

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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March 20, 2017

DANIEL B. LOWE,
Complainant,

v.

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

MATTHEW A. 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

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

ORDER

Before: Judge Simonton

These cases are before me upon complaints of discrimination under section 105(c) of the Federal Mine Safety and Health Act of 1977. Daniel Lowe and Matthew Varady (“Complainants”) each filed discrimination complaints with the Secretary against Veris Gold (“Veris”) in November 2013. The Secretary declined to pursue their cases, and Lowe and Varady appealed pursuant to § 105(c)(3). Veris Gold filed a petition for bankruptcy in June 2014, and one year later the United States Bankruptcy Court of the District of Nevada approved the sale of certain assets, including the Jerritt Canyon Mill, to Jerritt Canyon Gold LLC (“JCG”) “free and clear” of “claims based on any successor or transferee liability and any enforcement action or enforcement history,” including “all...employment and pension claims...” Doc. No. 318 in Dkt. No. 14-51015 (Bankr. D. Nev.) (“Sale Order”). Shortly after the Bankruptcy Court approved the Sale Order, the presiding Commission Administrative Law Judge found that the Complainants established their discrimination claims against Veris and granted their motion to amend their complaints to include JCG as a successor in interest. At issue in these consolidated cases is whether the express terms of the bankruptcy court’s Sale and Enforcement Orders can extinguish the Complainants’ successorship claims against JCG and other affiliated entities under the Mine Act.

JCG moves to dismiss the cases because the Sale Order permitted it to purchase the Jerritt

Canyon Mill free and clear of liens, claims, and interests, specifically including employment law claims, and stated that JCG would not be liable as a successor to Veris. The Complainants argue that the Mine Act authorizes them to pursue their discrimination claims against JCG as a successor in interest to Veris and to add various other parties as successors as well.¹ At the request of the Court, the Complainants, JCG, alleged affiliate WBox 2014-1Ltd. (“WBox”), and the Solicitor filed briefs addressing the court’s jurisdiction and authority to enforce the Complainants’ established discrimination claims against JCG in contravention of the Bankruptcy Court’s Sale and Enforcement order.² On the basis of the briefs and the prior submissions of the parties,³ I make the following findings and order.

I. BACKGROUND

Lowe and Varady first filed their discrimination complaints against Veris Gold (“Veris”) in November of 2013, shortly after they were discharged. The Secretary declined to pursue the claims, and the Complainants timely appealed the decisions to the Commission in April and May of 2014.

On June 9, 2014, Veris filed a petition for bankruptcy in the Supreme Court of British Columbia, Canada, Vancouver Registry, and filed a petition for recognition of the filing with the Bankruptcy Court for the District of Nevada. Veris listed the Complainants as creditors and sent notices of the bankruptcy to their personal addresses.

On June 4, 2015, the Bankruptcy Court issued an order approving a previously proposed sale of certain Veris assets to Jerritt Canyon Gold (“JCG”), pursuant to § 363 of the Bankruptcy Code. Sale Order at 6. The Order expressly approved the sale “free and clear” of all liens, claims or interests related to “any act or omission of the Debtors” prior to the sale closing,

¹ The Complainants allege that the following entities were “established or cited inside and outside of the actual bankruptcy sale of Veris Gold USA, Inc.: Jerritt Canyon Gold LLC; Whitebox Asset Management; Whitebox Advisors LLC; WBVG; WBVG LLC; WBVG 2014 Ltd.; Eric Sprott; Sprott Mining Inc.; Jerritt Canyon Gold LLC *dba* a subsidiary of Sprott Mining Inc.” *See* Complainants’ Brief, at 6-7.

² At this time, the Solicitor, WBox, and the other entities mentioned above are not parties to this case. The court ordered the Solicitor and WBox to submit briefs in a limited appearance to present their legal positions and aid the Court in rendering a decision.

³ Since the submission of the parties’ briefs, the Complainants have emailed the Court alleging that (1) the Solicitor’s office and its representatives have not read or responded to their emails, and (2) that Counsel for JCG has sent a letter informing the Complainants that it will pursue sanctions in accordance with the Bankruptcy Court’s enforcement order if Complainants continue to pursue their claims before the Commission. Regarding the first email, the Solicitor is not a party to this case and has no role or responsibility in the proceedings beyond the limited appearance to file the briefs requested by the Court. As for the email from Counsel for JCG, the Complainants have since filed a second complaint with the Commission alleging interference based on the contents of the letter. The letter is not pertinent to the instant cases, and will be sufficiently addressed in that interference proceeding.

including any claims “based on any successor or transferee liability,” and including any “labor, employment, and pension claims.” Sale Order at 6. The Sale Order also stated that JCG “is not a ‘successor’ to the Debtors or their estates by reason of any theory of law or equity, and the Purchaser shall not assume, nor be deemed to assume...any liability” of the Debtors. *Id.* at 21. Finally, the order expressly barred all individuals, including “former employees” and “governmental...and regulatory authorities” from pursuing any claims against JCG or its affiliates, successors, or assignees. *Id.* at 22.

