

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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May 31, 1995

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket Nos. LAKE 94-72, etc.
Petitioner	:	
	:	
v.	:	Buck Creek Mine
	:	
BUCK CREEK COAL INC.,	:	
Respondent	:	

ORDER DENYING MOTION FOR STAY
ORDER GRANTING IN PART AND DENYING IN PART
OBJECTION TO NOTICE OF DEPOSITIONS
AND MOTION FOR PROTECTIVE ORDER
PREHEARING ORDER

On April 25, 1995, the Commission issued a decision vacating the February 15, 1995, order continuing the stay of all Buck Creek cases. *Buck Creek Coal Inc.*, 17 FMSHRC 500 (April 1995). As a consequence, the Secretary, by counsel, has filed a Motion for Stay of Civil Proceedings and an Objection to Notice of Depositions and Motion for Protective Order. Buck Creek opposes the Secretary's motions.

Motion for Stay

The Secretary requests the "entry of an order which stays for sixty days all citations which have been designated by the

United States Attorney as areas involving conduct under criminal

investigation." Motion for Stay at 3.¹ For the reasons set forth below, the request is denied.

The motion states that the Secretary has referred numerous alleged violations of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 *et seq.*, to the U.S. Attorney, who, in turn, has initiated a review of all violations issued at the Buck Creek Mine from April 1993 through April 1995. The Secretary asserts that: "Any criminal prosecution resulting from said referral would arise out of the same facts and circumstances present in the instant proceedings. The factual and legal issues arising in any criminal prosecution would be similar or identical to many of the citations involved in the above cases."

In its *Buck Creek* decision, the Commission set out five factors that should be considered in determining whether a stay should be granted: (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. *Id.* at 503. The

¹ Somewhat inconsistently, the first paragraph of the motion states that the Secretary:

m oves to stay proceedings involving citations issued on or before September 1, 1994 and which have been designated as involving areas of conduct under criminal investigation by the Federal Mine Safety and Health Administration and the United States Attorney for the Southern District of Indiana. The Secretary further requests that certain citations issued after September 1, 1994 be stayed for sixty days or until such time as the United States Attorney . . . makes a determination regarding prosecution of Buck Creek Coal Company and any of its officers for criminal violations of the Federal Mine and Health Act of 1977.

Commission stressed that "[w]e conclude that the first element listed above, commonality of evidence, is a key threshold factor" that must be established in the record. *Id.*

This clearly places the burden on the party seeking the stay to satisfy this threshold showing or have the stay denied before any of the other factors are considered. In spite of this guidance, the Secretary has not presented in his new request anything other than the same type of unsupported assertions which the Commission has already found insufficient for the granting of a stay.

In none of the pleadings does the Secretary state what the criminal investigation involves. The closest that the Secretary comes to providing this information is in his memorandum in support of the motion where it states: "Those areas of conduct involve roof control plan at the face; failure to follow the ventilation plan, failures to report accidents including face ignitions and failures and to properly record hazardous conditions required to be written in the record books." Memorandum at 2. However, it is not clear from the context of the paragraph whether this refers to the citations for which the Secretary is seeking a stay or those for which he is not.

Furthermore, even if the quoted language does refer to the citations which the Secretary seeks to have stayed, it advises only what conduct the citations concern, not what the investigation involves. Therefore, there is nothing to compare the citations or orders which the Secretary seeks to have stayed with in order to determine whether there is a commonality of evidence and issues.²

² The Secretary has attached to his motion a 27 page list of citations. This apparently shows which specific citations or orders he seeks to have stayed, although that is not entirely clear since there is no explanation as to what some of the notations on the list, specifically the "Y" and "N," mean. This list is not useful; the cases before me are in dockets, but the list makes no reference to dockets. In view of my decision, the unhelpfulness of the list makes no difference. However, in the

The failure of the Secretary to establish a commonality of issues and evidence between the instant cases and the criminal matters, leaves no alternative but to deny the request for stay. Accordingly, it is **ORDERED** that the Motion for a Stay of Civil Proceedings is **DENIED**.

Objection to Depositions and Motion for Protective Order

future, the parties would be well advised to discuss citations or orders by docket as well as citation or order number, rather than expecting the judge to go through each of the over 500 dockets attempting to find the citation or order number mentioned.

With respect to the Buck Creek's notices of deposition³ the Secretary requests: (1) that the Respondent be only permitted to depose the inspectors who issued the citations or orders and that questions be limited to matters contained in the citations or orders; (2) that inquiry concerning the criminal investigation on any stayed citation be prohibited; (3) that seeking the identity or testimony of any cooperating witnesses in the criminal proceeding be prohibited; and (4) that the taking of depositions of Rex Music, David Whitcomb, Mark Eslinger, Mike Conley, Woodrow Hale, Richard Oney, Mike Finnie, Edward Ritchie or April Bryan be prohibited because they are either managers without first hand knowledge of the facts underlying the case, are special investigators who did not conduct the inspections or issue the citations or orders, or are a secretary in the Madisonville, Kentucky, field office.

