

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 5, 2013

VERIS GOLD USA, INC.,	:	CONTEST PROCEEDINGS
(FORMERLY QUEENSTAKE RESOURCES	:	
U.S.A.),	:	Docket No. WEST 2012-1124-RM
Contestant,	:	Citation No. 8692812; 06/05/2012
	:	
v.	:	Docket No. WEST 2012-1126-RM
	:	Order No. 8692814; 06/06/2012
	:	
SECRETARY OF LABOR,	:	Docket No. WEST 2012-1127-RM
MINE SAFETY AND HEALTH	:	Citation No. 8692815; 06/06/2012
ADMINISTRATION, (MSHA),	:	
Respondent.	:	Jerritt Canyon Mill
	:	Mine ID: 26-01621
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. WEST 2013-26-M
Petitioner,	:	A.C. No. 26-01621-300934
	:	
v.	:	Docket No. WEST 2013-357-M
	:	A.C. No. 26-01621-306880-01
	:	
VERIS GOLD USA, INC.,	:	
(FORMERLY QUEENSTAKE RESOURCES	:	
U.S.A.),	:	
Respondent.	:	Jerritt Canyon Mill

DECISION

Appearances: Joseph Lake and Leon Pasker, Office of the Solicitor, U.S. Dept. of Labor, San Francisco, California for the Secretary;
Brian Hendrix and Avi Meyerstein, Jackson Lewis, Denver, Colorado for the Respondent.

Before: Judge Miller

These cases are before me on Notices of Contest filed by Veris Gold U.S.A., Inc., formerly known as Queenstake Resources U.S.A., Inc. (“Veris”), and Petitions for Assessment of Civil Penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration against Veris, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § § 815 and 820). Veris operates the Jerritt Canyon Mill near Elko, Nevada. (Tr. 9). The dockets involve two citations and one order issued by MSHA in

response to incidents that occurred at the mine on June 5th and 6th, 2012.¹ The parties presented testimony and documentary evidence at a hearing held in Reno, Nevada on July 25, 2013.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

a. *Background*

The parties agree that the Mine Safety and Health Administration has jurisdiction over the mine. (Tr. 9). The mine is engaged in the mining and processing of gold ore. Veris is a large operator and the penalties proposed will not hinder its ability to continue in business. (Tr. 9-11).

On June 4, 2012, the MSHA Elko, Nevada field office received a complaint about unsafe equipment and unmaintained pumps, pipes and hoses at the Jerritt Canyon Mill. Sec’y Ex. 10. As a result, Inspector John Stull traveled to the mine on June 5, 2012 to begin a complaint inspection. After checking in at the mine, Stull went to the office of the safety supervisor, Dan Lowe, and provided a copy of the complaint. Lowe immediately became angry, called the complaint “bullshit” and subsequently, engaged in activity that interfered with the inspection. Lowe was loud, argumentative and repeatedly cursed and yelled at Stull, while escalating his behavior to the point of intimidation and harassment. As a result, I find that the mine impeded the investigation and violated Section 103(a) of the act, failed to abate the citation issued for that violation, and, finally, after being warned several times, worked in the face of the order issued for failing to abate the original citation.

The findings of fact detailed below, are based on the record as a whole and my careful observation of the witnesses during their testimony. In evaluating the credibility of the witnesses I paid very close attention to their demeanor and voice intonations. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration, or lack thereof, and consistencies or inconsistencies in each witness’s testimony and between the testimonies of witnesses. Any failure to provide detail on each witness’s testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433,436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

At hearing, the Secretary called Inspector Stull, his supervisor, Gary Hebel, and former Veris employee, and now MSHA mine inspector, Jeffrey Bain. I found each of the Secretary’s witnesses to be credible and thorough in their description of the events. The mine operator called Dan Lowe, the mine’s safety manger, who is accused of impeding the inspection, and his subordinate, Mark Butterfield. While Butterfield’s testimony was generally credible, I do not find Lowe to be a credible witness and, instead, rely on the facts as presented by Inspector Stull. While the parties agree to some of the relevant facts involved in this case, there are a number of

¹ At hearing, the Secretary elected to vacate Citation No. 8692571, which is part of Docket No. WEST 2013-357. (Tr. 12-13).

differences in their accounts of the incidents and, where necessary, I address those differences below.

b. Summary of Events

On June 4, 2012 the MSHA Elko, Nevada field office received a complaint that alleged two safety hazards at the Jerritt Canyon Mill, one of which involved unsafe equipment, and the other of which involved maintenance of pumps, pipes and hoses. Stull, who had nearly four years of experience as a mine inspector at the time, was assigned to conduct the complaint investigation. (Tr. 29). Stull traveled to the mine on June 5, 2012 and checked in at the guard shack. While in the guard shack, Stull observed an injured miner waiting to be transported to town. (Tr. 34). The miner had a cut on his leg after being hit while shoveling. (Tr. 34). Given the injury, Stull was on high alert that there were possible safety problems at the mine. (Tr. 34-35).

