

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 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

STAY 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). The listed Respondent, Veris Gold USA, filed for Chapter 15 Bankruptcy on June 9, 2014, several weeks before the Secretary first filed for temporary reinstatement on behalf of Ms. Garcia in this matter.¹ On June 4, 2015, Jerritt Canyon Gold (JCG) purchased the Jerritt Canyon Mill Mine and other Veris Gold assets pursuant to a section 363(f) asset sale approved by the U.S. Bankruptcy Court. As a condition of that sale, JCG obtained a liability waiver that stated the asset sale was “free and clear of all liens, claims, and interests.” Sale Order, Docket No. 14-51015 (Bankr. D. Nev.).

During that same time period, the court twice postponed the scheduled hearing in this matter with assurances 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. 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.

Veris Gold then repeatedly failed to participate in mandatory prehearing proceedings, and the court entered a default order in favor of the Complainant on September 21, 2015. At the court’s request, the Secretary submitted a civil monetary penalty and personal damages on behalf of Ms. Garcia on October 9, 2015.

Shortly thereafter, two different actions were filed with the Commission that, in effect, sought to add JCG as a liable successor in interest for separate 105(c) violations originally filed against Veris Gold. *Morreale v Veris*, WEST 2014-793, October 9, 2015 Motion to Reopen; *Lowe v. Veris*, 37 FMSHRC 2337 (October 2015)(ALJ Moran). The Commission remanded

¹ Ms. Garcia’s last potential cause of action occurred on or about February 27, 2014. As such, Ms. Garcia’s claim is a pre-bankruptcy claim and collection of any monetary award is presumptively governed by federal bankruptcy law.

Lowe to the ALJ for further consideration on January 12, 2016 and has not yet addressed the Complainant's Motion to Reopen in *Morreale*.

On February 4, 2016, this court ordered the Secretary, Veris Gold, and JCG to address the following issues for this docket.

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

The Secretary and JCG timely filed responses with the court on February 29, 2016. Veris Gold did not file a response. On February 16, 2016, JCG also filed a response with the Commission to the Complainant's Motion to Expedite and Amend in *Morreale v Veris*, WEST 2014-793.

Both the Secretary and JCG argue that this court should not add JCG as a liable successor in interest. Both entities state, with extra-Commission support, that a section 363(f) asset sale liability waiver is a complete bar to recovery for claims based upon the preceding owner's liabilities, including employment discrimination claims. *In re Trans World Airlines, Inc.*, 322 F.3d 283, 289-290 (3rd Cir. 2003); *In re New England Fish Co.*, 19 BR 323, 326-27 (Bankr. W.D. Wash. 1982). However, neither party offered any binding guidance on the relationship between the Commission's traditional successorship test and federal bankruptcy law.^{2 3}

JCG's February 16, 2016 Commission filing in *Morreale v. Veris* WEST 2014-793 is substantially similar to the filing made with this court on February 29, 2016. Therefore, it appears that the Commission is currently considering the same asset sale liability waiver and successorship issues presented in this case. The Commission's decision in *Morreale* will likely provide clarity for the adjudication of this docket. Thus, a temporary stay is warranted in this matter to ensure administrative efficiency and consistency.⁴

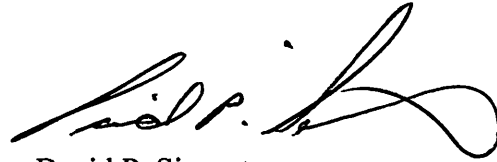
² JCG does note that the Bankruptcy Court may extinguish "Coal Act" successor liability pursuant to 11 U.S.C. § 363(f)(5). JCG Br., 7 (citing *Leckie Smokeless Coal Co.*, 99 F.3d 573, 585 (4th Cir. 1996)). Upon review the "Coal Act" referenced is the Coal Industry Retiree Health Benefit Act of 1992 that created a combined pension Fund and Plan for UMWA miners and retirees. *Leckie*, 99 F.3d 576-77. Accordingly, while the *Leckie* decision may be illustrative of the proper operation of section 363(f) asset sales in general, it is not pertinent to successorship liability under the subject Federal Mine Safety & Health Act of 1977.

³ Additionally, neither party addressed the explicit statutory requirement that 363(f) sales may proceed, "only if – (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest." 11 U.S.C. 363(f)(1). To be clear, this court cannot and will not review the Bankruptcy Court's approval of the asset sale itself. However, this court is not prepared to conclude that a section 363(f) liability waiver completely supersedes the Commission's longstanding successorship test without further Commission direction. See *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).

⁴ As noted by the Secretary, Veris Gold USA has been officially dissolved and does not retain any assets against which Ms. Garcia could potentially recover. Therefore, placing this matter in stay will not prejudice or harm the Complainant.

ORDER

Accordingly, Docket No. WEST 2014-905 is **STAYED** pending Commission action in *Morreale v Veris*, WEST 2014-793.

A handwritten signature in black ink, appearing to read 'D.P. Simonton', with a large, stylized flourish at the end.

David P. Simonton
Administrative Law Judge

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