

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 4, 2024

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. WEST 2022-0097

v.

GENEVA ROCK PRODUCTS, INC.

BEFORE: Jordan, Chair; Baker and Marvit, Commissioners

DECISION

BY THE COMMISSION:

This civil penalty proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018), is before the Commission on interlocutory review. On July 17, 2023, a Commission Administrative Law Judge issued an order granting a motion filed by Geneva Rock Products, Inc. (“Geneva Rock”) to stay the subject proceeding pending a parallel criminal investigation by the Department of Justice (“DOJ”). In reaching his decision, the Judge applied the factors set forth in *Buck Creek Coal Inc.*, 17 FMSHRC 500, 503 (Apr. 1995), and stayed the docket “pending the completion of the DOJ’s criminal investigation and any subsequent proceedings.” Unpublished Order dated July 17, 2023 (“Order”) at 4.

At issue is whether the Judge abused his discretion when he ordered a stay of this case for an indefinite duration. For the reasons discussed below, we conclude that the Judge erred, and we vacate the Judge’s order.

I.

Factual and Procedural Background

This case arose from a fatal accident that occurred on January 19, 2021, when the ground collapsed underneath a haul truck operated at a dumpsite at Geneva Rock’s Hansen Pit. As a result of the accident, on April 14, 2021, the Department of Labor’s Mine Safety and Health Review Administration (“MSHA”) issued one citation and three orders to Geneva Rock. All

four enforcement actions were designated as involving unwarrantable failure;¹ two were designated as involving high negligence; two were designated as involving reckless disregard; and one was ultimately proposed as a flagrant violation.² S. Opening Br. at 6. MSHA subsequently specially assessed penalties totaling \$381,500.

The parties filed various motions to stay and responses, engaged in limited discovery, and filed status reports in response to the Judge's orders. In relevant part, the Judge issued an order on February 10, 2022, staying the matter pending completion of the Secretary of Labor's investigations pursuant to sections 110(c) and 110(d) of the Mine Act, 30 U.S.C. §§ 820(c) and 820(d), and ordering recurring status updates. On August 9, 2022, Geneva Rock stated that it was able to confirm that there had been a referral to an attorney from the DOJ's Environmental Crimes Section and to an Assistant United States Attorney ("AUSA") for the District of Utah.

On August 22, 2022, the Secretary filed a motion to lift the stay, stating that no individual civil penalties under section 110(c) were forthcoming, and that the Secretary did not open and is not conducting any related special investigations. Mot. to Lift Stay at 3. Geneva Rock opposed the motion. On September 21, 2022, the Judge lifted the stay.

On March 28, 2023, Geneva Rock filed a motion to stay and a motion for a protective order to continue a Fed. R. Civ. P. 30(b)(6)³ deposition. It argued in part that it had been unable to find a person who would consent to testify as Geneva Rock's 30(b)(6) corporate designee. Geneva Rock noted that all five of Geneva Rock's witnesses who had been deposed had asserted their Fifth Amendment rights against self-incrimination in response to every substantive question posed. G. Resp. Br. at 4-5 ¶ 13. The Secretary filed a motion to compel the 30(b)(6) deposition and opposed the motion to stay. On April 5, 2023, the Judge granted the motion for a protective order, denied the motion to compel, and ordered additional briefing on the motion to stay.

On April 19, 2023, the Judge issued an order cancelling the hearing set for June 13-15, 2023. The Judge directed the parties to complete all the discovery they could to the best of their abilities, and to provide him with a status report on June 20, 2023, regarding discovery efforts and on the criminal investigation.

¹ The unwarrantable failure terminology is taken from section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), which establishes more severe sanctions for any violation that is caused by "an unwarrantable failure of [an] operator to comply with ... mandatory health or safety standards"

² The "flagrant" terminology is taken from section 110(b)(2) of the Mine Act, which provides that greatly enhanced penalties may be assessed for "flagrant" violations, that is, those violations that are deemed to involve "a reckless or repeated failure to make reasonable efforts to eliminate a known violation of a mandatory health or safety standard that substantially and proximately caused, or reasonably could have been expected to cause, death or serious bodily injury." 30 U.S.C. § 820(b)(2).

³ Fed. R. Civ. P. 30(b)(6) provides in part that when a notice or subpoena is issued to a corporation, the named organization must designate persons to testify on its behalf.

