

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
721 19th St. Suite 443
Denver, CO 80202-2500
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

January 25, 2017

DANIEL B. LOWE,
Complainant,

v.

VERIS GOLD USA, INC., and JERRITT
CANYON GOLD, LLC,
Respondents.

MATTHEW VARADY,
Complainant,

v.

VERIS GOLD USA, INC., and JERRITT
CANYON GOLD, LLC,
Respondents.

DISCRIMINATION PROCEEDINGS

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

Docket No. WEST 2014-307-DM
WE-MD 14-03

Jerritt Canyon Mill
Mine ID: 26-01621

BRIEFING ORDER

Before: Judge Simonton

These discrimination cases are before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). In 2015, Daniel Lowe and Matthew Varady (“Complainants”) established discrimination claims against Veris Gold USA, Inc. (“Veris Gold”), operator of the Jerritt Canyon Mill Mine. *See Daniel B. Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337 (Oct. 2015) (ALJ); *Matthew Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037 (Sept. 2015) (ALJ). Veris Gold filed for bankruptcy prior to those discrimination hearings, and the Complainants amended their complaint to include Jerritt Canyon Gold, LLC (“JCG”), purchaser of Veris Gold’s assets in bankruptcy. The Complainants also sought to add WBox 2014-1 Ltd. (“WBox”), which they alleged is also associated with JCG as a successor in interest to the Jerritt Canyon Mill mine. Currently, WBox is not a party to these cases.

On August 9, 2016, JCG and WBox filed a motion to reopen the bankruptcy proceedings to enforce the sale order and related injunction and seek sanctions against the Complainants for continuing to pursue their discrimination claims. In an Order dated September 2, 2016, the United States Bankruptcy Court of the District of Nevada enjoined the Complainants “from pursuing claims against the Purchaser, WBox 2014-1 Ltd. . . in any other Court or proceeding, including any administrative proceeding.” Though the Judge elected not to sanction the

Complainants at that time, he expressed his concern that other proceedings were being conducted in another administrative forum in violation of section 362(a) of the Bankruptcy Code.¹ The Judge ordered the Complainants to stop pursuing their cases before the Commission or face possible monetary sanctions.

Following the Order of the Bankruptcy Court, the assigned administrative law judge stated that he could not “put the pro se, non-attorney Complainants in financial jeopardy” and dismissed the Complainants’ cases, though no party sought dismissal at that time. The Complainants filed a petition for discretionary review with the Commission on November 23, 2016. The Commission granted the petition, and on December 16, 2016, vacated the dismissal and reopened the case. The Commission stated that,

Claimants may determine freely their response to the Order of the Bankruptcy Court. Separately, respondents may choose to file motions to dismiss or we would expect the Administrative Law Judge would ask for expeditious briefing on the impact, if any, of the Bankruptcy Court’s Order upon these cases.

Daniel B. Lowe v. Veris Gold USA, Inc. and Jerritt Canyon Gold, LLC, Matthew Varady v. Veris Gold USA, Inc. and Jerritt Canyon Gold, LLC, 2016 WL 7432617 (Dec. 2016). On December 10, 2016, the cases were assigned to this court on remand.

A conference call was held with the representatives of the parties and WBox on January 18, 2017.² It was determined during the call that the Respondents intended to file a motion to dismiss, which the Complainants planned to contest. The parties disagree over whether the Bankruptcy Court’s Order effectively bars the Complainants from pursuing their discrimination claims under the Mine Act. The Complainants argue that miners who have established

¹ 11 U.S.C. § 362(a) of the Bankruptcy Act provides in relevant part :

(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 this case under this title, or to recover a claim against the debtor that arose before the commencement of this case under the title.

² Representatives of the Solicitor were not present at this conference call. Initially, this court believed it unnecessary for the Solicitor to brief this matter. Upon further reflection, however, the court now believes that the Solicitor’s input regarding the mandatory penalty assessment for 105(c)(3) discrimination findings, discussed below, would be instructive in determining the impact of the Order of the Bankruptcy Court on these cases.

discrimination under 105(c) of the Mine Act have a Congressionally-recognized status. The Bankruptcy Court's Order should therefore not affect their right to pursue remedies for findings of discrimination under the Mine Act. Veris Gold, JCG, and WBox argue that the Complainants, as 105(c)(3) discriminatees, lack the authority to challenge the stay implemented by the Bankruptcy Court under 11 U.S.C. § 362(a), and do not fall into the "governmental unit" exception outlined in section 362(b), discussed below.

