

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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July 27, 2007

R & D COAL COMPANY, INC.,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. PENN 2007-50-R
	:	Citation No. 7008536;12/01/2006
v.	:	
	:	Docket No. PENN 2007-51-R
SECRETARY OF LABOR,	:	Order No. 7008537;12/01/2006
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	Docket No. PENN 2007-52-R
Respondent	:	Order No. 7008538;12/01/2006
	:	
	:	Docket No. PENN 2007-53-R
	:	Order No. 7008539;12/01/2006
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	:	Docket No. PENN 2007-54-R
	:	Order No. 7008540;12/01/2006
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	:	Docket No. PENN 2007-55-R
	:	Citation No. 7009281;12/01/2006
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	:	Docket No. PENN 2007-56-R
	:	Order No. 7009282;12/01/2006
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	:	Docket No. PENN 2007-57-R
	:	Citation No. 7009283;12/01/2006
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	:	Docket No. PENN 2007-58-R
	:	Order No. 7009284;12/01/2006
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	:	Docket No. PENN 2007-59-R
	:	Citation No. 7009285;12/01/2006
	:	
	:	Docket No. PENN 2007-82-R
	:	Citation No. 7009164; 12/08/2006
	:	
	:	R & D Coal Mine
	:	Mine ID 36-02053

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. PENN 2007-236
Petitioner	:	A. C. No. 36-02053-115138
v.	:	
	:	
R & D COAL COMPANY, INC.,	:	R & D Coal Mine
Respondent	:	
	:	

CONSOLIDATION ORDER
ORDER STAYING PROCEEDINGS

These cases are before me on Notices of Contest and a Petition for Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(d). The Notices of Contest are scheduled for trial on September 18, 2007. The petition proposes civil penalties for the citations and orders contested in the Notices of Contest. Accordingly, all of the proceedings are **CONSOLIDATED** for hearing.

On June 28, 2007, the Secretary, by counsel, filed a Motion to Stay the proceedings because the Mine Safety and Health Administration (MSHA) is making “a criminal referral of a matter arising from the same facts and circumstances as the instant case to the United States Attorney for the Middle District of Pennsylvania.” The motion requests that “all civil proceedings” and “all discovery in all civil proceedings” be stayed. The operator opposes the motion. I have reviewed the arguments of counsel made in a telephone conference call held on July 6, 2007; a July 13, 2007, letter submitted by the First Assistant U.S. Attorney for the Middle District of Pennsylvania for *in camera* review; and the briefs filed by the parties. For the reasons set forth below, the motion is granted.

Discussion

The Commission has held that the following factors should be considered in determining whether to grant a stay in cases where the prospect of criminal prosecution exists: (1) the commonality of evidence in the civil and criminal matters; (2) the timing of the stay request; (3) prejudice to the litigants; (4) the efficient use of agency resources; and (5) the public interest. *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (Apr. 1995). All of these factors lead to the conclusion that the stay should be granted.

Commonality of Evidence

This element is “a key threshold factor,” since civil proceedings are properly stayed if they cover the same evidentiary material as the criminal case. *Id.* This case involves 12 orders and citations. All but two of them were issued on December 1, 2006. The other two were issued

on December 8 and 21, 2006, respectively. All but Order No. 7009170, which is not the subject of a contest proceeding, allege that the violation either resulted in, or was a contributing factor toward, fatal injuries suffered by a miner in the mine on October 23, 2006. It is hard to imagine how a criminal prosecution resulting from the October 23 fatal accident would not involve the same evidence as the eleven contest proceedings. Indeed, the letter from the U.S. Attorney does no more than draw this obvious conclusion.

With regard to this factor, the operator argues that:

Here, there are only a few core citations that could support a criminal referral or pursuit by the Justice Department, and R&D Coal avers that none of its actions warrant such a referral and that it may well be vindicated (or, in the alternative, any citations that are sustained may well be reduced to low or moderate negligence) if the civil matter can proceed to trial in a timely manner

(Cont. Opp. at 4.) Significantly, the company acknowledges that the citations could be involved in a criminal referral. The rest of the argument misses the point, however. The issue is not whether the orders and citations themselves support a criminal referral, but whether they involve the same evidence. In this connection, even if for some reason they were reduced to low or moderate negligence, the evidence would still be the same.

Unlike *Buck Creek*, where the Commission vacated a stay order in a case involving over 500 violations because there had not been a showing of commonality of evidence, there are only 12 violations in this case. They all relate to the October 23 fatality and the investigation thereof. Accordingly, I conclude that this factor supports the stay request.

Timing of the Request

The Commission has held that where there has been no criminal investigation and, therefore, no reference to the U.S. Attorney for criminal prosecution there is a “reduced need for a . . . stay.” *Capitol Cement Corp.*, 21 FMSHRC 883, 890 (Aug. 1999). Such is not the case here. MSHA has conducted its investigation and reference to the U.S. Attorney is imminent. The U.S. Attorney is anticipating referral within the next 60 days.

