FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 24, 2016

SANDRA G. MCDONALD, Complainant, v. GEORGE KING, MARK TOLER, GUARDCO SECURITY, LLC, and NEW TRINITY COAL, INC., as successor-in-interest to FRASURE CREEK MINING, LLC, Respondents.	DISCRIMINATION PROCEEDING Docket No. WEVA 2014-387-D HOPE-CD 2013-10 Mine ID 46-07014 5G1

ORDER GRANTING MOTION TO AMEND COMPLAINT

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 relief under Section 105(c) of the Mine Act,[1] based on her alleged September 2013 termination of employment by George King and Mark Toler,[2] who were providing contract security guard

[1] 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).

[2] McDonald's initial complaint identified her employer as TMK Enterprise Security Services, Inc. ("TMK"). However, the evidence of record reflects that TMK's corporate status was terminated by the state of West Virginia on June 12, 2009. As McDonald began working for TMK in May 2011, McDonald was never employed by TMK, but rather was employed by King and Toler, the former principals of TMK, who were apparently operating their security services business as a non-corporate entity.

services at a mine site operated by Frasure Creek Mining, LLC ("Frasure Creek"). McDonald's discrimination complaint alleges, in essence, that her employment was terminated following safety complaints concerning the wearing of hardhats by employees on Frasure Creek property, as well as King and Toler's failure to provide timely security guard refresher training.

On December 31, 2015, McDonald filed an amended complaint, which I construe as a motion to amend, seeking to add, for the first time in this proceeding, Guardco Security, LLC ("Guardco") and Frasure Creek as parties.[3] Consequently, on February 26, 2016, the parties were ordered to address the propriety of adding Guardco and Frasure Creek in this proceeding. 38 FMSHRC 389 (Feb. 2016) (ALJ). Briefs submitted in this matter reflect that Guardco has provided contract security services at the Frasure Creek mine site since November 2014, which were previously provided by King and Toler. *Guardco Resp.*, at 2 (Apr. 12. 2016). The briefs further reflect that Frasure Creek was the subject of a Chapter 11 bankruptcy proceeding, which terminated on January 31, 2014, that identified New Trinity Coal, Inc. ("New Trinity"), *inter alia*, as "reorganized debtors." The bankruptcy proceeding provided that, as a reorganized debtor, New Trinity acquired the property of Frasure Creek "free and clear of all Liens, Claims, charges, Causes of Action, or other encumbrances." *New Trinity's Mot. to Dismiss Frasure Creek*, at 3-4 (Apr. 7, 2016). Both New Trinity, identifying itself as a successor-in-interest to Frasure Creek, and Guardco oppose McDonald's motion to include them as Respondents. *New Trinity's Opp'n to Adding Frasure Creek*, at 4 (Apr. 20, 2016).

I. Guardco as a proper party

McDonald asserts that Guardco is a proper party as a successor-in-interest to King and Toler's business operation. The Commission has determined 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 successor-in-interest in a discrimination proceeding, the Commission traditionally considers 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.

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)).

[3] McDonald's December 31, 2015, amended complaint, also for the first time, identified King and Toler in their individual capacities as Respondents.

Arguing that Guardco is a proper party as a successor-in-interest to King and Toler, McDonald asserts:

> Upon information and belief, Guardco conducts the same security activities at the same mine sites, employing the same Site Supervisor Karen Payne who was previously employed by Respondents King and Toler.

McDonald's Memo. in Support of Adding Guardo and Frasure Creek, at 5 (Mar. 30, 2016).

In response, Guardco asserts:

> In this matter the Defendent Guardco had absolutely no knowledge of and did not know Ms. McDonald existed on this earth, nor did it have any knowledge that she had a claim against her employer and Frasure Creek at the time they signed a contract to provide security services for Frasure Creek. No representations were made by Frasure Creek concerning this case whatsoever and Guardco had no reason to suspect any claims were pending.

Guardco Resp., at 3 (Apr. 12. 2016).

In addressing whether Guardco should be included as a party as a successor-in-interest to King and Toler, it is not necessary that all of the successorship criteria identified above be satisfied. Resolution of whether a party is a proper successor-in-interest requires an equitable determination in the context of the successorship criteria with respect to whether there is a substantial continuity of business operations. The undisputed fact that Guardco has employed Karen Payne as site supervisor for their operations, who was previously employed in the same capacity by King and Toler, for the purpose of performing, essentially, the identical security services performed by King and Toler, provides a *colorable claim* of successorship to include Guardco as a party *at this stage of the proceeding.*

However, unresolved issues of fact may remain with respect to the continuity of business of operations between King and Toler and Guardco, and other successorship criteria. Consequently, Guardco will have the opportunity to demonstrate that it is not, in fact, a successor-in-interest and a proper party at the forthcoming evidentiary hearing. As such, **McDonald's motion to include Guardco as a Respondent in this matter at this stage of the proceeding shall be granted.**

II. New Trinity, as a successor-in-interest to Frasure Creek, as a proper party

McDonald's initial section 105(c)(3) complaint was not docketed to include Frasure Creek as a Respondent. On this basis, McDonald's initial motion to amend her complaint by adding Frasure Creek as a party, filed on February 18, 2015, was denied on March 12, 2015, based on the Commission's holding in *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 Apr. 1991). *See Order Denying Mot. to Amend*, 37 FMSHRC 683 (Mar. 2015) (ALJ). In *Hatfield*, the Commission held:

> If the Secretary's . . . investigation . . . did not include consideration of the matters contained in the amended complaint, the statutory prerequisites for a complaint pursuant to § 105(c)(3) have not been met.