Stull next met with Dan Lowe, the mine's safety director. (Tr. 35). Although Stull had inspected the mine and mill in the past, this was his first encounter with Lowe. (Tr. 35). Stull handed Lowe a redacted copy of the complaint. (Tr. 35); Sec'y Ex. 9. After receiving the written complaint, Lowe became upset, and responded that the complaint was "bullshit" and that the allegations were vague. (Tr. 35-36). Lowe immediately called the MSHA district manager, Wyatt Andrews, to discuss the vagueness of the complaint. (Tr. 36). Lowe was under the impression that Andrews instructed Stull not to inspect the complaint item concerning pumps, pipes and hoses, but Stull denies that Andrews directed him to do so. (Tr. 85, 86).

Following his meeting with Lowe, Stull requested a list of equipment at the mine, and Butterfield, an employee who worked for Lowe in the safety department, went to find the list, while Lowe and Stull headed to the equipment shop to begin the inspection. (Tr. 87). Stull began the inspection by approaching a forklift similar to the one listed in the complaint, but found it had a flat tire and was out of service. (Tr. 37-38). The inspector and Lowe walked the "no go" line while Stull checked off, but did not formally inspect, the equipment that was not ready for use. (Tr. 41).

Stull then moved on to look at the equipment, specifically a guzzler truck, on the "ready" line. (Tr. 38). While inspecting the guzzler truck Stull observed that the cab was littered with bottles, a grease gun, trash and other debris. (Tr. 39). When Stull mentioned the condition of the cab, Lowe became very upset, said that Stull's concern was "bullshit," raised his voice and began to argue with Stull. (Tr. 40). Lowe told Stull that the mine could not be cited under the housekeeping standard and took out his regulation book to show the housekeeping regulation to the inspector. (Tr. 91). Lowe also pointed out that the key in the ignition had a "do not operate" tab on it. Stull continued with what he was doing and did not respond, while Lowe became increasingly loud and continued to swear. Lowe threatened to videotape Stull with the recording device on his phone. (Tr. 40). Lowe insists that he was merely pointing out errors to the inspector and his swearing was not directed at the inspector, but rather MSHA in general. Stull, on the other hand, testified that he had never seen such hostility. (Tr. 40-41). Stull next approached a crane that had been operated for training purposes the day before. (Tr. 42). Stull asked to see the pre-op cards for the crane, but the mine refused to provide them. (Tr. 42-43).

Lowe told Stull that he didn't have authority to ask for the pre-op sheets and that they would not be provided. (Tr. 42-43). However, at hearing, Lowe insisted that he did check to see who had operated the crane on the prior day and inquired about the pre-op forms. Stull does not recall Lowe providing any explanation, just loudly refusing each request. (Tr. 104-105). Lowe told Stull to inspect the crane as it was. Stull recalls that Lowe was loud and accusatory while cursing during the discussion about the crane. At this point, Stull informed Lowe that he was impeding the investigation. (Tr. 43-44).

Butterfield testified generally that both men were raising their voices through the inspection, but only Lowe was cursing and pointing fingers. (Tr. 187, 191, 200). Butterfield recalls that Stull did not use the word "impeding," but does remember Stull using the word "intimidate." (Tr. 212, 227, 228, 235).

Stull then moved on to the lube truck, which he observed pulling into the line. (Tr. 44). Stull approached the truck and asked the operator for the pre-op documents. The operator provided the documents as requested. (Tr. 44). The pre-op documents showed that the operator had noted that two studs were missing on one of the tires. Sec'y Ex. 14-2. Stull asked why the studs had not been repaired and was told that the mine had ordered the parts. (Tr. 45). However, the document that was eventually given to Stull, Sec'y Ex. 15, indicates that the parts were not ordered until the following day, June 6, 2012. Since Stull could not tell if the broken studs were a hazard, he asked to have the wheel removed for further investigation, but Lowe refused to do so. (Tr. 46-47).

Butterfield explained that at this point in the inspection the inspector was becoming agitated and unhappy as the two men continued their verbal back and forth. Lowe recalls that the truck operator, who was a mechanic, explained that the condition of the wheel was not a hazard, and that he changed the lug nuts himself to assure they were positioned safely. Stull did not recall any explanation from the driver of the truck. (Tr. 110).

Stull testified that, at that point during the inspection, Lowe had a fit and rattled off a number of expletives, including "[f]uck, this is bullshit . . . I want you fucking off my property[,]" became very aggressive, pointed his finger at Stull, and, pulled out his phone to make a call. (Tr. 47-48, 119, 121). Stull had never experienced this kind of treatment or conduct during an inspection. (Tr. 48). He explained that Lowe spoke loudly with his face just a foot or two away from Stull's face, and pointed his finger at Stull. (Tr. 48). Stull asked Lowe to be professional, but Lowe came within inches of Stull's face and, while pointing at Stull, said "I don't give a fuck. . . . I don't give a shit what you want" and told Butterfield to "[c]all the sheriff" and have Stull removed. (Tr. 48).

Stull explained that, during this interaction, he was between the equipment and the four mine representatives (i.e., Lowe, Butterfield, Lee and the truck driver) and felt "scared" and "unsafe." (Tr. 48-49). Butterfield agreed that Lowe was cursing, but explained that the cursing was not directed at Stull. Instead, Butterfield claimed that Lowe was criticizing MSHA. However, Lowe was pointing his finger at Stull while cursing, and saying MSHA "didn't know shit." Lowe again told Stull that the inspection was "bullshit," and MSHA was not following the

Mine Act. Given Lowe's behavior, and the fact that Stull was cornered by Lowe and Butterfield, Stull felt threatened. (Tr. 49).