The Complainants filed a motion in the Bankruptcy Court to stay the Sale Order two weeks after its approval. The Bankruptcy Court denied the motion because the Complainants did not follow proper procedure and did not establish a legal or factual basis for a hearing on the Stay. Doc. No. 325 in Dkt. No. 14-51015 (Bankr. D. Nev.). The asset sale closed on June 24, 2015, and the Complainants did not appeal the Sale Order. The sale generated minimal proceeds; administrative expenses were paid but none of the secured or general unsecured creditors received compensation. *See* Doc. No. 394 at 24 in Dkt. No. 14-51015 (Bankr. D. Nev.). The Bankruptcy Court entered an order granting a motion to close the Bankruptcy case on September 2, 2015. *See* Doc. No. 356 in Dkt. No. 14-51015 (Bankr. D. Nev.). The Order reiterated that all previous orders entered by the Court remained in full force and binding, and preserved the jurisdiction of the United States Bankruptcy Court for the District of Nevada in conflicts stemming from this matter. *Id.* at 2-3.

Meanwhile, the Complainants’ discrimination complaints against Veris continued to proceed before the Commission. The presiding Administrative Law Judge held Complainant Varady’s hearing on June 8-10, 2015, and issued a decision affirming his discrimination complaint on September 2, 2015. *See Matthew Varady v. Veris Gold USA, Inc.*, 37 FMSHRC 2037 (Sept. 2015) (ALJ). While acknowledging the ongoing bankruptcy sale, the ALJ nonetheless ordered the Secretary of Labor to file a petition for penalty assessment against Veris. *Id.* at 2061. The ALJ did the same after finding in favor of Complainant Lowe. *Daniel B. Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337, 2347-49 (Oct. 2015) (ALJ). The Secretary moved to dismiss the docket, arguing that the ALJ lacked jurisdiction under the Bankruptcy Code because the Complainants brought their suits as private individuals under § 105(c)(3), and thus neither suit was subject to the automatic stay exception under § 362(b)(4). The ALJ did not rule on this motion. At this time, neither party disputes that the Complainants have established a claim against Veris. *See* Respondent’s Brief at 19.

In January of 2016, both Complainants filed motions to amend their complaints before the Commission to add JCG as a successor to Veris, despite the explicit terms of the Sale Order. JCG entered a limited appearance to protest the Complainant’s motions, arguing that the ALJ did not have jurisdiction to contravene or modify the Bankruptcy Court’s Sale Order, which allowed a “free and clear” purchase and barred all successorship and employment law claims. In March of 2016 the ALJ granted the Complainants’ motions and denied JCG’s subsequent motion for certification of interlocutory review. The Commission denied JCG’s direct petition for interlocutory review in the following months. *See Daniel B. Lowe v. Veris Gold USA, Inc. and Jerritt Canyon Gold, LLC*, 38 FMSHRC 565 (Mar. 2016) (ALJ); *Matthew A. Varady v. Veris Gold USA, Inc., and Jerritt Canyon Gold, LLC*, 38 FMSHRC 513 (Mar. 2016) (ALJ).

On August 4, 2016, JCG filed a Motion to Reopen the Bankruptcy case before the U.S. Bankruptcy Court to enforce the Sale Order and related injunction. On August 11, 2016, the Court held a hearing on the motion. Both Complainants attended and participated in the proceedings. On September 2, 2016, the Court granted JCG's motion. The Bankruptcy Judge specifically advised the Complainants of their right to appeal his decision and outlined the proper procedure.⁴ While the Judge did not grant JCG's motion for sanctions at this time, he expressed his concern that the Complainants were pursuing a remedy in another administrative forum in violation of § 362(a) of the Bankruptcy Code. He ordered the Complainants to stop pursuing their cases before the Commission or face sanctions because the Bankruptcy Court was the proper venue to contest the terms of the Order and injunction. Though it was their right to do so, the Complainants did not appeal the Bankruptcy Court's decision.

