FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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October 25, 2016

DANIEL B. LOWE,
Complainant,

v.

VERIS GOLD USA, INC.,

and

JERRITT CANYON GOLD, LLC,
Respondents.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-614-DM
WE-MD 14-04

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

ORDER OF DISMISSAL

Jerritt Canyon Gold, LLC ("JCG") (FKA WBVG, LLC) filed a motion to reopen bankruptcy proceedings related to the Veris Gold USA, Inc. case for the purpose of enforcing the sale order and related injunction and seeking sanctions. Three attorneys appeared before bankruptcy court Judge Gregg W. Zive on August 11, 2016 in support of the motion.[1] The motion also sought to shorten the time for the Mine Safety and Health Act ("Mine Act") discriminatees Daniel Lowe and Matthew Varady to respond to the motion. The motion to shorten the response time was filed on August 4, 2015 and granted the following day by Judge Zive. A proceeding before Judge Zive ensued on August 11, 2016; the Judge expressed at the outset that he was greatly concerned that there were proceedings being conducted in another

[1] Local counsel appeared for JCG, as did an attorney with Dorsey& Whitney, out of Salt Lake City, and a third attorney with Fennemore Craig PC, out of Phoenix, on behalf of Wbox 2014-1 LTD, opposing the two pro se non-attorney complainants in the Mine Act discrimination proceedings, Mr. Daniel Lowe and Matthew A. Varady. Mr. Lowe's Mine Act docket number is listed in the caption. Mr. Varady's Mine Act discrimination docket number is WEST 2014-307. A separate order will be issued, mirroring this one, but substituting Mr. Varady's name and the docket number for his case.

administrative forum that were violative of Section 362(a) of the bankruptcy code.[2] Motion Tr. 4.

As noted, in its motion, Jerritt Canyon also sought sanctions against the Mine Act Complainants. Judge Zive announced near the end of the hearing that he was not going to sanction Lowe and Varady, but he then warned, "But you've got to stop. . . . No. You're stopping. You're not going to go anymore. You're not going to go before Judge Moran or any other - - you're stopping regarding any attempt against successor liability, because it's not allowed pursuant to the order that's final." Motion Tr. 45-46. After acknowledging that he would not tell any Administrative Law Judge what to do and that it would be inappropriate to do so, the Judge distinguished his authority over Lowe and Varady, stating that he does have jurisdiction over them, and adding "**You will not do anything more. If you do, than I [i.e. Judge Zive] would have to consider monetary sanctions because now I've put you on notice**."[3] Tr. 46 (emphasis added).

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[2] 11 U.S.C. §362 is the automatic stay provision of the Bankruptcy Act. As the case had been closed, there was no existing automatic stay. Therefore, the case first had to be reopened by the bankruptcy court. In relevant part, §362 provides, "(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of — (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. §362(a).

[3] Judge Zive's warning that he would consider imposing monetary sanctions against Lowe and Varady are of concern because, apart from the automatic stay provision, the Court does not know of the Judge's authority to effectively stop a proceeding in another tribunal. The Judge even seemed to contradict himself, telling Lowe and Varady that if they think, "the orders that are entered as a result of today's hearing are incorrect, you have a remedy. You can ask a court to review them. I am not the final word. I can, and often do, make mistakes. But you don't get to go to the [Mine Review] [C]omission. You need to exercise the remedies that are provided by the Bankruptcy Code and the appellate rules statutes." Tr. 46-47. Yet, later he acknowledged that the decision in *Gruntz*, "indicated that parties may request a state court or other forum to make a determination if there has been a violation of the stay, but they run the risk of the state court getting it wrong. And if the state court gets it wrong or administrative law judge gets it wrong, all the proceedings and any orders entered are void." Tr. 9. Per, n. 12, *infra* the Judge's reference to "*Gruntz*" was likely a cite to 202 F.3d 1074 (9th Cir. 2000). Ironically, although the dicta in *Gruntz* certainly supports the Judge, the state court got it right that the automatic stay did not void its criminal judgment. *Id.* at 1088.

