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January 5, 2016

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

ORDER REGARDING SECRETARY'S MOTION FOR RECONSIDERATION

Before: Judge Moran

The Secretary of Labor has filed a "Motion for Reconsideration" in this matter. The reconsideration sought through the Motion seeks to have the Court vacate its October 15, 2015, decision in which it found that the Complainant, Daniel B. Lowe, was discriminated against by Veris Gold, USA, Inc. ("Veris"). For the reasons which follow, the Court DENIES the Secretary's motion.

The problems with the Secretary's motion are many, beginning with his premise that the Court "effectively made the Secretary a party by ordering him to file a penalty petition." Motion at 1. No authority is cited for the contention that the Court's decision "effectively made the Secretary a party." The Secretary plainly decided not to become a party, a decision which compelled Mr. Lowe to move forward on his own, once the Secretary declined to be involved with his claim of discrimination. Lowe's invocation of his right to go forward without the Secretary's help was part of Congress' design in such matters by the Mine Act's provision, under section 105(c)(3), which provides that "the complainant shall have the right, within 30 days notice of the Secretary's determination [that the provisions of section 105(c) have not been violated] to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph [(c)](1)." Thereafter, the Secretary steered clear of the Lowe section 105(c)(3) proceeding, never seeking to intervene.

The civil penalty proceeding is an entirely separate matter, though the Secretary now would like to conflate it with the prior section 105(c)(3) action. The same provision goes on to provide:

> Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of

> miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 816 of this title. *Violations by any person of paragraph (1) shall be subject to the provisions of section*[] . . . *820(a) of this title*.

30 U.S.C. § 815(c)(3) (emphasis added).

The Commission's procedural rules specifically address this matter and make clear that, in the wake of a section 105(c)(3) decision finding for the complainant, the Secretary is to promptly file a petition for the assessment of a civil penalty:

> Petition for assessment of penalty in discrimination cases. . . . (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.

29 C.F.R. § 2700.44(b); *see also Maggard v. Chaney Creek Coal*, 8 FMSHRC 966 (June 1986) (ALJ); *Pendley v Highland Mining*, 37 FMSHRC 2436 (Oct. 2015) (ALJ). Such civil penalty proceedings are assigned their own docket numbers when the civil penalty action is launched.

Having found that the Secretary has not been "effectively made" a party of the section 105(c)(3) action, the premise of the Motion collapses and becomes more confusing by the Secretary's assertion that he has "standing to file this motion as a 'party adversely affected' by the ALJ's decision." Motion at 1 (citing Procedural Rule 10(d), 29 C.F.R § 2700.10(d)). Remembering that the motion at hand was brought *by the Secretary*, the procedural rule provision cited refers to *a statement in opposition* to a written motion. If accepted, the Secretary would apparently be opposing his own motion, a crazy-quilt result.

The Secretary does get some things right in his motion. As noted, it is accurate that the Secretary did decline to file a section 105(c)(2) action on behalf of Mr. Lowe, and that decision prompted Complainant to file his own action, under section 105(c)(3), per Congress' design. However, in a distressing fashion, the Secretary neglects to mention several salient points, such as that Mr. Lowe filed his complaint with MSHA on November 22, 2013, and that he filed his section 105(c)(3) complaint twenty days after MSHA declined to represent him, on April 24, 2014. By May 5, 2014, Veris had acknowledged that the Complaint had been filed and by June 3, 2014, Veris' retained law firm, and specifically Attorney David M. Stanton, was responding to Lowe's 105(c)(3) complaint, denying the allegations of discrimination. The Secretary notes that Veris began its quest for bankruptcy protection in June 2014, that is to say, at a point in time *after* Lowe's Complaint had been filed. Lowe's conundrum was that he could not make a claim for damages until after first prevailing in the administrative proceeding before this Court. Lowe

did so prevail upon the Court's issuance of its decision on October 15, 2015, finding that Veris had discriminated against him in violation of the Mine Act. The record does not reveal if the United States Bankruptcy Court was informed of Lowe's Complaint, nor does it disclose any notice to Mr. Lowe about such bankruptcy proceeding being launched, or his rights in that matter, although Lowe apparently received from Attorney Stanton a notice of an Order from the United States Bankruptcy Court, District of Nevada, dated September 17, 2014.