Following the Order of the Bankruptcy Court, the Commission ALJ dismissed the Complainants' cases *sua sponte* for fear of putting them at risk of sanctions. The Complainants nonetheless filed for discretionary review before the Commission on November 23, 2016. The Commission granted the petition and vacated the ALJ's dismissal as premature. *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*, 38 FMSHRC 2899, 2900 (Dec. 2016). The Commission held that the Complainants should freely determine their response to the Bankruptcy Court's Order, vacated the dismissal, and remanded the consolidated cases to the Chief Administrative Law Judge who then assigned the cases to this court. *Id.* While the Commission declined to make factual findings, it suggested that additional briefing was likely necessary on remand to discuss the impact of the Sale Order and the Complainants' successorship claims. *Id.*

II. DISCUSSION

The Complainants contend that the Mine Act grants the Commission exclusive authority to adjudicate cases brought before it, and thus the Bankruptcy Court lacks authority to extinguish their claims. They argue that miners who have established a 105(c) discrimination complaint under the Mine Act have a Congressionally-recognized status and thus have the right to pursue their successorship claims against JCG and other entities associated with the Veris Gold Sale. *See Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980).

The Commission has held that a corporate successor may be held liable for its predecessor's violation of the Mine Act. *Sec'y of Labor o/b/o Corbin v. Sugartree Corp.*, 9 FMSHRC 394, 397 (Mar. 1987), *aff'd sub nom. Terco, Inc. v. Fed. Coal Mine Safety & Health Review Comm'n*, 839 F.2d 236 (6th Cir. 1987); *see also Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465 (Dec. 1980) (applying successorship doctrine in a Coal Act Case). However, JCG argues that successor liability is not available in this case because it acquired Veris' assets "free and clear" as part of a bankruptcy proceeding, and because the Sale and Enforcement Orders bar any successorship claims from government entities or employment

⁴ Specifically, the Bankruptcy Court Judge said "If you 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...you need to exercise the remedies that are provided by the Bankruptcy Code and the appellate rules and statutes." Doc. No. 383 in Dkt. No. 14-51015 (Bankr. D. Nev.).

disputes.

JCG purchased the Jerritt Canyon Mill mine in a sale authorized by the bankruptcy court on June 4, 2015. Section 363(f) of the Bankruptcy Code permits a trustee in bankruptcy to “sell property under subsection (b) or (c) free and clear of any interest in such property of an entity other than the estate.” 11 U.S.C. § 363(f). Courts have generally held that this language empowers the trustee to sell assets free and clear of successor liability claims. *See, e.g., In re Motors Liquidation Co.*, 829 F.3d 135 (2d Cir. 2016), *petition for cert. filed sub nom. General Motors, LLC, v. Celestine Elliott, et. al.*, No 16-764 (Dec. 15, 2016); *In re Chrysler LLC*, 576 F.3d 108, 126 (2d Cir. 2009), *vacated as moot sub nom.; Ind. State Police Pension Tr. v. Chrysler LLC*, 558 U.S. 1087 (2009); *In re Trans World Airlines*, 322 F.3d 283, 288-90 (3d Cir. 2003) (“TWA”); *In re Leckie Smokeless Coal Co.*, 99 F.3d 573, 582 (4th Cir. 1996); *but see Zerand-Bernal Grp., Inc. v. Cox*, 23 F.3d 159, 163 (7th Cir. 1994). These courts have interpreted the “interests in property” language to refer to not only in rem interests, but also to interests that “arise from the property being sold.” *Chrysler*, 576 F.3d at 126; *TWA*, 322 F.3d at 290; *see also Motors Liquidation Co.*, 829 F.3d at 154-56. In *Leckie*, the 4th Circuit held that a pension fund’s right to collect premium payments from a successor under the Coal Act is an interest in property that may be extinguished in a § 363 sale because:

[t]hose rights are grounded, at least in part, in the fact that those very assets have been employed for coal-mining purposes: if [the debtors] had never elected to put their assets to use in the coal-mining industries, and had taken up business in an altogether different area, the Plan and Fund would have no right to seek payments from them.

Leckie, 99 F.3d at 582.

These courts have also observed that allowing a claimant to assert a successor claim against a § 363 asset purchaser would “subvert the Bankruptcy Code’s priority scheme, by allowing a low-priority, unsecured claim to leapfrog over other creditors in the bankruptcy.” *In re Grumman Olson Indus., Inc.*, 467 B.R. 694, 703 (S.D.N.Y. 2012); *see also Chrysler*, 576 F.3d at 126; *TWA*, 322 F.3d at 292; *New Eng. Fish Co.*, 19 B.R. 323, 329 (Bankr. W.D. Wash. 1982) (Holding that purchasers would not take businesses burdened with civil rights litigation, thus chilling or rendering impossible any other sale). Moreover, courts have noted that allowing the bankruptcy trustee to sell assets free and clear of successor liability claims enables the trustee to maximize the sale price of the assets. *See Douglas v. Stamco*, 363 F. App’x 100, 103 (2d Cir. 2010); *TWA*, 322 F.3d at 292-93; *Leckie*, 99 F.3d at 586-87. While this may be at the expense of successor liability claimants, it is consistent with the Bankruptcy Code’s goal of preserving jobs. *See TWA*, 322 F.3d at 293.

