FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, D.C. 20004-1710

JAN 12 2016

DANIEL B. LOWE	:	
	:	
v.	:	Docket No. WEST 2014-614-DM
	:	
VERIS GOLD USA, INC.	:	
	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

ORDER

BY THE COMMISSION:

In this proceeding arising under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3), a Commission Administrative Law Judge issued a Decision and Request for Direction from the Commission, in which he upheld a complaint of discrimination filed by Daniel Lowe against the operator of the mine at which Lowe was employed, Veris Gold USA, Inc. 37 FMSHRC 2337 (Oct. 2015) (ALJ). The Judge directed Lowe to provide documented damages within 30 days of the decision so that the Judge could issue a final disposition in the proceeding, awarding damages and providing relief. *Id.* at 2350.

In his decision, the Judge noted that, around the time of the June 18, 2015, hearing on the complaint, the operator had received bankruptcy protection and its assets had been sold.[1] More specifically, the Judge summarized a newspaper article reporting that a Canadian bankruptcy court had ordered Veris Gold to sell its assets; Veris had sold its mines to Jerritt Canyon Gold LLC; Jerritt Canyon owns 80% of Veris Gold's assets; and 20% of Veris Gold's assets is owned by Whitebox Asset Management. *Id.* at 2348 n.9. The Judge sought direction from the

[1] We note that there are currently other discrimination matters pending against Veris Gold before the Commission and at the trial level. *See, e.g., Jennifer Morreale v. Veris Gold USA, Inc.*, Docket Nos. WEST 2014-788-DM and 793-DM (pending motion to reopen discrimination case and pending motion for expedited consideration, motion to reopen and motion to amend before the Commission); *Matthew Varady v. Veris Gold USA, Inc.*, Docket No. WEST 2014-307-DM (discrimination matter pending before ALJ).

Commission about how to proceed because Veris Gold's successor had never been joined as a party to the proceeding. *Id.* at 2348-49.

The Judge's October 15 decision was not a final decision ending the Judge's jurisdiction over this matter. *See Sec'y of Labor on behalf of Shemwell v. Armstrong Coal Co.*, 35 FMSHRC 2056, 2057 (July 2013). Rather, the Judge's decision was an interlocutory decision pending his final decision awarding damages and providing relief. *See id.; Estrada v. Runyan Constr., Inc.*, 36 FMSHRC 886 (April 2014).

As an administrative body created by statute, the Commission may permissibly act only within the scope of its authority as set forth in the Mine Act, 30 U.S.C. § 801 et seq. (2012), and the Commission's Procedural Rules, 29 C.F.R. Part 2700. *See, e.g., Black Beauty Coal Co.*, 34 FMSHRC 1856, 1860 (Aug. 2012). We find no provision of the Mine Act or the Commission's Procedural Rules that would permit the Commission to provide guidance to the Judge regarding the Judge's interlocutory decision or the manner in which the Judge should fashion relief in his final decision.

The Commission may not provide direction to the Judge under section 113(d)(2) of the Mine Act, 30 U.S.C. § 823(d)(2).[2] Section 113(d)(1) of the Mine Act provides that a Judge shall "make a decision which constitutes his final disposition of the proceedings" and that the decision "shall become the final decision of the Commission 40 days after its issuance unless within such period the Commission has directed that such decision shall be reviewed by the Commission in accordance with paragraph (2)." 30 U.S.C. § 823(d)(1). Paragraph (d)(2) provides two avenues of review by the Commission: under subparagraph (d)(2)(A), through a party's filing of a petition for discretionary review, and, under subparagraph (d)(2)(B), through the Commission's direction of review within its own discretion in the absence of the filing of a petition. Here, the Commission may not provide either type of review because paragraph (d)(2) provides review of only those decisions that constitute a Judge's "final disposition of the proceedings."

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[2] 30 U.S.C. § 823(d)(2) provides in relevant part:

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> (A)(i) Any person adversely affected or aggrieved by a decision of an administrative law judge, may file and serve a petition for discretionary review by the Commission of such decision within 30 days after the issuance of such decision. . . .
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> * * * * *
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> (B) At any time within 30 days after the issuance of a decision of an administrative law judge, the Commission may in its discretion . . . order the case before it for review but only upon the ground that the decision may be contrary to law or Commission policy, or that a novel question of policy has been presented. . . .

Nor may the Commission provide direction to the Judge under the Commission's rule pertaining to interlocutory review, Procedural Rule 76, 29 C.F.R. § 2700.76. Pursuant to Rule 76, the Commission may review a Judge's ruling, prior to the Judge's final decision in the case, only if certain conditions are met. First, pursuant to Rule 76(a)(1), either the Judge must certify that his or her interlocutory ruling involves a controlling question of law and that immediate review will materially advance the final disposition of the proceeding, or the Judge must deny a party's motion for certification of the interlocutory ruling to the Commission and the party must file with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification. Second, under Rule 76(a)(2), a majority of the Commission members must conclude that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding. In this case, none of these conditions have been met.

