FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, DC 20004-1710

DEC 16 2016

DANIEL B. LOWE	:	Docket No. WEST 2014-614-DM
v.	:	
VERIS GOLD USA, INC., and JERRITT CANYON GOLD, LLC	:	
MATTHEW VARADY	:	Docket No. WEST 2014-307-DM
v.	:	
VERIS GOLD USA, INC., and JERRITT CANYON GOLD, LLC	:	

BEFORE: Jordan, Chairman; Young, Cohen, and Althen, Commissioners

ORDER

BY: Jordan, Chairman; Young, and Althen, Commissioners

By Order dated September 2, 2016, the United States Bankruptcy Court for the District of Nevada enjoined the above-identified Petitioners "from pursuing their claims against the Purchaser, WBox 2014-1 Ltd., or any other persons or entities related to or associated with the Purchaser or WBox 2014-1 Ltd. . . . in any other Court or proceeding, including any administrative proceeding." Thereafter, by Orders dated October 25, 2016 and October 28, 2016, respectively, the Administrative Law Judge dismissed the above-referenced cases. No party in either proceeding sought dismissal prior to the Judge's *sua sponte* dismissals.

On November 23, 2016, Daniel B. Lowe and Matthew Varady filed a petition for discretionary review, which we granted on December 2, 2016.

The dismissal of the actions prior to a motion by either party was premature. Such action deprived the petitioners of an opportunity to decide freely upon their course of action and deprived the respondents of an opportunity to file a fully briefed motion for dismissal. Based

upon the preemptory nature of the dismissal, we vacate the order of dismissals and remand the cases for further proceedings.

Claimants may determine freely their response to the Order of the Bankruptcy Court. Separately, respondents may choose to file motions to dismiss or we would expect the Administrative Law Judge would ask for expeditious briefing on the impact, if any, of the Bankruptcy Court's Order upon these cases.[1] In short, it is likely the Administrative Law Judge will be in a position to make a fully considered judgment about the status of the cases.[2]

Finally, we note that during a hearing held on August 11, 2016, the Bankruptcy Court expressed a concern that email exchanges between the Administrative Law Judge and the parties potentially implicated the neutrality of the proceedings before the Administrative Law Judge. Proceedings before the Commission must remain free of any possible question about the neutrality of our adjudications. Therefore, without expressing any concurrence with the Bankruptcy Court expressions, and only out of an abundance of caution, we will remand the case to the Chief Administrative Law Judge for reassignment.

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[1] It is premature for the Commission to draw or suggest any legal conclusions based on the record in this case. The initial analysis and fact-finding required to support such conclusions are properly the province of the Judge on remand. *See also Martin County Coal Corp.*, 28 FMSHRC 247 (May 2006) (holding that "fact-finding is not the province of the Commission").

[2] We note that in two somewhat similar proceedings, the claimants settled their claims in a manner satisfactory to all parties. *Sec'y of Labor on behalf of Cheryl Garcia v. Veris Gold USA, INC., and its successors,* WEST 2014-905-0DC, Unpublished Order dated July 14, 2016; *Sec'y of Labor on behalf of Jennifer Morreale v. Veris Gold USA, Inc., Jerritt Canyon Gold, LLC, Whitebox Management, & Eric Sprott,* WEST 2014-793-DM, Unpublished Order dated May 25, 2016.

Accordingly, we hereby vacate the dismissals and remand the consolidated cases to the Chief Administrative Law Judge for action consistent with this Order.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

William I. Althen, Commissioner

Commissioner Cohen, concurring and dissenting:

While I agree with my colleagues that it is appropriate to vacate the Judge's dismissals in these matters for the reasons discussed above, and I also agree that on remand the matter should be reassigned to another Judge, I believe it is important to note that there is a key issue that will need to be resolved in this matter going forward. Specifically, the Judge assigned on remand will need to determine whether an operator can be a successor-in-interest under *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980) when that operator purchased the predecessor's assets "free and clear of all liens, claims, and interests" pursuant to a bankruptcy court sale order.

In light of the fact that this issue is of the utmost importance in these proceedings, I am inclined to have the Commission resolve it now. The observations which follow are preliminary, without the benefit of briefing. They are solely my observations, and may or may not reflect the views of my colleagues.

