

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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February 4, 2016

SECRETARY OF LABOR, MSHA, on
behalf of **CHERYL GARCIA**,
Complainant,

v.

VERIS GOLD USA, INC.,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-905-DM
WE MD 14-16

Jerritt Canyon Mill Mine
Mine ID 26-01621

SUCCESSORSHIP BRIEFING ORDER

Before: Judge Simonton

This discrimination case is before me under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c). Following the listed Respondent's repeated failure to participate in mandatory prehearing proceedings, the court entered a default order in favor of the Complainant, Ms. Cheryl Garcia, on September 21, 2015. At the court's request, the Secretary submitted a civil monetary penalty and personal damages claim on behalf of Ms. Garcia on October 9, 2015.

That same day, a different 105(c)(2) Complainant petitioned the Commission to add the current operator of the Jerritt Canyon Mill Mine, Jerritt Canyon Gold, ("JCG") as a successor in interest in a separate 105(c)(2) proceeding against Veris Gold USA.¹ On October 15, 2015, a Commission ALJ sought direction from the Commission on whether JCG should be added as a successor in interest in yet another discrimination claim against Veris Gold USA.² The Commission remanded *Lowe v. Veris* WEST 2014-614 to the ALJ for further consideration³ on January 12, 2016 and has not yet addressed the Motion to Reopen in *Morreale v. Veris* WEST 2014-793.

Before assessing any penalty or damages award in this docket, the court seeks to determine if any additional party should be added as a liable entity. Accordingly, the Secretary, the Respondent, and the Current Operator, JCG, are ordered to separately address the following issues:

- 1.) Is JCG liable as a successor in interest for the discrimination claims contained in this docket?

¹ *Morreale v Veris*, WEST 2014-793, October 9, 2015 Motion to Reopen

² *Lowe v. Veris*, 37 FMSHRC 2337 (October 2015)(ALJ Moran).

³ *Lowe v. Veris*, WEST 2014-614 January 12, 2016 Commission Order

- 2.) If the Secretary does not move to add JCG as a successor in interest, may the court add JCG *sua sponte* pursuant to Rule 21 of the Federal Rules of Civil Procedure?

BACKGROUND

The Chief Judge first assigned the associated Temporary Reinstatement proceedings to this court on June 24, 2014. The Respondent opposed the Secretary's application for Temporary Reinstatement and indicated that it had recently filed for Chapter 15 Bankruptcy protection. The court subsequently granted the Complainant's application for Temporary Reinstatement on July 16, 2014.⁴ The Secretary filed a formal 105(c)(2) discrimination complaint with the Commission on August 4, 2014. The court postponed the scheduled hearing on two separate occasions with assurances from both parties that additional time would aid settlement negotiations.

On June 11, 2015, the Respondent's bankruptcy counsel sent the Complainant a letter stating that Veris Gold USA would be liquidated through an asset sale and that no proceeds would be available to satisfy employee claims.⁵ On June 16, 2015, Respondent's previous counsel filed a Notice of Withdrawal stating that Veris Gold USA had instructed counsel to withdraw from this matter pending the Respondent's corporate dissolution. Squire Patton Boggs Notice of Withdrawal.

However, the Respondent did not provide the court with any documentation regarding the asset sale, update the court on the resolution of the Respondent's Chapter 15 U.S. bankruptcy proceedings, or attempt to withdraw their contest of the subject claim. On July 28, 2015, the Secretary forwarded an e-mail message from the Respondent's bankruptcy monitor counsel indicating that the Respondent did not intend to appear at hearing, as it no longer had any employees located in the United States. July 30, 2015 Boris Orlov e-mail.

On August 17, 2015, the court convened a previously scheduled prehearing teleconference. The Secretary participated in the conference but no representative for Veris Gold USA or the Jerritt Canyon Mill Mine appeared for the call. The court subsequently determined that the Respondent's failure to appear for the prehearing conference, communicate with the Secretary, or provide current contact information violated the court's prehearing order to maintain communication with opposing counsel and the court. On August 26, 2015, the court issued an Order to Show Cause Why a Default Order Should Not Be Entered pursuant to Commission Rule 2700.66.

As JCG assumed operation of the Jerritt Canyon Mill Mine in June 2015, the court distributed the Order to Show Cause to JCG counsel for record and notice purposes. The court made no findings whatsoever on JCG's potential liability for the claims at issue in this docket. Neither the Respondent, the Respondent's Bankruptcy monitor, nor JCG provided a substantive response to the Order to Show Cause. The court entered a Default Order in favor of the Complainant on September 21, 2015.

⁴ The court denied the Complainant's request for temporary economic reinstatement and also denied the Secretary's Motion for Reconsideration of the same issue on August 22, 2014.

⁵ June 11, 2015 Ernst and Young Letter.

