

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE NW, SUITE 520N
WASHINGTON, DC 20004-1710

OCT 23 2015

SANDRA G. MCDONALD

v.

Docket No. WEVA 2014-387-D

TMK ENTERPRISE SECURITY

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

DECISION

BY THE COMMISSION:

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act”). It involves a complaint of discrimination filed by Sandra G. McDonald (“McDonald”) against “TMK Enterprise Security” pursuant to section 105(c)(3) of the Mine Act.¹ At issue is whether the Administrative Law Judge erred by finding that “TMK Enterprise Security” could not have been McDonald’s employer because it was not registered as a corporation during the period of McDonald’s employment. For the reasons that follow, we hold that the Judge erred when determining that this entity could not have been McDonald’s employer. Accordingly, we reverse and remand the Judge’s decision.

I.

Factual and Procedural Background

The complaint filed by McDonald concerns her employment as a security guard by a security services contractor at a mine site operated by Frasure Creek Mining, LLC, during the

¹ Section 105(c)(3), 30 U.S.C. § 815(c)(3), provides in pertinent part:

Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right . . . to file an action in his own behalf before the Commission[.]

period May 2011 through September 2013. Her employment was terminated on or about September 3, 2013.

On September 13, 2013, McDonald filed a discrimination complaint with the Department of Labor's Mine Safety and Health Administration ("MSHA") under section 105(c)(2) of the Mine Act.² In this complaint, McDonald named her employer, the security services contractor, as "TMK Enterprise Security," which is listed as a contractor in the MSHA Mine Data Retrieval System.³ MSHA Discrimination Compl.; Mot. to Lift Temporary Stay and to Amend Compl., MSJ000002 (records of the MSHA Mine Data Retrieval System). After an investigation, MSHA declined to pursue her complaint. Subsequently, on January 7, 2014, McDonald filed a discrimination complaint with this Commission under section 105(c)(3) of the Mine Act. That complaint also named "TMK Enterprise Security" as the Respondent.

The Judge scheduled a hearing on the case for November 18, 2014. A few days prior to the hearing, counsel for the Respondent sought to withdraw as counsel asserting as good cause a disagreement between Mark Toler and George King, whom counsel represented to be the owners of the Respondent, regarding the ongoing operation of the business. Counsel also cited the Respondent's financial inability to continue to retain counsel. The Judge granted the attorney's request to withdraw and ordered that the security services business file a notice of appearance and specify substitute representation or the pro se appearance of King and/or Toler on or before January 14, 2015. The Judge rescheduled the case for hearing on February 10, 2015. Unpublished Order (Dec. 3, 2014). On January 14, 2015, King and Toler informed the Judge that they intended to proceed *pro se* and would participate fully in all remaining hearings. Unpublished Order (Feb. 3, 2015).

On January 21, 2015, McDonald filed a motion for default judgment, alleging that the Respondent had failed to comply with the Judge's Order. On January 22, 2015, the Judge convened a conference call with the parties. During the call, it was represented that the corporate status of "TMK Enterprise Security" was dissolved in June 2009. The Judge then ordered the parties to participate in a mediation conference with the Commission's settlement counsel. The mediation was scheduled for January 28, but neither King nor Toler appeared.

On February 2, 2015, McDonald filed a motion for a temporary stay of the proceeding, stating, in part, that she intended to file a motion to amend her original complaint to add parties. The Judge granted the motion and continued the hearing pending the filing of a motion by McDonald to amend her complaint.⁴ Unpublished Order at 2 (Feb. 3, 2015). On February 18,

² Section 105(c)(2), 30 U.S.C. § 815(c)(2), provides in pertinent part, that "[a]ny miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may . . . after such violation occurs, file a complaint with the Secretary alleging such discrimination."

³ In her complaint to MSHA, McDonald also listed her employer's contractor ID as "5GI" which, according to the Mine Data Retrieval System, corresponds to the company "TMK Enterprise Security." MSHA Discrimination Compl.; Mot. to Lift Temporary Stay and to Amend Compl., MSJ000002.

2015, McDonald filed a motion to lift the stay and amend her complaint to add Frasure Creek, the operator of the mine, as a Respondent in the matter.

On March 12, 2015, the Judge issued an Order denying the motion to amend to include Frasure Creek, stating that the Secretary's initial investigation did not include consideration of matters contained in the amended complaint, and that McDonald had failed to comply with the statutory prerequisite of initially filing a complaint with the Secretary pursuant to section 105(c)(2). The Judge also found that the corporate status of "TMK Enterprise Security Services, Inc." had been terminated on June 12, 2009, prior to the relevant period of McDonald's employment (May 2011 through September 2013). *McDonald v. TMK Enterprise Security*, 37 FMSHRC 683, 683-85 (Mar. 2015) (ALJ).⁵ Therefore, the Judge dismissed the proceeding as he concluded that "TMK Enterprise Security Services, Inc." could not have been McDonald's employer during the relevant period of her employment. Instead, he found that "McDonald was employed by George King and Mark Toler, the former [principals] of [the corporation], who continued to operate their security services business as a non-corporate entity." *Id.* at 683.

On March 23, 2015, McDonald filed a "Petition for Reconsideration" requesting that the Judge set aside his dismissal order and add King and Toler as Respondents. On March 31, 2015, the Commission directed review *sua sponte* "to determine whether the Judge erred as a matter of law in concluding that TMK Enterprise Security could not have been the employer of Sandra McDonald because it was not registered as a corporation during the period of McDonald's employment." Thus, the Direction for Review focused on whether "TMK Enterprise Security," rather than the corporation "TMK Enterprise Security Services, Inc.," could have been McDonald's employer.

II.