The Secretary's motion states that, on December 17, 2014, this Court rejected Veris' claim that the bankruptcy court's order enjoining the commencement or continuation of any proceedings against Veris Gold applied to Lowe's complaint.[1] That much is true. However, as the Secretary tells the chronology of events, immediately after his motion recounts that the Court rejected the claim by Veris that the bankruptcy court's order applied to Lowe's complaint, the motion *next* states that:

> Veris Gold's attorney later informed the ALJ that he was withdrawing from representation, that Veris Gold would be unrepresented at the hearing, and that Veris Gold was aware of these facts. No representative for Veris Gold appeared at the hearing.

Motion at 3.

In the Court's assessment, the Secretary engaged in a technically accurate, but quite misleading, telling of the events since it implied nearness in time between the Court's order and Veris' attorney's informing the Court that he was withdrawing from representation of Veris. In point of fact, more than six months elapsed following the Court's ruling that Lowe's complaint could proceed. Veris' attorney first announced his intention to withdraw from the *Lowe v. Veris* discrimination litigation less than a week before that hearing began. During that half-year interval between the Court's ruling and the start of the hearing, Veris prepared, through Attorney Stanton, for Lowe's hearing. A companion Veris discrimination case, another section 105(c)(3) hearing, with this Court presiding, had concluded in the week just prior to the start of Lowe's hearing. *Varady v. Veris Gold USA, Inc*., WEST 2014-307-DM. Attorney Stanton appeared and represented Veris throughout that entire hearing involving Mr. Varady's claim. The Varady hearing did not go well for Veris. The credible testimony revealed to all at the hearing the merits of Mr. Varady's claim and at the same time the lack of a credible defense by Veris. Attorney Stanton could not have been oblivious to the testimonial developments and the devastating impact that had on Veris' defense claims. The weakness of Respondent's defense was subsequently memorialized in the Court's September 2, 2015, decision in the Varady matter, but it was plain to all who participated at the Varady hearing that the complainant would prevail.[2]

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[1] The Secretary's motion is not paginated and therefore the Court can only approximate the page associated with a particular quoted passage.

[2] The Court noted in its decision in the *Lowe v. Veris Gold* matter:

> 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

Immediately after the Varady hearing concluded, through emails to the Court from Veris' attorney, Respondent began to take actions to staunch the bleeding. This culminated the following week when, on the first day of the Lowe hearing, Attorney Stanton appeared for the purpose of withdrawing from representation of Veris. Thus, the Secretary's recounting of the events, jumping from the Court's December 17, 2014, decision to allow the continuation of Lowe's action against Veris, to a time some six months later when Attorney Stanton sought to back out of the case, is misleading. It is fair to presume that Attorney Stanton's firm was being paid or at least was billing Veris for its defense of the Lowe and Varady discrimination complaints up until the conclusion of the Varady hearing on June 10, 2015, and through the first day of Lowe's hearing on June 18th.

The Secretary's Motion, after noting that the successor to Veris Gold USA, Inc., Jerritt Canyon Gold, LLC, was not a party to the Lowe hearing, contends that this Court lacked jurisdiction to adjudicate Lowe's 105(c)(3) complaint. To arrive at this contention, the Secretary first acknowledges that

> [t]he Commission has held that [11 U.S.C. §] 362(b)(4) permits the Commission to adjudicate proceedings brought by the Secretary alleging violations of the Mine Act and mandatory health and safety standards and regulations promulgated thereunder. *Hidden Splendor Res., Inc.*, 35 FMSHRC 1548, 1550 (2013). Additionally, the Commission has held that Section 362(b)(4) exempts Section 105(c)(2) actions filed by the Secretary on behalf of a complainant. *Jim Walter Res., Inc.* 12 FMSHRC 1521, 1528-30 (1990).

Motion at 4.

