

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 26, 2016

MATTHEW A. VARADY,
Complainant,

v.

VERIS GOLD USA, INC.,

and

JERRITT CANYON GOLD, LLC,
Respondents.

DISCRIMINATION PROCEEDING

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

Mine: Jerritt Canyon Mill
Mine ID: 26-01621

**ORDER ON JERRITT CANYON GOLD'S MOTION FOR CERTIFICATION OF
INTERLOCUTORY REVIEW**

Before: Judge Moran

Dorsey & Whitney LLP, on behalf of Jerritt Canyon Gold, LLC, ("JCG") has filed a motion seeking interlocutory review, per 29 C.F.R. § 2700.76.¹ The Motion requests that the Court "certify that [its] ruling to add JCG as a respondent in this matter involves a controlling question of law and that immediate review *will* advance the final disposition of the proceeding."² Motion at 1 (emphasis added).

For the reasons which follow, the Court, by not having determined that immediate review will materially advance the final disposition of the proceeding, DENIES the motion.³

¹ The Court, after checking with the Commission's electronic filing system, emailed the Complainant on April 19, 2016, to determine if any response was made to this motion. The Respondent confirmed via email the same day that he had not submitted a response.

² An unexplained oddity, under § 2700.76, when a judge is addressing a motion for interlocutory review, part of the test is whether immediate review *will* materially advance the final disposition of the proceeding, but the same section provides that, if the motion is denied by the judge, the Commission's review is whether "immediate review *may* materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(1)(i), (a)(2) (emphasis added).

³ Given this Court's denial of the motion, the provisions at 29 C.F.R. § 2700.76(a)(1)(ii) and (a)(2) come into effect. JCG Counsel is aware of these provisions.

In pertinent part, the provision addressing interlocutory review by a judge provides:

(a) Procedure. Interlocutory review by the Commission shall not be a matter of right but of the sound discretion of the Commission. . . .

(1) Review cannot be granted unless:

(i) The judge has certified, upon his own motion or the motion of a party, that his interlocutory ruling involves a controlling question of law and that in his opinion immediate review *will materially advance the final disposition of the proceeding*; or

(ii) The Judge has denied a party's motion for certification of the interlocutory ruling to the Commission, and the party files with the Commission a petition for interlocutory review within 30 days of the Judge's denial of such motion for certification.

29 C.F.R. § 2700.76 (emphasis added).

The motion contends that there is no jurisdiction to add JCG as a party. It then revisits all of the arguments previously made to, and rejected by, this Court,⁴ in support of its claim of lack of jurisdiction, which arguments will not be repeated here.⁵

The motion incorrectly describes the “Issue” as whether allowing the Complainant to amend his discrimination complaint “to add JCG as an additional respondent in the case [is] in contravention of the Canadian and U.S. Bankruptcy Courts’ automatic stay, prior adjudication, discharge and free and clear sale of the Veris Gold assets to JCG under Section 363(f) of the Bankruptcy Code.” Motion at 7. The issue, however, is whether the asserted jurisdictional bar involves a controlling question of law and whether, in the Court’s opinion, immediate review of that issue will materially advance the final disposition of the proceeding.⁶

Among the many reasons advanced by JCG, all rejected by this Court in its previous ruling, are that any actions taken in violation of the bankruptcy court’s automatic stay are void *ab initio*, that only the bankruptcy courts can modify the automatic stay and, because of that, all MSHA proceedings are stayed. *Id.* at 10. JCG then continues with citations to the Canadian and U.S. Bankruptcy Courts’ holding that JCG acquired the assets of Veris Gold free and clear of any

⁴ In fact, and as a matter of practicality, the motion essentially repeats, verbatim, large portions from previous submissions to this Court.

⁵ The Court’s March 4, 2016, Order on Complainant’s Motion to Amend addresses JCG’s contentions. *See generally Varady v. Veris Gold USA, Inc.*, No. WEST 2014-307-DM, 2016 WL 944251 (FMSHRC Mar. 4, 2016) (ALJ).