Butterfield explained that Lowe often uses bad language and hand movements, but while Butterfield heard Lowe swearing, he did not hear the inspector swear. (Tr. 200, 224). Nor did Butterfield see a physical altercation, but agreed that there was a verbal one unlike any he had seen while working at the mine. (Tr. 200). After placing the call to the sheriff and requesting a civil standby, Butterfield returned to Lowe and Stull to say that the sheriff had been summoned. (Tr. 185-227).

Stull stated that he was being intimidated and he was done and was going to leave the property. (Tr. 51-52, 126). In fact, Lowe had told Stull to leave, but Lowe insists that he invited the inspector to continue the inspection several times. Lowe asked the inspector at least three times if he was done with his inspection and then told the inspector that, if was done, he had no right to remain on the property. Stull made an attempt to diffuse the situation by walking away and going to his car in the hope that it would allow Lowe to cool off, however, Lowe and Butterfield followed his every step. (Tr. 52, 54).

Stull, even while inside his car, continued to feel intimidated, and so removed his car from inside the gate and parked outside to call his supervisor, Hebel. (Tr. 52, 54, 128-129). Stull explained to Hebel that Lowe was impeding the inspection, and described the verbal abuse, cursing, and yelling to Hebel. (Tr. 55). Hebel testified that Stull was nervous, distraught, and not himself. (Tr. 249). Hebel informed Stull that he was on his way.

Stull waited in his car until the sheriff arrived. (Tr. 56). Lowe and Butterfield came out of the gate to greet the sheriff. Stull told the sheriff why he was there, and Lowe countered that Stull had no authority to be there given that he had finished his inspection, that the mine property runs along the road and down to the highway, and said that Stull must leave. (Tr. 56). Stull agreed to move down to the highway, and did so while he waited for Hebel. (Tr. 56). While waiting, Stull wrote up and issued Citation No. 8692812 for impeding the investigation. (Tr. 57); Sec'y Ex. 1. He set the termination time for 2:00 that day.

When Hebel arrived, he spoke to the sheriff, who then escorted Hebel and Stull back to the guard shack where they met with Lowe. (Tr. 57-58, 250-251). Stull gave Lowe a copy of the citation and Lowe responded that it was "all a bunch of lies." (Tr. 58). Lowe told Hebel that it was Stull who was flipping out and that he thought Stull had a problem. (Tr. 58). Stull explained the situation to everyone present and informed them that he was issuing a citation for impeding and that he wished to continue the inspection without Lowe. (Tr. 59). Hebel recalled Lowe saying "just issue the fucking thing." (Tr. 252). At that time, Lowe agreed he would not go on the inspection and, subsequently, Stull left with Butterfield to continue the inspection. (Tr. 61-62, 251).

While Stull and Butterfield continued the inspection, Lowe and Hebel went to Lowe's office where Hebel attempted to speak with Lowe about professional behavior and communication. (Tr. 61-62, 251). Lowe responded that he could do what he wanted and that it was his mine. (Tr. 252). Hebel testified that he had spoken to Lowe in the past about his

behavior, and explained that, on this occasion, he found Lowe's loud, cursing statements to have constituted intimidation.

Both Hebel and Stull agree that they made it clear to Lowe that he was not wanted and, in fact, could not participate in the remainder of the inspection. (Tr. 251). Hebel and Stull both explained to Lowe that the citation for a violation of Section 103(a) would stay in effect until the complaint inspection was complete. (Tr. 62). Lowe told them that that was fine, and he would not go with Stull. However, at hearing, Lowe testified that he did not understand that the citation meant that he could not accompany Stull for the entirety of the complaint inspection, and, instead, he thought the violation was terminated when Stull returned to continue his inspection that afternoon. I credit the testimonies of Stull and Hebel in this regard as in others. Stull was clear with Lowe that he did not terminate the citation. Stull intended to leave the citation in place as he had no intention of terminating the citation if it meant that Lowe would continue to follow him and engage in aggressive behavior, including the incessant swearing, yelling and intimidation.

Stull continued the inspection with Butterfield for several hours, and then, along with Hebel, returned to the office in Elko. (Tr. 62-63). While in the office, Stull called a truck dealer to discuss the missing studs on the lube truck. (Tr. 64). The technician he spoke to recommended a torque test to determine if the wheel was secure and not a hazard. (Tr. 64).

Jeff Bain, currently an MSHA inspector, was employed in Veris' mine safety department during Stull's June 2012 inspection. (Tr. 158). Bain testified that, while working in the mine's safety department, he was responsible for accompanying inspectors during inspections. (Tr. 160). Bain testified regarding his recollection of the events on June 5th, about his time working at the mine, and his history with Lowe. I found Bain to be a very calm, honest and straight forward witness, and I credit his testimony.

Bain explained that, at the time of the inspection, he reported directly to Lowe, who had been hired as the mine's safety manager. (Tr. 160-161). Lowe, as part of his job, conducted training regarding how the safety department personnel should accompany mine inspectors. (Tr. 161). Lowe's methods were a big change from how the mine had operated in the past as Lowe instructed the safety department to be more adversarial, and, wanted them to get the inspector on and off the property as fast as possible. (Tr. 161). Bain explained that Lowe trained them to engage the inspector at every point, contest what the inspector said, and bring up issues with the inspectors in the strongest terms in an attempt to have the citation vacated. (Tr. 161). According to Bain, they were instructed to be argumentative, but not to the point that they made the inspector mad. (Tr. 162).

