FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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DENVER, CO 80204-3582
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February 6, 2003

THOMAS P. DYE II, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEST 2002-408-DM
	:	RM MD 02-11
v.	:	
	:	Mine I.D. 05-01732
	:	Cotter Mill
MINERAL RECOVERY SPECIALISTS, INC., Respondent	:	

ORDER DENYING MOTION TO AMEND COMPLAINT TO INCLUDE RECOVERY DYNAMICS LLC AND TBD LLC AS RESPONDENTS

This proceeding was brought by Thomas P. Dye against Mineral Recovery Specialists, Inc., ("MRSI") under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq*. ("Mine Act") and 29 C.F.R.§ 2700.40 *et seq*. The complaint alleges, in part, that MRSI violated section 105(c) of the Mine Act when it did not hire Dye as a permanent employee because he insisted that a recently repaired piece of equipment be fully safety-tested before it was put back into service. MRSI denies the allegations in the complaint. MRSI states that the business of the company has ceased and that it is in the process of winding up and liquidating its affairs.

Mr. Dye filed a motion to amend the complaint to add Recovery Dynamics LLC and TBD LLC as respondents. Mr. Dye states that Recovery Dynamics, also known as Recodyne, is the predecessor of MRSI. It appears that Recovery Dynamics entered into an agreement as a subcontractor to CMS Enterprises Company to provide engineering and design services for a zirconium recovery project at the Cotter Mill, owned and operated by Cotter Corporation. The owners of Recovery Dynamics incorporated MRSI to perform this work. All rights and responsibilities under the agreement were assigned to MRSI. Mr. Dye alleges that Recovery Dynamics and MRSI are one and the same company because they have the same address, phone number, and fax number and because they share other similarities. He alleges that these two entities commingled funds. He also states that they shared employees. He bases his motion on documents that he located on the Internet, records that were kept in the MRSI trailer at the Cotter Mill, and the written statements of Rene L. Lucas, who was the shipping and receiving administrator for MRSI at the mill. Dye states that Dan Dilday was the owner of MRSI and was its project manager at the mill. Mr. Dilday was also working on the White Mesa Mill project for Recovery Dynamics. Thus, Dilday was employed by both entities. Mr. Dye also states that MRSI is owned by a company called TBD LLC. He states that TBD is also owned by Dilday and is located at the same address as MRSI and Recovery Dynamics.

The record in this case does not reveal who owns Recovery Dynamics, TBD, and MRSI.

Dye contends that Mr. Dilday was the sole owner of these companies, but he offered no proof. MRSI admits that the owners of MRSI also own Recovery Dynamics. Dye enclosed 19 attachments to support his motion. Many of these attachments are Internet records kept by the Tennessee Secretary of State. These records show that Mr. Dilday was the registered agent for a number of companies including TBD and EN2 LLC, which is a medical equipment supply company. (Attach. 2 & 15). The principal office of these companies is listed as 200 East Main Street, 6th Floor, Johnson City, Tennessee. These records show that a number of other companies are also headquartered at the same address including MSRI and Recovery Dynamics. (Attach. 2, 5, 16 & 19). These records also list David R. Tierney and W. Dan Black as registered agents for Recovery Dynamics. (Attach. 18 & 19). None of these records specify who are the shareholders of these corporations.

A written statement of Ms. Lucas explains that there was a drawer of files in the MRSI trailer at the Cotter Mill relating to Recovery Dynamics' work for International Uranium Corporation in Utah. (Attach. 1). Ms. Lucas helped organize files for MRSI and in her statement she asserts that over three million dollars was paid to MRSI under the relevant contract between March 2000 and January 2001. *Id.* Mr. Dye contends that the two companies must have commingled funds because MRSI is now claiming that it is insolvent. Ms. Lucas states that "I find it odd that MRSI would claim that they're broke when I know for a fact that, though MRSI did buy some equipment . . . , a major portion of what they received was for salaries, wages, expenses, and services." (Attach. 1 at 2).

Dye also produced Internet records of the Colorado Secretary of State to show that Dilday was president of Rooster's Bar and Grill, Inc., in Canon City, Colorado. (Attach. 6). Dye and Lucas visited this establishment and state that they were told by Christine Smith that Mr. Dilday sold his interest in the bar for $1. (Attach. 7). Ms. Smith, who told them that she is the current owner of the bar, advised Dye and Lucas that she had to pay $60,000 for these same shares. Lucas's statement on this matter includes other allegations including a description of a conversation Ms. Smith said that she overheard at her bar to the effect that MRSI made sure that the zirconium recovery project failed so that it "could file the patent [on the zirconium recovery process] and collect the insurance money." According to the statement, the insurance money was obtained by deliberately destroying equipment.

Section 105(c)(1) provides that no person shall discharge or in any manner discriminate against a miner in any coal or other mine subject to the Mine Act because he has made a safety complaint. A miner is defined as any individual working at a mine. A "coal or other mine" is defined in section 3(h)(1) of the Mine Act to include facilities used in the milling of minerals. The term "person" is defined in section 3(f) as any "individual, partnership, association, corporation, firm, subsidiary of a corporation or other organization." In this case, Mr. Dye filed a complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") alleging that MRSI discriminated against him for making safety complaints in violation of section 105(c). When MSHA determined that Mr. Dye was not discriminated against, he brought this action on his own behalf. At all pertinent times, Dye was employed by MRSI at its project at the Cotter Mill.