> 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 stated, *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.

Lowe v. Veris Gold USA, Inc., 37 FMSHRC 2337, 2338 (Oct. 2015) (ALJ).

However, the Secretary, siding with mine operator *Veris*, not miner *Lowe*, asserts that the Court erred by

> holding that Section 362(b)(4) exempts Section 105(c)(3) actions brought by miners themselves. [The Secretary argues that] [m]iners do not meet the definition of 'governmental unit' for purposes of the Section 362(b)(4) exemption. *See id*. (noting that the Bankruptcy Code defines 'governmental unit' as the 'United States;…department, agency, or instrumentality of the United States.' 11 U.S.C. § 101(27)).

Motion at 4.

The Motion continues by referencing other examples where private individuals, as opposed to a governmental unit, are out of luck when it comes to stays. *Id.* at 5. Accordingly, on the basis that a section 105(c)(3) claim is inherently infirm *vis-à-vis a* bankruptcy court's stay, the Secretary maintains that he:

> cannot comply with the ALJ's order to commence a penalty proceeding against Veris Gold or its successor. Any such penalty would be for discriminatory action that occurred prior to Veris Gold's bankruptcy filing. Consequently, the Secretary's only remedy against Veris Gold was to file a proof of claim in the bankruptcy proceeding. Moreover, commencing a civil penalty proceeding would be futile, insomuch as Veris Gold has been liquidated in bankruptcy and the proceeding has closed. Docs. 320, 356 in Docket No. 14-51015 (Bankr. D. Nev.). Nor may the Secretary seek to impose a penalty on Veris Gold's successor. When, as here, the successor purchases the predecessor in bankruptcy, the Bankruptcy Code renders such sales "free and clear," 11 U.S.C. § 363(f) – even of employment discrimination claims. *In re Trans World Airlines, Inc*., 322 F.3d 283, 290-92 (3rd Cir. 2003); see also *In re Leckie Smokeless Coal Co*., 99 F.3d 573, 585-87 (4th Cir. 1996) (successors of coal mine operators sold in bankruptcy were not liable for financial obligations to employees' benefit plan and fund). In suggesting otherwise, the ALJ relied on Commission case law imposing successor liability[3] for Section 105(c) discrimination cases that did not involve sales in bankruptcy. ALJD at 12.

Motion at 5-6.

[3] While the Court recognizes that it is entirely premature to rule on successorship liability, if newspaper accounts turn out to be correct, it would appear quite likely that Jerritt Canyon Gold, LLC, squarely meets most, if not all, of the nine-factors applied in determining whether an entity is a successor. These include notice of this proceeding, substantial continuity of the mining operations, no significant hiatus in that continuity, employment of substantially the same workforce, essentially the same job functions and working conditions, the same machinery, and selling the same mined material, gold. *See Sec'y of Labor on behalf of Zambonino v. Colonial Mining Materials*, 36 FMSHRC 1239 (May 2014) (ALJ) (citing *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465-66 (Dec. 1980), *aff'd in relevant part sub nom., Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983)).

Mr. Lowe, who is not an attorney and has proceeded *pro se* throughout this proceeding, filed a response to the Secretary's motion.[4] In arguing against the Secretary's motion, Lowe contends that the Secretary could have moved to intervene in the 105(c)(3) case, but did not, and that it is now too late to be considered a party to this proceeding. Lowe Motion, Arguments I and II. The Court agrees that the Secretary is not now, by the Court's action, effectively, a party, as discussed, *supra*.[5] Lowe also contends that the Secretary is duty-bound by 29 C.F.R.§ 2700.44(b) to petition for the assessment of a penalty after a complaint of discrimination has been sustained by the judge. Lowe next notes that in the companion discrimination case of *Varady v. Veris Gold*, this Court, having found that Varady was discriminated, similarly ordered that the Secretary file a civil penalty and that the Secretary did file such a petition. Lowe Response at 7.[6]