⁶ JCG also requests that “in the interest of judicial economy and fairness to the parties, [the] proceedings in th[is] docket . . . be stayed pending a final determination on the issue of jurisdiction.” Motion at 8. This request is DENIED. The proceedings are stayed but only until the Commission rules on the motion for interlocutory review.

interest, claim or liability. *Id.* at 10-12. These claims rest upon the asserted legitimacy of the § 363(f) proceeding under the Bankruptcy Code. In its prior ruling, the Court has addressed this issue as well.

The motion then discounts this Court's reference to the Commission's Order "in a recent parallel proceeding, *Lowe v. Veris Gold USA, Inc.*, No. WEST 2014-614-DM, 2016 WL 197500, at *2 n.4 (FMSHRC Jan. 2016), in stating that JCG's asset purchase in bankruptcy 'free and clear' of employment claims may not extinguish successorship liability," as dicta and contends that the Court's reference to "the much criticized 35 year old NLRB opinion, *In International Technical Products Corp.* ("ITP"), 249 NLRB 1301 (June 1980)," is misplaced as outdated. *Id.* at 14. The motion also contends that this Court's reference to "dicta in *Chicago Truck Drivers, Helpers, and Warehouse Union (Independent) Pension Fund v. Tasemkin, Inc.*, 59 F.3d 48, 49 (7th Cir. 1995), in stating that a bankruptcy disposition did not preclude creditors from a successor liability claim . . . is distinguishable from the facts of the Varady case." *Id.* at 15.

The motion also maintains that "[t]he doctrine of *res judicata* bars the Complainant from attaching his discrimination claim to JCG." *Id.* at 17. However, the Court notes that this theory extends the *res judicata* claim beyond the bankruptcy court's sale order, asserting that it controls any Mine Safety and Health Review Commission decision. The Court, in the context of the entirety of its previous order addressing JCG and Varady, has spoken to this claim and rejected it.

JCG's motion ends with the assertion that "[t]here are strong preemptive and public policy considerations under the Bankruptcy Code that support the conclusion that the ALJ and Commission do not have jurisdiction to add JCG as a respondent to Varady's claims against Veris Gold, in an effort to *manufacture* a successor liability claim." *Id.* at 19 (emphasis added).

Discussion

The Court cannot, in effect, endorse JCG's Motion because its previous ruling points in a very different direction.⁷ That previous ruling provides a detailed basis for the Court's conclusion but the reasoning will be briefly highlighted here.

While JCG refers to cases in which it has been held that any actions taken in violation of the bankruptcy court's automatic stay are void *ab initio*, and that only the bankruptcy courts can modify the automatic stay and that, in light of those arguments, all MSHA proceedings are stayed, no cases involving MSHA discrimination proceedings have been cited. The same point applies to the assertion that no challenge can be made contravening a bankruptcy court's holding that assets of a successor are acquired free and clear of any interest, claim, or liability — there is no case law applying such a holding to MSHA discrimination actions.

The issue at this point is whether JCG and potentially others may be liable as successors for acts of discrimination committed by Veris Gold. The Commission has found that successorship liability may be available in a given case where an action is brought under section 105(c)(2) of the Mine Act, and no case has held that such relief is unavailable merely because a

⁷ See generally *Varady*, 2016 WL 944251.

discrimination claim has been brought under section 105(c)(3). *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463, 3465-66 (Dec. 1980), *aff'd in relevant part sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir. 1983), *cert. denied sub nom. Smitty Baker Coal Co. v. FMSHRC*, 464 U.S. 851 (1983); *see also Sec'y of Labor on behalf of Keene v. Mullins*, 888 F.2d 1448, 1453 n.15 (D.C. Cir. 1989). Certainly there is no suggestion in the language employed by Congress in section 105(c)(3) matters that miners proceeding under that provision are to be treated as second class complainants. Though it may be that some other court may side with JCG's position, it is not for the Commission's judges to anticipate what another tribunal may conclude about the breadth and effect of Mine Act discrimination.

