made "with that information in mind." Tr. 11. Therefore, as Attorney Stanton confirmed, Veris and its successor understood the risk they assumed by foregoing any defense in the Lowe matter. *Id.* With Veris' full understanding of the consequences of the requested withdrawal, the Court then granted Attorney Stanton's motion to withdraw from representation and he was then excused from the proceeding.[2]

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[2] As noted in *Getz Coal Sales, Inc.*, 2 FMSHRC 2172, 2176 (Aug. 1980) (ALJ):

> The Commission's rules do not specifically address the question of the failure of a party-respondent to appear at a hearing pursuant to notice. Rule 63, 29 C.F.R. § 2700.63 provides for summary disposition of cases when a party fails to comply with an order of a judge or the Commission's rules. Subsection (b) provides that when a respondent is found to be in default in a civil penalty case the judge shall enter summary order assessing the proposed penalties a final and directing that they be paid. Section 105(d) of the Act provides that a mine operator be afforded an opportunity for a hearing in a contested case so that he may contest the citation and any proposed civil penalty assessment proposed by the Secretary.

In *Broken Hill Mining Co.*, 19 FMSHRC 477 (Mar. 1997), the judge issued a default order because Respondent failed to appear at the hearing, but the judge also stated that the Secretary had proven all violations by a preponderance of the evidence after hearing testimony from the Secretary. The Commission remanded the case to another judge for clarification of the judge's original preponderance of the evidence determination. *Id.* On remand, the judge noted that "[s]ection 2700.66 of Commission regulations, 29 C.F.R. § 2700.66 (1996), provides that when a party does not appear at a hearing, the judge may find the party in default without issuing a show cause order." *Broken Hill Mining Co.*, 19 FMSHRC 751, 751-52 (Apr. 1997) (ALJ). At the earlier hearing, following a motion for default judgment from the Secretary, the original judge directed that the hearing would proceed with the testimony of the inspectors so that there was a factual basis to assess the civil penalty. *Id.* at 752. After hearing the testimony regarding each citation, the judge affirmed the citation. *Id.* The remand decision also noted that

> [s]ection 2700.1(a) of Commission regulations, 29 C.F.R. § 2700.1 (a), provides that the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure. Rule 55 (a) of the Federal Rules of Civil

The hearing then continued, it being incumbent, as noted above, for Complainant to establish a *prima facie* case, irrespective of Respondent's election to default. The Court then advised that it was confined to the basis of Mr. Lowe's complaint, as presented to MSHA when he filed his complaint, citing *Hatfield v. Colquest Energy, Inc*., 13 FMSHRC 544 (Apr. 1991). Tr. 22. In addition to the complaint itself, a one page document, dated November 22, 2013, there is also a statement by MSHA special investigator Kyle E. Jackson. That document, the Court noted, identifies some protected activity. While that protected activity is not expressly contained within the four corners of Mr. Lowe's discrimination complaint, the Court stated that, by inference, it was part of the complaint to MSHA, as the special investigator had to have been informed about such protected activity by Complainant.

In the complaint proper, Lowe listed the following Veris management individuals as responsible for discriminatory action against him: Mr. Kim, Mr. Jones, Mr. Dickson, Mr. Hofer, Francois Marlan, Mr. Ward, and Dr. Goodfield. Tr. 25. The Court then noted that the typewritten discrimination report filed on November 22, 2013, provides:

> In accordance with the Mining Act of 1977 and by statutory rights of as a miner, [Daniel Lowe] was continuously discriminated against in matters of safety and health as well as in matters of regulatory compliance. These acts came in the form of constant threats of reprisal by members of senior management and/or corporate officers in matters of safety and health and regulatory compliance. These include threats of termination of employment, termination of my employment, and physical threats of violence by a member of senior management to do [Complainant, Lowe,] bodily harm when attempting to make safe the Jerritt Canyon Mill, as well as all mining operations of Veris Gold USA, Inc. located in Elko County, Nevada.

Tr. 26-27.