The operator asserts that until “an actual referral is made, the case should not be stayed, and should proceed to trial in mid-September. Discovery, including depositions should continue without further hindrance.” (Cont. Opp. at 5.) Thus, while recognizing that a stay is appropriate after referral, the operator apparently seeks to use the liberal discovery allowed in a civil case, to prepare for the criminal case. This is one of the main reasons why civil cases are stayed for criminal proceedings. As the Commission has noted:

Criminal defendants enjoy limited discovery compared with the

broad scope of discovery available in civil proceedings. *Compare* Rules 26 through 37, Fed. R. Civ. P., with Rules 15 and 16, Fed. R. Crim. P.; *see also Campbell v. Eastland*, 307 F.2d [478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963)]. When the government moves for a stay, it is generally seeking to prevent the prejudice that can result from a defendant's use of civil discovery to learn the government's strategy and evidence in the criminal matter. *See Campbell*, 307 F.2d at 487. Accordingly, courts do not permit criminal defendants to employ liberal civil discovery procedures to obtain evidence that would ordinarily be unavailable to them in the parallel criminal case. *E.g., United States v. One 1964 Cadillac Coupe de Ville*, 41 F.R.D. 352, 353 (S.D.N.Y. 1966), *citing Campbell*.

Buck Creek, 17 FMSHRC at 504.

The Contestant also suggests that the Secretary is using the stay request as a delaying tactic and to gain an advantage in the criminal proceeding. This argument is advanced based solely on the timing of the case thus far. I find no such bad faith on the part of the Secretary. Indeed, these cases have been progressing much faster than the normal case.

The request for a stay was made as soon as the Secretary's counsel who is handling these cases was informed that a criminal referral was going to be made. It was made less than nine months after the accident occurred. The timing of the request is appropriate and there is no evidence that it was delayed for tactical reasons. Therefore, I find that this second factor also supports staying these cases.

Prejudice to the Litigants

The operator argues that its "ability to call necessary witnesses at trial will be unduly hampered if the stay were granted. A delay would prejudice Contestant because of disbursal of witnesses and the prospect of faded memories." (Cont. Opp. at 6.) The Contestant speculates that many of the MSHA witnesses are near retirement age or are in ill health. However, these are problems that can occur in any case. Further, the problem cuts both ways. Many of the MSHA employees that the operator postulates "may be unavailable" may also be witnesses the Secretary intends to call.

On the other hand, as discussed under the second factor, the government's criminal case could be significantly prejudiced if the stay is not granted, by the operator's using civil discovery to find out about the criminal case. The Commission has said that: "In evaluating the harm that may be caused by granting or refusing to grant a stay, the judge is required to balance the litigant's competing interests. *Afro-Lecon, Inc. v. United States*, 820 F.2d. 1198, 1202 (Fed. Cir. 1987)." *Id.* Here the Contestant has alleged no specific or actual prejudice, while the

government's case could suffer actual harm if the stay is denied. Consequently, I conclude that this factor favors granting the stay.

Efficient Use of Agency Resources

This factor also supports granting the stay. The Contestant has expressed a desire to proceed with discovery. Yet, with a criminal proceeding pending, any witness who may be subject to criminal prosecution is likely to assert his privilege against self-incrimination at a deposition or at trial of the civil case. Moreover, the Contestant suggests no remedy for this problem, stating only that: "Contestant can only speculate as to who will or will not invoke the privilege, but it is certain that the Secretary may call other witnesses who are available to provided substitute, but equivalent, testimony." (Cont. Opp. at 11.) However, if the civil proceeding is stayed, "it obviates the need to make rulings regarding potential discovery disputes involving issues that may affect the criminal case" and insures "that common issues of fact will be resolved and subsequent civil discovery will proceed unobstructed by concerns regarding self-incrimination." *Maloney v. Gordon*, 328 F.Supp.2d 508, 513 (D. Del. 2004).

It is apparent that not granting the stay would hinder rather than advance the efficient use of agency resources. "Furthermore, the outcome of the criminal proceedings may guide the parties in settlement discussions and potentially eliminate the need to litigate some or all of the issues in [these cases]." *Id.* It is even possible that the disposition of the criminal case will also dispose of the civil case. *See e.g. Southmountain Coal, Inc. et al*, 17 FMSHRC 1081 (June 1995) (ALJ) (civil penalty and contest cases dismissed in conjunction with the acceptance of the operator's guilty pleas in a related criminal proceeding and agreement to pay substantial criminal and civil penalties).

The Public Interest

Many years ago, the Commission observed that "there is a substantial public interest in the expeditious determination of whether penalties are warranted." *Scotia Coal Mining Co.*, 2 FMSHRC 633, 635 (Mar. 1980). However, that was in a decision holding that an administrative law judge did not abuse his discretion in lifting a stay, which had been in effect for over a year, for 20 of 28 cases which did not have a commonality of evidence with the criminal case. *Id.* at 634. That is not the situation here. All of the 12 violations in this case are inextricably intertwined with the fatal accident which is the subject of the Secretary's criminal referral, and proceedings have not yet been stayed.

Moreover, there is also a substantial public interest in the criminal prosecution of those who criminally violate the Mine Act. Indeed, this interest may be stronger than any interest in determining whether penalties are warranted. Accordingly, I conclude that this factor also supports staying these cases.

Order

As discussed above, all of the factors enumerated in *Buck Creek* to be considered in deciding whether to stay civil proceedings for criminal proceedings lead to the conclusion that these cases should be stayed. Therefore, the motion of the Secretary is **GRANTED** and further proceedings in these cases, specifically including discovery, are **STAYED** until the criminal proceedings have been completed. Counsel for the Secretary is directed to inform the judge, in writing, of the status of the criminal proceedings on **September 28, 2007**, and on the last working day of each quarter thereafter until the stay is lifted,

T. Todd Hodgdon
Administrative Law Judge
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