In addition, the Complainants maintain that JCG and WBox can be held liable for the findings of discrimination against Veris under the Mine Act's successorship law. The Respondents and WBox again disagree.

In order to reach the question of the successorship status of JCG and non-party WBox, this Court must first address the impact of the Bankruptcy Court's Order on the Commission's jurisdiction. Only if this court determines that the Commission retains the authority to modify the Complainants' 105(c)(3) claims shall it proceed to address the interaction between the Bankruptcy Code and the Commission's successorship doctrine. Thus, this court finds it prudent to have the parties, as well as WBox and the Solicitor, brief the matters discussed below.

While the Commission declined to draw any legal conclusions based on the record in the recent Order, Commissioner Cohen provided some observations in his concurrence. Commissioner Cohen noted that because section 105(c) of the Mine Act outlines specific, Congressionally-granted rights to encourage miners to actively participate in matters of mine safety and health, the Act grants miners a status beyond ordinary unsecured creditors in the Bankruptcy Code. The Commissioner believes that this status applies to both 105(c)(2) discrimination complaints, which MSHA brings on behalf of miners, and 105(c)(3) discrimination complaints, which miners bring themselves.

Commissioner Cohen emphasized that the Commission is bound to uphold the Congressionally-recognized purposes of the Mine Act. Congress granted the Commission, not the Bankruptcy Courts, the authority to modify and set aside discrimination and interference claims under the Mine Act, and as such, the Commission has the exclusive authority to pursue these discrimination claims. Commissioner Cohen notes that this view is shared by other federal agencies. *See International Technical Products Corp.*, 249 NLRB 1301 (Jun. 1980) (determining that the Board had exclusive authority to set aside claims under the NLRA, and failure to do so would be "tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its authority...to proceed against a successor employer in furtherance of that obligation"), *reaffirmed in Leiferman Enterprises, LLC*, 355 NLRB 364 (Aug. 2010).

Finally, Commissioner Cohen observed that courts have proven willing to hold successors in interest liable for the actions of bankrupt predecessors because many of the protections of the Bankruptcy Code no longer apply to either party after the closing of bankruptcy proceedings. *See Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund, et al., v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995). Thus, there is precedent permitting successorship liability for a predecessor's actions after a "free and clear" asset sale.

Persuasive precedent exists in favor of the Respondents and WBox as well. In a similar case that was not appealed to the Commission, this court found that a discriminatee cannot pursue a claim against a successor in interest for the predecessor's discriminatory behavior when the successor purchased a bankrupt company's assets "free and clear of all Liens, Claims, and interests." *Marshall Justice v. Gateway Eagle Co., LLC*, 38 FMSHRC 2341 (Aug. 2016) (ALJ). In *Gateway Eagle*, this court granted the complainant an order of default against predecessor Gateway Eagle for a section 105(c)(3) violation because it failed to file an answer or respond to an Order to Show Cause. The court declined to extend the default order to include Rockwell LLC, the purchaser of Gateway's assets in bankruptcy. *Id.* The Court looked to the holding of the 4th Circuit in *In re Leckie Smokeless Coal Co.*, which held that a pension fund's right to collect premium payments from a successor under the Coal Act was an interest in property that arose from the property being sold. *Id.* Thus, the interest could be extinguished by a § 363 sale because the rights were grounded in the fact that those assets were employed for coal-mining purposes. *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 582 (4th Cir. 1996).

Also at issue is the status of 105(c)(3) complaints in relation to the automatic stay provision of section 362 of the Bankruptcy Code. Section 362(b) exempts any "continuation of a proceeding by a 'governmental unit' to enforce the governmental unit's police or regulatory power" from the automatic stay. *See Big Laurel Mining*, 37 FMSHRC 1997, 1997-98 (Sept. 2015). The Commission has held that "governmental unit" includes the Secretary of Labor, the Department of Labor, and MSHA within the meaning of the Bankruptcy Code. *Id. citing Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1530 (Aug. 1990).