Reviewing that document and guided by the *Hatfield* decision, the Court noted that the first allegation was too vague. Tr. 27. Then, the Court continued to read from the Complaint that "[Lowe asserted that he] was given specific direction from senior management/corporate

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> Procedure provides that when a party against whom a judgment for relief is sought fails to plead or otherwise defend, the party's default may be entered. . . . In applying Rule 55, the courts have stated that in a default situation all well pleaded allegations are taken as true. *Benny v. Pipes*, 799 F.2d 489, 495 (9th Cir. 1986), *cert denied*, 484 U.S. 870, 108 S.Ct. 198 (1987). And when a default judgment is entered, facts alleged in the complaint may not be contested. *Black v. Lane*, 22 F.3d 1395, 1399 (7th Cir. 1994). The standard for appellate review of a default judgment is whether the trial court committed an abuse of discretion. *Johnson v. Gudmundsson*, 35 F.3d 1104, 1117 (7th Cir. 1994). An entry of a default judgment is not an abuse of discretion where a party who fails to appear at a scheduled hearing, because such conduct strays from recklessness to bad faith. *Id*.

Id.

officers to ignore employee safety and health rights under the Mining Act of 1977 and told [his] job was to keep the mill manager and assistant mill manager stress-free." *Id.* The Court again noted that the allegation does not inform "as to specific protected activity nor, [the Court noted] could [MSHA] go out and conduct an investigation based on that. If [MSHA] were right at the mine they couldn't know what to ask about, [because the allegation is] too vague." *Id.*

Continuing, the Court read:

> Due to [Lowe's] efforts to make necessary changes at the Jerritt Canyon Mill related to safety and health [he] was under constant daily harassment from members of the senior management and/or corporate officers in practically any matter that pertained to regulatory compliance and the statutory rights of miners that would or could interfere with the production of gold. When [Lowe] brought forth legitimate and serious safety and health issues or regulatory compliance issues with senior management and corporate officers, [he] was either ignored or verbally threatened with a reprisal of having [his] employment terminated. At present, production and only production of gold is the only thing that senior management and corporate officers care about. [Lowe is] seeking immediate reinstatement to [his] former position as . . . Mine Safety and Regulatory Compliance Manager with full back pay and allowed expenses.

Tr. 28. Again, the Court advised Complainant at the hearing that "there is nothing . . . alleging specific protected activity." *Id.*

The Court noted that it did "have the declaration of [MSHA investigator] Kyle Jackson, [wherein] Mr. Jackson [stated that] he investigated claims of discrimination." Tr. 29. The Court took note that Jackson couldn't have just invented claims out of his imagination, and therefore, at some point he must have been given information from Mr. Lowe. *Id.* However, the Court did not yet possess such information. It then noted that Jackson stated at page two of his declaration that

> [d]uring the week of November 11, 2013 Mr. Lowe engaged in protected activity by reporting housekeeping issues with two lunchrooms at Veris Jerritt Canyon Mill to mill manager . . . Kim and assistant mill manager Chris Jones. Mr. Lowe reported that one of the lunchrooms had an issue with mercury contamination and that another had an issue with dirt on the wall.[3]

Id. The Jackson declaration continued, "Mr. Lowe also told Mr. Kim and Mr. Jones that Veris needed to enforce company policy that employees not enter the lunchrooms wearing contaminated clothing." *Id.* The Court noted that two instances of protected activity were identified: the housekeeping dirt and mercury contamination issues. Tr. 30. Jackson's statement then continued, asserting that "[o]n November 18th Mr. Lowe again engaged . . . in protected activity when he sent an e-mail to chief operating officer Graham Dickson reporting that Mr. Jones had screamed at miner Cheryl Garcia [with Jones asserting] that Ms. Garcia and Mr. Lowe

[3] The Court parenthetically noted that dirt on a lunchroom wall did not sound like much of a safety or health violation, although it stated it would keep an open mind about the claim.

were trying to fuck him with the lunchroom housekeeping issue."[4] *Id.* The Court then noted that Mr. Lowe's employment with Veris was terminated on November 21, 2013. *Id.*

The Court then summed up the foregoing by noting that the only things that it could take cognizance of were the housekeeping issue of dirt on a wall, and the mercury contamination, that is, workers entering the lunchroom with contaminated clothing. *Id.*

Having articulated all that it could find in terms of protected activity presented to MSHA when Lowe filed his complaint, the Court inquired if Mr. Lowe had anything else to offer, in terms of information presented to MSHA when he filed his complaint. His response was that he also alleged that Mr. Jones engaged in reckless driving (speeding) on mine property, that he advised Veris of this, and that he was fired not long after that event. Tr. 32-34. However, that allegation is not found in the complaint, nor referenced by MSHA investigator Jackson. Therefore, it cannot be considered as an independent claim of discrimination for the section 105(c)(3) complaint. However, it can be considered to demonstrate that Veris, and Jones in particular, were angry at Lowe over his lunchroom safety complaint.