With the threat of imposing sanctions if Lowe and Varady continued to pursue damages for the acts of discrimination by Veris, and potential successor Jerritt Canyon Gold, this Court cannot put the pro se, non-attorney Complainants in financial jeopardy. Therefore, it is dismissing their claims and hopes, but does not order, that neither Lowe nor Varady appeal this Court's dismissal. The Complainants' determination of whether to bring an appeal is strictly theirs to make.

This Court's Order of Dismissal does not necessarily mean that Lowe's and Varady's Mine Act cases are terminated, because the Commission may, pursuant to 29 C.F.R. §2700.71, review this Court's decision on its own motion.[4] In the event that the Commission opts to review this dismissal, Lowe and Varady could not be held accountable or subject to the threat of monetary sanctions being imposed by Judge Zive.

The August 11, 2016 Hearing Before Judge Zive

At the outset of the hearing, Judge Zive noted that Veris sought bankruptcy protection in a Canadian court on June 9, 2014, under Chapter 15 of the United States Bankruptcy Code. Tr. 4. On May 22, 2015, a Motion for entry of an order to recognize and enforce the Canadian sale order was made. Tr. 15. The sale was pursuant to Section 363 of the Code and the Judge remarked that provision has all of the due process protections as section 1141 of the Code.[5] The Judge assumed that the financier, "got some money together, formed this entity, and bought it," adding that none of the creditors, secured and unsecured, got paid. Tr. 16. Thus, the Judge stated that if Lowe and Varady had a judgment they would not have been paid.[6] Tr. 16.

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[4] The section provides: "At any time within 30 days after the issuance of a Judge's decision, the Commission may, by the affirmative vote of at least two of the Commissioners present and voting, direct the case for review on its own motion. Review shall be directed 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. The Commission shall state in such direction for review the specific issue of law, Commission policy, or novel question of policy to be reviewed. Review shall be limited to the issues specified in such direction for review." 20 C.F.R. 2700.71

[5] Not everyone agrees with the Judge's view that the due process protections under section 363 are the same as section 1141. *See* this Court's Order on Complainant's motion to amend, 38 FMSHRC 565, 578, n. 9 (citing George W. Kuney, "Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process," 76 Am. Bankr. L.J. (2002), and "Why Successor Liability Claims are not 'Interests in Property' under Section 363(f)," 18 Am. Bankr. Inst. L. Rev. 697 (2010)).

[6] The Judge's remark that Lowe and Varady "would not have been paid" implicitly refers to Veris. That is most certainly true, but the Mine Act's successorship law would inquire whether Jerritt Canyon could be held accountable. For that entity, the Judge invoked his ruling that no successor would be liable.

On May 29, 2015 the Judge entered a sale order. The Judge stated he was aware that there was a Section 364 first position lien to the debtor in possession ("DIP") lender, (variously referred to as "WB," "Whitebox," "Wbox 2014-1"), meaning that the DIP had priority over any other secured interests. The Judge noted that Whitebox advanced $15 million and created an entity known as WBVG, Inc. LLC, which then, on June 5, 2015, changed its name to Jerritt Canyon Gold, Inc., and the transaction closed on June 24, 2015. Tr. 19. Eighty percent (80%) of the interest in Jerritt Canyon Gold was transferred to Canadian billionaire[7] Eric Sprott. Tr. 19. The DIP, Wbox 2014-1, had the remaining 20% interest in the mine. Continuing with his recounting of the events, Judge Zive stated that the Canadian sale order occurred on May 28 [2015] and that he issued his order on June 4th [2015]. Tr. 19. The Judge stated that those orders clearly provided there would be no successor liability.[8] Tr. 19. The Judge stated that, on June 18th, a motion to stay was filed by Lowe, Varady and others but that, as judgment had been entered for the Respondent on September 9, 2014, this was "well after" the complaints filed by Lowe and Varady and therefore their complaints were pre-petition. Tr. 20.