On June 20, the Secretary filed a status report stating that a large number of documents had been exchanged including a video of the fatal accident itself, numerous photographs taken by both parties, and thousands of pages of documents from both sides. The Secretary further stated that there were outstanding discovery requests, including that Geneva Rock had not disclosed its expert witnesses or designated a 30(b)(6) deponent. The Secretary asserted that the DOJ has taken no position on whether the civil penalty case should be stayed, and that the Judge cannot compel the DOJ to provide a status update on its investigation to the Commission, to the Secretary, or to Geneva Rock's attorneys.

In its June 20 status report, Geneva Rock confirmed in part that the parties had served and responded to written discovery requests, and that Geneva Rock took six depositions of MSHA personnel. Geneva Rock's counsel further stated that an attorney from the DOJ's Environmental Crimes Section indicated that his office and the office of an AUSA for the District of Utah received a criminal referral from the Department of Labor ("DOL"), that those attorneys are still evaluating the referral, and that they are awaiting further information from the DOL before they can conclude the process.

On July 17, 2023, the Judge issued an order granting Geneva Rock's motion to stay the subject proceeding. In the order, which is at issue in the subject interlocutory appeal, the Judge applied the *Buck Creek* factors and stayed the docket "pending the completion of the DOJ's criminal investigation and any subsequent proceedings." Order at 4. Noting that the Secretary does not intend to request status updates from the DOJ, the Judge ordered Geneva Rock to provide recurring updates regarding the criminal investigation every 90 days following the issuance of the order.

On July 20, 2023, the Secretary filed a motion for summary decision. On August 1, 2023, the Judge denied the Secretary's motion as premature.

The Secretary subsequently filed a motion to certify the Judge's July 17 stay order. The Judge denied certification for interlocutory review. The Secretary filed a petition for interlocutory review, which the Commission granted.

After the Judge's July 17 stay order, Geneva Rock filed status updates on October 16, 2023, and January 16, 2024. Each update provided that the DOJ attorney and AUSA received the criminal referral from the DOL, that they are still evaluating the referral, and that they are awaiting further information from the DOL before they are able to determine whether the referral will be accepted.

On September 12, 2024, Geneva Rock filed another update with the Commission. The update provides that a different DOJ trial attorney and AUSA have been assigned to the matter; Geneva Rock's counsel made an attorney proffer to those attorneys; those attorneys have requested to interview seven Geneva Rock employees or former employees and have expressed an interest in interviewing another employee who is represented by individual counsel; a special agent from the DOL's Inspector General's Office has been assigned to the matter; and the DOJ attorney, AUSA, and Geneva Rock's counsel will be working on a targeted request for

documents, which Geneva Rock understands will be memorialized in a Grand Jury subpoena to the operator.

Following the September 12 update, the Commission heard oral argument, and the parties have filed briefs with the Commission.

On review, the Secretary argues that the Judge abused his discretion by staying this case for an indefinite period because the stay was unjustifiably broad. She asserts that the Judge made legal errors that infected his analysis of the *Buck Creek* factors. Specifically, the Secretary contends that the Judge erroneously shifted the burden of proof from the moving party, in this case the operator, to the non-moving party, the Secretary. Second, she asserts that the Judge erred by requiring the Secretary to disclose information that the Secretary does not have and does not control. Third, the Secretary argues the Judge improperly conflated the Fifth Amendment rights of the individual Geneva Rock employees with Geneva Rock as a corporation. She requests that the Commission vacate the stay and remand this case to the Judge for a hearing based on a legally correct analysis of the *Buck Creek* factors. The Secretary submits that the Commission should instruct the Judge to allow: (1) a Rule 30(b)(6) deposition; (2) discovery related to expert witnesses; (3) any other outstanding discovery related to the Geneva Rock corporation; and (4) motions for summary decision and partial summary decision. S. Opening Br. at 19.