It is possible that on remand the Judge may ultimately find facts showing that Jerritt Canyon Gold, LLC would be a successor-in-interest to Veris Gold, but for the bankruptcy sale. If that occurs, the parties should not assume, as the Judge of the Bankruptcy Court for the District of Nevada apparently did, that Mr. Lowe and Mr. Varady should be treated like any other creditors under the Bankruptcy Code. Miners and others who file claims based on discrimination or interference under section 105(c) of the Mine Act have rights granted by Congress that may, at times, conflict with rights and responsibilities contained in the Bankruptcy Code. The resolution of those conflicts requires an understanding of the policy choices made by Congress and the role of the Commission.

The primary purpose of the Mine Act is to preserve "the health and safety of [the mining industry's] most precious resource – the miner." 30 U.S.C. § 801(a). According to the legislative history, Congress included section 105(c) because, for the Mine Act "to be truly effective, miners will have to play an active part in the enforcement of the Act." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978). Congress recognized that "in a treacherous environment, miners had to have the ability to act to protect their safety. . . . Obviously, if miners advocate strongly for their own safety, they could be inviting retaliation from mine management." *Riordan v. Knox Creek Coal Corp.,* 38 FMSHRC 1914, 1920 (Aug. 2016). Hence, Congress concluded that "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." *Legislative History, supra*, at 623.

Hence, a miner who has established discrimination under section 105(c) of the Mine Act has a Congressionally-recognized status beyond that of an ordinary creditor under the Bankruptcy Code. In this regard, it does not matter whether the action which established the miner's entitlement as a discriminatee was brought by the Secretary of Labor under section 105(c)(2) or by the miner himself or herself under section 105(c)(3), as in the cases of Mr. Lowe and Mr. Varady.

As the body designated by Congress to assess penalties and adjudicate contested matters under the Mine Act, it is the Commission's institutional responsibility to honor Congress' policy choices regarding the safety and health of miners. It is possible in this instance that the policy choices made by Congress in the Bankruptcy Code[1] are at odds with the choices it made in the Mine Act. In the context of a policy conflict, the Commission's mission is to uphold the purposes of the Mine Act.

Other agencies and courts have taken a similar view regarding policy conflicts with the Bankruptcy Code. For example, in *International Technical Products Corp.*, the National Labor Relations Board discussed whether a company that purchased all of the assets of a predecessor company "free and clear of all liens" pursuant to an order of a bankruptcy court could be held responsible for a predecessor's backpay liability. 249 NLRB 1301 (Jun. 1980). After determining that the purchaser was a bona fide successor, the Board held unequivocally, "we find that . . . liability was not . . . extinguished by the bankruptcy court's order allowing [the successor] to purchase [the predecessor's] assets free and clear of all liens, claims, and encumbrances." *Id.* at 1303. The Board noted that Congress had granted it exclusive authority to modify or set aside a claim under the National Labor Relations Act and that it therefore did not share that authority with the bankruptcy courts. *Id.* The Board believed that finding otherwise would "be tantamount to a relinquishment by the Board of its statutory obligation to remedy unfair labor practices and also its authority . . . to proceed against a successor employer in furtherance of that obligation." *Id.* In explaining why the Board's Order superseded and was not bound by the Bankruptcy order, the Board noted:

> [U]nlike the bankruptcy court's order which affects only the assets of a bankrupt, a Board order, which enforces a public rather than a private right, reaches beyond the assets of an employer and attaches to the employing entity itself. To insure that the adverse effects of a wrongdoer's unlawful conduct are eliminated and that the public right is vindicated, it is essential that there be full compliance with the Board's order requiring that the employer comply with the order's remedial provisions. It should be noted, however, that while on certain occasions the remedial provision of a Board order may or may not, depending on the violations found, require financial reimbursement, that order seeks only to remedy a wrongdoer's unlawful conduct and to this end it is fashioned without regard to a wrongdoer's past, present, or future state of assets. Thus, it cannot be classified or treated simply as a "lien, claim, or encumbrance" within the common usage of