The Complainants argue that the Mine Act’s purpose and authority grant miners a Congressionally-recognized status beyond that of ordinary creditors. Complainants Brief at 8. The Complainants believe that this status elevates Mine Act claims above the bankruptcy court’s authority to extinguish claims for successor liability. *See International Technical Products Corp.*, 249 N.L.R.B. 1301 (1980) (“ITP”). In *ITP*, the NLRB held that a bankruptcy court’s free and clear sale did not extinguish a successor’s liability for back pay under an NLRB order against the debtor. *Id.* at 1303. The Board stated that:

“[W]hile a bankruptcy court may have the authority to assign priority to the Board’s claim for back pay, the authority to modify or set aside the order upon which the claim is based rests exclusively with the Board and the appropriate reviewing Federal courts, and not the bankruptcy courts.

ITP, 249 N.L.R.B. at 1303.

I decline to apply the *ITP* decision to the facts at hand. First, *ITP* was decided under the previous Bankruptcy Act, and it is unclear whether it is applicable under the current code. The decision was not appealed, and other Board decisions have challenged the validity of its holding. See *Kanowski Furniture, Inc.*, 314 NLRB 107, 112 (1994) (“Whatever the final balance between the [NLRA and Bankruptcy Code] may be, totally ignoring regular bankruptcy proceedings is not it.”); *In the Matter of Ecusta Development Center*, 32 NLRB AMR 71, 2005 WL 6715471 (2005) (Judge/Administrative Officer) (“*ITP*...fails to take into account and reconcile the important competing objectives underlying [the Bankruptcy Code’s] different Federal statutory scheme.”). This court has also expressed doubt about the viability of *ITP*’s holding in the context of §105(c)(3) complaints. See *Justice v. Gateway Eagle Coal Co., LLC*, 38 FMSHRC 2341, 2344 (Aug. 2016) (ALJ).

Second, the *ITP* holding has been criticized by various Courts of Appeals, including the Ninth circuit, for conflicting with the Supreme Court’s decision, *Nathanson v. National Labor Relations Board*, 344 U.S. 25 (1952). The Court in *Nathanson* held that the NLRB may enforce a back pay award against a bankrupt entity, but that the claim is not entitled to priority or special status.⁵ Most Courts of Appeals have found that the Bankruptcy Court has the authority to approve an assets sale free and clear of successor liability. *Id.* at 27-29; see *TWA*, 322 F.3d at 291-92 (barring successorship for EEOC discrimination claims); *In re Leckie Smokeless Coal Co.*, 99 F.3d at 582 (barring successorship claims of pension funds stemming from the Coal Act); *NLRB v. Walsh (In re Palau Corp.)*, 18 F.3d 746, 750 (9th Cir. 1993) (Holding that the Bankruptcy Code determines whether NLRB back pay claims receive priority); *In re New Eng. Fish Co.*, 19 B.R. at 327 (finding that the *ITP* majority’s attempt to distinguish *Nathanson* is based on “specious reasoning”).

The Ninth Circuit, where the Jerritt Canyon Mill is located, has declined to accept the

⁵ The Complainants rely on *Nathanson* to argue that Mine Act discrimination claims are similar to NLRB unfair labor practice claims, and thus cannot be extinguished. Their reliance is misplaced, however, since the Court in *Nathanson* held that “the policy of the NLRA is fully served by recognizing the claim for back pay as one to be paid from the estate. The question whether it should be paid in preference to other creditors is a question to be answered from the Bankruptcy Act.” *Id.* at 28-29. Assuming that the Mine Act and NLRA are sufficiently similar to warrant comparison, the holding in *Nathanson* would support the argument that discrimination claims under the Mine Act should not be prioritized over Veris’ secured creditors, who did not receive payment from the sale to JCG. Thus, the holding in *Nathanson* supports the Bankruptcy Court’s Sale Order in this case because Mine Act discrimination claims are not given special status or preference to other creditors under the terms of the Bankruptcy Code.