Geneva Rock responds that the Judge did not abuse his discretion in staying the proceedings pending completion of any criminal proceedings. It asserts that if the Commission lifts the stay, it will be denied due process in that it will be deprived of the opportunity to be heard at a meaningful time in a meaningful manner. G. Resp. Br. at 2, 9, 13. It asserts that the Secretary is hiding information as to whom and what are being investigated criminally which amounts to a misuse of parallel proceedings, agency bad faith, and malicious government tactics. *Id.* at 19. The operator explains that because there is no information about the criminal investigation, Geneva Rock's witnesses have been scared into not testifying, which could result in adverse inferences being drawn against Geneva Rock and, ultimately, a default judgment. *Id.* at 19. Geneva Rock disagrees that the Judge committed the errors objected to by the Secretary, and that he properly applied the *Buck Creek* factors. *Id.* at 22-31.

Geneva Rock filed a motion to strike all the arguments regarding suggested remedies set forth in section III of the Secretary's opening brief. It asserts that the remedies sought by the Secretary regarding the instructions that should be provided to the Judge on remand exceed the scope of interlocutory review. The Secretary opposes the motion to strike.

II.

Disposition

A. Application of *Buck Creek* Factors

The Commission applies the factors set forth in *Buck Creek* in order to balance equities in circumstances involving parallel civil and criminal proceedings. *Capitol Cement Corp.*, 21 FMSHRC 883, 888-89 (Aug. 1999), *aff'd*, 229 F.3d 1141 (4th Cir. 2000). In *Capitol Cement*, the

operator claimed that it had been denied due process when a Judge lifted a stay and conducted a hearing although one of the operator's witnesses asserted his Fifth Amendment rights against self-incrimination and refused to testify. *Id.* at 887. In reviewing Capitol Cement's due process argument, the Commission recognized that the fundamental requirement of procedural due process is the opportunity to be heard "at a meaningful time and in a meaningful manner" appropriate to the nature of the case. *Id.* (quoting *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976)) (other citations omitted). The timing and manner of the hearing depend upon "appropriate accommodation of the competing interests involved." *Capitol Cement*, 21 FMSHRC at 887 (quoting *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (other citations omitted)).

Although a Judge may stay a civil proceeding pending the outcome of a parallel criminal prosecution, such action is not required by the Constitution. *Capitol Cement*, 21 FMSHRC at 887 (citations omitted). Relying in part upon *United States v. Kordel*, 397 U.S. 1 (1970), the Commission has explained that in "the absence of circumstances 'in which the nature of the proceedings demonstrably prejudices substantial rights of the investigated party or of the government,' parallel proceedings should not be prohibited." *Capitol Cement*, 21 FMSHRC at 888 (citations omitted).

In *Buck Creek*, the Commission listed five factors that are appropriate for consideration in determining whether a stay should be granted. Those factors include: (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*, 17 FMSHRC at 503 (citations omitted).

Consideration of the *Buck Creek* 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) (citation omitted) (emphasis in original). No single factor is meant to be dispositive. *Id.* The lack of evidence of a single factor should be weighed with the other factors, and if available evidence weighs in favor of a stay, the stay should be granted. *Id.*

A Judge's stay determination is reviewed under an abuse of discretion standard. *Buck Creek*, 17 FMSHRC at 503 (citations omitted). An abuse of discretion may be found when there is no evidence to support the decision or if the decision is based on an improper understanding of the law. *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 302 (June 2021). In addition, the "burden is on the movant to provide 'sufficient substantiation' of the requirements for the stay." *Sec'y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 44 FMSHRC 725, 727 (Aug. 2022) (citations omitted).

For the reasons discussed below, we conclude that the Judge erred in his application of the *Buck Creek* factors and thereby abused his discretion in issuing the July 17 order.

1. The commonality of evidence

The Judge noted that the Secretary refused to make any representations about the commonality of facts between this docket and the criminal referral before the DOJ. Order at 2. He found that the “fact that MSHA made a criminal referral of these matters suggests the commonality of evidence between these proceedings.” *Id.* at 3. The Judge therefore concluded that “in the absence of convincing evidence to the contrary, . . . there is likely a commonality of evidence between these proceedings.” *Id.*

The Secretary asserts that the Judge erroneously shifted the burden from the operator to the Secretary by assuming that there was enough commonality of evidence without making Geneva Rock prove it. She contends that the Judge abused his discretion by basing his decision on a lack of evidence.

We agree. The operator presented evidence that MSHA made a criminal referral of the violations at issue in the civil penalty proceeding to the AUSA’s Office for the District of Utah and the DOJ’s Environmental Crimes Section. G. Mot. to Stay at 4-5. The Secretary submitted that “the Department of Justice has provided no information to the Secretary regarding the progress, if any, of its investigation,” and that everything she knows about the progress, she has learned from Geneva Rock. S. Resp. to Renewed Mot. to Stay at 4.