The Court's reaction to the Secretary's contention is multi-faceted. While the Secretary states, as noted above, that he "cannot comply with the ALJ's order to commence a penalty proceeding against Veris Gold or its successor [because] [a]ny such penalty would be for discriminatory action that occurred *prior* to Veris Gold's bankruptcy filing," that seems to be an acknowledgment in favor of Lowe. Motion at 5. Lowe's initial complaint to MSHA, relating to alleged discriminatory activity, and later, his subsequent 105(c)(3) complaint, all occurred before the commencement of the Veris bankruptcy proceeding. As noted, Lowe filed his initial complaint with MSHA on November 22, 2013 and, thereafter, on April 24, 2014, filed his section 105(c)(3) complaint. Veris filed for relief from creditors on June 9, 2014. Thus, Veris Gold, through its retained counsel, had notice of the claim. Neither Lowe, nor anyone else, including the Secretary of Labor, could file a proof of claim until after prevailing in the

[4] Lowe accurately notes that, while the Secretary opted not to pursue his discrimination complaint and thereby necessitate that he file a 105(c)(3) claim in order to continue his complaint, MSHA Special Investigator Kyle E. Jackson, investigated Lowe's discrimination claim, found that Lowe engaged in protected activity, and that his employment was terminated, at least in part, because of that protected activity. Declaration of Kyle E. Jackson, attached as Exhibit 1 to Complainant's Motion to Deny the Secretary's Motion for Reconsideration. Unfortunately, the Secretary declined to follow the recommendation of its special investigator. The Court cannot usurp, nor look behind, the Secretary's decision to decline a section 105(c)(2) complaint; the Court can only proceed when a miner elects to pursue a discrimination claim filed under section 105(c)(3), as occurred here.

[5] The Court has reviewed each of Lowe's contentions in his motion, which is more in the nature of a response to the Secretary's motion. Not every observation made by Lowe, such as the Secretary's mistake in listing the certificate of service date as "December XX, 2015," will be commented upon.

[6] Following the Court's determination that Matthew Varady had been discriminated against by Veris, on September 11, 2015, an Associate Regional Solicitor filed a petition for assessment of penalty in the Varady matter seeking a civil penalty of $20,000.00. The matter was then docketed on September 15, 2015, as WEST 2015-909-M. On December 23, 2015, the Secretary moved to dismiss the civil penalty petition essentially on the same arguments presented and addressed here in the Lowe matter. No order has yet been issued on the Secretary's motion to dismiss in the Varady matter.

discrimination case. It would seem that Veris, and the law firm representing it, being fully aware of the bankruptcy filing and Lowe's discrimination complaint, had a duty to inform Lowe of that bankruptcy action, any notification rights he might have before the bankruptcy court, and to advise the bankruptcy court of this potential liability. Instead, Veris, through its legal counsel, pressed forward with discovery and defense of Lowe's complaint. Indeed, as noted earlier, by June 3, 2014, Veris' law firm and Attorney David M. Stanton were responding to Lowe's 105(c)(3) complaint.

The Secretary adds, as also noted above, that:

> commencing a civil penalty proceeding would be futile, insomuch as Veris Gold has been liquidated in bankruptcy and the proceeding has closed[, and] . . . [e]ven if he had, . . . it appears that general unsecured creditors, such as the Secretary would have been, did not receive any payment from the bankruptcy estate of the debtor.

Motion at 5 & n. 2.

The Court's reaction to these contentions has two aspects. First, the Secretary has confused Mine Act proceedings with proceedings in which businesses seek the refuge of bankruptcy protection. Lowe's right to pursue his 105(c)(3) action before the Federal Mine Safety and Health Review Commission exists apart from bankruptcy court issuances. Although it is possible that Veris, and the successor entity Jerritt Canyon Gold, LLC, may escape financial responsibility for discriminating against Mr. Lowe, such maneuvers do not erase Lowe's right to bring his Mine Act claim in the first instance. At a minimum, Lowe would have for all the world to see the decision that Veris engaged in discrimination in violation of that Act, behavior that Congress intended to protect miners from, and for which it expressed that compensation and such other relief as the Commission deems appropriate was to be provided. That Veris and Jerritt Canyon may be able to legally walk away from compensating a victim of discrimination through the process of bankruptcy law is, in this Court's view, a stain on those entities.

