FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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January 12, 2016

CHRISTIAN LANDERS, Complainant, v. PEABODY POWDER RIVER MINING, LLC, and JOY GLOBAL SURFACE MINING, INC., Respondents.	DISCRIMINATION PROCEEDING Docket No. WEST 2015-732-D DENV-CD 2015-10 Mine: North Antelope Rochelle Mine Mine ID: 48-01353

ORDER ON COMPLAINANT'S MOTION TO ADD PARTY

Complainant, Christian Landers, has filed a motion to amend his complaint brought under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (2012) ("Mine Act") to add a party. The Motion seeks to add Joy Global Surface Mining, Inc. ("Joy") as a Respondent in Landers' discrimination proceeding under section 105(c)(3) of the Mine Act. In support of his motion, Complainant first points out that in Landers' statement to MSHA, dated April 24, 2015, he named *both* Joy and the North Antelope Rochelle Mine (Peabody Powder River Mining, LLC) ("Peabody") as his employers. Complainant's Ex. 1. The Motion asserts that Complainant, in his statement to MSHA, complained of cold weather issues to an agent of Peabody and that both Peabody and Joy discriminated against him. Motion at 2. The Motion concedes that MSHA's notice to Landers, declining to take up his case, named only Peabody. However, the key point from Complainant's perspective is not the names that appeared on MSHA's notice but the substance of Mr. Landers' complaint, as set forth in the statement he gave to MSHA investigator Lois Duwenhoegger. That substance identifies *both* Joy and Peabody as the entities that discriminated against him. *Id.* at 2.

Landers correctly notes that the Commission's procedural rules (29 C.F.R. § 2700) do not speak to the issue of adding parties to an action and that, in such circumstances, those rules provide that "the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil . . . and Appellate Procedure." 29 C.F.R. § 2700.1(b). Applying that, Complainant looks to Federal Rules of Civil Procedure, Rule 19 — Required Joinder of Parties — and contends that adding Joy Global meets that Rule because joining that entity as a party will

not deprive the court of subject-matter jurisdiction and, in that person's absence, the court cannot afford full relief among existing parties. *Id.* at 3. Complainant also asserts that Joy Global is an "operator" within the meaning of the Act as it "was, and remains, a contractor performing services at a mine, in this case, Peabody's North Antelope Rochelle Mine." *Id.* Further, Landers' complaint of discrimination, brought under 30 U.S.C. § 815(c), broadly prohibits discrimination of the type alleged and it applies to operators such as Joy Global. *Id.*

The Motion continues, contending that, as "Landers was directly employed by Joy Global and provided services at Peabody's North Antelope Rochelle Mine," Complainant cannot be afforded full relief without the joinder of Joy Global. *Id.* 3-4. With Landers seeking both reinstatement and backpay with interest, the former relief cannot be granted if Joy Global is not joined as a party. *Id.* at 4.

Peabody Powder River filed a short response to the Motion. Citing *Pontiki Coal Corp*., 19 FMSHRC 1009, 1017 (June 1997), for the proposition that "it is the scope of the Secretary's investigation, rather than the initiating complaint, that governs the permissible ambit of the Commission's jurisdiction," it contends that the Complainant will need to show that the Secretary's investigation included an investigation of Joy [Global]." Peabody Response at 1.

Joy Global's Response acknowledges that it hired the complainant, Landers, on February 13, 2012, and, at the time of Landers' termination on January 15, 2015, he was employed as a field service technician for Joy. However, Joy points to Landers' complaint naming Peabody as the entity that committed discrimination and only a Peabody employee, Mike Hatfield, is identified as the person for the discriminatory action. It also points to the flip side of that observation, that "Complainant did not name JGSM as an organization Committing Discrimination nor did Complainant identify any [Joy] employee as a person responsible." Joy Response at 2. Joy adds that it was not "served with an administrative complaint nor investigated for alleged discriminatory conduct by the Secretary . . . [and, on May 21, 2015,] the Secretary issued a finding to Peabody Powder River Mining LLC." *Id.*

Joy argues that "[i]t is the scope of the Secretary's investigation, rather than the initiating complaint, that governs the permissible ambit of the Commission's jurisdiction." Joy Response at 3 (quoting *Pontiki*, 19 FMSHRC at 1017. Joy also quotes from a decision issued by this Court wherein, upon citing the Review Commission's decision in *Hatfield v. Colquest Energy,*13 FMSHRC 544 (1991), the Court, quoting from *Hatfield* at 546, noted: "[I]f the Secretary's determination was based upon an investigation that did not include consideration of the matters contained in the *amended* complaint, the statutory perquisites for a complaint pursuant to §105(c)(3) have not been met." *Lowe v. Veris Gold USA, Inc. 37 FMSHRC 1130, *1131* (May 22, 2015).