In considering this factor, the Judge was required to determine whether the evidence provided by the operator was sufficient to substantiate the claim that the civil proceeding and criminal investigation “churn[ed] over the same evidentiary material.” *Buck Creek*, 17 FMSHRC at 503 (quoting *Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975)). Instead, he effectively determined that the commonality factor had been proven because scant evidence offered by the operator outweighed a lack of contrary evidence. If evidence of a criminal referral were sufficient substantiation, the commonality of evidence factor would be established in every instance in which a criminal referral had been made. In so holding that this factor had been established, the Judge improperly shifted the burden of proof from the operator to the Secretary and abused his discretion. *See, e.g., Sims Crane*, 41 FMSHRC 393, 396 (July 2019) (holding that Judge improperly shifted burden when he considered the strength of counterarguments rather than considering whether burden had been met). Accordingly, the Judge erred in determining that this factor supports a stay.

2. The timing of the stay request

The Judge held that it was “an appropriate time [for the operator] to request a stay.” Order at 3. He reasoned that the criminal referral limited the operator’s ability to prepare its case, particularly because five of its witnesses had asserted their Fifth Amendment rights, and Geneva Rock had reached a dead end with discovery. *Id.* In essence, the Judge only considered the time of the stay as it pertained to the status of the Mine Act civil penalty proceedings over which he was presiding. The Judge’s analysis did not discuss the status of the criminal proceeding and how this impacted the appropriateness of a stay.

This factor focuses on the comparative timing of the civil and criminal proceedings. *See Capitol Cement*, 21 FMSHRC at 890 (citations omitted). The Commission has observed with respect to the timing factor that “imminence of indictment favors limiting [the] scope of discovery or staying [the] proceedings.” *Buck Creek*, 17 FMSHRC at 503 (citations omitted). Whether a stay of a civil proceeding should be granted prior to indictment generally depends upon how active the investigation is. *See Note, Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 Harv. L. Rev. 1023, 1043-44 (1985). If the investigation is active and indictment is imminent, a stay may be favored because the potential for self-incrimination is great and the potential for harm to the civil litigants from delay is less given the requirement for a speedy criminal trial. *Id.* However, if the investigation is only nominally active, a stay may be less favored because a criminal action may never commence. *Id.*

The Judge failed to consider the comparative timing of the civil and criminal proceedings and erroneously considered the timing of the stay request only within the civil penalty proceeding. Thus, the Judge abused his discretion in applying this factor.

3. Prejudice to the litigants

The Judge held that the factor of prejudice to the litigants weighed heavily in favor of a stay. Order at 3. He found compelling Geneva Rock’s arguments that several witnesses have refused to testify out of fear that they may be charged in the criminal case, and no evidence has been produced that suggests otherwise. *Id.* The Judge concluded that “[a]ny prejudice imposed on the Secretary by staying this case” was outweighed by the prejudice imposed on Geneva Rock if the case proceeded to hearing. *Id.* at 4.

The Secretary argues that the Judge abused his discretion by assuming that consequences are the same as prejudice, failing to consider the harm to both parties, and failing to balance the parties’ competing interests. S. Opening Br. at 15. She asserts in part that she and the public have an enforcement interest in expeditious disposition of civil penalty proceedings, and that an indefinite stay jeopardizes the Secretary’s case as time passes and memories fade. *Id.* at 16-17.

In considering prejudice to the litigants, the Commission has recognized that the Judge is required “to balance the litigants’ competing interests.” *Buck Creek*, 17 FMSHRC at 504, *citing Afro-Lecon v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987). Although the Judge considered Geneva Rock’s interests, he failed to consider the Secretary’s competing interests. The only reference the Judge made to the Secretary’s interest was his statement that “[a]ny prejudice imposed on the Secretary” was outweighed by the prejudice imposed on the operator. Order at 4. Thus, the Judge erred in his consideration of this factor.