13 FMSHRC at 546; *see also Pontiki Coal Corp.*, 19 FMSHRC 1009, 1018 (Jun. 1997). Following the March 12, 2015, denial of McDonald's request to include Frasure Creek as a party based on the Commission's holding in *Hatfield*, on October 23, 2015, the Commission, upon review, granted broad leave for McDonald to "amend the complaint to add [all] other relevant parties...." 37 FMSHRC 2239, 2243 (Oct. 2015).

Currently before me is McDonald's second motion to amend her complaint, filed on December 31, 2015, to add Frasure Creek as a party. New Trinity, as a successor-in-interest to Frasure Creek, opposes McDonald's motion for three reasons. Namely: 1) that McDonald's initial 105(c)(3) complaint failed to assert any allegations against Frasure Creek; 2) that Frasure Creek was never properly served with McDonald's initial 105(c)(3) complaint; and 3) that McDonald's claims against Frasure Creek were discharged in bankruptcy.

With respect to New Trinity's first two objections, it is true that my March 12, 2015, dismissal order initially denied McDonald's motion to add Frasure Creek based on the Commission's holding in *Hatfield*. 37 FMSHRC 683 (Mar. 2015) (ALJ). However, upon revisiting this issue subsequent to the Commission's remand, I find it significant that the caption of the Mine Safety and Health Administration's ("MSHA") December 5, 2013, letter declining to pursue McDonald's discrimination complaint noted both TMK (King and Toler) and Frasure Creek. Shortly thereafter, McDonald's January 7, 2014, 105(c)(3) complaint, filed with the Commission, identified both TMK (King and Toler) and Frasure Creek in its caption. Significantly, McDonald's 105(c)(3) complaint reflects that copies were sent to: "USDOL, MSHA Mt. Hope; TMK Enterprise Security; Frasure Creek."

Additionally, the evidence further reflects that Frasure Creek communicated its dissatisfaction with McDonald's performance as a security guard to King and Toler at or about the time McDonald was allegedly terminated. *Letter from Vedat Ozsever, Director of Coal Processing, to Karen Payne* (Sept. 9, 2013). Thus, when viewed in its entirely, the evidence of record demonstrates that McDonald, acting *pro se* at the time, adequately named Frasure Creek as a relevant party in her discrimination complaint.

I am cognizant that McDonald has not formally sought to include New Trinity as a party to this matter. However, by their own admission New Trinity has identified itself as a successor-in-interest to Frasure Creek. Thus, I construe McDonald's motion to add Frasure Creek as a motion to add New Trinity as Frasure Creek's successor.

Regarding New Trinity's argument that McDonald's claims against Frasure Creek were discharged in bankruptcy, it is well-settled that the fundamental purpose of section 105(c) is to ensure, where discrimination has occurred, that "discriminatees are made whole." *See, e.g., McGlothlin v. Dominion Coal Corp.*, 38 FMSHRC __, slip op. at 2 (Mar. 30, 2016). The Mine Act's goal would be thwarted if miners who are the victims of discrimination were left without a remedy when a successor steps into the shoes of a predecessor as a result of a bankruptcy proceeding. The issue of whether discrimination claims are not dischargeable in bankruptcy has been thoroughly addressed by Judge Moran in ongoing litigation before him. *See Lowe v. Veris Gold USA, Inc., and Jerritt Canyon Gold, LLC*, 38 FMSHRC __, slip op. at 6-11 (Mar. 14, 2016) (ALJ); *Varady v. Veris Gold USA, Inc., and Jerritt Canyon Gold, LLC*, 38 FMSHRC __, slip op. at 6-11 (Mar. 4, 2016) (ALJ). While I find it doubtful that discrimination claims can be discharged in bankruptcy, I need not definitively address this matter until such time as it is determined that McDonald has a meritorious claim against Frasure Creek. Thus, New Trinity's motion to dismiss based on its assertion that Frasure Creek's bankruptcy precludes any liability in this matter shall be denied as premature.

Consequently, **New Trinity, as a successor-in-interest to Frasure Creek, shall be included as a party at this stage of the proceeding.** Inclusion of New Trinity at this point does not prejudice New Trinity's opportunity to demonstrate that it is not, in fact, a proper party at the forthcoming evidentiary hearing.

Given that testimony in an evidentiary hearing is necessary to ultimately resolve the issue of the proper parties to be included in this matter, in the interest of judicial economy, the hearing on this issue shall be consolidated with the hearing on the merits of McDonald's discrimination complaint.

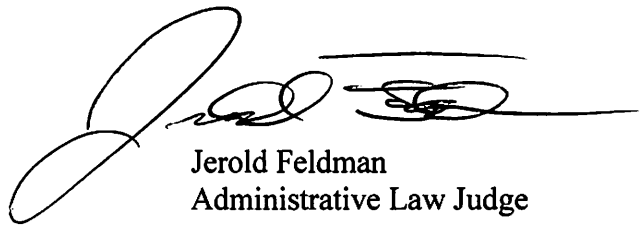
ORDER

In view of the above, **IT IS ORDERED** that McDonald's December 31, 2015, motion to amend her complaint to include George King, Mark Toler, Guardco Security, LLC, and New Trinity Coal, Inc., as a successor-in-interest to Frasure Creek Mining, LLC, **IS GRANTED.**

IT IS FURTHER ORDERED that New Trinity's motion to dismiss its participation in this matter as a successor-in-interest to Frasure Creek **IS DENIED** as premature.

IT IS FURTHER ORDERED that the parties contact my law clerk, Avery Peechatka, at apeechatka@fmshrc.gov **within 10 days of the date of this Order** to provide their availability to schedule this matter for a hearing to commence no later than September 27, 2016.

Finally, nothing herein should be construed as either, an ultimate finding with respect to the proper parties to be included in this matter, or a finding with regard to the merits of McDonald's discrimination complaint.



Jerold Feldman
Administrative Law Judge

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