The Court does not view these cases as supportive of Joy's position. The context of the Commission's decision in *Pontiki*, a section 105(c)(2) action, addressed the *scope of the Secretary's investigation*, but in speaking to that investigation, it was expanding the ambit of the complaint, not curtailing it. The Commission also referenced its decision in *Hatfield*, and while Joy correctly quotes from that decision, there are important distinctions. In *Hatfield*, the context was a section 105(c)(3) complaint, with the issue being whether "the miner's complaint differed

substantially from the complaint he initially filed with MSHA." *Pontiki*, 19 FMSHRC at 1017. Although the Secretary's investigation was addressed, again it was in the context of whether that investigation included matters identified in the *amended* complaint. *Id.* at 1017-18.

The matter presented here is quite different. Landers, as Joy admits, named "Joy Global/North Antelope Rochelle Mine" in his April 13, 2015, Statement to MSHA before that agency's investigator. While it is true that a complainant has to identify those who are alleged to have engaged in discrimination, as long as that occurred, as it did here, a complainant is not barred from proceeding against all employers named. A complainant has no ability to direct the scope of the Secretary's investigation. Further, no small observation, only Joy, as the Complainant's employer, could, and did, fire the Mr. Landers.

Also instructive, in this Court's view, is the Commission's decision in *Sandra G. McDonald v. TMK Enterprise Security*, No. WEVA 2014-387-D, 2015 WL 6588249 (FMSHRC Oct. 23, 2015).[1] As with this matter, that case was also a section 105(c)(3) proceeding. McDonald had been employed as a security guard by a security services contractor at a mine site operated by Frasure Creek Mining. In its *sua sponte* review of that judge's determination, the Commission pointed out that "*[i]n her complaint to MSHA, McDonald also listed her employer's contractor ID* as "5GI" which, according to the Mine Data Retrieval System, corresponds to the company 'TMK Enterprise Security.'" *McDonald*, 2015 WL 6588249, at *4 n.3 (emphasis added). Thus, the Commission looked to the entities named by the complainant in her MSHA Complaint.

Landers filed a motion seeking leave to file a reply to Joy's Response in opposition to its motion to add Joy. This was granted. The Motion notes that Joy argues that, because MSHA made no determination about Joy Global, Landers cannot now add Joy, as the section 105(c)(3) jurisdictional prerequisite is missing. The essence of Landers' Reply is that Joy "overstates the rigidity of the jurisdictional prerequisites set forth in Section 105(c) and [that such a] result [would operate to] punish[] Landers for incomplete administrative processing, a process over which Landers had no control." Landers' Reply at 2. The Court agrees. Landers did the only thing over which he had control: he named Joy Global as his employer in the discrimination complaint. As noted, Joy admits to being Landers' employer. Having done that, naming Joy in his Complaint, Landers can hardly be put in a position of being penalized because MSHA focused on Peabody Powder River, and compounded this by listing only Peabody Powder River

[1] In what the Court construes as a research error on Joy's part, it cites to an earlier decision by an administrative law judge in *McDonald* in which that judge denied that complainant's attempt to add a new respondent. However, as noted, *supra*, the Commission, *sua sponte*, examined that judge's decision, reversing and remanding it. The judge then issued an order on that remand, granting Complainant McDonald's right to amend her complaint, adding certain other parties "as well as any other relevant parties." *McDonald*, No. 2014-387-D, 2015 WL 7074631, at *2 (FMSHRC Nov. 3, 2015) (ALJ). Landers' Reply makes the same point, noting that Joy's analysis missed the ultimate outcome: the judge was reversed and was directed by the Commission to *add* the new respondent.

Mining LLC in its letter declining to pursue the complaint on his behalf, believing that it lacked sufficient evidence to prevail under the preponderance of the evidence standard.[2]

Landers has an assessment of the Commission's decision in *Pontiki Coal Corp*. which is in line with the view of this Court. Although Landers agrees that, as a general proposition, the Commission looks to the scope of the Secretary's investigation of discrimination complaints, it notes that the interpretation of 105(c) complaints must be consistent with its determination "that Congress intended section 105(c) to be broadly construed to afford maximum protection for miners exercising their rights under the Act." Landers' Reply at 2 (citing *Pontiki*, 19 FMSHRC at 1017). Joy contends that it is clear that the Secretary's investigation included Joy, but that "Landers was not able to control the *quality and nature* of MSHA's investigation, *i.e.*, how vigorously MSHA investigated Joy Global, [as] that was out of Landers' control." Landers' Reply at 3.

Accordingly, for the reasons set forth above, and as now reflected in the revised caption, Joy Global Surface Mining is hereby added as a party to this proceeding. This matter remains, as scheduled, for the hearing to commence in Gillette, Wyoming, on April 5, 2016. The parties should prepare accordingly, as the hearing date will not be moved back.

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

[2] One should not confuse MSHA's determination as tantamount to concluding that Landers' claim was without merit. Rather, as noted, it only came to the conclusion that there was insufficient evidence to meet the preponderance standard. Instead, MSHA noted, per Congress' design, that Landers had the right to file a discrimination case on his own behalf. Landers did that, and it was only the administrative process that continued to, incorrectly, only list Peabody Powder River Mining, LLC, as the sole respondent.

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