

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 27, 2013

FRED ESTRADA,	:	DISCRIMINATION PROCEEDING
Complainant	:	
v.	:	Docket No. CENT 2013-311-DM
	:	SE-MD 2013-06
	:	
	:	
FREEPORT McMoRan TYRONE, INC.,	:	
and/or RUNYAN CONSTRUCTION,	:	Tyrone Mine
Respondent	:	Mine ID 29-00159

**ORDER ON FREEPORT-McMORAN TYRONE's MOTION
FOR SUMMARY DECISION**

Respondent, Freeport McMoRan Tyrone, Inc. ("Freeport") filed, on September 13, 2013, a Motion for Summary Decision together with an accompanying memorandum of law in support of its motion. Respondent Runyan Construction, through Counsel, filed a response to the motion on September 25, 2013.¹ Runyan's Response, agrees with the six enumerated statements² in

¹ Runyan's Response bears the incorrect date of September 12, 2013 date on the first page but the certificate of service correctly lists that it was served on September 25th.

² Those statements were: 1. This motion concerns the improper inclusion of Freeport as a respondent to these proceedings even though it was not Complainant, Fred Estrada's ("Mr. Estrada") employer, nor in control of or responsible for the instrumentalities at issue; 2. Pursuant to 29 C.F.R. § 2700.67 of the Procedural Rules of the Federal Mine Safety and Health Review Commission, Freeport is entitled to summary decision in this action as a matter of law. Summary judgment "shall be granted" when it is shown that "[t]hat there is no genuine issue as to any material fact; and . . . [t]hat the moving party is entitled to summary decision as a matter of law." ... ; 3. Mr. Estrada specifically explained that the party responsible for the condition of the truck and later for his termination was Runyan Construction, Inc. and not Freeport. Freeport is an improper respondent in this proceeding and should be dismissed as a matter of law.; 4. . . . the undisputed facts demonstrate that Freeport cannot be held liable for the acts of its independent contractor, Runyan, because Freeport did not contribute by either act or omission to the occurrence of the alleged violation in the course of Runyan's work or operation; Freeport did not contribute by act or omission to the continued existence of the violation alleged by Mr. Estrada; Freeport's employees were never exposed to the alleged hazard complained of by Mr. Estrada; and Freeport had no control over the condition of the truck that allegedly needed abatement.; 5. Freeport and Runyan are separate and distinct companies conducting distinct operations at the Tyrone mine. Runyan

Freeport's Motion and concludes that Runyan "does not object to Freeport [McMoRan] Tyrone, Inc. [] being granted summary decision and dismissed from this proceeding." Runyan Response at 2. No response was made by the Complainant, Fred Estrada.³

There being no genuine issue as to any material fact, pursuant to 29 C.F.R. § 2700.67 of the Commission's procedural rules, the Motion is appropriate for summary decision on the issue of whether Freeport McMoRan is a proper named party in this litigation. For the reasons which follow, upon consideration of the Motion, the Memorandum in support thereof, the Response of Counsel for Runyan Construction, and the entire record at this point, the Court GRANTS Freeport's Motion and DISMISSES Freeport from this action.

The Court adopts the following undisputed material facts⁴ relating to Freeport's Motion: Runyan was an independent contractor working at the Freeport Tyrone Mine . Runyan Construction entered into a contract with Freeport to haze birds and manage wildlife at the Tyrone mine. Freeport and Runyan conduct their respective operations separately, and Freeport has no ownership interest in Runyan. Freeport and Runyan share no common management personnel. Freeport does not control or instruct Runyan in how to carry out its obligations under the contract as Runyan is responsible for the methods and means of performance of the services under the contract. Freeport has no control over the business or employment practices of Runyan. Freeport is not involved in the termination of employees of Runyan. Mr. Estrada worked for and was supervised by Runyan in October 2012, working as a bird hazer for Runyan at the Tyrone mine. Mr. Estrada was supervised by Runyan and not by any employee of Freeport. Mr. Hamilton was Mr. Estrada's supervisor. Hamilton was an employee of Runyan and was not employed by Freeport. Mr. Estrada's employment paperwork and training records were processed and retained by Runyan. Mr. Estrada did not fill out any employment paperwork with Freeport to work at the Tyrone Mine. Mr. Estrada's pay stubs were issued by Runyan. Freeport was not involved in the day-to-day business operations of Runyan, and Freeport took no part in the decision to terminate Mr. Estrada. Freeport has no ownership interest or operational control of the vehicles operated by Runyan. Runyan supplies its own trucks to fulfill its bird hazing obligations. The truck that was operated by Mr. Estrada was owned and maintained by

performed bird hazing activities at the Tyrone mine to protect migratory fowl from the leach ponds on the property and Mr. Estrada's sole job was to "haze" the migratory fowl by using Runyan's truck. Freeport is not a single-employer with Runyan.; 6.Freeport is entitled to summary decision as a matter of law because there is no issue of material fact, and it was included as a respondent improperly and not in accordance with the law.