On June 5th, Bain observed Lowe and Stull engaged in a heated discussion near the guard shack. (Tr. 162-163). Although Lowe disputes the fact, Bain testified that he was asked by Lowe to observe what was going on. (Tr. 163). Bain observed Lowe speaking in a loud voice, and arguing over a hazard complaint and inspection. (Tr. 163). Lowe was berating MSHA, the training of inspectors, and how MSHA applied training to inspections. (Tr. 163). Bain, while standing eight to ten feet away, heard the inspector tell Lowe that he was being impeded and intimidated. (Tr. 163-164). Bain heard Lowe using expletives, but didn't recall Stull using any.

(Tr. 164). He heard Lowe ask Stull if he was done, and Stull said yes, but that he was going to call his supervisor and possibly issue an impending violation. (Tr. 164). It was obvious to Bain that Stull was shaken and that Stull wanted to disengage from the conversation with Lowe. (Tr. 165).

At some point, Bain learned from Butterfield that Lowe had asked Butterfield to call the sheriff because there was a trespasser on the site. (Tr. 165). Bain was shocked and found the action unusual. (Tr. 166). When the sheriff arrived, Bain moved on, but later questioned Lowe about the incident. (Tr. 167). Lowe explained that he wanted to show MSHA who was boss, that he didn't want to let the inspector push the company around, and that this was his way of training the inspector. (Tr. 168). Lowe explained to Bain that he was training one field office and one inspector at a time, and teaching them how to look at hazards and apply standards. (Tr. 168). Lowe also told Bain that if he directed his criticism at MSHA as a whole, and as long as he did not personally direct his abuse at an inspector, he could skirt an impending citation. (Tr. 168-169). According to Bain, Lowe said he was justified in calling the sheriff because the inspector said he was done and, as a result, no longer had a right to be on the property. (Tr. 169). While Lowe testified that he called the sheriff to diffuse the situation and because there was something wrong with the inspector, I find Bain's explanation to be more in keeping with the other testimony and, accordingly, I credit Bain's recollection of the events.

On June 6, 2012, Stull returned to the mine alone to continue the complaint inspection with the expectation that he could do so without interference from Lowe. (Tr. 64-65). Stull met Butterfield, who accompanied him back to the lube truck, where Brian Lee joined the two of them and they began the inspection. (Tr. 64-65). Stull asked Lee if he could check the torque on the tire with the missing studs so that Stull could determine if the condition created a hazard. (Tr. 65-66). Lee agreed and went to find the proper tools. (Tr. 66). However, before the torque test could be initiated, Lowe approached the party. (Tr. 66). Stull didn't want any confrontation with Lowe and, in an effort to avoid Lowe, attempted to continue to conduct the test. (Tr. 66-67). Lowe asked Stull what he was doing and, when told about the torque test, Lowe said "[b]ullshit . . . [y]ou are not going to do anything." (Tr. 67). Lowe was speaking loudly, as Stull tried to explain the purpose of the test. (Tr. 67). Lowe said that the mine didn't have to do it and was not going to do it. (Tr. 67). Stull then explained to Lowe that he was not supposed to be in the inspection party, as there was still a citation in place that had not been terminated which prohibited Lowe from impeding the inspection. (Tr. 67).

Lowe testified that he was not aware that the citation had not been terminated or that the expectation was that he could not join the inspection party. However, I credit the testimonies of Stull and Hebel that they told him that the citation was not going to be terminated until the inspection was complete and that Lowe could not accompany the inspector during that time. I note that Lowe made much of the fact that he is well versed on MSHA regulations, yet he missed the fact that the citation had not been terminated. Also, I note that, in his testimony, Lowe pointed out that he was given until the end of the first day to terminate the citation. If he was aware of the time given, he certainly should have been aware that it was not terminated.

After telling Lowe that he could not travel with the inspection party, Stull explained that, if Lowe did not leave, he would have to issue a failure to abate order. (Tr. 67). Lowe told Stull

to go ahead and issue the order because he was not going to leave the inspection party. (Tr. 68). Stull gave Lowe another opportunity to leave and explained to Lowe that he could avoid the order by leaving and allowing other members of the safety department to complete the inspection.

Stull then called Hebel at the field office and explained that Lowe was trying to join the inspection and that Stull was alone, and nervous. (Tr. 68). Hebel confirmed that Stull sounded nervous about dealing with Lowe once again. Stull discussed with Hebel issuing a 104(b) order and explained that there was no diffusing the situation with Lowe. As a result, Hebel agreed that Stull should go ahead and issue the 104(b) order. While Stull was on the phone, Hebel could hear Lowe's loud voice in the background and specifically remembered hearing him say "fucking issue it." (Tr. 253).