Commission Rule 56(b), 29 C.F.R. ' 2700.56(b), states that "[p]arties may obtain discovery of any relevant, non-privileged matter that is admissible evidence or appears likely to lead to the discovery of admissible evidence." Rule 56(c), 29 C.F.R. ' 2700.56(c), provides that "[u]pon motion by a party or by the person from whom discovery is sought or upon his own motion, a Judge may, for good cause shown, limit discovery to prevent undue delay or to protect a party or person from oppression or undue burden or expense."

The Secretary's motion contains almost nothing in the way of good cause for its requests. With regard to its request that the depositions of specific individuals be prohibited, the motion simply states, in addition to the fact that the individuals are managers, special investigators or a secretary, that "[t]he depositions of the above individuals are not relevant to the civil citations/orders and Buck Creek should not be allowed to conduct discovery in these proceedings relating to the criminal investigation of Buck Creek Coal Company and its officers." Secretary's Motion at 3. No argument or evidence of any type is presented for the remaining requests.

In its decision vacating the stay, the Commission pointed out that "[t]he judge has the power to impose limitations on the time and subject matter of discovery, which would permit the

³ Buck Creek's notices of depositions were filed with the Secretary in July 1994. The Secretary's objection to them was not ruled on at that time because of the granting of the stay. The Secretary now renews his objection.

civil matter to proceed without harming the criminal case." *Id.* at 504. The Commission further stated that in doing this, "[t]he judge should also consider [the commonality of issues and evidence between the civil and criminal matters] when determining the limits of discovery in order to permit civil proceedings to advance without prejudice to criminal matters." *Id.* at 505. On the other hand, as the Commission also stated, "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." *Id.* at 504.

The difficulty with this motion, as with the motion for stay, is that the Secretary has not provided any information concerning the parallel criminal case on which I can make a consideration of the commonality between the civil and criminal matters. The instant motion provides even less information than the stay motion concerning what the criminal investigation involves.

Accordingly, taking into consideration the wide scope of discovery set forth in Rule 56(b) and the Secretary's almost total failure to set forth good cause, let alone provide evidence to support it, the Secretary's motion is **GRANTED IN PART** and **DENIED IN PART** as follows:

(1) The Secretary's request that the depositions of Rex Music, David Whitcomb, Richard Oney, Mike Finnie and Mark Eslinger be prohibited is **DENIED**. The fact that these individuals are managers does not mean that they do not have knowledge of the facts underlying these cases or information that might lead to the discovery of admissible evidence.

(2) The Secretary's request that the depositions of Edward Ritchie, Mike Conley and Woodrow Hale be prohibited is **DENIED**. The fact that these individuals "did not conduct inspections which resulted in the issuing of the citations/orders or write the citations/orders" does not mean that they do not have knowledge of facts underlying the cases or information that might lead to the discovery of admissible evidence.

(3) The Secretary's request that the deposition of April Bryan be prohibited is **GRANTED**. It appears obvious from her position that she is not likely to have knowledge of the facts underlying these cases or information that might lead to the discovery of admissible evidence.

(4) The Secretary's request that the Respondent be prohibited from inquiring concerning the criminal investigation on any citation or order for which the Secretary has requested a stay is **GRANTED**. Although by this order no citations or orders have been stayed, inquiries concerning the criminal investigation would not have any relevance to the cases in this proceeding.

(5) The Secretary's request that the Respondent be prohibited from seeking the identity or the testimony of any cooperating witness in the criminal proceeding is premature. The informant's privilege is already available to the Secretary. If the Respondent attempts to elicit such information from a witness, the Secretary asserts the privilege and the Respondent seeks to compel a response, I will rule on the matter in accordance with Commission Rule 61, 29 C.F.R. ' 2700.61. *Thunder Basin Coal Co.*, 15 FMSHRC 2228 (November 1993); *Bright Coal Co.*, 6 FMSHRC 2520 (November 1984).

(6) The Secretary's request that the Respondent be allowed to depose only those inspectors who issued the citations or orders is **DENIED**.

This order permits the taking of depositions 19 individuals, including managers, from district offices in and around Indiana.

I expect the parties to cooperate in scheduling the depositions so that they are not unduly burdensome or oppressive either to the individual witnesses or their respective offices in carrying out their day-to-day activities.

Prehearing Order

In accordance with the provisions of Section 105(d) of the Act, 30 U.S.C. ' 815(d), these cases will be set for hearings on the merits at times and places to be designated in subsequent orders. Prior to setting the cases for hearing, the parties are directed to confer for the purpose of discussing settlements and stipulating as to matters not in dispute. These discussions, as well as discovery, should be completed by **August 3, 1995**.

A **prehearing conference** will be held on **August 3, 1995**, in **Sullivan, Indiana**, beginning at 9:00 AM. The purpose of the conference will be to go through the cases docket by docket to take settlements and schedule hearings. Any discovery issues

that have not been resolved, along with any unusual procedural or evidentiary issues will be taken up at that time. The parties should make sure that any witnesses necessary for completing the above matters are present at the hearing room.

T. Todd Hodgdon
Administrative Law Judge
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