Mr. Dye was never employed by Recovery Dynamics. Recovery Dynamics was not a mine operator at the Cotter Mill. A mine "operator" is defined in section 3(d) of the Mine Act as "any owner, lessee, or other person who operates, controls, or supervises a coal or other mine or any independent contractor performing services or construction at such mine." MRSI was an independent contractor performing services as an operator at the Cotter Mill. There has been no showing that Recovery Dynamics was in any way involved in operating, controlling or supervising the work being performed at the Cotter Mill. There has also been no showing that Recovery Dynamics was an independent contractor performing services or construction at the Cotter Mill.

The fact that the owners of Recovery Dynamics incorporated MRSI to carry out the terms of the contract to provide services for the zirconium recovery project does not establish that Recovery Dynamics was an operator at the Cotter Mill. It is clear that both corporations used the same office and phone system in Johnson City, Tennessee. It is also clear that the two corporations shared some employees. These facts do not establish that the two corporations were one and the same or that Recovery Dynamics was an operator at the Cotter Mill. Although it appears that Mr. Dilday was employed by both corporations, there is no evidence to show that he was working for anyone other than MRSI when carrying out his duties under the contract at the zirconium recovery project. The information provided by Mr. Dye does not prove that the two corporations should be treated as one mine operator. The evidence concerning the money paid MRSI under the contract is just an assertion; it does not establish that the two companies commingled funds. I conclude that Recovery Dynamics was not an operator at the Cotter Mill and cannot be held liable for any discrimination against Dye under section 105(c) of the Mine Act.

Mr. Dye presented very little information to support his motion with respect to TBD. Dye apparently bases his contention that TBD owns MRSI on the information he obtained when he entered the name of MRSI's website (mineralrecovery.com) at domainwatch.com, which apparently is an Internet resource that provides information on Internet domain names. When he entered the website name for MRSI at the domain watch website, it listed TBD LLC as the "organization" that holds the domain name. (Attach. 14). This information is insufficient to establish ownership. Although it is clear that Dilday has a relationship with TBD, there is no showing that TBD was an operator at the Cotter Mill. For the reasons discussed above, I conclude that there is no proof that TBD was an operator at the mill and I conclude that TBD is not subject to liability under section 105(c) of the Mine Act.

A court must generally recognize and uphold a corporate entity unless specific, unusual circumstances call for the exception. (18 Am. Jur. 2d *Corporations* § 58, at 868-69). If a corporation is used as an intermediary to perpetrate fraud or promote injustice, its identity as a corporate entity may be pierced. The "corporate veil may be pierced . . . when . . . the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud." *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). I find that Mr. Dye did not establish that MRSI was used by its owners to perpetrate fraud or promote injustice. Dye presented information that he believes shows that MRSI, Recovery Dynamics, and TBD were rather shady

operations that engaged in fraudulent transactions, but this information is insufficient to establish that allegation because the information presented is pure speculation and hearsay. Mr. Dye has not presented sufficient evidence to warrant piercing the corporate veil.

The corporate form can also be set aside in certain situations if it can be shown that the unity of ownership and interest is so great that the individuality or separateness of two corporations has ceased. (18 Am. Jur. 2d *Corporations* § 56, at 861-62). I find that Mr. Dye failed to establish that MRSI was the alter ego of Recovery Dynamics or TBD. The fact that Recovery Dynamics and MRSI had the same owners is not enough to ignore the corporate form. Likewise, that Dilday performed services for both corporations and that all three corporations used the same address and support staff is insufficient to establish that they were alter egos. "The fact that the stockholders, officers or directors in two corporations may be the same persons does not operate to destroy the legal identity of either corporation, nor does the fact that one corporation exercises a controlling influence over another through the ownership of stock or through the identity of stockholders make either the agent of the other or merge the two corporations into one. . . ." (*Id.* at § 57, p 865). Dye has not demonstrated that financial transactions were improperly accounted for in the books of the corporations or that the corporations did not honor the corporate form in all respects. It has not been established that Recovery Dynamics or TBD were in any way involved at the Cotter Mill or that the three corporations were treated as one by the owners. As discussed above, Dye's allegations of fraudulent transactions is too speculative to form the basis for the motion.

In some circumstances, a successor may be required to remedy wrongful discrimination. A successor is a corporation that assumes the rights and liabilities of the corporation that engaged in the discrimination. In such cases a variety of relevant liability and economic factors are considered, as follows:

> (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 operations, (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 on behalf of Corbin v. Sugartree Corp., 9 FMSHRC 394, 397-98 (Mar. 1987) (citation omitted). It has not been shown that Recovery Dynamics or TBD are successors to MRSI. MRSI performed services at the Cotter Mill for about two years. MSRI is no longer performing any services at the mill and neither Recovery Dynamics nor TBD ever performed any services at the mill. It has not been shown that the same jobs exist at Recovery Dynamics or TBD or that the same services are provided by Recovery Dynamics or TBD at any location in the

United States. Consequently, I conclude that Mr. Dye has not established that Recovery Dynamics or TBD are successors to MRSI.

For the reasons discussed above, Mr. Dye's motion to amend his complaint of discrimination to include Recovery Dynamics LLC and TBD LLC as respondents is **DENIED**.
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Richard W. Manning
Administrative Law Judge

Distribution:

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