Following the phone call to Hebel, Stull asked to speak to the mine manager. (Tr. 68). Lowe replied that he was in charge of the mine when Stull was conducting his inspection. (Tr. 68). Stull subsequently learned that Mike Armuth was the acting mine manager that day and asked to speak to him. (Tr. 70). Lowe spoke to Armuth alone first, then Armuth came out to speak with Stull. (Tr. 322). Stull explained that there was an impending citation in place from the previous day, that it had not been terminated, and that Lowe was very much aware of its existence. Stull also explained that he had given Lowe an opportunity to avoid a failure to abate order and he was giving Armuth that same opportunity. Stull explained that he was going to issue the 104(b) order if he was not allowed to continue without interference from Lowe. (Tr. 71). Stull gave the mine five minutes to abate the condition. (Tr. 71-72). Stull testified that the short time frame was reasonable since Lowe only had to leave the inspection party for the mine to comply. (Tr. 72). Lowe belligerently refused and Armuth agreed with Lowe. Stull then went out to his car and wrote the 104(b) order, Sec'y Ex. 2, and approximately 40 minutes later provided a copy to Lowe. (Tr. 72).

When Stull returned to hand the order to the mine, he spoke with Bain, who agreed to ask Lowe if the mine was going to comply. (Tr. 76). Bain returned and said they would not comply and called Butterfield to pick up the 104(b) order and take it to Lowe. (Tr. 75, 76). Butterfield agreed to have Lowe look at it and, again, Lowe said they were not going to comply. (Tr. 75-76) Stull explained to those present that his next step was going to be issuing another violation for working in the face of the 104(b) order. Even so, Lowe loudly and arrogantly refused to allow Stull to continue his inspection unimpeded.

Stull advised the mine that he would give them time to talk and consider that they were working in the face of the order and he would call back at 3:00 p.m. to see if they had made any decisions. Stull left the mine around noon. Hebel and Stull called the mine at 3:00 p.m. and spoke with Lowe. Lowe advised Hebel and Stull that he wouldn't comply and MSHA should just go ahead and issue the next citation. Stull wrote up Citation No. 8692815 for working in the face of a 104(b) order, and sent the order by email. Hebel recalls that the conversation with Lowe was short. Lowe was asked to comply and not interfere in the inspection, but Lowe responded "fuck no" and hung up. (Tr. 255).

At hearing, Lowe insisted that he explained to Stull that his job was to accompany the inspector and that MSHA could not keep him from doing his job as a representative of the mine. However, Stull explained a number of times that Lowe must stay away during the inspection in order to comply with the order and terminate the original citation.

Stull, in an attempt to complete the complaint inspection, returned to the mine a day or two later. (Tr. 79). However, this time, Stull did not go alone. He was accompanied by Hebel and the district manager, Kevin Hirsch. (Tr. 79). Bain accompanied the MSHA inspection party initially, but then left and another member of the safety department accompanied them. (Tr. 80). Lowe did not join the inspection at first, but did show up at some point later. (Tr. 80). Again Lowe was argumentative, but with the presence of the MSHA supervisors, he was not attacking Stull or MSHA to the degree he had the prior two days, nor was he intimidating and harassing like he was on previous days. (Tr. 80). Stull did not feel he was harassed or intimidated by Lowe on that day and, therefore, he terminated the citation. (Tr. 80).

c. Citation No. 8692812

On June 5, 2012, Inspector Jack Stull issued Citation No. 8692812 to Veris for a violation of section 103(a) of the Mine Act. Section 103(a) of the Act states, in pertinent part, as follows:

Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines. . . . In carrying out the requirements of this subsection, no advance notice of an inspection shall be provided. . . . [and the authorized representatives] shall have a right of entry to, upon, or through any . . . mine.

30 U.S.C § 813(a). The citation described the alleged actions as follows:

On 06/05/2012, Danny Lowe, Safety Manager, refused to allow Jack Stull, an authorized representative of the secretary, entry into the Jarrett (sic) Canyon Mill for the purpose of conducting an inspection of the mine pursuant to Section 103(a) of the Act. Mr. Lowe harassed, intimidated and verbally assaulted Mr. Stull. Mr. Lowe instructed Mark Butterfield, Safety Coordinator, to call the sheriff. Once the sheriff arrived, Mr. Lowe denied Jack Stull entry to the mine and asked Mr. Stull to leave the mine property. This condition has not been designated as “significant and substantial” because the conduct violated a provision of the Mine Act rather than a mandatory safety or health standard.

The inspector determined that an injury was not likely, that the violation would not result in any lost workdays, that no persons were affected, and that the negligence was high.

Stull issued Citation No. 8692812 after enduring the yelling, cursing, intimidation and aggressive behavior of the mine’s safety manager, Dan Lowe. While both parties may have raised their voices, it was Lowe who constantly cursed, yelled, pointed his finger, demeaned and

criticized MSHA and the inspector, and, in the final act of intimidation, called the sheriff to have the inspector removed. The mine's witnesses acknowledged that this behavior took place, and seem to believe that such conduct is excused because they find it acceptable. I disagree. I find that Lowe's behavior was far worse than that described in the cases cited below, that the conduct rose to the level of harassment and intimidation and, in doing so, impeded the investigation and violated Section 103(a) of the Act.

The Commission has noted that the Secretary has broad authority to conduct inspections and investigations under section 103(a) of the Act. Section 103(a) authorizes inspections and investigations to determine "whether there is compliance with the mandatory health or safety standards or with any citation, order, or decision issued under the subchapter or other requirement of this chapter." *Big Ridge, Inc. et al.*, 34 FMSHRC 1003, 1012 (May 24, 2012) (citing 30 U.S.C § 813(a)). In *United States Steel Corp.*, 6 FMSHRC 1423 (June 1984), the Commission held that a violation of Section 103(a) existed where an operator failed to provide an inspector transportation to the site of an accident, which in turn prevented him from inspecting the scene. In addition, the Commission concluded that the company's insistence on the presence of a company attorney at an interview during the investigation of the accident, without specifying when the attorney would be present, then failing to produce the attorney, "had the effect of unreasonably delaying the . . . investigation" and that this delay "impeded" the investigation in violation of Section 103(a). *Id.* at 1433.

