FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 17, 2014

DANIEL B. LOWE, Complainant v. VERIS GOLD USA, INC., Respondent,	DISCRIMINATION PROCEEDING Docket No. WEST 2014-614-DM WE-MD 14-04 Jerritt Canyon Mill Mine ID 26-01621

ORDER

Before: Judge Moran

In this discrimination proceeding brought under section 105(c)(3) of the Mine Act, Counsel for the Respondent, has asserted that, pursuant to the Order of the United States Bankruptcy Court, this matter and any other administrative proceeding, is to be stayed until the Bankruptcy Court lifts its stay.

Per an Order issued by the United States Bankruptcy Court for the District of Nevada ("Bankruptcy Ct NV") on September 3, 2014, which Order was issued under Chapter 15 of the Bankruptcy Code and "Pursuant to 11 U.S.C. §§ 1504, 1515, 1517, and 1521, recognizing Foreign Representative and Foreign Main Proceeding," that court, at Paragraph 13(c) of its Order, stated:

> [A]ll persons and entities are enjoined from commencing or continuing, including the issuance or employment of process of, any judicial, administrative or any other action or proceeding involving or against the Debtors or their assets or proceeds thereof that are located in the United States, or to recover a claim or enforce any judicial, quasi-judicial, regulatory, administrative or other judgment, assessment, order, lien or arbitration award against the Debtors or their assets or proceeds thereof that are located in the United States.

Counsel for Respondent, Veris Gold USA, Inc., takes the position that there is a uniqueness associated with the fact that this is a Chapter 15 Bankruptcy Proceeding. Working from that premise, Respondent contends that decisional law issued by the Federal Mine Safety and Health Review Commission ("Commission") holding that stays under other Chapters of the Bankruptcy Code *do not* apply to Commission proceedings are not relevant to a Chapter 15 proceeding. The essence of Respondent's argument is that because stays are not automatic under Chapter 15 and because the Bankruptcy Ct NV affirmatively issued its stay order, that order must be followed.

With great respect for the United States Bankruptcy Court for the District of Nevada, this Court concludes, for the reasons which follow, that the stay does not apply at this stage of this discrimination action. Chapter 15 is a new chapter added to the Bankruptcy Code which replaces section 304 of the Bankruptcy Code. The "Bankruptcy Basics" site for the U.S. Courts notes that Chapter's purpose is "to provide effective mechanisms for dealing with insolvency cases involving debtors, assets, claimants, and other parties of interest involving more than one country." http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter15.aspx That site goes on to state that the objectives of Chapter 15 include providing "for the fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested entities, including the debtor." *Id.*

In a December 3, 2014 email from Respondent's Counsel to the Court and the Complainant, the Court was advised that there is anticipation that the Respondent will emerge from this bankruptcy in early 2015. Respondent also related that it views the Commission decision in *MSHA v. Hidden Splendor Resources, Inc.* as distinguishable, from this matter, chiefly on the basis that the *Hidden Splendor* matter involved a Chapter 11 bankruptcy. Respondent also sees a distinction in that stays are automatic under Chapter 11, but require an affirmative invocation for a stay under Chapter 15.

Subsequently, on December 15, 2014, Respondent's Counsel supplemented its position on this issue,[1] after seeking input from the law firm representing Veris in the bankruptcy matter. That information, provided in a "Memorandum Regarding Recognition of Foreign Main Proceeding in Chapter 15 Case and Application of the Automatic Stay" essentially reiterated the arguments made by Veris' attorney in this discrimination proceeding. The law firm representing Veris in the bankruptcy matter emphasized in its memorandum that the stay order "operates as an injunction against all acts against a debtor on account of pre-petition debt[.]" Memorandum at 3 (emphasis added). The Memorandum goes on to note that the Complainant's action does not qualify as an exception to a stay, as it is not being brought by a governmental unit. It adds that the Complainant's sole remedy was to have filed a proof of claim in the foreign main proceeding in Canada, which it describes as "an exclusive process by which creditors could assert claims against Debtors."[2] *Id.* at 4-6. Finally, the Memorandum suggests that moving forward in the discrimination proceeding runs the risk that it could be deemed void *ab initio*.

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[1] It is noted that Respondent's Counsel in this discrimination proceeding *is not* the Counsel for Veris Gold USA, Inc. in the Chapter 15 Bankruptcy proceeding.

[2] While not reflective of the basis for this Order, it is noted that Complainant could not have been properly served as the service was made to "Danny Lowe, Federal Mine Safety and Health Review,

Complainant, Daniel B. Lowe, acting *pro se*, has expressed, as the Court construes his arguments, that the "Commission has consistently held that MSHA proceedings are not subject to the automatic stay bankruptcy provisions of section 362. *Sec'y of Labor o/b/o Michael L. Price and Joe John Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1528-30 *(August 1990); Sec'y v. L. Kenneth Teel,* 13 FMSHRC 1915, 1916-17 (December 1991) (ALJ) [and that other cases support that discrimination cases may go forward despite a bankruptcy action citing] *Midcontinent Resources Inc.*, 14 FMSHRC 882 (May 21, 1992). Complainant contends that "[e]nforcement proceedings before the Federal Mine Safety and Health Review Commission brought by the Secretary of Labor under section 105(c)(2) of the Mine Safety Act come within a statutory exception to the automatic stay provisions of the Bankruptcy Act." Mr. Lowe adds that [w]hen actions are brought under the provisions of section 105(c)(2) of the Mine Safety Act, this is an exercise of police and regulatory powers which places this proceeding within the section 362(b)(4) exemption to the automatic stay," [citing *NLRB v. Evans Plumbing Company*, 639 F.2d 291 (5th Cir. 1981); *In re Bel Air Chateau Hospital, Inc*., 611 F.2d 1248 (9th Cir. 1979), and *In the Matter of Shippers Interstate Service, Inc*., 618 F.2d 9 (7th Cir. 1980).] On the basis of those contentions, Complainant asserts that his action should receive similar treatment. Daniel Lowe email, December 7, 2014.