Disposition

For the reasons that follow, we conclude that the Judge erred in failing to consider whether the named respondent, "TMK Enterprise Security," referred to a "person" meaning "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization," pursuant to section 3(f) of the Mine Act, which employed McDonald during the relevant period of her employment. 30 U.S.C. § 802(f).

The Judge found that following the termination of "TMK Enterprise Security Services, Inc." in 2009, George King and Mark Toler continued to operate their security services business

⁴ The Judge did not grant the motion for default judgment, noting that King and Toler had informed his law clerk that they intended to proceed *pro se* and provided assurances that they would participate fully in all remaining proceedings. The Judge also noted, however, that neither King nor Toler had attended the scheduled mediation conference. Unpublished Order (Feb. 3, 2015).

⁵ The records of the State of West Virginia confirm that the corporate status of "TMK Enterprise Security Services, Inc." had been terminated on June 12, 2009. Mem. in Supp. of Mot. for Default J., Ex. C.

as a non-corporate entity. A non-corporate entity may constitute an employer under the Mine Act. Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), provides, in pertinent part that “[n]o person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner.” Section 3(f) of the Mine Act defines the term “person” to mean “any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization.” 30 U.S.C. § 802(f). See *Meredith v. FMSHRC*, 177 F.3d 1042, 1052-56 (D.C. Cir. 1999). Therefore, it is clear that a non-corporate entity such as a partnership, association, or other organization may qualify as a “person” or employer under section 105(c) of the Mine Act.

The Judge also noted that the relevant period of McDonald’s employment, for the purpose of this proceeding, was May 2011 to September 2013. We find that the record establishes that King and Toler operated one or more non-corporate security services businesses under the name “TMK Security” and/or “TMK Enterprise Security,” which employed McDonald during this period.⁶

Furthermore, the record indicates that during 2011 through 2013, “TMK Security” was the trade name for “Appalachian Enterprise Security Services, LLC.” Pet. for Recons., Ex. 1. “Appalachian Enterprise Security Services, LLC” listed King and Toler, the former principals of “TMK Enterprise Security Services, Inc.,” among its officers. *Id.* Upon the termination of the corporate status of “TMK Enterprise Security Services, Inc.,” Messrs. King and Toler clearly continued to operate in a non-corporate form under the name “TMK Security” and/or “TMK Enterprise Security,” without attention to details of corporate law. Therefore, the termination of the corporate status of “TMK Enterprise Security Services, Inc.” does not lead to the dismissal of the complaint against “TMK Enterprise Security.” The entity, either as a partnership of Toler and King or as a trade name for “Appalachian Enterprise Security Services, LLC,” was Respondent’s employer during the period applicable to the complaint.⁷

⁶ In this regard, the “employee disciplinary report” issued to McDonald on September 9, 2013 bears the letterhead “TMK Security.” Employee Disciplinary Report, issued on Sept. 9, 2013. However, as noted above, a security entity operated by King and Toler was registered as a contractor with MSHA under the name “TMK Enterprise Security.” Significantly, “TMK Enterprise Security” filed an Answer to McDonald’s complaint, responded to her interrogatories and requests for production of documents, and filed both a motion to dismiss, and a Pre-Hearing Report. In the Answer to the complaint, motion to dismiss and response to McDonald’s discovery requests, the entity referred to itself as “TMK Enterprise Security.” Answer to Compl. at 1-2; Mot. to Dismiss at 1-2; Resp. to Disc. Reqs. at 1-2. In the Pre-Hearing Report, the entity referred to itself as “TMK Security.” Resp’t Preh’g Report at 4. Significantly, it was never denied that McDonald worked for this entity, or that King and Toler were the principals of the entity.

⁷ After termination of its corporate form “TMK Enterprise Security” would have been operating as a partnership between Messrs. King and Toler or as a trade name for “Appalachian Enterprise Security Services, LLC.” Therefore, the complainant may amend her complaint to add “Appalachian Enterprise Security Services, LLC,” “TMK Security,” King, and Toler as Respondents.

Hence, we hold that the Judge erred when he dismissed the complaint against “TMK Enterprise Security.”⁸

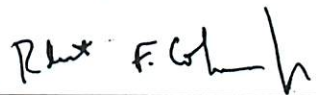
III.


Conclusion

For the reasons stated above, we reverse the Judge and conclude that “TMK Enterprise Security” is a “person” pursuant to section 3(f) of the Mine Act. “TMK Enterprise Security” continues to be a Respondent in this proceeding and leave is granted for McDonald to amend the complaint to add other relevant parties, including King and Toler. The case is remanded for further proceedings consistent with this decision.


Mary Lu Jordan, Chairman


Michael G. Young, Commissioner


Robert F. Cohen, Jr., Commissioner


Patrick K. Nakamura, Commissioner


William I. Althen, Commissioner

⁸ Not only is “TMK Enterprise Security” listed in the MSHA Mine Data Retrieval System, but the Mine Data Retrieval System lists citations issued to the contractor “TMK Enterprise Security” in 2013, several years after the termination of the corporation “TMK Enterprise Security Services, Inc.” Mot. to Lift Temporary Stay and to Amend Compl., MSJ000002.

Distribution:

Samuel B. Petsonk
Mountain State Justice, Inc.
1031 Quarrier St., Suite 200
Charleston, WV 25301
sam@msjlaw.org

George King
1704 Jackson Avenue
Saint Albans, WV 25177
kingg@arrowsecurity.net

Mark Toler
P.O. Box 88
Delbarton, WV
tolermd@citynet.net

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
201 12 St. South, Suite 500
Arlington, VA 22202-5450

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12 St. South, Suite 500
Arlington, VA 22202-5450

Administrative Law Judge Jerald Feldman
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N. W., Suite 520N
Washington, D.C. 20004