

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 PENNSYLVANIA AVE., N.W., SUITE 520N  
WASHINGTON, DC 20004-1710  
TELEPHONE: 202-434-9933 / FAX: 202-434-9949

June 2, 2016

DANIEL B. LOWE,  
Complainant,

v.

VERIS GOLD USA, INC.,

and

JERRITT CANYON GOLD, LLC,  
Respondents.

DISCRIMINATION PROCEEDING

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

Mine: Jerritt Canyon Mill  
Mine ID: 26-01621

**ORDER ON RESPONDENT’S MOTION FOR 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. JCG’s 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.” JCG Mot. for Cert. of Interlocutory Rev., at 1 (Apr. 13, 2016) (“Mot.”) (emphasis added).<sup>1</sup>

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<sup>1</sup> 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). Given this Court’s denial of the motion, the provisions in Commission Rules 76(a)(1)(ii) and (a)(2) come into effect. JCG’s counsel is fully aware of these provisions.

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

JCG's Motion essentially repeats the arguments it has advanced many times before, most recently in the parallel ongoing discrimination proceeding, *Varady v. Veris Gold USA, Inc. and Jerritt Canyon Gold, LLC* ("Varady"). In its most recent ruling in the *Varady* matter, the Court denied JCG's request to certify that an interlocutory ruling in that matter involved a controlling question of law and that immediate review of the Court's opinion *would materially advance the final disposition of the proceeding*. 38 FMSHRC \_\_, slip op., WEST 2014-307 DM (Apr. 26, 2016) (ALJ). That order in *Varady* is hereby incorporated by reference.<sup>2</sup>

JCG's 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 in support of its claim of lack of jurisdiction, which will not be repeated here.<sup>3, 4</sup>

JCG's 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." Mot. 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.<sup>5</sup>

Among the many arguments advanced by JCG, all rejected by this Court in its previous rulings, 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

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<sup>2</sup> In issuing this Order, the Court read and considered Complainant Lowe's Opposition to Respondents' Motion for certification of interlocutory review, Respondents Reply in support of its motion, and Complainant's Reply in further opposition. The Court would add that the reply filed on behalf of Whitebox Entities seems to be an initially unpersuasive exercise in parsing the various relationships among the various respondents, which only demonstrates the importance of discovery so that their true nature can be understood.

<sup>3</sup> In fact, and as a matter of practicality, the motion essentially repeats, verbatim, large portions from previous submissions to this Court.

<sup>4</sup> The Court's March 4, 2016, Order on Complainant's Motion to Amend addresses JCG's contentions. *See* 38 FMSHRC \_\_, slip op., WEST 2014-614-DM (Mar. 4, 2016) (ALJ).

<sup>5</sup> 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." Mot. at 2, 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 section 363(f) proceeding under the Bankruptcy Code. In its prior ruling, the Court has addressed this issue as well.

### **The Essential Problem with JCG's Motion**

It is not the job of a Federal Mine Safety and Health Review Commission administrative law judge to do the laundry for another court. The Court acknowledges that, should the Commission decline to adopt JCG's contentions, it is possible that another court may determine that JCG's purchase of certain Veris Gold assets was free and clear of all liens, claims, and interests, that section 363 of the Bankruptcy Code provides a total corporate welfare cover to that and other potentially related entities, and that there was no need to employ the due process hearing procedure found in section 1141 of that Code. It may also be that some other court, *but not this Court*, may determine that Veris Gold, JCG, and the bankruptcy monitor fully informed such bankruptcy courts about the nature of Lowe's and Varady's Mine Act claims, and that due process was fully satisfied, that Mine Act discrimination proceedings are indistinguishable from those debts owed to traditional business creditors, and that the hearing which was ostensibly held regarding Lowe's (and Varady's) claims, demonstrates a record that evinces fairness.<sup>6</sup>

However, that is not this Court's role in deciding discrimination matters under the Mine Safety and Health Act. This Court upheld Mr. Lowe's discrimination complaint after a hearing. That hearing afforded Veris Gold a full opportunity to challenge Lowe's claim. Indeed, Veris Gold hired an attorney to do just that, and that attorney conducted discovery and vigorously defended Veris Gold in that action until, only a few days before the Lowe hearing was to commence, that attorney announced that he had been instructed to withdraw his representation. The attorney also acknowledged on the record at the start of Lowe's discrimination proceeding, that Veris Gold fully understood the consequences of that withdrawal.<sup>7</sup>

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<sup>6</sup> No record of any hearing transcript before a Bankruptcy Court addressing Lowe's or Varady's claims has been provided to the Court by JCG's Counsel.