The Judge found that there was neither a legal nor a factual basis for a stay of the U.S. sale order and that Lowe and Varady had not complied with the proper procedure and that they had failed to provide any authority for the relief they sought. Tr. 22. On September 2, 2015 the case was closed. The Judge stated that in a liquidating Chapter 11 there is no discharge and that Lowe and Varady's claims can't be satisfied by the "purchaser or anybody subsequent because the injunction found in the sale order, which is a final order entered in the bankruptcy case when it was open, precludes it." Tr. 24.

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[7] Marianne Kobak McKown, *Going Private: Canadian billionaire buys Jerritt Canyon*, ELKO DAILY FREE PRESS, June 26, 2015, *available at* http://elkodaily.com/mining/canadian-billionaire-buys-jerritt-canyon/article_605d9414-8871-5695-878c-4c430c230929.html.

[8] The Judge, who stated that he had "some experience with mining," added, "I will confess now. When I was a lawyer many, many years ago, I actually did work for Dee Gold and for Barrick -- no, I didn't do -- but for Newmont," and expressed an upside to the sale as it "allow[ed] this operation to go forward, which protected the jobs of the miners and, of course, provided related economic benefit in the communities near the mine site." Tr. 41, 6. This suggested that the gold at Jerritt Canyon might otherwise be left unmined, an unlikely event. Further, the multiple discrimination complaints filed against Veris were equally important to "protecting the jobs of the miners." Around the time of those discrimination complaints, Veris was also being reviewed to determine if it should be subject to a pattern of violations charge by the Secretary of Labor.

Addressing this Court's comment about the appearance of fairness in allowing Lowe and Varady, to determine through discovery the status of Jerritt Canyon as a successor, the Judge stated,

> [w]ell, a couple points. Jerritt Canyon was the buyer, the successor. The point is it was the purchaser. What did it purchase? Their assets. But even if it is, it is of no legal significance because there's no successor liability."

Tr. 27.

The Judge continued that, as for this Court's suggestion to Lowe and Varady in advance of their appearance before the Judge, that they be allowed to have full discovery regarding the principal stock holding officers of these various entities,

> there's no point to that. Even if it was appropriate, and it's not, there's no successor liability. There's no point to let the proceeding before the Federal Mine Safety and Health Review Commission to continue to determine if Jerritt is the successor because once again, there's no successor liability.[9]

Tr. 27- 28.

The Judge stated that,

> [y]our choice is not to do anything or to ask the bankruptcy court to get relief from the stay so that you can proceed with your claim, and then the court would look at your pleadings and any opposition and make a decision. Happens all the time in bankruptcy cases, where we will allow folks that have been injured in automobile accidents or states or counties that have suffered environmental damage.

Tr. 31-32.

The Judge continued,

> Then I would have made a decision. Unfortunately, it probably wouldn't have made much economic difference to you -- and this is what I'm really trying to get across – because there is -- and none of the other debtors had any ability to satisfy your claim. I'm not saying that you weren't discriminated again. That's not what

[9] With discovery on the issue of successorship barred, the Judge's determination means that the financial relationships, if any, between those who had interests in Veris Gold and Jerritt Canyon Gold will never be known and inquiry into the monitor's acknowledgement that "[w]hile the DIP Lender's lack of support for the various EOIs might be perceived as a potential conflict of interest, the Monitor remains of the view that the Credit Bid Transaction is the appropriate course of action at this late stage of the proceedings," will similarly not be known. *Id*. at para. 39; 2016 WL 4158375 at *7. The Court is unaware of any on the record discussion by the bankruptcy court inquiring into the potential conflict of interest alluded to by the Monitor.