Moreover, as the Secretary argues, her interests are harmed by the Judge’s imposition of an indefinite stay. The D.C. Circuit has stated that a “‘stay is immoderate and hence unlawful unless so framed in its inception that its force will be spent within reasonable limits, for at least as they are susceptible of prevision and description.’” *McSurely v. McClellan*, 426 F.2d 664, 671 (D.C. Cir. 1970) (citations omitted). The Court stated that “an indefinite stay . . . should not be entered unless no alternative is available.” *Id.* at 672. The Judge stayed the civil penalty proceeding “pending the completion of the DOJ’s criminal investigation and any subsequent proceedings.” Order at 4. As the Judge acknowledged, the civil penalty proceeding could be

stayed “for years.” *Id.*⁴ The Judge abused his discretion by failing to consider the Secretary’s interests and by imposing a stay of an indefinite duration.⁵

4. The efficient use of agency resources

The Judge concluded that moving forward with this proceeding would not be the most efficient use of resources because although scheduling a hearing would be speedy, it would not be just given the operator’s limited witness participation. Order at 4.

The Secretary argues that the Judge held that because some Geneva Rock witnesses may take the Fifth, holding a hearing would be a waste of time. S. Opening Br. at 17. She contends that lifting the stay would not be a waste of time because the parties could complete expert witness and other discovery (including a 30(b)(6) deposition) and engage in motions practice. The Secretary observes that legal mechanisms exist for parties who plead the Fifth. *Id.*

The Commission has considered the efficient use of agency resources, or judicial economy, in circumstances in which the Commission has avoided needless litigation. *See, e.g., Solar Sources Mining, LLC*, 43 FMSHRC 367, 378 (Aug. 2021) (assessing penalty rather than remanding for assessment in interest of judicial economy). The Third Circuit has recognized that judicial economy may be served by staying a civil proceeding because resolution of a criminal case may “moot, clarify, or otherwise affect various contentions in the civil case.” *United States*

⁴ We note that this proceeding has already been stayed for well over a year. Specifically, this case was stayed from February 10, 2022 to September 21, 2022 and again from July 17, 2023 to the date of the instant Decision.

⁵ We reject Geneva Rock’s argument that the Secretary’s refusal to take action to determine the status of the criminal proceedings and in not permitting a deponent to answer questions about the referral process rises to the level of agency bad faith or malicious governmental tactics. As Geneva Rock asserts, courts have recognized that circumstances that weigh in favor of staying civil proceedings include malicious prosecution, agency bad faith, and malicious governmental tactics. *Afro-Lecon*, 820 F.2d at 1202, *citing SEC v. Dresser Indus., Inc.*, 628 F.2d 1368 (D.C. Cir. 1980); *Kordel*, 397 U.S. at 11-12. The Supreme Court described the unconstitutionality or impropriety of criminal prosecution in part as involving “a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution or has failed to advise the defendant in its civil proceeding that it contemplates criminal prosecution.” *Kordel*, 397 U.S. at 11-12.

Here the Secretary began the civil proceeding before involving the U.S. Attorney’s Office. “This tends to negate any likelihood that the government began the civil [proceedings] in bad faith, as, for example, in order to obtain evidence for a criminal prosecution.” *United States v. Stringer*, 535 F.3d 929, 939 (9th Cir. 2008). The Secretary claims that the facts surrounding the criminal referral are privileged, and that she is not requesting information about the status of the proceedings in order to maintain appropriate boundaries in DOL between the Solicitor’s attorneys involved in the civil and criminal proceedings. Such actions do not reveal bad faith or malicious prosecution or government tactics.

v. Mellon Bank N.A., 545 F.2d 869, 873 (3d Cir. 1976); *see also Pitt-Des Moines*, 17 O.S.H. Cas. (BNA) 1936, *4 (recognizing that a stay of civil proceedings “achieves efficient use of government resources by precluding relitigation of issues resolved in the criminal proceeding”). Thus, a stay of a civil proceeding may support the most efficient use of agency resources if the ongoing criminal proceeding will dispose of some of the issues shared with the civil proceeding.

Because the operator did not prove the commonality of evidence between the civil and criminal proceedings, it did not demonstrate that any criminal proceeding would moot, clarify or otherwise affect this civil penalty matter. Therefore, the Judge erred in finding that this factor weighed in favor of granting a stay.

Furthermore, even if there was some commonality of evidence, it would be error for the Judge to summarily conclude that further proceedings would be inefficient or unjust, without first considering the possibility of alternative legal mechanisms for completing discovery or bifurcating the hearing by issue (discussed *infra*).