With the cognizable protected activities identified, the Court then received testimony, starting with the complainant, Mr. Lowe. Lowe began his employment with Veris on April 19th of 2012. Tr. 54. He was hired to address mine safety and regulatory compliance matters.[5] Tr. 55. His testimony involving the basis of his discrimination claim began with the lunchroom incident. This occurred during an MSHA inspection when dirt was observed on a lunchroom wall and high levels of mercury were found in another lunchroom. Tr. 37. Lowe did not believe that citations were issued for these conditions; the inspector instead gave the mine an opportunity to clean up the conditions. Tr. 38. Lowe was not present when the conditions were found. Tr. 39.

A day or two later, Cheryl Garcia came to Lowe reporting that Chris Jones had just screamed at her, telling her not to fuck him with lunchroom issues, at least according to Lowe's recounting of the event. Tr. 40. Lowe then elevated the issue to his boss, Bill Hofer, but no action was taken against Jones. Tr. 41. Following that, Lowe sent himself an e-mail to document Jones' incident with Garcia. Tr. 420. The e-mail, dated November 18, 2013, was sent to Graham Dickson, Veris' Chief Operating Officer. Ex. C-1. The text of the email stated:

[4] As to the expletive expression, allegedly made by Mr. Jones, the Court noted that it was not cognizable protected activity when one sends an e-mail as described here that Mr. Jones had screamed at Cheryl Garcia saying that Ms. Garcia and Mr. Lowe were trying to f--- him. Tr. 30.

[5] Lowe held that position for about a year and two to three months, but then, in July 2013, he was demoted to the position of Compliance Coordinator by Joe Driscoll, who came on as the mine's new general manager. Tr. 55. The demotion only lasted a month and Driscoll was terminated from Veris' employment. Lowe was then reinstated to his original position and remained there until his firing. Tr. 57.

> Subject: Employee abuse. Importance: High. Graham, on Friday Dave Jenkins came into Cheryl Garcia's office seeking assistance with decontaminating areas using HgX. He said he was going to be cleaning the lunchrooms and he showed the janitorial staff how to do this using HgX. Also he stated that once they cleaned the lunchroom they would retest using a Jerome meter. While Dave was in Cheryl's office Chris Jones came in and began screaming at Dave saying, "you don't need to be in here, you are in maintenance, you don't need to talk to her about the mercury issues."

Id. Garcia then went to speak with Jones about his outburst, and Jones related that he believed she and Lowe were trying to f[---] him over the lunchroom cleanliness issues. Tr. 44. Lowe's email continued, stating that he did "not believe any person should be subjected to this kind of behavior when she was only doing her job and doing her job well, and trying to keep our employees safe and healthful." Tr. 45. Dickson did not reply to Lowe's email. Tr. 47.

Next, Lowe alleged that Jones drove aggressively very close behind him on Highway 225 the following morning, November 19th.[6] Tr. 48. Lowe also related that later that day he went to the office of HR Manager Dwayne Ward, informing him that he had sent the two emails described above and in footnote six. Tr. 52. Lowe expressed to Ward that he thought he might be fired because of the emails. *Id.* According to Lowe, Ward responded that, as it involved Chris Jones, there was nothing he could do about the matter. *Id.* Later that day, Ward spoke to Lowe advising him that he would indeed be fired that Thursday. *Id.* Ward informed Lowe that he was being fired because of attorney's fees incurred by Veris, though he did not understand the particulars. Tr. 52-53. Lowe then went into his office and called in Mark Butterfield, who confirmed the news Ward had given. Tr. 53. All of those events occurred on the 19th. *Id.*