At least two Commission judges have found violations of Section 103(a) in circumstances somewhat similar to the case at hand. In *Sanger Rock & Sand*, 11 FMSHRC 403 (Mar. 1989) (ALJ), the judge found a violation of Section 103(a) when the operator was uncooperative during the inspection, delayed furnishing records that the inspector requested, and twice called the inspector a "liar." In *Jeppesen Gravel*, 30 FMSHRC 324 (Apr. 30, 2008) (ALJ), the judge affirmed violations of Section 103(a) of the Act when the operator refused to allow an authorized representative to inspect the mine, harassed and tried to intimidate the inspector while he was trying to conduct a compliance follow-up inspection, and screamed and made provoking comments toward the inspector.

The mine asserts that Lowe is naturally loud and accustomed to cursing, and argues that he was merely questioning the inspector and providing information that related to the citations. I find this argument to be without merit and, instead, find that his behavior was purposefully aimed at intimidating and harassing the inspector. Additionally, I do not find Lowe to be a credible witness. I base this finding on my observation of his testimony, including the tone of his voice, his body language, and his derogatory remarks. While Lowe and Butterfield attempted to dismiss the derogatory statements made during the inspection by insisting that they were directed at MSHA, and not the inspector, I find that they were purposefully made with the intent of intimidating and harassing the inspector. Moreover, while Lowe insists that he had the sheriff called as a way to diffuse the situation, he told Bain that he did so to show Stull "who was boss" and that "he wasn't going to let [Stull] push the company around and he was going to train the inspectors[.]" (Tr. 168). Lowe trained the safety department to question MSHA inspectors but when practicing his own policy, particularly when alone with the inspector, he did so in an overly aggressive and antagonizing manner. At hearing, Lowe continued his behavior and directed derogatory statements at Stull. Challenging an inspector and seeking clarification is

acceptable, but should not include yelling, cursing, calling names, and other intimidating behavior.

Lowe intentionally engaged in an intimidating manner and, as a result, the negligence for this citation goes beyond “high.” I note that Lowe engaged in his worst behavior when he was either alone with the inspector, or with the inspector and Butterfield, his subordinate, present. Lowe was much better behaved when Stull returned with Hebel, and again when Stull completed his inspection with Hebel and the district manager present.

Based upon my assessment of credibility and testimony as a whole, I find that the mine violated Section 103(a) as alleged. I also find this to be a very serious violation. Stull was at the mine on a complaint inspection and, whether Lowe agrees that there was a legitimate complaint or not, there is a basis to believe that a miner had some concern about his safety. Impeding the inspection essentially had the effect of preventing Stull from looking into the allegations in a timely manner and helping to correct a hazard that may have been serious. I find that Lowe’s behavior was aggravated and therefore assess a penalty of \$10,000.00 for this violation.

d. Order No. 8692814

On June 6, 2012, Inspector Stull returned to the mine and issued Section 104(b), Withdrawal Order No. 8692814. Section 104(b) provides, in part, as follows:

If . . . [an inspector] finds (1) that a violation described in a citation issued pursuant to subsection (a) has not been totally abated within the period of time as originally fixed therein or as subsequently extended, and (2) that the period of time for the abatement should not be further extended, he shall . . . promptly issue . . . [a withdrawal] order[.]

30 U.S.C. § 814(b). The order states as follows:

Danny Lowe, Safety Manager, continued to deny Jack Stull, an authorized representative of the Secretary, the right of entry into the Jarrett (sic) Canyon Mill for the purpose of conducting an inspection of the mine in accordance with the requirements of Section 103(a) of the Act. Mr. Lowe failed to take action to abate citation # 8692812. The mine is hereby given 05 minutes to comply with this order.

After issuing the 104(a) violation for impeding the inspection on June 5th, Stull returned on June 6th and was again harassed by Lowe. The mine had done nothing to abate the original citation and, given Lowe’s behavior and the nature of the violation, it was not reasonable for Stull to extend the time to abate.

The mine argues that the underlying citation had been terminated on the previous day when Stull returned and continued his inspection with Butterfield. However, when Stull began

the next day he had not issued a termination, nor had he extended the time for abatement. When Stull observed Lowe arrive and he immediately became argumentative, he determined that Lowe continued to impede his investigation. On the first day, Lowe agreed to withdraw from the inspection party and, for a short period of time, let Stull continue his inspection while Butterfield represented the mine. When Stull returned on the 6th and resumed his inspection, Lowe initially did not go along, but shortly thereafter joined the inspection party. Lowe asserts that Stull told him to leave immediately, but I credit Stull's recollection that Lowe began the intimidating behavior immediately upon his arrival, before Stull could even ask him to leave. Prior to issuing the 104(b) order, Stull informed Lowe at least twice that he should not be present and should allow the inspection to continue with another representative. I find that Stull was reasonable and gave the mine every opportunity to abate the violation prior to issuing the order. Again, Lowe was able to stall the inspector in his investigation into the complaint of unsafe conditions at the mine.

