

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 21, 2022

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner,

v.

GENEVA ROCK PRODUCTS, INC.,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEST 2022-0097
A.C. No. 42-02107-545346

Mine: Hansen Pit

ORDER GRANTING MOTION TO LIFT STAY

Before: Judge Simonton

This case is before me upon the Secretary’s petition for the assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act”). It involves four violations issued on April 14, 2021, following MSHA’s investigation of a fatal accident that occurred on January 19, 2021. This matter has been stayed for over seven months, and the Secretary has moved to lift the stay. For the reasons set forth below, the Secretary’s motion is granted.

I. Procedural Background

This matter was assigned to me on January 10, 2022. On February 9, 2022, Respondent, Geneva Rock Products, Inc. (“Geneva Rock”), moved to stay this proceeding until the conclusion of any special investigations conducted by the Secretary pursuant to Sections 110(c) or 110(d) of the Mine Act, or until the Secretary confirmed there would be no individual civil penalties or criminal referrals related to this matter. On February 10, 2022, I stayed this matter pending the completion of any possible Section 110(c) or 110(d) investigations and directed the parties to provide an update in March 2022 confirming whether any such investigations were being conducted.

In March, April, and June 2022, the Secretary filed “status reports” with the court. In each of these reports, the Secretary conveyed that he had “no update” on the status of any investigations against Geneva Rock or its agents.

The Secretary filed a more substantive update in August 2022. In this status report, counsel for the Secretary stated that she has no information regarding potentially related

investigations involving other agencies and has no access to such information. The Secretary proposed that the stay in these proceedings should be lifted, over Geneva Rock's anticipated objection.

For the first time, in August 2022, Geneva Rock submitted its own status report. In it, Geneva Rock asserted that a criminal referral had been made, and that the matter had been assigned to an attorney from the U.S. Department of Justice, Environmental Crimes Section, and an attorney from the U.S. Attorney's Office for the District of Utah. Geneva Rock stated that an investigation was ongoing, but no formal action had been taken. Accordingly, Geneva Rock suggested that it would be prejudiced absent a stay and stated it would oppose a motion to lift the stay.

On August 22, 2022, the Secretary filed a Motion to Lift Stay of Proceedings ("Sec'y Mot."). Geneva Rock filed its Opposition to Secretary's Motion to Lift Stay of Proceedings on September 2, 2022 ("Geneva Rock Opp.").

II. Discussion

The Commission has held that judges should consider the following factors when determining whether a stay is appropriate in a case like this one, where there is a possibility of a related criminal prosecution: (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). Consideration of these factors "involves a balancing test in which the factors are weighed against each other in order to determine whether the balance favors a stay." *Performance Coal Co.*, 32 FMSHRC 1212, 1215 n.2 (Oct. 2010). No single factor is dispositive, and the factors must be "weighed against a background of coordinated and consistent government action between agencies." *Id.*

a. The Commonality of Evidence in the Criminal and Civil Matters

The Secretary asserts that the first *Buck Creek* factor supports lifting the stay. Sec'y Mot. at 4-7. To support this position, the Secretary points to numerous prior cases in which the Secretary moved for a stay in cases where parallel criminal matters were pending. *Id.* at 4-5. In those cases, the Department of Justice provided information to the Secretary and requested that the civil matters be stayed because they were likely to interfere with the criminal investigations or proceedings. *Id.* at 4-5. In contrast with those instances, the Secretary argues, the Department of Justice has not provided him with any information to support that there is commonality of evidence between this case and a criminal investigation. *Id.* at 6. Accordingly, given the lack of information supporting this factor, the Secretary argues this it weighs in favor of lifting the stay. *Id.*

Geneva Rock, on the other hand, asserts that the first factor strongly weighs in favor of a stay. Geneva Rock Opp. at 8. Geneva Rock states that the evidence in this civil proceeding and any potential criminal proceeding "would likely be identical (or at least have substantial overlap) because those proceedings likely would arise out of the same underlying, allegedly violative

conduct at issue in this matter, or at least closely related conduct.” *Id.* Geneva Rock asserts that on April 1, 2022, an attorney at the Department of Justice confirmed that it received a “referral package of this matter containing a large number of documents from the Mine Safety and Health Administration.” *Id.* at 5. According to Geneva Rock, the Department of Justice confirmed in August that it is still working through the documents, that the investigation of the referral is active, and that no decisions have been made regarding potential criminal charges or the targets of any potential charges. *Id.* at 5-6. Accordingly, Geneva Rock argues that the stay of this matter is appropriate and should be continued, and that the Secretary’s motion should be denied.