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[1] Article I of the Constitution grants Congress the power to enact bankruptcy laws. U.S. Const. art. I, § 8, cl. 4. Congress has exercised that authority on numerous occasions, sometimes amending the Bankruptcy Code to reflect new policy preferences. *See, e.g.*, Bankruptcy Abuse Prevention and Consumer Protection Act Pub. L. 109–8, 119 Stat. 23 (2005); Todd J. Zywicki, *The Past, Present, and Future of Bankruptcy Law in America*, 101 Mich. L. Rev. 2016 (2003). Broadly speaking, the purpose of the current Bankruptcy Code is to equitably distribute a debtor's estate and give debtors a fresh start unburdened by the existence of old debts. *See In re Labor Industries of California, Inc.*, 675 F.2d 1062, 1065-66 (9th Cir. 1982) and *In re Stoltz*, 315 F.3d 80, 94 (2d Cir. 2002).

> those terms and, consequently, any liability arising therefrom cannot be extinguished or modified . . . through the purchase . . .

Id. at 1304.

The Board explicitly reaffirmed the holding in *International Technical Products* just six years ago in *Leiferman Enterprises, LLC*, 355 NLRB 364 (Aug. 2010) incorporating by reference 354 NLRB 872 (Oct. 2009), *aff'd sub. nom. NLRB v. Leiferman Enterprsies, LLC*, 649 F.3d 873 (8th Cir. 2011), *cert den.* 132 S.Ct. 1741 (2012).

The interests described by the NLRB are substantially similar to those of the Commission. Specifically, Congress granted the Commission, and not the bankruptcy courts, the authority to modify and set aside discrimination and interference claims under the Mine Act. Similarly, the discrimination provision in section 105(c) enforces public rights rather than private rights, by protecting miners who make safety complaints.

Courts have also been willing to hold successors-in-interest liable for the actions of their bankrupt predecessors in certain circumstances. For example, in *Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund, et al., v. Tasemkin, Inc.*, a company filed for Chapter 7 liquidation at a time that it owed $300,000 to its pension fund. 59 F.3d 48, 49 (7th Cir. 1995). The fund attempted to recover its claim in the liquidation proceeding but failed. *Id.* Eventually a new company, Tasemkin, Inc., ended up with all of the original company's assets. *Id.* Two years after the bankruptcy closed, the Fund sued Tasemkin, Inc., as a successor. *Id.* The Seventh Circuit noted that many of the protections contained in the Bankruptcy Code no longer exist once the bankruptcy proceeding is closed nor did those protections apply to a successor. *Id.* at 51. More importantly, the court ultimately allowed successor liability, noting:

> What the imposition of successor liability would accomplish, and what the district court objected to, would be a second opportunity for a creditor to recover on liabilities after coming away from the bankruptcy proceeding empty-handed. But a second chance is precisely the point of successor liability, and it is not clear why an intervening bankruptcy proceeding, in particular, should have a *per se* preclusive effect on the creditor's chances.

Id.

A very recent ERISA case in the Ninth Circuit reached a substantially similar result. In *Carpenters Health and Security Trust of Western Washington v. Paramount Scaffold, Inc., et al.*, 2016 L.R.R.M. 27,070 (W.D. Wash. 2016), the court heard a claim that an employer had withheld required sums from a pension fund. *Id.* The employer eventually filed for Chapter 11 bankruptcy and a new company purchased the assets in a free and clear bankruptcy sale. *Id.* The pension fund pursued the purchaser as a successor. *Id.* As in *Tasemkin*, the court found that many of the bankruptcy protections afforded to debtors did not apply to successors after the close of the bankruptcy proceeding. *Id.* The court described the successorship doctrine as an "exception from the general rule that a purchaser of assets does not acquire a seller's liabilities"

and found for the pension fund. *Id. citing Resilient Floor Covering Pension Trust Fund Bd. of Trs. v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1090 (9th Cir.2015). In short, the court found essentially the same thing that the NLRB had found: a successor can be found liable for a predecessor's actions even after a "free and clear" sale.

It is with those considerations in mind that I join my colleagues in vacating the Judge's dismissal of these matters.

Robert F. Cohen, Jr., Commissioner

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