LEGAL CONSIDERATIONS

The Secretary, the Respondent, and JCG are directed to address the nine factor successorship test announced in *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), aff'd in relevant part sub nom. *Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983). The court notes that it may take judicial notice of Commission and ALJ findings, bankruptcy filings, and public press releases relevant to JCG's assumption of mining operations at the Jerritt Canyon Mill Mine.^{6 7 8 9} *Union Oil*, 11 FMSHRC 289, 300 n.8 (March 1989)(judicial notice can be taken of the existence or truth of a fact or other extra record information that is not the subject of testimony but is commonly known, or can safely be assumed to be true).

The briefing parties shall also address the Commission's ability to reinstate a miner to an operator's successor in interest. *Sec y of Labor on behalf of Corbin v. Sugartree Corp.*, 9 FMSHRC 394 (Mar. 1987), aff'd sub nom., *Terco v. Fed. Coal Mine Safety & Health Review Comm 'n*, 839 F.2d 236 (6th Cir. 1987), cert. denied, 488 U.S. 818 (1988); *Simpson v. Kenta Energy*, 11 FMSHRC 770, 778 (May 1989).

The court notes that an asset purchaser's liability waiver does not necessarily protect a successor in interest from liability for employee claims adjudicated by a federal administrative body. *Lowe v. Veris*, January 12, 2016 Commission Order, 4 n.4 (citing *International Technical*

⁶ *Lowe v. Veris*, WEST 2014-0614 October 15, 2015 Decision, 12 n. 9

⁷ Marianne K. McKown, *Veris Gold sells Jerritt Canyon*, Elko Daily Free Press (June 25, 2015), http://elkodaily.com/mining/veris-gold-sells-jerritt-canyon/article_9a84e5c1-c299-5179-8bc6-49f02d15e513.html.

“(Veris Gold USA) sold its Elko County gold mines Thursday to Jerritt Canyon Gold LLC, but most of the miners will remain on the job. The assets sold include the Jerritt Canyon facilities. . . . Jerritt Canyon Gold President and CEO Greg Gibson said the majority of the 250 Veris Gold employees at the site were hired. . .”

⁸ *Morreale v. Veris Motion to Reopen*: June 11, 2015 Ernst and Young Letter, JCG State of Nevada Business Registration Filing.

⁹ <http://www.law360.com/articles/546363/gold-mining-company-veris-files-ch-15-to-shield-us-assets>

“As of March 31, Veris claimed assets worth approximately \$323 million and liabilities of about \$282 million, according to the filing. The company said it does not believe it will require any interim financing to maintain its operations during the case, based on its cash flow forecasts.

Also on Monday, Veris announced that the Supreme Court of British Columbia had granted its application for creditor protection under Canada's Companies Creditors Arrangement Act. The order also extends the protection to its subsidiaries, including Veris Gold USA Inc. and Queenstake Resources Ltd.

The company called the move “the most prudent and effective way to carry on business and maximize value for the company's stakeholders,” and said it will continue to explore restructuring alternatives, including reducing its obligations and operating costs, as it navigates the bankruptcy proceedings.

It also assured investors that its primary U.S. mining operation — the Jerritt Canyon mine in Elko County, Nevada — will continue producing gold during the case and currently has a positive cash flow.

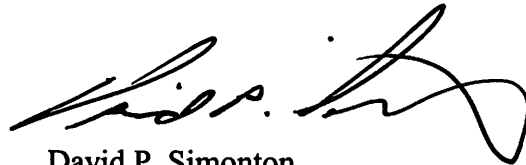
In re: Veris Gold Corp., case number 14-51015, in the U.S. Bankruptcy Court for the District of Nevada.”

Products Corp., 249 NLRB 1301 (Jun. 1980)(holding that a company which purchased all of the assets of a predecessor company "free and clear of all liens, claims and encumbrances" pursuant to an order of a bankruptcy court could be held responsible for the predecessor's backpay liability under federal labor law); *Leiferman Enterprises, LLC*, 355 NLRB 364 (Aug. 2010), incorporating by reference 354 NLRB 872 (Oct. 2009), aff'd sub nom. *NLRB v. Leiferman Enterprises, LLC*, 649 F.3d 873 (8th Cir. 2011), cert. denied, 132 S. Ct. 1741 (2012)); See also *Perma Vinyl Corp.* 164 NLRB No. 119(1967); *Golden State Bottling Co., Inc. v. N.L.R.B.* 94 S.Ct. 414 (1973).

Finally, the briefing parties shall address the ability of a Commission ALJ to independently join a party in interest. *Jones v. Federal Mine Safety and Health Review Com'n*, 827 F.2d 769, (U.S. Sixth Circuit Court of Appeals)(1987)(reversing Commission finding that ALJ could not add party *sua sponte* on grounds that joined party had adequate notice and suffered no undue prejudice); See also *Macke Laundry Service Co. of D.C.*, 190 NLRB No. 1 (1971)(finding that *sua sponte* joinder did not violate due process as the operational connections between companies were so intertwined that there was not an element of surprise to the Board's actions).

ORDER

The Secretary, the Respondent, and JCG are **ORDERED** to submit briefs on the issues outlined above no later than Monday, February 29, 2016.



David P. Simonton
Administrative Law Judge

Distribution: (U.S. First Class Mail)

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