

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

OFFICE OF ADMINISTRATIVE LAW JUDGES  
1331 Pennsylvania Avenue NW, Suite 520N  
Washington, D.C. 20004

February 26, 2016

SANDRA G. MCDONALD,  
Complainant,

v.

GEORGE KING, MARK TOLER,  
FRASURE CREEK MINING, LLC,  
and GUARDCO SECURITY, LLC,  
Respondents,

DISCRIMINATION PROCEEDING

Docket No. WEVA 2014-387-D  
HOPE-CD 2013-10

Frasure Creek Mining, LLC  
Mine ID 46-07014 5G1

**ORDER TO SHOW CAUSE**

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on January 7, 2014, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (2006) (Mine Act). Sandra G. McDonald seeks to recover appropriate relief under Section 105(c) of the Mine Act,<sup>1</sup> from TMK Enterprise Security Services, Inc. (“TMK”), a business entity that had been incorporated in West Virginia.

**I. Background**

McDonald was a contractor employee working as a security guard during the period May 2011 through September 3, 2013, at a mine site operated by Frasure Creek Mining, LLC (“Frasure Creek”). However, the evidence of record reflects that TMK’s corporate status was terminated by the state of West Virginia on June 12, 2009. Consequently, McDonald was never employed by TMK prior to its termination as a corporate entity. Rather, McDonald was employed by George King and Mark Toler, the former principles of TMK, who continued to operate their security services business as a non-corporate entity.

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<sup>1</sup> Section 105(c)(1) provides, in pertinent part:

No person shall discharge or in any manner discriminate against ... any miner ... because such miner ... has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent ... of an alleged danger or safety or health violation in a coal or other mine ... or because such miner ... instituted any proceeding under or related to this Act ....

30 U.S.C. § 815(c)(1).

Consequently, on February 3, 2015, I issued a stay order to provide counsel with an opportunity to amend the pleading by adding King and Toler as the proper respondents. However, rather than amending the complaint to include King and Toler—who during several telephone conferences had asserted a financial inability to pay any relief claimed by McDonald—McDonald’s counsel sought to substitute Frasure Creek as an entirely new respondent, under a new theory of the case. Specifically, McDonald’s counsel alleged:

Frasure Creek was intimately involved in and had direct knowledge of all of the hazard complaints at issue in this discrimination case, and had a direct role in effectuating an illegal and discriminatory course of conduct, by communicating and consummating an adverse employment action against the Complainant in retaliation for protected activity.

Mot. to Lift Temp. Stay and to Amend Compl., at 2 (Feb. 18, 2015).

On March 12, 2015, I issued an Order Denying McDonald’s Motion to Amend Complaint, which sought to substitute Frasure Creek for TMK, rather than add King and Toler as respondents as directed by the February 3, 2015, Order. McDonald’s motion was denied based on apparent Commission precedent that McDonald was precluded from bringing a discrimination action against Frasure Creek in a 105(c)(3) proceeding as the allegations of discrimination against Frasure Creek had not been investigated by the Secretary under section 105(c)(2). 37 FMSHRC 683, 685 (Mar. 2015) (ALJ); *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (Apr. 1991) (citations omitted). The case was dismissed because McDonald’s counsel elected not to amend the complaint to include King and Toler as respondents. 37 FMSHRC at 685. However, the March 12, 2015, Order noted that the dismissal was *without prejudice* to any subsequent reopening of McDonald’s 105(c)(3) discrimination complaint against King and/or Toler, as individuals. *Id.*

On March 23, 2015, McDonald filed a Petition for Reconsideration with the undersigned that sought to set aside the March 12, 2015, dismissal order by allowing McDonald to add King and Toler as respondents. Shortly thereafter, on March 31, 2015, the Commission exercised review *sua sponte* of the March 12, 2015, Order. On October 23, 2015, the Commission remanded this matter granting leave to McDonald to “amend the complaint to add other relevant parties, including King and Toler,” an opportunity that was essentially previously extended by the undersigned and initially rejected by McDonald. 37 FMSHRC 2239, 2243 (Oct. 2015).

Consistent with the Commission’s October 23, 2015, remand, an order was issued on November 3, 2015, granting leave for McDonald to amend her complaint to include King and Toler, as well as any other relevant parties. 37 FMSHRC 2651 (Nov. 2015) (ALJ). On December 31, 2015, McDonald filed an amended complaint. In addition to adding King and Toler, McDonald now seeks to add Frasure Creek and Guardco Security, LLC (“Guardco”), as a successor-in-interest to TMK. On February 5, 2016, Guardco answered McDonald’s amended complaint, through counsel, by denying any liability in this matter.