I find that the first factor supports lifting the stay in this matter. Geneva Rock has failed to establish a nexus between the possible criminal prosecution and this case. Without any concrete information showing a commonality of evidence and only the recounting of communications between Geneva Rock and the Department of Justice, Geneva Rock’s assertion that a potential criminal investigation involves “identical” evidence is merely an assumption at this juncture. This is an assumption the court is unwilling to adopt. However, Geneva Rock remains free to move for a renewed stay if and when any criminal proceeding actually interferes with or is impeded by this civil penalty proceeding.

b. The Timing of the Stay Request

The Secretary further argues that the second *Buck Creek* factor also supports lifting the stay. Sec’y Mot. at 7. Since this case was originally stayed in February, the Secretary decided not to open any related special investigations and has confirmed he is not pursuing any individual civil penalties under Sections 110(c) or 110(d) of the Mine Act. *Id.* at 3. He further asserts that “the imminence of an indictment would weigh in favor of limiting discovery or staying proceedings,” but given the five-year statute of limitations and Geneva Rock’s report that no formal action has been taken by the Department of Justice, this case should not be kept on hold based on the possibility of related criminal proceedings. *Id.* at 7.

Geneva Rock counters that the timing of the stay request supports a continuance of the stay. Geneva Rock Opp. at 9. It asserts that clarity regarding potential criminal charges and the targets of those charges “should emerge” in the coming weeks. *Id.*

I agree with the Secretary and find that the second factor of the *Buck Creek* test supports lifting the stay. This matter was stayed over seven months ago, and the Secretary has confirmed individual civil penalties under Sections 110(c) or 110(d) will not be assessed for conduct related to the accident at issue in this case. At this time, the timing factor weighs in favor of lifting the stay; nearly two years have passed since the accident at issue and indictments are not imminent.

c. Prejudice to the Litigants

The Secretary argues that his “civil penalty case is at risk of substantial prejudice if the stay continues. Sec’y Mot. at 10. To support this assertion, the Secretary points to the fact that the lead accident investigator has left his employment with MSHA and relocated out of state, and that a continued stay makes his availability more difficult. *Id.* Additionally, the Secretary notes that 14 Geneva Rock employees are listed in the Fatal Accident Report as participants in the

investigation, and that, as time passes, the likelihood increases that some witnesses may become unavailable. *Id.* at 10-11. The Secretary also argues that Geneva Rock may dispose of discoverable documents, according to its retention policy or otherwise. *Id.* at 11. The Secretary argues that because the risk of prejudice to his case is “concrete and substantial,” rather than speculative, the stay should be lifted. *Id.*

Geneva Rock asserts that it will be prejudiced in three ways if the stay is not continued. Geneva Rock Opp. at 9. First, it argues that allowing this case to proceed will force Geneva Rock to address “overlapping witnesses and evidence against two powerful government opponents at the same time, potentially placing great financial hardship” on Geneva Rock. *Id.* at 9-10. Second, it expects that many necessary witnesses might assert their Fifth Amendment privileges at depositions or at hearing to preserve their own interests during the pendency of criminal investigations or proceedings, which would deprive Geneva Rock of testimony crucial to its defenses and possibly expose it to adverse inferences in the Secretary’s favor. *Id.* at 10. Third, Geneva Rock argues that allowing this case to proceed will prejudice it by requiring it to “expose the bases of its defenses” to the prosecution before a criminal trial. *Id.* at 11. Accordingly, Geneva Rock concludes that this third factor weighs in favor of extending the stay.