> I'm saying at all. What I'm saying is that even if you were able to get some type of damages, that you couldn't collect it from the debtors. There is no money. That's why Wbox 214 [sic] made a credit bid and Deutsche Bank didn't overbid. That's why there were millions and millions and millions of dollars lost in this enterprise and lost forever. And there's also a provision under 363 of the Code that allows sales of asset to occur if that's in the best interest of both the creditors and the debtor. And that was the findings (sic) made by both the Canadian judge and me. You're being treated exactly the same as every other unsecured creditor in this case.

Tr. 32-33.

The Judge acknowledged that Lowe had a judgment but that, "it's void - - it may be void ab initio as a result of a violation of Section 362 of the Bankruptcy Code." Tr. 36. The Judge did allow that "[t]he United States Courts of Appeal say the bankruptcy courts make that, and you… the Gruntz case, which dealt with a state court action, said the state court judgment entered its opinion, but if the state court judge gets it wrong, the parties are at their own peril." Tr. 36. The Judge offered that, "you [Lowe and Varady] probably should have got stay relief." Tr. 37. The Judge also remarked, "But every other creditor in this case didn't get paid, and you're in exactly the same position. . . . And they didn't do anything wrong either." Tr. 39. The Judge also remarked,

> if you want to proceed in another forum, in another place, and there's no exception to the stay, which I believe there isn't in this case -- and I understand there may be some disagreement with that, that's fine. But then you need to seek relief from this court. And the prudent measure -- and the Ninth Circuit has -- . . . has indicated that whenever there is even a doubt whether or not you need to seek relief, seek relief from the stay.

Tr. 40.

The Judge continued,

> My point is this. When those cases were filed, everybody was given the same notice you were given. And claims can be discharged, and if there's a sale of assets, it generally does not allow successor liability, which is allowed pursuant to Section 363 of the code. And there are lots of cases dealing with discrimination -- TWA was a discrimination case, if I remember correctly. . . . And those were flight attendants, I think. . . . And those claims went away. And that's the result. People lose their pensions in bankruptcy court. It's no -- one takes no pleasure in that, but that is how Congress has written the statute for policy reasons that it believes are paramount, and I don't get to wave a magic wand and ignore them, and the United States Supreme Court Law v. Siegel case about a year and a half,

two years ago made that clear. . . . Everybody says the bankruptcy court is a court of equity. In a sense we are, but that doesn't mean we just get to say, well, this would be fair, and therefore I get to do it.

Tr. 41-42.

And still later, the Judge told Lowe and Varady, "if you think I'm wrong and you want to go to another court and tell the other court your position -- . . . you can do that. . . . And that's what you -- what I'm really trying to tell you is that's what you should have done last June." Tr. 47.

Following those remarks, the Judge stated,

> I'm granting the motion to reopen. I'm going to grant the motion to enforce my sale order. And I'm going to make it clear if it wasn't clear in the order itself. There's an injunction against any attempt to proceed regarding successor liability because successor liability is specifically prohibited by the terms of the sale order. And I'm going to instruct counsel for Jerritt Canyon to provide written findings and conclusions...What it means is I've reopened the bankruptcy case. . . . That's why we have two motions. . . . first, I have to open the case. If I don't reopen the case, then I can't enter the order to enforce my earlier sale order. So I'm granting the motion to reopen under Section 350, and I find good cause exists. Then I'm granting the motion to enforce the order no success liability and injunction precluding, preventing, stopping [Varady] and Mr. Lowe from proceeding in any other forum regarding successor liability.

Tr. 58-59.

He concluded, "I put Mr. Lowe and Mr. Varady on notice that if they violate my order, I will enforce it with monetary sanctions." Tr. 60.

Following the August 11, 2016 hearing, on September 2, 2016, Judge Zive issued his order affirming his remarks at that hearing.[10]

Accordingly, as discussed above, the Court feels it has no option but to dismiss this proceeding. Despite the outcome, the Court believes that further discussion is warranted.