The mine also argues that Lowe cannot be kept from the inspection given that his job is to accompany the inspection party. I find this argument to be without merit. I recognize that the mine has a right to have a representative accompany the inspector, and the mine can choose who to appoint as that representative. However, when the appointed representative continues to harass the inspector and impede the investigation, it is reasonable for the inspector to seek an alternative representative. The mine had several other safety department representatives available and, in fact, Butterfield accompanied the inspector through most of his inspection without incident. Bain also was appointed to travel with Stull on one of the inspection days, as well as other managers and representatives from various departments. In keeping Lowe from participating, MSHA was not infringing on any right the mine had to allow a representative to accompany the inspector.

Section 103(f) of the Mine Act states in pertinent part that “[s]ubject to regulations issued by the Secretary, a representative of the operator . . . shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a)[.]” 30 U.S.C. § 813(f). The Commission recently addressed the rights of a representative appointed by the mine to accompany an inspector and concluded that the walkaround rights under section 103(f) are “for the purpose of aiding such inspection.” 30 U.S.C. § 813(f); *SCP Investments, LLC*, 31 FMSHRC 821 (Aug. 2009). The Commission has acknowledged that the inspector does have some discretion in limiting walkaround rights. *Secretary of Labor on behalf of Wayne v. Consolidation Coal Co.*, 11 FMSHRC 483, 489 (Apr. 1989). In *SCP Investments, LLC*, 31 FMSHRC 821, 831 (Aug. 2009) the Commission acknowledged that the legislative history of section 103(f) confirms that failure to allow a certain representative to accompany an inspector does not in any way take away from the resulting inspection. “Rather, what section 103(f) clearly does with regard to operators vis-a-vis MSHA and its inspectors is grant a qualified right[.]” *Id.* at 833.

Clearly there is no intent in the statute or the regulation to give a mine operator an unfettered right to accompany an inspector and harass, intimidate and impede that inspector. To the contrary, Section 103(f) is meant to allow a mine representative to accompany an inspector for the purpose of aiding in the inspection, not impeding it. I find that Lowe does not have an

unrestricted right to accompany the inspector and that Stull's request to have Lowe kept from accompanying him was reasonable under the circumstances found here, and particularly in light of the fact that other representatives of the mine were available to, and in fact did, accompany the inspector.

In order to establish the validity of a Section 104(b) order, the Secretary has the burden of proving by a preponderance of the evidence the existence of the initial underlying citation, including a reasonable time for abatement; the expiration of the abatement time; the failure to abate the cited violative conditions; and that the abatement time should not be extended. *Clinchfield Coal Co. v. UMWA*, 11 FMSHRC 2120, 2135 (Nov. 1989) (Commissioner Lastowka concurring).

In *Calvin Black Enterprises*, 7 FMSHRC 1151 (Aug. 1985), the Commission upheld a 103(a) violation and 104(b) withdrawal order after inspectors were denied entry to a mine because the mine's owner had issued instructions that no one was permitted on mine property without his written permission. The mine told the inspectors they were trespassing, and, as a result, the inspectors issued a citation for a 103(a) violation. Twenty minutes later, the inspectors again requested and were denied permission to inspect, prompting the inspectors to issue a 104(b) withdrawal order. The mine continued operations following issuance of the withdrawal order and was subsequently cited for working in the face of an order. Also, in *Hopkins Cnty. Coal, LLC*, 34 FMSHRC 789 (Apr. 2012) (ALJ), a Commission judge upheld a violation of 103(a) where the mine operator refused to produce the records requested by the MSHA inspector. The court also upheld a 104(b) withdrawal order because the mine operator refused to produce the requested documents after the citation was issued.

I conclude that evidence supports the inspector's determination that the time set for abatement was reasonable and should not have been extended. I have already found that there was a violation and I find that the 104(b) order was properly issued. The inspector did not abuse his discretion in determining the time set for abatement. He listed 2:00 pm as the termination time, but decided that, given Lowe's behavior and refusal to stay out of the inspection, it could not be abated at that time, and should remain in place until the complaint inspection was complete. When Stull, accompanied by Butterfield, attempted to continue his inspection the first day, he did not want a repeat of the harassing behavior exhibited by Lowe. Therefore, he asked Lowe to stay away until the inspection was complete. Still, Lowe arrived the next day after the inspection began, and exhibited the same belligerent and aggressive behavior. Not only had he been warned the previous day that the citation had not been terminated, he was warned the following morning when he appeared. Stull saw no reason to amend or change the citation and wanted to continue unimpeded. In order for Stull to terminate the citation, there must be some action to abate the violation. Here, Lowe continued to impede the inspection, and, as a result, the original citation was not sufficiently abated and would not be terminated until Stull was free to complete his inspection without the constant interference and harassment from Lowe.

Stull credibly testified that, while he gave the mine ample notice of the abatement requirements, his primary concern was completing the complaint inspection and he could not do so while Lowe continued the aggressive behavior. I find that Stull had a clear understanding of the law. He gave the company an original termination date, and when he determined that Lowe

had not complied and was continuing to harass him, he gave the mine operator additional chances to abate the violation. Stull gave due consideration to the safety of the miners in setting a time and in finally issuing an order for a failure to abate.