<sup>7</sup> As the Court noted in its October 15, 2015 decision:

At the outset of the hearing, Attorney David Stanton, privately retained legal counsel for Veris Gold, appeared. The Court noted that Attorney Stanton filed a motion for his withdrawal as the Respondent's representative. Tr. 6. The Court had previously received word of Attorney Stanton's motion to withdraw at the conclusion of the prior week, one day after another section 105(c)(3) hearing against Veris, *Matthew Varady v. Veris Gold USA, Inc.*, WEST 2014-307-DM, had concluded. This Court presided in the Varady discrimination case. That case involved the pro se discrimination claim brought Matthew Varady against Veris Gold, and a decision finding for Mr. Varady was issued on September 2, 2015. Attorney Stanton represented Veris in the Varady discrimination matter for the entirety of the hearing. As noted, *infra*, the Varady hearing did not go well, evidentiary-wise, from Respondent's perspective, and it was obvious that Attorney Stanton correctly gauged the adverse evidentiary consequences of the

With liability for discrimination having been established by this Court, apart from whatever may come to pass regarding Veris Gold's employment of bankruptcy protection, the next step *under the Mine Act* is to determine if successorship applies to any or all of those entities that now run the Jerritt Canyon Mill, which, it is noted, continued to hum along essentially without interruption throughout the whole bankruptcy process.<sup>8</sup> Because the Court is duty bound to attend to the relevant discrimination issues before it, the Respondent must be entitled to conduct legitimate discovery in order for the Court to determine if the Commission's

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proceeding, owing to the poor credibility of Respondent's various witnesses. Therefore, it was not a surprise to the Court that the attorney moved to withdraw from representation. As the Varady and Lowe matters are closely linked, it followed that withdrawal would be sought in the Lowe matter as well. Due to the indefinite nature of Attorney Stanton's initial email request to withdraw his representation of Veris, it was not clear whether the attorney's request was confined to the Lowe and Varady matters or whether the attorney was withdrawing completely from all representation of Veris. Attorney Stanton was equivocal about his continuing role, in that he indicated that it would continue until the bankruptcy monitor in Canada acts. Tr. 6. At the time of and prior to the hearing's start, Veris had been involved in a bankruptcy proceeding. Attorney Stanton confirmed that mining would continue at the Veris site and it was his understanding that Veris would continue as a legal corporate entity and he represented that the Veris entity would 'remain in existence for some period of time while the monitor addresses some ... lingering issues,' although he did not know exactly what those issues were. Tr. 8. Emphasizing that the mine would be a continuing operation, albeit under a successor, 'White Box' or the debtor in possession, Attorney Stanton hoped that his legal representation would continue with the new ownership. Tr. 9. Thus, it is fair to state that the mining operation and attorneys representing it would continue to move along nicely, while apparently simultaneously attempting to evade responsibility, through bankruptcy legal mechanisms, for acts of discrimination under the Mine Act.

*Lowe v. Veris Gold USA, Inc.*, 37 FMSHRC 2337, 2238-39 (Oct. 2015) (ALJ).

<sup>8</sup> In a recent, related, development, the Court notes that in *Sec'y o/b/o Morreale v. Veris Gold USA, Inc., Jerritt Canyon Gold, LLC, Whitebox Management, and Eric Sprott*, 38 FMSHRC \_\_\_, slip op., WEST 2014-793 DM (May 25, 2016) (ALJ) ("*Morreale*"), yet another discrimination proceeding initially against Veris Gold, the parties reached a private settlement and the judge in that case dismissed the proceeding upon the parties' representation that "the terms of the [private] settlement agreement had been completed and satisfied." *Id.* at 1. This Court is aware of the putative distinction in *Morreale* that the discrimination proceeding was brought by the Secretary. Substantively, the Court sees no difference, and it would note that Congress, in enacting the Mine Act's discrimination provisions, did not characterize section 105(c)(3) claims as inferior. The Court believes that, it is in the interests of all for the parties to explore settlement in the Lowe and Varady matters.

adopted successorship principles should apply to JCG, and/or Whitebox, and/or Eric Sprott.<sup>9</sup> Once such discovery is completed, the Court will be in an informed position to rule upon those

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<sup>9</sup> As pertinent in this matter as it was in the Court's April 26, 2016, Order addressing JCG's motion for interlocutory review in the *Varady* matter, it should be

. . . 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, 328-31 (Mar. 2009) (affirming ALJ holding that onsite foremen who

successorship issues. Should the Complainant prevail against some or all of those other entities, the final step for the Court would be to make a ruling on the appropriate damages.

Accordingly, for the reasons expressed in this Order on JCG's Motion for Certification of Interlocutory Review, JCG's Motion is **DENIED**.

*William B. Moran*

William B. Moran  
Administrative Law Judge

Distribution:

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

Annette Jarvis, Dorsey & Whitney, LLP, 136 South Main Street, Suite 1000, Salt Lake City, UT 84101

Daniel B. Lowe, P.O. Box 2608, Elko, NV 89801

Cathy L. Reece, Fennemore Craig, P.C., 2394 East Camelback Rd., Suite 600, Phoenix, AZ 85016

Brad J. Mantel, Esq., U.S. Department of Labor, Office of the Solicitor, 201 12th Street South, Suite 401, Arlington, VA 22202-5450

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

Tevia Jeffries, Dentons Canada LLP, Counsel for Bankruptcy Monitor, 250 Howe Street, 20<sup>th</sup> Floor, Vancouver, BC V6C 3R8, Canada

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conducted safety examinations and assigned tasks were agents of the operator).

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

38 FMSHRC \_\_\_, slip op. at 4 n.3, WEST 2014-307 DM (Apr. 26, 2016) (ALJ).