[10] The Judge's order, at his direction, was created by counsel for Veris/JCG and adopted by the Judge who inserted his signature.

Discussion

Judge Zive noted at the outset of the proceeding that he was aware of the discrimination complaints brought by Lowe, Varady and others. However, he then proceeded to state that he would "make the record now, Administrative Judge Moran had telephoned [him] while the case was pending, asking if [he] was aware of these [discrimination] claims." Motion Tr. 5.[11] The Judge[12] couldn't remember exactly what he told Judge Moran, nor did he take any notes, but he "remembered distinctly" telling this Court that he could not provide any legal advice, that it would be inappropriate to do so and that the discrimination complainants should obtain legal counsel, but that "[a]pparently that advice was not heeded." *Id.*

The problem with Judge Zive's multiple references to speaking with this Court in the transcript of his proceeding on Jerritt Canyon's motion is that such conversations *never* occurred.[13]

Upon reading the transcript and Judge Zive's multiple references to alleged conversations with this Court, it was necessary, on August 16, 2016, for the Court to send the Judge a letter calling attention to his multiple, egregious factual errors in asserting that there had been such communication. This Court informed the Judge that there had *never* been *any* sort of communication between Judge Zive and this Court. The letter advised,

> Judge Zive, you are mistaken. I have never called you, never spoken with you and never emailed you. Perhaps you spoke on some prior occasion with another administrative law judge, on that I can only speculate, but there has never been

[11] To be clear, the references are to Judge Zive's statements during his August 11, 2016 motion hearing.

[12] All references to the "Judge" in this Order of Dismissal refer to Judge Zive. References to the "Court" refer to the undersigned author of this Order, Judge William Moran.

[13] The Judge made several other references during his hearing, claiming to have spoken with Judge Moran. Among those errors at transcript page 12, the Judge states: "or Judge Moran - - I think that's how he's referred to is Administrative Judge Moran - - who I already indicated that I talked to, seems like a very nice man - - responded to Mr. Lowe on August 8th." Tr. 12. Later, the Judge remarked in the context of advice, "And that's why I told Judge Moran he should tell you folks to get a lawyer." Tr. 14. "And that's why when Judge Moran called me some time ago, I - - as I do in every one of these cases, without exception, I strongly urged him to advise you, if that's what he was going to do - -." Tr. 34. As noted, the Judge never spoke with this Court at any time before his August 11, 2016 hearing and the *only* communication *after* that hearing was the Judge calling this Court to apologize for his errors.

any conversation or any form of communication between us and, in the name of accuracy, I call upon you to correct the record on this score.[14]

Judge Zive recounted that he presided at the hearing to recognize the sale order, which had been approved by the Canadian court, and that he inquired of counsel for the debtor if they were aware of the discrimination claims and that he was "told yes and they were being handled." *Id.* Noting that those discrimination complaints were brought by individuals and not by "any governmental body or regulatory agency," the Judge stated that the automatic stay provision at Section 362(b)(4) appeared inapplicable.[15] *Id*. at 5-6. The Judge then noted that the bankruptcy court retains jurisdiction to determine if the automatic stay provision applies.[16] *Id.* at 6. Upon review of all the pleadings, the Judge concluded, "there was no money and [he] was satisfied that that was the situation and obviously so was the judge in Canada." *Id.* at 6-7.

Judge Zive then noted that the "sale order that was entered clearly provides that there will be no successor liability for the purchaser," and that a "new entity was formed before the transaction closed on June 24th." *Id.* at 7. The Judge then added that no request to seek relief to

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[14] To his credit, Judge Zive called this Court, twice, the same day the letter was sent to him. He apologized for his errors and advised that the record in his case would reflect his errors and include this Court's letter to him. Judge Zive's errors were not limited to knowing whom he spoke with, as he twice referenced that "*the solicitor general of the United States* disagrees with [Lowe's] position" about miners being the most precious resource and that the bankruptcy court disregards the Mine Act. Tr. 33 (emphasis added). It is the Solicitor of Labor that took issue with this Court's view, not the Solicitor General of the United States.