Board's ruling in *ITP* regarding statutory claims analogous to the Mine Act, and has clarified the interplay between federal employment statutes and the Bankruptcy Code. See *In re Palau Corp.*, 18 F.3d at 750; *New Eng. Fish Co.*, 19 B.R. at 327. In *New England Fish Co.*, the Bankruptcy Court found that Title VII civil rights claimants were unsecured creditors and therefore could not pursue successorship liability claims in a free and clear sale. *New Eng. Fish Co.*, 19 B.R. at 328. The Court found that adhering to *ITP* and allowing pursuit of successorship would create a "value judgment...that it was the intention of Congress for certain creditor or claimant constituencies to be accorded a higher priority than any set forth in the Code," contrary to the Supreme Court's holding in *Nathanson*. *Id.* In *Palau*, the Court found that while NLRB laws prohibiting unfair labor practices govern the question of whether or not a claim for compensation exists and what the value of that claim is, it is the Bankruptcy Code which determines the priority and the allowability of any and all claims filed in a bankruptcy proceeding. *In re Palau Corp.*, 18 F.3d at 750 (citations omitted).

Here, allowing the Complainants to pursue successorship liability against JCG in violation of a free and clear sale would subvert the policies outlined in the Bankruptcy Code and affirmed in *Nathanson*. Like the Title VII claimants in *New England Fish Co.*, the Complainants in these cases are unsecured creditors. They pursued their claims and received a decision and monetary judgment well after Veris initially petitioned for bankruptcy and the Judge finalized the Sale Order. *New Eng. Fish Co.*, 19 B.R. at 328. The Complainants' motions to amend their complaints and include JCG as a successor were filed even later. It is undisputed that the asset sale only covered administrative costs, and did not satisfy the claims of Veris' secured creditors, let alone its unsecured creditors. See Doc. No. 394 at 24 in Dkt. No. 14-51015 (Bankr. D. Nev.). Therefore, to allow the Complainants to pursue successorship claims in violation of a free and clear Sale Order would prioritize an unsecured creditor over the unpaid secured and unsecured claims expressly protected within the Bankruptcy Code.

Furthermore, I find no support for the claim that the Commission can override or ignore the Bankruptcy Court's interpretation and enforcement of the Sale Order to allow successorship liability. The Mine Act's discrimination provisions are similar to the NLRA's unfair labor practices in *Palau*, in that the statutes govern the existence and value of employment claims, but do not authorize the agency to determine priority and allowability of those claims in a bankruptcy proceeding. See *Palau*, 18 F.3d at 750. In this case, the issue is not whether discrimination occurred but whether the Complainants can pursue their successorship claims beyond the terms of the Sale Order before the Commission. The interpretation and efficacy of the Sale Order is governed by the Bankruptcy Code and not the Mine Act. *Id.*

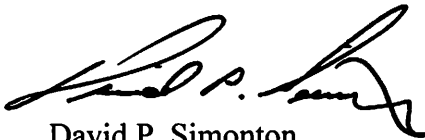
The bankruptcy court determined the priority and allowability of the Complainants' claims when it ordered the sale "free and clear of all Liens, Claims, and Interests," and stated that JCG would not be liable as a successor to Veris. The Bankruptcy Court also expressly retained jurisdiction over disputes regarding the terms of the Sale Order. This was clearly within the bankruptcy court's power under § 363. Thus, to deny the Respondent's Motion to Dismiss and adjudicate the issue of successor liability would be futile.

ORDER

Upon review of the complaint and the entire record in these cases, the Respondent's Motion to Dismiss is **GRANTED**. Complainants' motion to add additional parties as successors in interest to Veris Gold is **DENIED**.

Should the Complainants wish to obtain an order of payment against Veris Gold, they are directed to resubmit claims for personal relief no later than April 3, 2017. The Complainants should state with particularity whether they are seeking reinstatement, back pay, or both, and should provide calculations of back pay and evidence of mitigation of circumstances. *See Metric Constructors*, 6 FMSHRC 226, 232 (Feb. 1984) (Employee must reasonably search for a suitable alternative job.), *aff'd*, 766 F.2d 469 (11th Cir. 1985); *Sec'y o/b/o Michael J. Dunmire v. Northern Coal Co.*, 4 FMSHRC 126, 144 (Feb. 1982) (back pay may be reduced where a miner fails to mitigate damages by failing to remain in the labor market or to search diligently for alternative work) (citations omitted). Upon receipt of Complainant's petitions for relief against Veris Gold, I will review them and issue a subsequent order for relief against Veris Gold and consistent with my above order dismiss any and all claims against JCG. .

If the Complainants elect not to submit claims for personal relief against Veris Gold they may immediately notify the court and a dismissal order will be issued. The parties will then have 30 days after the dismissal order is issued within which to appeal to the Commission for discretionary review.



David P. Simonton
Administrative Law Judge

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