

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

October 11, 1996

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 95-539-RM
	:	WEST 95-540-RM
STILLWATER MINING COMPANY	:	WEST 96-131-M
	:	WEST 96-214-M

BEFORE: Jordan, Chairman; Marks and Riley, Commissioners¹

ORDER

BY Jordan, Chairman; Riley, Commissioner:

On September 25, 1996, Stillwater Mining Co. (“Stillwater”) filed with the Commission an Application To Stay Assessment of Penalty, pending the appeal of the decision of Administrative Law Judge Arthur J. Amchan. 18 FMSHRC 1291 (July 1996) (ALJ). On that same day, Stillwater filed with the United States Court of Appeals for the Ninth Circuit a petition for review of the judge’s decision.² Stillwater requests the Commission to stay, pending its appeal, that part of the judge’s order that assesses a civil penalty of \$1,500.

Stillwater’s application was made pursuant to Rule 18 of the Federal Rules of Appellate Procedure, which provides that “[a]pplication for a stay of a decision or order of an agency pending direct review in the court of appeals shall ordinarily be made in the first instance to the agency.” Section 106(a)(1) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 816(a)(1) (1994), states that, upon appeal of a final decision of the Commission, the court of appeals shall have exclusive jurisdiction in the proceeding once the record before the Commission

¹ Pursuant to section 113(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

² The Commission did not direct review of the judge’s decision and it became a final decision of the Commission pursuant to 30 U.S.C. § 823(d)(1).

is filed with the court. Because the record has not yet been filed, the Commission has jurisdiction to consider Stillwater's motion. *Secretary ex rel. Smith v. Helen Mining Co.*, 14 FMSHRC 1993, 1994 (December 1992).

In *Secretary of Labor ex rel. Price and Vacha v. Jim Walter Resources, Inc.*, 9 FMSHRC 1312 (August 1987), the Commission held that a party seeking a stay must satisfy the factors in *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Those factors include: (1) likelihood of prevailing on the merits of the appeal; (2) irreparable harm if the stay is not granted; (3) no adverse effect on other interested parties; and (4) a showing that the stay is in the public interest. *Virginia Petroleum*, 259 F.2d at 925. The Court made clear that a stay constitutes "extraordinary relief." *Id.*

In support of its application, Stillwater asserts that there is a "reasonable likelihood" of success on appeal, that payment of the penalty constitutes "irreparable harm per se," and that the stay will not prejudice the Commission or the Secretary or harm the public interest or Stillwater employees.

Stillwater's assertions lack sufficient substantiation to satisfy the requirements of a stay. Stillwater has failed to provide any explanation as to why there is a likelihood of success on appeal. Its claim of irreparable injury also is not established. Recoverable monetary loss, such as the payment of the \$1,500 penalty here, "may constitute irreparable harm only where the loss threatens the very existence of the movant's business." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985). Stillwater has not alleged, nor substantiated, such an irreparable injury in its application. Likewise, Stillwater's assertion on the third factor, no adverse effect to others, lacks adequate proof. As to the fourth factor, Stillwater has made no showing that its sought after stay is in the public interest.

Accordingly, we conclude that Stillwater has failed to establish that a stay should be granted.³ See *W. S. Frey Co.*, 16 FMSHRC 1591, 1592 (August 1994); *Air Products and Chemicals, Inc.*, 16 FMSHRC 29 (January 1994). Upon consideration of Stillwater's application, it is denied.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

³ Commissioner Marks votes to grant the application.