Neither party disputes that section 105(c)(2) discrimination complaints brought by MSHA are excepted from the automatic stay provision of the bankruptcy code. It is less clear, however, whether the exception applies when miners bring their own discrimination complaints before the Commission under section 105(c)(3) of the Mine Act. The Commission has held the Secretary of Labor is required to pursue a civil penalty in all cases in which discrimination has been found. *See Callahan v. Hubb Corp*, 20 FMSHRC 832 (Aug. 1998); *Meek v. Essroc Corp.*, 15 FMSHRC 606 (Apr. 1993). There appears to be no case law interpreting whether the Solicitor's mandatory pursuit of civil penalties in all 105(c) findings of discrimination affects the automatic stay provision of the Bankruptcy Court.

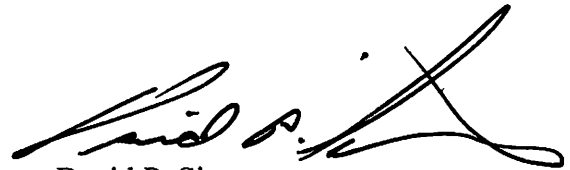
Absent binding Commission precedent on these matters and at the direction of the Commission, further briefing is necessary to determine the impact, if any, of the Bankruptcy Court's Order on the Commission's jurisdiction to determine successor liability in these cases.

The parties, WBox, and the Secretary shall file briefs regarding the impact of the Bankruptcy Court's Order upon these cases.³ Within their responses, the parties shall address:

³ The court stresses that this briefing order does not change the non-party status of WBox or the Solicitor for this case. The court recognizes that the Solicitor opted not to represent the Complainants in the discrimination cases and that the Complainants' Motion to Amend to add WBox as a party to this dispute was never granted. Neither WBox nor the Solicitor are parties to this proceeding for any purpose outside of this order.

- 1) The observations put forth by Commissioner Cohen in his concurrence.
- 2) This court's opinion in *Gateway Eagle*, 38 FMSHRC 2341.
- 3) The impact, if any, of the Bankruptcy Court's Order on the Commission's authority to pursue, modify and set aside 105(c) discrimination claims.
- 4) Whether sections 105(a), 105(c)(3), and 110(a) of the Mine Act, requiring the Solicitor to assess a civil penalty for established 105(c)(3) discrimination violations, affect or implicate the automatic stay provision in section 362 of the Bankruptcy Code.
- 5) Whether a successor in interest may be found liable for a predecessor's actions even after a "free and clear" asset sale in bankruptcy.

WBox and the Solicitor are provisionally added as parties for purposes of responding to this Order. The parties, WBox, and the Solicitor are hereby **ORDERED** to submit briefs on the issues outlined above no later than February 27, 2017.



David P. Simonton
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Cathy L. Reece, Fennemore Craig, P.C., 239 East Camelback Rd., Suite 600, Phoenix, AZ 85016

Mark Kaster, Dorsey & Whitney, 1500 South 6th Street, Minneapolis, MN 55402

Annette Jarvis, Dorsey & Whitney, 136 South Main Street, Suite 1000, Salt Lake City, UT 54101

Eric Sprott, 200 Bay Street, Suite 2700, P.O. Box 27, Toronto, Ontario, Canada M5J 2J1

Matthew A. Varady, 701 South 5th Street, #6, Elko, NV 89801

Daniel Lowe, P.O. Box 2608, Elko, NV 89803

Shaun Heinrichs, Veris Gold, 688 West Hastings Street, Suite 900, Vancouver, BC V6B 1P1, Canada

Tevia Jeffries, Dentons Canada LLP, 250 Howe Street, 20th Floor, Vancouver, BC V6C 3R8, Canada

Brad J. Mantel, Office of the Solicitor, U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202

Benjamin R. Botts, Office of the Solicitor, U.S. Department of Labor, 90 7th Street, Suite 3-700, San Francisco, CA 94103

W. Christian Schumann, Office of the Solicitor, U.S. Department of Labor, 201 12th Street South, Suite 401, Arlington, VA 22202