Lowe was next at work on the 21st. *Id.* On that date Lowe went to Dwayne Ward's office and where he met Tia Monahan, HR technician, and Joe Stoddard, HR recruiter/assistant HR manager. Ward then presented a release to Lowe, asking that he sign it. It offered two months of severance pay, but Lowe stated that the release took away all his rights and therefore he refused to sign it. Tr. 58. That release was entered into the record. Ex. C-3. Lowe stated that

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[6] This prompted Lowe to send another email to Dickson, this time copying Bill Hofer. The email text of Exhibit C-2 provided:

> Subject: Speeding company vehicle. Importance: High. Graham, while traveling northbound on Nevada 225 this morning on the way to work and at approximately 6:15 I observed a vehicle coming up behind me at a high rate of speed. As I passed where the roads splits the farm the vehicle was literally so close to the rear of my vehicle I could not see the vehicle's headlights. Once I passed the farm the vehicle overtook my vehicle and I could see that it was Veris Gold light vehicle with the number LV 3907 on the front fender.

Tr. 50. Lowe estimated the vehicle speed at 85 to 90 mph. Tr. 51. He noted that the license LV 3907 is assigned to Chris Jones. *Id.* Lowe received no email response to his message. *Id.* As noted, this claim cannot be considered, per the holding in *Hatfield*, as a separate act of discrimination.

the release included the signatures of Tia Monahan and Joe Stoddard on it, bearing witness that Lowe refused to sign it.[7] Tr. 59.

At that time, Lowe stated that he inquired about the basis of his termination, and that Ward advised that he didn't know but that Veris would think up something and let him know. Tr. 60. The decision was made to have Mark Butterfield then drive Lowe home. Tr. 61. Lowe related that during discovery for this litigation, Attorney Stanton, Veris' attorney until the week prior to the commencement of the Lowe hearing, sent him information and included within that was the letter from Dwayne Ward stating the reason for Lowe's termination. Tr. 63. Up until he received that information from Veris' attorney, which was over a year after he was terminated, Lowe had not been apprised of the reason for his firing. *Id.*

As noted, Lowe asserted that he never received the termination letter until the discovery process. The exhibit was admitted as Exhibit C-4, letter from Veris, dated November 21, 2013, to Danny Lowe. Tr. 63. Lowe maintained that the letter had errors in it. Again, he stated that he never received the letter until disclosed through the discovery process for this litigation, with Lowe asserting that the letter had the wrong zip code. Tr. 64. Lowe read the text of the letter into the record. It stated: "You are being terminated on Thursday, November 21st, 2013. There are several factors that led to this decision. First, you were written up on October the 1st, 2013 for not reporting vacation time taken." Tr. 66. The termination letter continued, "In addition, you have had several conversations with Bill Hofer and Graham Dickson on the performance of your department and how it has not met the needs of the other departments in addition to not keeping normal work hours." Tr. 67.

Lowe challenged the accuracy of both those claims. Regarding the alleged failure to not report vacation time, Lowe asserted that he sent an email to Bill Hofer, requesting the days off. Tr. 66. The claim was that Lowe should have informed Mary Buttes, an administrative aide to Graham Dickson, of his planned leave. When Lowe challenged the write-up, Dickson noted that the notice to advise Buttes of leave was sent out on two dates. However, upon consulting with Veris' IT Manager, Pablo Cortez, Lowe learned that his name was not on the distribution list and therefore he had not been notified of the requirement to inform Ms. Buttes of leave. *Id.* Lowe maintained that the write-up was later rescinded. Tr. 67.

As to the other claimed basis for his discharge, the claim that the performance of Lowe's department had not met the needs of the other departments and that Lowe had not kept normal work hours, Lowe asserted that there had never been any conversation between Hofer, Dickson and himself regarding Lowe's work performance. *Id.* To the contrary, Lowe asserted that Mark Butterfield was prepared to testify that the department managers were happy with his work and that the safety department was meeting the mine's needs. *Id.*

Last, Lowe addressed the claim in his termination letter that he was not keeping normal working hours. Lowe agreed, but in a different sense than the letter implied, as he maintained

[7] Near the end of the hearing Lowe was able to locate a copy of his employment release, which he refused to sign. Ex. C-3; Tr. 98. Lowe refused to agree to the terms of that document, entitled, "Severence Release and Waiver." On the last page, Lowe's signature appears, below the words "Refused to sign." Two other signatures appear on that page. Ex. C-3 at 6.

that he essentially worked around the clock at Veris. Tr. 68-69. He stated that there were many occasions when his day would begin as early as 3:30 a.m. Tr. 68. In addition, he asserted that Graham had changed his hours so that effectively he was on call 24 hours. Tr. 69.