Even if Lowe had reason to believe that MSHA could not order him to stay away from an inspection, he was required to first abate the citation, and then bring up the issue in the proper course. He did not do so and, instead, intentionally continued to ignore the instructions of the inspector. I find that the 104(b) order was validly issued. I have considered the failure to abate in assessing the penalty for the citation discussed above.

e. Citation No. 8692815

On June 6, 2012 Stull observed that the mine operator continued to work in the face of the 104(b) withdrawal order, discussed *supra*. As a result, he issued Citation No. 8692815 for a violation of Section 104(b) of the Mine Act. The violative conduct was described as follows:

The mine operator is continuing to operate even though a 104(b) order #8692814 for non-compliance was issued by MSHA on June 6, 2012. This order required the operator to comply with the standards under 103a of the Mine Act. This condition has not been designated as “significant and substantial” because the conduct violated a provision of the Mine Act rather than a mandatory safety or health standard.

The condition or practice was later modified for the below stated reason:

This action is taken to modify the condition or practice to include the following verbiage; Safety manager Danny Lowe indirectly denied entry by continuing to harass the MSHA inspector, even after a reasonable time was given to abate the order.

The inspector determined that an injury was not likely, that the violation would not result in any lost workdays, that 1 person was affected, and that the negligence was high.

Inspector Stull issued this citation for working in the face of the 104(b) order discussed above, only after he had spoken to both Lowe and to the acting mine manager. Stull explained to both individuals that Lowe’s behavior was intimidating and interfered with the inspection, and that Lowe must not accompany the inspector during the course of this inspection. Stull’s expectation was reasonable and he relayed his expectations to Lowe on a number of occasions, as well as to the mine manager and other persons at the mine. Lowe, on the other hand, continued to be demeaning and rude and told Hebel and Stull that “fuck no” he would not comply. (Tr. 255). Lowe would not discuss the matter or seek a way to resolve it, but continued with his aggressive and threatening behavior. At that point, Stull had no choice but to issue the citation.

The mine argues that, because the failure to abate order should not have been issued, neither should this citation. The mine also argues that MSHA had no authority to keep Lowe from being part of the investigation and, in fact, they allowed him to join part way through the next inspection day. First, I have already found that the 104(b) failure to abate order was properly issued. Second, I do not agree that MSHA overstepped its authority. It is clear that MSHA was trying to get the complaint inspection complete without further delay, and that Lowe was the sole force standing in the way. In order to complete the investigation, the impediment must be removed. Other members of the safety department can, and often do, accompany the inspectors, and they were available on the dates Stull was at the mine. Lowe was allowed to rejoin the inspection before the failure to abate order was terminated only because Stull was not alone and Lowe, while aggressive, was better behaved in the presence of others, including the district manager. There is no question that the citation was valid, that it had not been abated, and that the mine continued to refuse to comply, thereby working in the face of an order.

In *Hopkins Cnty. Coal, LLC*, 34 FMSHRC 789 (Apr. 2012) (ALJ), the Commission judge concluded that a mine inspector properly issued a citation which alleged the mine continued to operate in the face of a withdrawal order and continued to violate section 103(a) by refusing to produce the requested records. Like the inspector in *Hopkins*, Stull gave the mine a number of opportunities to avoid the citation for working in the face of the order, but the mine refused. I find that the order is valid as issued. I also find this to be a serious violation. Stull was not able to complete a complaint inspection due to Lowe's actions and, therefore, was not able to follow up on a miner's safety concern. Lowe's aggressive behavior and his failure to comply with the failure to abate order were intentional. Considering the history of the mine, its size, its failure to abate the violation, along with the gravity and negligence of the violation, I assess a \$15,000.00 penalty.

f. *Citation No. 8692571*

The Secretary has elected to vacate Citation No. 8692571. (Tr. 12-13).

II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(i) of the Mine act delegates to the Commission and its judges "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(i). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. § § 815(a), 820(a). Thus when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that "in assessing civil monetary penalties, the Commission [ALJ] shall consider" six statutory penalty criteria:

- (1) The operator's history of previous violations,
- (2) the appropriateness of such penalty to the size of the business of the operator charged,
- (3) whether the operator was negligent,
- (4) the effect on the operator's ability to continue in business,
- (5) the

gravity of the violation, and (6) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(i). The history of assessed violations was admitted into evidence and shows a reasonable history for this mine. The mine is a large operator. The operator has stipulated that the penalties as proposed will not affect its ability to continue in business. The gravity and negligence are discussed above. Veris, as discussed in detail *supra*, failed to demonstrate good faith in abating the original 104(a) citation, as well as the subsequently issued 104(b) order. Based upon the six penalty criteria, and particularly the level of negligence demonstrated by the mine, an increased penalty is reasonable. The penalty amounts are as follows:

Citation No. 8692812	\$10,000.00
Order No. 8692814	Non-Assessable
Citation No. 8692815	\$15,000.00
<u>Citation No. 8692571</u>	<u>VACATED</u>
TOTAL	\$25,000.00

III. ORDER

Based on the criteria in section 110(i) of the Mine Act, 30 U.S.C. § 820(i), I assess the penalties listed above for a total penalty of \$25,000.00. Veris Gold U.S.A., Inc., formerly known as Queenstake Resources U.S.A., Inc. is hereby **ORDERED** to pay the Secretary of Labor the sum of \$25,000.00 within 30 days of the date of this decision.

/s/ Margaret A. Miller
Margaret A. Miller
Administrative Law Judge

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