## II. Frasure Creek

In her amended complaint, McDonald alleges that she was terminated by TMK, at the insistence of Frasure Creek, shortly after MSHA received anonymous complaints regarding Frasure Creek's alleged failure to provide periodic refresher and hazard training, as required by 30 C.F.R. §§ 48.28(a) and 48.31, respectively. Amended Compl., at 4-7 (Dec. 31, 2015). However, the evidence of record in this matter reflects that McDonald's discrimination complaint under section 105(c)(2) was never previously construed by MSHA, or McDonald's counsel, as a complaint against Frasure Creek. Consequently, MSHA never conducted an investigation under section 105(c)(2) to determine whether Frasure Creek discriminated against McDonald. *See Hatfield*, 13 FMSHRC at 546 (holding that an MSHA investigation of a claim of alleged discrimination under section 105(c)(2) is a statutory prerequisite for a complaint under section 105(c)(3)). Significantly, McDonald's counsel has, to date, never served Frasure Creek as a party, such as during discovery in this proceeding, serving only TMK (Toler and King).

Consequently, McDonald **IS ORDERED TO SHOW CAUSE** why her amended complaint should not be dismissed with respect to Frasure Creek. Specifically, McDonald should address whether MSHA's failure to investigate Frasure Creek's alleged discrimination against McDonald under section 105(c)(2) precludes McDonald's attempt to add Frasure Creek as a respondent in this 105(c)(3) proceeding.<sup>2</sup>

## III. Guardco as a successor-in-interest

McDonald's amended complaint also seeks to add Guardco as a successor-in-interest to her former employer, TMK (Toler and King). The Commission has recognized that a successor-in-interest may be found liable for its predecessor's discriminatory conduct. *See Meek v. Essroc Corp.*, 15 FMSHRC 606, 609-10 (Apr. 1993). To determine whether an entity is a proper party in a discrimination proceeding as a successor-in-interest, the Commission has traditionally considered nine factors:

- (1) whether the successor company had notice of the charge,
- (2) the ability of the predecessor to provide relief,
- (3) whether there has been a substantial continuity of business operation,
- (4) whether the new employer uses the same plant,
- (5) whether he uses the same or substantially the same work force,
- (6) whether he uses the same or substantially the same supervisory personnel,
- (7) whether the same jobs exist under substantially the same working conditions,
- (8) whether he uses the same machinery, equipment and methods of production and
- (9) whether he produces the same products.

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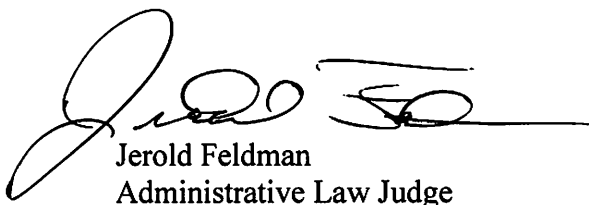
<sup>2</sup> In view of the Commission's holding in *Hatfield*, in a March 12, 2015, Order, I denied McDonald's motion to amend her complaint to include Frasure Creek. The Commission remanded this matter granting leave "for McDonald to amend the complaint to add other relevant parties, including King and Toler." 37 FMSHRC at 2243. Consequently, I do not consider the previous denial of McDonald's request to include Frasure Creek as a respondent to be the law of the case.

*Sec'y of Labor o/b/o Keene v. S&M Coal Co.*, 10 FMSHRC 1145, 1153 (Sep. 1988) (citing *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), *aff'd sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir 1983), *cert. denied*, 464 U.S. 851 (1983)). The key factor in this successorship analysis is whether there is substantial continuity of business operations. *Id.*

Accordingly, McDonald **IS ORDERED TO SHOW CAUSE**, by specifically addressing any of the relevant indicia of successorship noted above, whether Guardco is a proper successor-in-interest to TMK (Toler and King) in this proceeding.

### **ORDER**

Consistent with the above, McDonald **IS ORDERED TO SHOW CAUSE on or before March 30, 2016**, why Frasure Creek and Guardco are proper parties in this matter. Any oppositions or replies filed by Frasure Creek<sup>3</sup> and/or Guardco should be filed **on or before April 20, 2016**.



Jerold Feldman  
Administrative Law Judge

Distribution: (by regular and certified mail)

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<sup>3</sup> To date, Frasure Creek has not answered, or otherwise acknowledged, McDonald's amended complaint identifying it as an alleged party in this matter. Frasure Creek is cautioned that a failure to oppose or reply to McDonald's response to this Order to Show Cause, may result in the issuance of a default judgment against it with respect to any reasonable remedy that may be awarded in this matter.