The letter included a final basis for Lowe's termination, asserting that "[t]he final determining factor of your termination is our accounting department received a bill from [the law firm of] Jackson Lewis in November that was for $533,815.18." Tr. 69. The letter claimed that Lowe "incurred all these charges without prior approval and also without reporting it to accounting. Therefore, we are terminating you as stated on Thursday, November 23rd, 2013." *Id.* Dwayne Ward's signature was on the termination letter. Lowe's response to the claim was that the legal fees incurred were justified because he was hired, in part, to get rid of all the citations Veris had received, so that it could be released from the potential pattern of violation status, on which it had been placed. Tr. 69-70. Lowe stated that he was hired and authorized to incur such fees, as part of the effort to address the violations. He stated that he has the affidavit of Guy Simpson, who was his original general manager at Veris, and also that of Joseph Welin, affirming that Lowe was authorized to incur those legal fees. Tr. 70. It was, Lowe stated, a tumultuous time at Veris as the mine had gone through seven or eight general managers. *Id.* Except for his brief demotion when Joe Driscoll was a general manager there, everyone knew what Lowe was doing vis-à-vis the attorneys. Tr. 70.

Accordingly, Lowe maintained that his firing stemmed from his confrontation with Chris Jones, as described above.[8] Tr. 71. Lowe agreed that the events which ultimately precipitated his firing were the lunchroom cleaning issues.

In testimony supporting Lowe's recounting of the events, he called Cheryl Garcia as a witness. Garcia affirmed that she was with an MSHA Inspector during November 2013 when high levels of mercury were discovered in a lunchroom at the mill. Tr. 76. She then notified her manager, Complainant Lowe, that the lunchroom would be closed during the mercury cleanup. *Id.* Garcia also emailed Lowe about the process for the cleanup and copied Veris management officials Kiedoc Kim and Chris Jones about it. Tr. 78. Not long after, Jones saw Jenkins in Garcia's office and yelled at him, telling him that he was to leave and that he had no business being in Garcia's office. *Id.* This intemperate interaction prompted Garcia to visit Jones in his office, whereupon Jones claimed that she and Lowe were trying to cause trouble for him over the lunchroom problems. *Id.*

Matthew Varady also testified for Mr. Lowe. Varady stated that in September 2013 he was overexposed to chemicals while working at his job in the CIL circuit. Tr. 80. Varady contended that he was directed by Kiedoc Kim, Mill Manager, to remain at his CIL job under all circumstances or he would be fired. *Id.* Thereafter, as Varady was feeling ill, Cheryl Garcia, upon consultation with Lowe, directed that he see Dr. Matteran for an evaluation of his

[8] According to the uncontroverted testimony, the conflict between Lowe and Jones had its antecedent months earlier, in October 2012, when Jones wanted access to the chlorination building. Tr. 71-72. That building had been closed and removed from service. Tr. 72. Jones approached Lowe, wanting access to the building, and Lowe advised him as the procedure to be employed to gain access. *Id.* However, Jones ignored the procedure and was discovered entering the building through a window. *Id.* Lowe believed Jones' act was insubordination. *Id.*

symptoms. Tr. 80-81. Varady learned that the investigation regarding his health problem had been stopped and that Lowe advised him that Chris Jones was trying to terminate Varady's employment for making a safety and health complaint. Tr. 81-82.