Second, it should be for the bankruptcy court, with its expertise in such matters, to rule upon such claims, and not for the Secretary of Labor to peremptorily cede that obtaining payments would be hopeless. It may be, as with the Federal Mine Safety and Health Review Commission, that bankruptcy law permits such courts to reopen matters in the interest of justice.[7]

[7] While not claiming any expertise in bankruptcy law, the Court notes that under 11 U.S.C. section 105(a) of the Bankruptcy Code, a bankruptcy court can issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title and that "the overriding consideration in bankruptcy … is that equitable principles govern." *In re NWFX, Inc.*, 864 F.2d 588, 590 (8th Cir. 1988). Even the Supreme Court considers *in forma pauperis* petitions, and so it may also be that if Lowe makes a claim before the bankruptcy court, it could decide to consider Lowe's claim. Given that changes in bankruptcy law, which went into effect in October 2005, made it more difficult for individuals, as opposed to corporations, to escape obligations they could afford to pay, it would be ironic if, in discrimination cases, corporations, employing other bankruptcy chapters, remain freer than individuals to clear away debts.

See, e.g., *Tolbert v. Chaney Creek Coal*, 12 FMSHRC 615 (Apr. 1990); *Sec'y of Labor v. Deck*, 37 FMSHRC ___, No. SE 2014-322-M (Dec. 18 2015).

Similarly, regarding the Secretary's contention that it may not impose a penalty on Veris Gold's successor "[w]hen, as here, [a] successor purchases the predecessor in bankruptcy, [because] the Bankruptcy Code renders such sales "free and clear," 11 U.S.C. § 363(f) – even of employment discrimination claims," the Court believes that should be up to the Commission, and, if the Commission agrees with this Court, ultimately the bankruptcy court to make such a ruling. After all, the Mine Act is a remedial statute. As the Commission has observed:

> The Federal Mine Safety and Health Act of 1977 is a remedial statute, the "primary objective [of which] is to assure the maximum safety and health of miners." U.S. Senate, Committee on Human Resources, Subcommittee on Labor, Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. at 634 (1978). *Cf. Freeman Coal Mining Company v. IBMOA*, 504 F.2d 741, 744 (7th Cir. 1974). The Senate Committee emphasized the remedial nature of the Act's compensation provision. The Committee stated:
>
> > This provision . . . is not intended to be punitive, but recognizes that miners should not lose pay because of the operator's violations. . . . It is therefore a remedial provision which also furnishes added incentive for the operator to comply with the law. This provision will also remove any possible inhibition on the inspector in the issuance of closure orders. Legislative History, supra, at 634-635. In interpreting remedial safety and health legislation, "[i]t is so obvious as to be beyond dispute that . . . narrow or limited construction is to be eschewed . . . [L]iberal construction in light of the prime purpose of the legislation is to be employed."
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> *St. Mary's Sewer Pipe Co. v. Director, U.S. Bureau of Mines*, 262 F.2d 378, 381 (3rd Cir. 1959); *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772, 782 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). We believe that a liberal construction of the 30-day filing period for compensation claims requires a conclusion that the period may be extended in appropriate circumstances.

Local 5429, UMWA v. Consolidation Coal Co., 1 FMSHRC 1300, 1302 (Sept. 1979).

In sum, unless the Commission directs otherwise, the Court intends to review Lowe's submission of his damages and to issue a decision regarding an appropriate award.[8] Accordingly, the Secretary's Motion for Reconsideration is DENIED.

William B. Moran
Administrative Law Judge

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[8] While an extra-judicial observation, the Court would note that there is nothing prohibiting Jerritt Canyon Gold from stepping up and doing what the Court considers to be the right thing by settling the Lowe (and Varady) matters. Settlements regarding damages in discrimination matters routinely occur and it may be that the new gold mine owners may decide it best, in good conscience, to put these matters, remnants of the troubled former operation under Veris Gold USA, Inc., behind them.

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