5. The public interest

In considering the factor of public interest, the Judge recognized that the incident occurred over two years ago and that the case may be stayed for years pending conclusion of the DOJ’s investigation. Order at 4. He further recognized that with the passage of time, witness memories fade and evidence grows stale. *Id.* The Judge agreed with the Secretary that the resolution of this matter is in the public’s interest, but concluded that, given the limitations on discovery imposed by the criminal investigation, Geneva Rock cannot reasonably be expected to prepare this case for hearing. *Id.*

The Commission has recognized 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); *see also Capitol Cement*, 21 FMSHRC at 891 (stating that there is a public interest in the “expeditious resolution of penalty cases”). In drafting the Mine Act, Congress made clear that in order to effectively induce an operator’s compliance with mandatory safety standards, penalties must be paid in reasonably close time proximity to the occurrence of the underlying violation.” S. Rep. No. 95-181, at 16 (1977), reprinted in Senate Subcomm. On Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 604 (1978) (“The Committee firmly believes that to effectively induce compliance, the penalty must be paid by the operator in reasonably close time proximity to the occurrence of the underlying violation.”).

As the Judge acknowledged, there is a public interest in timely resolution of these proceedings, and the resolution of the criminal matter could take years. Thus, any payment of penalties would not occur within a reasonably close time proximity to the alleged underlying violations. The Judge’s focus on the limitations of discovery is a consideration more relevant to the factor regarding prejudice to the parties. The Judge erred in concluding that this factor weighed in favor of a stay, particularly one of an indefinite duration.

In sum, we conclude that the Judge erred in his application of the *Buck Creek* factors. Accordingly, we vacate the Judge’s July 17 stay order.

B. Motion to Strike

Geneva Rock filed a motion to strike all of the arguments regarding the Secretary's requested remedies set forth in section III of the Secretary's opening brief. Geneva Rock contends that the arguments impermissibly exceed the scope of interlocutory review granted by the Commission. Mot. to Strike at 1; G. Resp. Br. at 31.

We hereby deny the motion to strike. The Secretary's request for relief is sufficiently related to the issue on review to be included within the scope of the Commission's interlocutory review. Although we do not strike from the record the Secretary's request for specific instructions to the Judge, we do not provide those specific instructions to the Judge here.

As evident from Geneva Rock's September 12 status update, the criminal investigation has become more active. We decline to give the Judge specific instructions requiring that he permit certain filings and discovery because changing circumstances may affect the appropriateness of those instructions. Rather, we instruct the Judge to consider the appropriateness of taking the following actions among others.

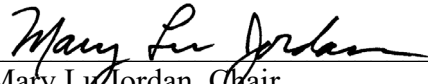
With respect to the Secretary's request to take a 30(b)(6) deposition of Geneva Rock, the Judge should consider the appropriateness of requiring Geneva Rock's counsel to provide the Secretary with an affidavit by Geneva Rock's counsel providing a list as complete as reasonably possible of employees with knowledge of the violations, that he has interviewed those employees, that each employee had a reasonable fear of incrimination, and that each employee intends to assert the privilege against self-incrimination. *See, e.g., United States v. Barth*, 745 F.2d 184, 188 (2d Cir. 1984). If there are no Geneva Rock employees who could serve as a Rule 30(b)(6) deponent, the Judge could consider requiring Geneva Rock to appoint an agent, free of self-incrimination problems, who could testify on behalf of the operator. *See id.*

Regarding other discovery, the Judge could consider holding some discovery, for instance, written interrogatories, under seal pending completion of any criminal trial. In addition, the Judge could consider bifurcating the civil penalty proceeding hearing, permitting the hearing to go forward on the issues of violation, while staying the hearing on issues of negligence for a limited time, for instance, until the completion of any criminal trial. The Judge could also permit motions for summary decision on limited issues, such as issues of violation. In addition, the parties may file such motions as are appropriate given the changing circumstances.

III.

Conclusion

For the reasons stated above, we vacate the Judge's July 17 stay order. This matter returns to the Judge's jurisdiction for proceedings consistent with this decision, and in accordance with the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.



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Timothy C. Baker, Commissioner



Moshe Z. Marvit, Commissioner

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