Mark Butterfield was then called by Lowe. Butterfield was the safety coordinator at Veris during the relevant time. Tr. 83. He reported to Lowe, who was the safety manager. Butterfield agreed that Lowe assigned him to investigate the health incident involving Varady at the CIL circuit. *Id.* His investigation began by interviewing Doug Morris, who was the mill superintendent at that time. Tr. 83-84. Then he met with the HR Manager, Dwayne Ward, about the matter. Tr. 84. Chris Jones then appeared and inquired about the nature of Butterfield's business. *Id.* Upon learning the subject, he ordered Butterfield to stop the investigation. *Id.* Butterfield resisted the order, advising Jones that he was not in his chain of command. *Id.* Ward then intervened, telling Butterfield that the investigation was put on hold until he, Ward, spoke to Lowe. Tr. 85. Butterfield advised Lowe of the developments; his investigation never resumed. *Id.*

Another Veris employee, Shawn Rose, then testified. Rose's attention was directed to November 19, 2013. Rose agreed that Lowe told him that Dwayne Ward had just tipped Lowe off, advising Lowe that he was going to be fired. Tr. 87-88. Rose did not know at that time of the reason for Lowe's impending dismissal. Tr. 88.

Pablo Cortez then testified. *Id.* Cortez was asked by Lowe about an incident around October 2, 2013, in which Lowe asked about the e-mail group system. Tr. 89. Cortez recalled the incident, advising that there had been an issue about Lowe's time off. *Id.* Veris' Mary Buttes had asked people to advise her if they would be off from work, such as for vacations. *Id.* Cortez recalled that Lowe was not on the e-mail group and therefore was not informed of the request that employees were to notify of time off from work. *Id.* After speaking with Buttes about the matter, Cortez then advised Graham Dickson and Dwayne Ward that Lowe was not on the list. *Id.* Cortez blamed himself for the omission. *Id.*

Tia Monahan testified next. She affirmed her presence in Dwayne Ward's office on November 21, 2013, at the time Lowe was terminated. Tr. 91. She also agreed that she witnessed Lowe's refusal to sign a release regarding that termination. *Id.* When Lowe asked of Ward the official reason for his termination, Monahan related that Ward responded "[t]hat they [Veris] would think of something." *Id.* Joseph Stoddard also witnessed this exchange, according to Monahan. *Id.*

Joseph Stoddard was then called as Complainant's final witness. Tr. 92. Stoddard stated that at the time of the matters associated with Lowe's termination, he was a senior HR manager or specialist. Tr. 93. His employment with Veris ended in December 2013. *Id.* Stoddard was fired from Veris at that time. *Id.* Directed to November 21, 2013, Stoddard agreed that he was in the HR Manager's office on the morning when Lowe was fired and that he also heard the HR Manager say words to the effect that they would think of something to support Lowe's termination. Tr. 94. Stoddard further stated that, the week before Lowe's firing, Ward revealed that Veris would be firing Lowe. *Id.* When Stoddard asked Ward about the reason for doing that, Ward said words to the effect that Lowe "got in Chris Jones's and Mary Buttes's cross-

hairs." Tr. 94-95. Although Stoddard asked for more specifics, he stated that Ward "he didn't really have an answer for that." Tr. 95.

Discussion

Bearing in mind that Respondent defaulted, waiving its opportunity to defend against the claims of Complainant, based on the credible and unrebutted evidence of record, the Court finds that Daniel Lowe engaged in protected activity when he complained about the housekeeping issues with the two lunchrooms at Veris' Jerritt Canyon Mill to mill manager Kim and assistant mill manager Jones and by his informing those individuals that Veris needed to enforce company policy that employees not enter the lunchrooms wearing contaminated clothing. The speeding incident, while not a separate basis of protected activity, is instructive to support that Jones was angry at Lowe for his complaints about the safety and health housekeeping issues in the lunchrooms. Thereafter, on November 21, 2013, Lowe's employment with Veris was terminated.

As Veris elected to default at the start of the hearing, despite being fully informed of the consequences of that determination, by its then-counsel, Attorney Stanton, the credible record evidence establishes that Lowe engaged in the above-described protected activity, that he was thereafter fired, and that his termination was motivated by his engagement in that protected activity. By virtue of Veris' default, the record is devoid of any evidence to show that Veris was in no part motivated by the miner's protected activity. Similarly, there is no evidence from Veris to show that it would have taken the adverse action in any event for the unprotected activity alone.

Conclusion

Having found that Daniel Lowe engaged in protected activity and that his employment was terminated on November 21, 2013, because of his exercise of that activity, damages may be awarded. Reinstatement does not appear to be possible as the Veris operation is now run by a new owner.