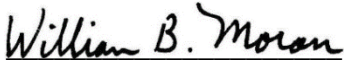
Discovery remains vital to the fair determination of potential successor liability for a number of reasons.⁸ First, though the § 363(f) proceeding under the Bankruptcy Code has been

⁸ It is noted that fellow Administrative Law Judge David Simonton recently issued a briefing order relevant to these issues. After noting that there is legal ambiguity concerning the "correct interaction of bankruptcy law and the Commission's successorship doctrine," Judge Simonton concluded that "the most prudent course of action is to first resolve the factual question of JCG's successorship status before proceeding to potential bankruptcy protection issues," and, in line with view, that stated "further discovery into the facts of JCG's acquisition and operation of the Jerritt Canyon Mill mine is necessary to determine if JCG, Eric Sprott and Whitebox Asset Management are liable as successors in interest for the conduct of Veris." Briefing Order at 2, *Sec'y of Labor on behalf of Morreale v. Veris Gold U.S.A. Inc.*, WEST 2014-793 (FMSHRC Apr. 21, 2016). Helpfully, Judge Simonton directed the respondents to respond to the following non-exclusive, preliminary questions regarding successorship:

- 1) Did JCG management learn of the finalized settlement agreement between the Secretary, Ms. Morreale, and Veris prior to JCG's purchase of the Jerritt Canyon Mill mine?
- 2) Did JCG management learn of any pending 105(c) discrimination claim against Veris Gold USA prior to JCG's purchase of Veris?
- 3) What percentage of Veris Gold USA did Eric Sprott and his subsidiary holdings, own and/or control prior to JCG's acquisition of the Jerritt Canyon Mill mine?
- 4) What percentage of JCG does Eric Sprott and his subsidiary holdings own and/or control?
- 5) What percentage of Veris employees employed at the Jerritt Canyon Mill mine did JCG rehire following their assumption of mining operations in June 2015?
- 6) What percentage of Veris supervisory agents at the Jerritt Canyon Mill mine were retained by JCG? In addition to senior management personnel, the Commission generally considers supervisors with production and safety responsibilities agents of the operator. *Nelson Quarries, Inc.*, 31 FMSHRC 318,

held up by JCG as a badge of authority, this Court's March 4, 2016, Order noted that several commenters have criticized that provision as being extended beyond its natural language and seriously deficient from a due process standard. The Court raised several concerns in this regard, including the nature of the hearing which occurred before the bankruptcy courts and the transcript of such proceeding. Also, as the Court previously noted, the bankruptcy monitor was apparently aware of, and inferentially approved, Veris Gold's attempt to defend the Varady discrimination claim at the hearing.⁹ That action, in the Court's view, implicitly accepted that the bankruptcy proceeding may not have barred the discrimination action. More likely, Veris might have calculated that it could prevail at the hearing but, after it did not, it employed a "heads I win, tails you lose" strategy, the latter approach now being asserted.

Accordingly, for the reasons expressed both in this Court's March 4, 2016, Order on Complainant's Motion to Amend as well as those stated above, in this Order on Jerritt Canyon Gold's Motion for Certification of Interlocutory Review, JCG's Motion is DENIED.


William B. Moran
Administrative Law Judge

328-31 (Mar. 2009) (affirming ALJ holding that onsite foremen who conducted safety examinations and assigned tasks were agents of the operator).

7) Has JCG substantially altered production methods at the Jerritt Canyon Mill mine?

Id. at 3.

⁹ Only through discovery can Complainant learn both of the legitimacy of the § 363(f) proceeding and the appropriateness of any successorship application. Questions abound. For example, in the related matter of *Daniel Lowe v. Veris Gold USA, Inc., and Jerritt Canyon Gold, LLC*, WEST 2014-614-DM, it was earlier suggested that two secured creditors, owed \$120 million, received nothing. *See Lowe v. Veris Gold USA, Inc.*, No. WEST 2014-614-DM, 2016 WL 1553724, at *6 n.6 (FMSHRC Apr. 7, 2016) (ALJ). Yet, in the present Motion for Certification of Interlocutory Review, JCG advises that "the secured creditors received no monetary payments." Motion at 20 (emphasis added).

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