[15] Though not providing any specific case citations, the Judge stated, "there are a number of cases finding that dealing with asbestos cases, dealing with SEC cases, dealing with complaints regarding remediation of environmental hazards," in support of his statement that the automatic stay provision was applicable. Motion Tr. 6.

[16] The Judge stated this was not new law, and noted without specific citation, that one "can go back to 2002 and look at the Gruntz case." Motion Tr. at 6. The Judge was apparently referring to *In re Gruntz*, 202 F.3d 1074 (9th Cir. 2000), in which the Ninth Circuit addressed "(1) whether a state court modification of the bankruptcy automatic stay binds federal courts; and (2) whether the automatic stay enjoins a criminal prosecution for the willful failure to pay child support. We hold that federal courts are not bound by state court modifications of the automatic stay, but that the automatic stay does not enjoin state criminal prosecutions." Id. at 1077. Judge Zive's expression of the holding in *Gruntz* is that "parties may request a state court or other forum to make a determination if there has been a violation of the stay, but they run the risk of the state court getting it wrong. And if the state court gets it wrong or *administrative law judge gets it wrong*, all the proceedings and any orders entered are void." *Id.* at 9 (emphasis added). Ultimately the Judge may be correct but this Court is not aware of any decision by a federal district or bankruptcy court holding *that Mine Act discrimination proceedings*, with its unique anti-discrimination provisions, are subject to the automatic stay.

allow the discrimination claims to proceed in the administrative forum was made and that, apart from whatever the merits may be, it was the process that was not followed. *Id*. Judge Zive then continued that,

> astoundingly, it would appear that the failure to follow that process was being advocated by an administrative law judge who, so far as [the Judge] [could] determine, has an obligation to be fair and impartial, and yet is clearly providing legal advice to at least two of the claimants, notwithstanding the disclaimer that he was not doing so. [The Judge didn't] know how anyone who could be opposed or on the other side of the discrimination claims could believe that they were going to get a fair hearing when [one] read[s] emails indicating that the administrative law judge is providing advice and - - to those claimants that are before him and telling them how to proceed in this [Judge Zive's] court.[17]

Id. at 7-8.

It is difficult to know where to begin with Judge Zive's comments. First, fair hearings *on the issue of liability* had occurred; the decisions upholding the discrimination complaints of Mr. Lowe and Mr. Varady had long ago been decided by this Court: October 15, 2015 in the case of Mr. Lowe, 2015 WL 6447553, and September 2, 2015, in the case of Mr. Varady, 2015 WL 5307780. In the Varady matter, defense counsel hired by Veris appeared before this Court. When the evidence at that hearing made it plain to all that Varady was the victim of discrimination, Veris folded its tent and its counsel withdrew. The same counsel then announced at the outset of the Lowe discrimination complaint the week following the Varady hearing, that it was withdrawing any defense to the Lowe matter as well. However, the damages phase has never occurred for either complaint. Consequently, *no* amount of damages has been determined for either complainant.

[17] The Judge apparently believed that this Court's guidance to the pro se, non-attorneys Lowe and Varady, demonstrated unfairness. "I don't know who would want to go now in front of, frankly, Judge Moran once he's provided the assistance to you he's provided to you. I would hate to be sitting on that other side of the table, representing somebody else against you folks at this point, candidly. That's why I was surprised when I saw those emails." Tr. 28. The Judge apparently forgot that liability had already been decided in both cases, with Varady's case decided after a full and fair hearing with Veris' counsel conducting extensive discovery and full participation in the Varady hearing and then quitting participation on the eve of the Lowe hearing. Further, the Court's emails, *all* sent to both sides, informed that no determination had been made on the successorship question, nor had damages of any amount been determined. Full participation would have been provided by the Court on the issues of successorship and damages. Further, while Lowe and Varady offered preliminary thoughts about their claimed damages, this Court has never ruled on those issues and noted that some of those claims were not cognizable under the Mine Act. Those issues remain undecided even today.