Request for Direction from the Commission

This case has now become complicated by the fact that Veris sought and received bankruptcy protection. The hearing in this matter occurred on June 18, 2015. As this decision has alluded to, the hearing did not go well for Respondent, Veris Gold, in the companion case of *Matthew Varady v. Veris Gold*, held the week prior to the Lowe matter. No doubt, counsel for Respondent recognized that problems similar to those encountered in the Varady matter would be present for the Lowe hearing. A harbinger of this, the day after the Varady hearing ended, counsel for Veris requested a conference call "to discuss a procedural issue that [he] believe[d] affect[ed] both the Varady and Lowe cases." Email from David M. Stanton, Counsel for Veris Gold USA, Inc., to the Court (June 11, 2015, 10:42 EDT). Therefore, it did not come as a surprise to the Court that two days after the hearing concluded, Respondent's attorney advised, via email on June 12, 2015, that he was requesting withdrawal from his representation of

Respondent for both the Varady and Lowe matters. Subsequently, the Court learned that Veris has been sold.

Based on news reports, it is the Court's understanding that the Veris mine resumed operations immediately following the ownership change and that most of the same personnel continue to work at the mine.[9] It is hoped that, rather than attempt to hide behind successorship barriers, the new entity, which literally mines gold, will accept responsibility and pay Mr. Lowe such damages as the Court may award, which are expected to be modest.

In addition, direction is sought from the Commission about how to proceed in this matter of first impression. As noted, Veris Gold has been sold. *See In re Veris Gold Corporation*, No. 14-51015-gwz (Bankr. D. Nev. June 4, 2015) (order recognizing and enforcing the Canadian sale Order).[10] This Court recognizes that the Commission has generally held that successorship does not eliminate liability for discrimination.[11] Bearing in mind that Complainant proceeded *pro se* and that the successor entity has never been a party to this matter, the Court, recognizing that it cannot act as *de facto* counsel for Lowe, is uncertain whether it should direct Lowe to file a motion to reopen the hearing[12] for the purpose of adding the purchaser, WBVG LLC, which is wholly owned by WBOX 2014-1 LLC, the DIP Lender, and to 2176423 Ontario Ltd, a company

[9] The *Elko Daily Free Press* reported on June 25, 2015, that Veris Gold Corp. "sold its Elko County gold mines Thursday to Jerritt Canyon Gold LLC, but most of the miners will remain on the job. The assets sold include the Jerritt Canyon facilities. . . . Jerritt Canyon Gold President and CEO Greg Gibson said the majority of the 250 Veris Gold employees at the site were hired. . . . Jerritt Canyon Gold is a subsidiary of Sprott Mining which is controlled by Canadian billionaire Eric Sprott. Jerritt Canyon Gold owns 80 percent of Veris Gold's assets and the other 20 percent is owned by Whitebox Asset Management, Gibson said. 'Mining was not suspended. Mining will be increased,' Gibson said. . . . He said the site is on track to produce 185,000 to 200,000 ounces of gold this year. The sale of the site happened after a Canadian bankruptcy court ordered Veris Gold to sell its assets. Veris Gold had filed under Companies' Creditors Arrangement Act in Canada, which is a type of bankruptcy protection, in June of last year. It was operating under the protection of the CCAA and the U.S. Bankruptcy Code since June 9, 2014." Marianne K. McKown, *Veris Gold sells Jerritt Canyon*, Elko Daily Free Press (June 25, 2015), http://elkodaily.com/mining/veris-gold-sells-jerritt-canyon/article_9a84e5c1-c299-5179-8bc6-49f02d15e513.html.

[10] Each of the documents referenced in this section of this decision, all of which were transmitted electronically to the Court by then counsel for Veris, Attorney David Stanton, have been made part of this record.

[11] See, for example, *Sec'y on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394 (Mar. 1987), in which the Commission reiterated its successorship doctrine as set forth in *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), *aff'd in relevant part sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983). There, the Commission approved application of nine factors to be considered when evaluating the appropriateness of successor liability.