In response to Respondent's subsequent submission, Mr. Lowe adds that as he is "seeking relief in this action b[r]ought before and through the authority of the Federal Mine Safety and Health Review Commission under Section 105(c) of the [1977 Mine Act]," only the Commission can adjudicate that action and that the bankruptcy proceeding cannot dilute or reduce his rights under the Mine Act. Daniel Lowe email, December 16, 2014.

Discussion

The Commission has addressed matters involving the intersection of Mine Act and Bankruptcy actions in *Sec'y of Labor o/b/o Michael L. Price and Joe John Vacha v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1528-30 (August 1990), ("*Price & Vacha*") cited above. There, it held that the matter fell "within the exceptions to the automatic stay provisions of the Bankruptcy Code," citing the "governmental unit" exception of Bankruptcy Code section 362(b)(4). It added that the case was "brought by the government, through the Secretary, to effectuate and protect the rights secured by section 105(c)(1) of the Mine Act [and that] [t]his is the kind of 'police or regulatory' action covered by the exception to the automatic stay." Last, the Commission took note that "[s]ection 362(b)(5) also excepts from automatic stay 'enforcement of a judgment, *other than a money judgment*, obtained in an action or proceeding by a governmental unit's police or regulatory power . . . [and that the] Courts have recognized that adjudicatory bodies presiding over a governmental 'police or regulatory' action may *enter* a money judgment against a respondent-debtor but may not permit *collection* of that pecuniary judgment in an enforcement action." (emphasis in original).[3]

Commission Chief Administrative Law Judge Robert J. Resnick" without any other identifying information. Also, the Chief Judge is Robert J. Lesnick.

[3] The Court has concluded that *Midcontinent Resources Inc.*, 14 FMSHRC 882 (May 21, 1992), and *Sec'y v. L. Kenneth Teel*, 13 FMSHRC 1915, 1916-17 (December 1991) (ALJ) are not useful to the resolution of this issue. However, beyond *Price & Vacha*, the Commission has

In determining that this matter should go forward, the Court's decision is based upon the following observations. Review of the section of the Mine Act involved here, section 105(c)(3), evidences Congress' clear intent that a miner's right to bring his own action is to be recognized, notwithstanding the Secretary's determination not to go forward under section 105(c)(2). Indeed, Congress directed that such 105(c)(3) proceedings are to be "expedited." There is no hint in the language employed in the (c)(3) provision that the miner's option to proceed in his own behalf is to be viewed as a diminished right vis-à-vis a discrimination action brought by the Secretary.

In addition, as with *Price & Vacha*, this determination does not tread upon the *collection* of any monies. Mr. Lowe has not yet had his day in court. Unless and until he prevails in his 105(c)(3) action, there can be no monetary compensation available to him. Anyone reading Chapter 15, or any other Chapter of the Bankruptcy Act, realizes that its focus is upon claims against debtors or their assets. Veris Gold is not a debtor at this stage of this Mine Act discrimination proceeding. Accordingly, continuing with this discrimination claim does not threaten such assets at this juncture.[4] Given that it is expected that Veris Gold will have emerged from this bankruptcy by the spring of 2015, concerns about interference with the Bankruptcy Court's authority over its assets are illusory and, in any event, this Court, consistent with Commission case law, would not address any collection issue as long as the bankruptcy proceeding is active.

When balanced against the potential harm to Mr. Lowe's exercise of his Congressionally afforded right to pursue his discrimination claim, including the risk of faded memories or witnesses becoming unavailable, the Court construes the language of section 105(c)(3) to be within the spirit of the exception to the stay provision and therefore concludes that the matter is not foreclosed by the Bankruptcy Court's stay.

The parties are directed to participate in a conference call on December 19, 2014 at 6 p.m. EST, (3 p.m. PST) and to confirm this via email to the Court.

William B. Moran

William B. Moran
Administrative Law Judge

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consistently held that the automatic stay provision does not apply. *Sec. v. Hidden Splendor Resources, Inc.*, 2013 WL 3759789, June 6, 2013.

[4] This observation means that the specter raised by the Respondent, that proceeding with the Mine Act claim runs the risk of it becoming void *ab initio*, does not apply. First, the Bankruptcy Court could not void a proceeding brought under the Mine Safety and Health Act. At most, the Bankruptcy Court could void a monetary award. Second, as noted, this proceeding is a long way from such a possible development and if Veris Gold were still in bankruptcy at that point, no order against its assets would be issued by this Court until the Bankruptcy Court allowed that to occur.

Distribution:

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