For the foregoing reasons, we conclude we are without jurisdiction[3] to provide the Judge with direction regarding his October 15 decision.[4]

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[3] On December 28, 2015, Lowe filed a Motion for Expedited Consideration from the Commission with the Commission's Office of Administrative Law Judges. In the motion, Lowe moves the Commission for "expedited consideration from the Commission to assist Judge Moran with finalizing his decision in the Complainant's discrimination action . . . ." Because we do not have jurisdiction over this proceeding, we are foreclosed from providing the assistance Lowe requested.

[4] Commissioner Cohen notes that the Complainant may file a motion to amend the complaint to add as parties the entities which now have a successor interest in the mine formerly owned by Veris Gold. *See Tolbert v. Chaney Creek Coal Corp.*, 12 FMSHRC 615 (Apr. 1990). Moreover, the Federal Rules of Civil Procedure may present several potential avenues of relief for the Complainant. *See* 29 C.F.R. § 2700.1(b) ("the Commission and its Judges shall be guided so far as practicable by the Federal Rules of Civil Procedure"). For instance, under Rule 21, a Judge may *sua sponte* grant a post-hearing joinder of a new party. Fed. R. Civ. P. 21 ("the court may at any time, on just terms, add or drop a party"). In addition, Federal Rule of Civil Procedure 15 permits a party, with the court's leave, to amend a complaint more than 21 days after the pleading is served "when justice so requires." Fed. R. Civ. P. 15(a)(2). The parties and the Judge should be cognizant of these potential options.

The Mine Act provides a Judge broad remedial powers to address instances of discrimination as may be appropriate. 30 U.S.C. § 815(c)(3) (providing that if a Judge sustains charges of discrimination he may grant "such relief as [he] deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner of his former position with back pay and interest or such remedy as may be appropriate"). Accordingly, Commissioner Cohen notes that the Commission has been granted more discretion in fashioning an appropriate remedy by the Mine Act than the Judge initially recognized. The Judge concluded that reinstatement of a miner to a successor in interest is *not possible* under the Mine Act. 37 FMSHRC at 2347. However, the remedy of reinstatement may be imposed on an operator's successor in interest. *Sec'y of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394 (Mar. 1987), *aff'd sub nom., Terco v. Fed. Coal Mine Safety & Health Review Comm'n,* 839 F.2d

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

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236 (6th Cir. 1987), *cert. denied,* 488 U.S. 818 (1988); *Simpson v. Kenta Energy,* 11 FMSHRC 770, 778 (May 1989).

Moreover, it is not clear to Commissioner Cohen that the bankruptcy proceeding filed by Veris Gold is effective against Lowe. It appears that in filing its bankruptcy petition, Veris Gold may not have given Lowe proper notice of the filing. Indeed, Lowe – together with other former employees of Veris Gold who have discrimination complaints before the Commission under section 105(c) of the Mine Act – filed a motion in the U.S. Bankruptcy Court for the District of Nevada in Case No. 14-51015 gwz in which they made this allegation. Even if the bankruptcy filing was effective against Lowe, this fact does not necessarily foreclose the Commission from providing relief against the successors in interest of Veris Gold. In *International Technical Products Corp.,* 249 NLRB 1301 (Jun. 1980), the NLRB held that a company which purchased all of the assets of a predecessor company "free and clear of all liens, claims and encumbrances" pursuant to an order of a bankruptcy court could be held responsible for the predecessor's backpay liability under federal labor law. In 2010, the Board reaffirmed the *International Technical Products Corp.* holding in *Leiferman Enterprises, LLC,* 355 NLRB 364 (Aug. 2010), *incorporating by reference* 354 NLRB 872 (Oct. 2009), *aff'd sub nom. NLRB v. Leiferman Enterprises, LLC,* 649 F.3d 873 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 1741 (2012).

Distribution:

Daniel B. Lowe
P.O. Box 2608
Elko, Nevada 89803
danny.lowe@icloud.com

Veris Gold, USA, Inc.
HC 31 Box 78
Elko, NV 89801

David M. Stanton, Esq.
Goicoechea, Di Grazi, Coyle & Stanton, Ltd.
P.O. Box 1358
davidstanton@frontiernet.net

Honorable Gregg W. Zive
U.S. Bankruptcy Court
District Of Nevada
C. Clifton Young Federal Bldg.
300 Booth St.
Reno, Nevada 89509

Matthew A. Varady
701 S. 5TH Street, #6
Elko, NV 89801

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St., South, Suite 500
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
201 12th Street South, Suite 500
Arlington, VA 22202-5450

Administrative Law Judge William B. Moran
Federal Mine Safety & Health Review Commission
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004-1710