As to the Judge's assertion that this Court was "clearly providing legal advice to at least two of the claimants, notwithstanding the disclaimer that [it] was not doing so," there are two points to be made. The Court made it plain when communicating with the non-attorney *pro se* complainants, Lowe and Varady, about the motion they faced by Veris to reopen the bankruptcy case, that its comments were in response to Mr. Lowe's communication to this Court upon being informed of the Veris motion before the bankruptcy court. Far from providing legal advice, the Court noted:

> If [the Court] were in [Lowe's] position, when eventually before the Bankruptcy Court, [the Court] would make the following points before that Court, ***all as expressed in the various orders/decisions this Court has issued in your discrimination proceeding before the Federal Mine Safety and Health Review Commission***. You should not view the points which follow as restricting the contentions that you may make at the Bankruptcy Court hearing, as you may have other arguments to present before that court. I would also provide the Bankruptcy Court with copies of all orders/decisions issued by this Court as well as those issued by Mine Act Judge David P. Simonton and the related Mine Review Commission's issuances.

August 8, 2016 email to Mr. Lowe, which email also copied the various Veris/Jarrett Canyon attorneys (emphasis added).

That the Court referenced its prior orders to the pro se complainants to assist them before the daunting prospect of facing multiple lawyers for Veris, Jerritt Canyon Gold, and Wbox 2014-1 LTD did not amount to providing legal advice. The Court considers it as its duty, in fact views it as part of its responsibility that essential justice be provided, to provide a pro se litigant with clarification on the significance of its decisions and the nature of the proceedings they face. Every person has a fundamental right to access justice through a fair, impartial, and meaningful hearing, regardless of whether they are represented by counsel. In particular, judges have an ethical duty to be both impartial and fair. Model Code of Judicial Conduct Canon 2 (1997) (hereinafter MCJC). Pro se litigants often find it particularly difficult to navigate complex legal and procedural issues while attempting to obtain a full hearing on the merits of their dispute. Therefore, judges have the power to make reasonable accommodations in the courtroom to ensure that pro se litigants are not unfairly hindered in exercising their Constitutional right to a fair hearing. The MCJC was revised in 2007 to clarify, "it is not a violation of [the canon of impartiality] for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard." Comment 4 to MCJC.

There is not yet comprehensive guidance on what specific accommodations are "reasonable," or what accommodations are prohibited. Jona Goldschmidt, Judicial Assistance to Self-Represented Litigants, 17 Mich. St. J. Int'l L. 601, 608 (2009). When confronted with this issue, the Supreme Court of West Virginia held,

> The fundamental tenet that the rules of procedure should work to do substantial justice . . . commands that judges painstakingly strive to insure that no person's cause or defense is defeated solely by reason of their unfamiliarity with procedural or evidentiary rules. . . . Cases should be decided on the merits, and to that end, justice is served by reasonably accommodating all parties, whether represented by counsel or not. This "reasonable accommodation" is purposed upon protecting the meaningful exercise of a litigant's constitutional right of access to the courts.

Blair v. Maynard, 324 S.E.2d 391 (West Virginia 1984).