[12] For example, the Commission alluded to such an approach at the appropriate time in *Simpson v. Kenta Energy*, 8 FMSHRC 312 (Mar. 1986).

wholly owned by Eric Sprott, as a party.[13] Alternatively, the Court could wait for the Secretary to fulfill his obligation to seek a civil penalty and monitor the Secretary's actions to hold the successor liable, while holding a final order in this matter in abeyance until the Secretary's action is completed. Still another route could be to direct the Respondent to bring his judgment before the Nevada Bankruptcy court. At paragraph 46 of the Order of the United States Bankruptcy Court for the District of Nevada, it states:

> This [District of Nevada United States Bankruptcy] Court shall retain exclusive jurisdiction to enforce the terms and provisions of this Order and the Agreement in all respects and to decide any disputes concerning this Order and the Agreement, or the rights and duties of the parties hereunder or thereunder or any issues relating to the Agreement and this Order including, but not limited to, the interpretation of the terms, conditions and provisions hereof and thereof, the status, nature and extent of the Assets and all issues and disputes arising in connection with the relief authorized herein, inclusive of those concerning the transfer of the assets free and clear of all Liens, Claims and Interests. This Court retains jurisdiction of this proceeding pending the issuance of a final order granting relief.

ORDER

The concept of damages is to "make whole" a person who has been unlawfully discharged. Because Mr. Lowe is not an attorney, the Court offers the following general guidance as to allowable damages. Such damages would include reimbursement for expenses in seeking reemployment and lost wages plus interest[14] from the date of discharge until reemployment, if applicable. Because the "make whole" concept of relief does not contemplate a windfall to such individuals, any unemployment benefits received for the period between the unlawful discharge and the date of new employment, if applicable, are offsets to the damages that may be awarded. Litigation-related expenses are awardable. As examples, these would include copying expenses; any costs related to subpoenaing witnesses; medical expenses, including premiums, that would have been covered by Complainant's medical insurance, if applicable; and lost vacation pay, if applicable. Mileage, telephone calls, and postage are other examples of awardable damages. These are examples only. The guiding principle is for a complainant to recover the financial reimbursement for items he would have received had his employment continued and the expenses in pursuing this litigation, minus benefits received such as unemployment compensation.

[13] The reference to owner Eric Sprott is consistent with the reporting in the *Elko Daily Free Press* on June 25, 2015, as reflected in footnote 9, *supra*.

[14] In *Local Union 2274, UMWA v. Clinchfield Coal Co.*, 10 FMSHRC 1493 (Nov. 1988), the Commission directed that in discrimination cases it would use the short-term Federal rate applicable to the underpayment of taxes as the rate for calculating interest for periods commencing after December 31, 1986.

Some damages are not recognized for relief under the Mine Act. For example, there is no authority or precedent for awarding compensatory damages for damage to reputation and/or pain and suffering. *Bewak v. Alaska Mech., Inc.*, 33 FMSHRC 2337, 2338 (Sept. 2011) (ALJ); *Peterson v. Sunshine Precious Metals, Inc.*, 24 FMSHRC 810, 811-12 (Aug. 2002) (ALJ); *Casebolt v. Falcon Coal Co.*, 6 FMSHRC 485, 503 (Feb. 1984) (ALJ).

Complainant Daniel Lowe is directed to provide his itemized and documented damages within 30 days of this decision.

Commission Rule 44(b), 29 C.F.R. § 2700.44(b), provides that the Judge shall notify the Secretary in writing immediately after sustaining a discrimination complaint brought by a miner pursuant to section 105(c)(3) of the Act.[15] Consequently, the Secretary shall be provided with a copy of this decision so that he may file a petition for assessment of civil penalty with this Commission. The Secretary of Labor is directed to commence a civil penalty proceeding against Veris for this matter.

So Ordered.

William B. Moran

William B. Moran
Administrative Law Judge

[15] The provision, 29 C.F.R. § 2700.44, "Petition for assessment of penalty in discrimination cases," states, in relevant part:

> (b) Petition for assessment of penalty after sustaining of complaint by miner, representative of miners, or applicant for employment. Immediately upon issuance of a decision by a Judge sustaining a discrimination complaint brought pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), the Judge shall notify the Secretary in writing of such determination. The Secretary shall file with the Commission a petition for assessment of civil penalty within 45 days of receipt of such notice.

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