I find that the third *Buck Creek* factor favors lifting the stay. While I acknowledge Geneva Rock’s concerns, its assertion that it will be prejudiced if this case moves forward is little more than speculation at this point. Geneva Rock assumes that a criminal proceeding will move forward during the pendency of this case, and that some unidentified witnesses may refuse to be deposed or to testify at a hearing in this case for fear that they may be charged in a separate criminal action. However, Geneva Rock is apparently unable to show that the Department of Justice will be moving forward with any criminal indictments, let alone criminal indictments for the conduct at issue in this docket. On the other hand, the Secretary’s concerns about the continuing passage of time are well taken and shared by the court. Unlike any potential criminal case, this civil penalty case is currently pending, and resolving it in accordance with the Commission’s aim to “secure the just, speedy, and inexpensive determination of all proceedings” is of utmost importance at this juncture. As the Commission has stated, “a complete stay of the civil proceedings is by no means the only method by which to avoid prejudice to a related criminal prosecution.” *Buck Creek*, 17 FMSHRC at 504. Either party may petition the court for limitations imposed on discovery, or as stated above, may move for a renewed stay if a criminal proceeding begins and is impeded by this civil proceeding.

d. The Efficient Use of Agency Resources

The Secretary attests that the fourth *Buck Creek* factor favors lifting the stay. Sec’y Mot. at 11-12. He argues that he should not be required to wait to enforce civil penalties until the criminal statute of limitations has run, and that efficient use of agency resources requires that the Secretary be permitted to pursue a prompt civil penalty. *Id.* at 12.

Geneva Rock counters that a continuation of the stay would promote judicial economy and the efficient use of agency resources. Geneva Rock Opp. at 11. It speculates that if the Department of Justice declines to bring criminal charges, the Secretary may change course and seek individual civil penalties under Sections 110(c) or 110(d) after all, and this scenario would

support consolidation of the cases for discovery, settlement negotiations, and hearing. *Id.* at 11-12. Additionally, Geneva Rock posits that allowing the criminal investigation to conclude before proceeding with this case may present an opportunity for a “‘global settlement’ addressing any criminal charges and agency claims at once, thus avoiding wasted government efforts in both proceedings. *Id.* at 12 (citation omitted).

I find this factor favors lifting the stay. At this time, it is unclear whether there will be a criminal proceeding and, if so, the extent to which the criminal and civil proceedings will involve the same witnesses and evidence. It is possible that this factor later weighs in favor of a stay if either party provides concrete information to support such a finding. Now, however, the Secretary asserts that moving forward with this proceeding is the most efficient use of his agency’s resources. Without any contrary information from the Department of Justice, I find that moving this proceeding along is the most efficient use of Commission resources as well.

e. The Public Interest

The Secretary asserts that this fifth factor further supports lifting the stay. Sec’y Mot. at 12-14. He points to the Secretary’s and the Commission’s responsibilities under the Mine Act, stressing that it was Congress’ intent to protect the health and safety of miners through prompt enforcement and swift adjudication of civil penalties. *Id.* Waiting for the completion of a criminal investigation and any proceedings frustrates the public interest in the swift adjudication of civil penalties, according to the Secretary. *Id.* at 13-14.

Geneva Rock argues that the public interest favors continuing the stay until any criminal investigations are complete. Geneva Rock Opp. at 12. It notes that the Secretary has taken this position in many other cases, and that courts have found staying civil proceedings pending parallel criminal proceedings protects the defendant’s constitutional rights, which is more important than avoiding delay and inconvenience in the civil case. *See id.* at 12-13. Geneva Rock asserts that the public interest in the money damages arising from the civil proceeding is outweighed by the public interest in the criminal proceeding and the protection of the defendant’s constitutional rights. *Id.*

I find that the public interest supports lifting the stay at this juncture. The Commission has long 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). This case has been stayed since February, and there is still no parallel criminal proceeding pending. Accordingly, given the information available now, I find that the public interest favors lifting the stay. Again, Geneva Rock may move for a stay at a later date if these circumstances change.

III. Order

Having considered the five *Buck Creek* factors, I find that the Secretary’s request to lift the stay in these proceedings is appropriate, despite the possibility of a related criminal prosecution. Though I appreciate Geneva Rock’s concerns, its vague, largely assumptive arguments are insufficient to support continuing this already lengthy stay. Accordingly, the

Secretary's Motion to Lift Stay of Proceedings is **GRANTED** and the stay of WEST 2022-0097 is hereby **LIFTED**. The parties are directed to submit their prehearing reports on or before **November 7, 2022**.

A handwritten signature in black ink, appearing to read "David P. Simonton". The signature is fluid and cursive, with a large, stylized initial "D" and "S".

David P. Simonton
Administrative Law Judge

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