The Court considers it no less than a judicial obligation to provide pro se parties with reasonable assistance. Needless to say, "this requires a balancing of the rights of both parties." The Role of the Judge in Pro Se Litigation, 10 No. 6 Divorce Litigation 115 (1998). There is an important difference between judicial neutrality and judicial passivity, especially in the pro se context when justice occasionally demands judicial engagement, in service of true neutrality, to balance out the disadvantages of only one party having the benefit of counsel. Richard Zorza, Esq., The Disconnect Between the Requirements of Judicial Neutrality and Those of the Appearance of Neutrality When Parties Appear Pro Se: Causes, Solutions, Recommendations, and Implications, 17 Geo. J. Legal Ethics 423 (2004). The Court's task of balancing the judge's function as an impartial arbiter against the "necessity that the pro se litigant's case be fully and competently presented" is sometimes a difficult one. ABA Standards, Commission on Standards of Judicial Administration, Trial Courts § 2.23 at 45-47 (1976).[18]

Judge Zive then proceeded to note that the discriminated former employees of Veris had been before him earlier when seeking to stay the sale order, and that they were creditors and that their claims existed prior to the bankruptcy petition, citing the definition of a creditor as an "entity - -and that includes an individual[19] - - that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." *Id*. at 8.

The Court certainly respects the jurisdictional expressions made by Judge Zive, but it does not believe that this Court's perspective is as unsound as the Judge asserted. That the

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[18] See also, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. Nat'l Ass'n Admin. L. Judiciary 447, Fall 2007.

[19] 11 U.S.C § 101, provides, at section (10) that the term "creditor" means — (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or (C) entity that has a community claim. Section (15) provides that the term "entity" includes person, estate, trust, governmental unit, and United States trustee.

subject of discrimination claims and their interface with bankruptcy protection is a thorny issue has been recognized by others:

> Bankruptcy courts, facing a surge in claims stemming from employment discrimination, are slowly exploring the impact of this area of law on case administration. An inherent conflict exists between the policies underlying employment discrimination and bankruptcy laws. On the one hand, employment discrimination laws seek to protect employees by making them whole for losses suffered, while at the same time deterring management from discriminating again. Conversely, the bankruptcy reorganization process stresses rehabilitation of the debtor and equality of distribution among the claimants. Although the Bankruptcy Code (the "Code") affords some protection to victims of discrimination, their claims are not afforded special treatment under the bankruptcy laws. Low dollar distributions on discrimination claims eviscerates the rehabilitative and deterrent goals of Title VII of the Civil Rights Act of 1964 and state discrimination statutes. The swelling tide of insolvencies involving parties to discrimination lawsuits warrants an analysis of both the treatment of employment discrimination claims in bankruptcy and the impact of these claims on the bankruptcy process… and the ability to exempt employment discrimination claims in bankruptcy.

Joanne Gelfand, *The Treatment of Employment Discrimination Claims in Bankruptcy: Priority Status, Stay Relief, Dischargeability and Exemptions,* 56 U. Miami L. Rev. 601, 602 (April 2002).

Although the *Discrimination Claims in Bankruptcy* article refers to the automatic stay provision, 11 U.S.C. §362 and acknowledges that it does not apply "to stay the commencement or continuation of proceedings by governmental units to enforce their police or regulatory power or to enforce nonmonetary judgments," this Court finds it difficult to distinguish a Section 105(c)(3) proceeding from a Section 105(c)(2) proceeding, simply because the government launches the latter.

This view arises because Congress did not establish a (c)(3) action as a lesser claim and by providing such an action for an individual to pursue it was effectively enforcing the governmental regulatory power through the individual. Congress foresaw that the agency may get it wrong and therefore created the alternative, but equal, avenue for relief against acts of discrimination against miners. In that respect the Section 105(c)(3) action is arguably unique among discrimination claims and can be viewed as indistinguishable by Congress' inclusion of the provision.

In addition, Veris proceeded to defend against Mr. Varady in the hearing before this Court. It was only when it was beyond cavil that Veris would not prevail that it packed up and left the Varady proceeding and quickly thereafter bailed from the Lowe discrimination complaint.

Conclusion

For the reasons set forth above, the Court hereby **DISMISSES** the discrimination claim brought by Daniel B. Lowe.

SO ORDERED.

William B. Moran

William B. Moran
Administrative Law Judge

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