³ The absence of a response was not unexpected as, on more than one occasion, Complainant Estrada has expressed that he agrees that Freeport is not a proper party to this proceeding. However, the Court has ruled that the determination of the proper parties is a factual and legal determination for it to make. Court's Order of July 30, 2013.

⁴ The motion was accompanied by supporting exhibits A through G. Citations to those exhibits are omitted from the Court's adopted supporting facts.

Runyan, and Runyan was responsible for the servicing of its own trucks. Freeport has no maintenance obligations for the vehicles operated by Runyan. Freeport did not contribute, by any act or omission, to the alleged defective condition of the vehicle operated by Mr. Estrada. Freeport did not contribute to any violation alleged by Mr. Estrada. None of Freeport's employees were exposed to the alleged hazardous condition complained of by Mr. Estrada.

It is true that the Commission, in determining whether two or more entities can be deemed a single operator under the Mine Act, has looked to the standard employed “under similar statutory language [found in] the NLRA [National Labor Relations Act] and Title VII [of the Civil Rights Act of 1964].” Those factors are: the interrelation of operations; common management; centralized control of labor relations; and common ownership. *Berwind Natural Resources Corp., et al.*, 21 FMSHRC 1284, *1316. No one of the factors carries the day. Instead, the Commission examines the “totality of the circumstances to determine whether one corporate entity exercised such pervasive control over the other that the two entities should be treated as one.” *Id.* at *1317.

It is accurate to state that none of the factors above apply to the relationship between Freeport and Runyan. Runyan’s task was limited to “haz[ing] birds and manag[ing] wildlife as needed at the Freeport Tyrone Mine.” Freeport, Exhibit D. Although, for the most part, Freeport’s Exhibit G appears to be simply a standard form services agreement with boilerplate language and not specifically tailored to Runyan’s specific contractual responsibilities with Freeport, the last attached page of that exhibit, identified as “Section 6: Scope of Services,” provides that Runyan is to “[m]onitor and haze migratory birds from Tyrone and Chino Mines,” with its additional responsibilities listed as “None.” Given the limited nature of Runyan’s contract with Freeport, it is not surprising that the two entities conduct their operations separately, that they share no common management personnel and that Freeport does not have control over or direct the employment practices of Runyan. Indeed, Runyan has admitted to this during discovery. Freeport Exhibit B. Runyan has also agreed that it owned the vehicle that was operated by the Complainant, and that Freeport had no operational control, nor maintenance obligations, over that vehicle. Freeport Exhibit B.

Counsel for Respondent Freeport also addressed, in its Motion and its memorandum of law in support of that Motion, the issue of whether Freeport could be liable for the acts of Runyan, acting as its independent contractor. It noted that in *Bryant v. Dingess Mine Service, et al.*, 10 FMSHRC 1173, the Commission stated that resolution of liability of a principal for the acts of others working at a mine site depends upon the conduct of the parties and the “true nature of th[eir] relationship.” *Id.* at 1178. As Freeport has observed, the issue of whether it can “properly [be] included in these proceedings centers on what amount of control, if any, Freeport had over Runyan’s operations and employees.” Freeport Memorandum at 9. The Court agrees with Freeport’s statement that the answer to that inquiry is “none.” *Id.*

Accordingly, for the foregoing reasons, the Court DISMISSES Freeport McMoRan Tyrone, Inc. from this proceeding.

The Court is fully aware that in its earlier Motion to Dismiss, Freeport, through Counsel, provided strong arguments to support that motion. However, as Counsel for Freeport recognized, there is a process which must be followed and the Court's July 30, 2013 Order adhered to that process, for the reasons it articulated at that time. With Freeport's subsequent motion, as discussed above, along with its memorandum in support, and with the response from Runyan's Counsel, that process was carried out. The Court is appreciative of the high ethical standards presented by Counsel in Freeport's September 13th submission, which foursquarely addressed the applicable case law.

Having dismissed Freeport as a Respondent from this proceeding, future captions will not include Freeport-McMoRan Tyrone Inc. Only Runyan Construction will be listed as the sole remaining Respondent.

So Ordered.

/s/ William B. Moran
William B. Moran

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