

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
721 19th Street, Suite 443
Denver, CO 80202-2500
303-844-3577/FAX 303-844-5268

June 23, 2015

STAR MINE OPERATIONS, LLC,
Contestant

v.

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

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

v.

STAR MINE OPERATIONS, LLC,
Respondent

CONTEST PROCEEDING

Docket No. WEST 2014-592-RM
Order No. 8754779; 04/01/2014

Revenue Mine
Mine ID 05-03528

CIVIL PENALTY PROCEEDINGS

Docket No. WEST 2014-994-M
A.C. No. 05-03528-359228-01

Docket No. WEST 2014-995-M
A.C. No. 05-03528-359228-02

Docket No. WEST 2015-023-M
A.C. No. 05-03528-360911-01

Docket No. WEST 2015-024-M
A.C. No. 05-03528-360911-02

Docket No. WEST 2015-025-M
A.C. No. 05-03528-360911-03

Docket No. WEST 2015-030-M
A.C. No. 05-03528-361952-01

Docket No. WEST 2015-031-M
A.C. No. 05-03528-361952-02

Docket No. WEST 2015-037-M
A.C. No. 05-03528-363546-01

Docket No. WEST 2015-038-M
A.C. No. 05-03528-363546-02

Docket No. WEST 2015-098-M
A.C. No. 05-03528-365154

Docket No. WEST 2015-127-M
A.C. No. 05-03528-365446-01

Docket No. WEST 2015-128-M
A.C. No. 05-03528-365446-02

Docket No. WEST 2015-304-M
A.C. No. 05-03528-369886-01

Docket No. WEST 2015-305-M
A.C. No. 05-03528-369886-02

Docket No. WEST 2015-306-M
A.C. No. 05-03528-369886-03

Docket No. WEST 2015-370-M
A.C. No. 05-03528-372806

Docket No. WEST 2015-440-M
A.C. No. 05-03528-375046

Docket No. WEST 2015-462-M
A.C. No. 05-03528-376084

Docket No. WEST 2015-547-M
A.C. No. 05-03528-378328

Docket No. WEST 2015-596-M
A.C. No. 05-03528-379026

Revenue Mine

ORDER GRANTING SECRETARY'S MOTION TO STAY PROCEEDINGS

These cases are before me upon a notice of contest and 20 petitions for assessment of civil penalty filed by the Secretary of Labor ("Secretary"), acting through the Mine Safety and Health Administration ("MSHA"), against Star Mine Operations, LLC ("Star"), pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act"). The Secretary filed a motion to stay these proceedings due to pending criminal investigation into two accidents that occurred at the Revenue Mine. Star filed a response in which it stated that it does not object to staying the majority of the cases but does object to staying those cases involving citations and orders issued for conditions that existed at the mine after May 8, 2014. Star contends that it no longer owned or operated the mine after May 8, 2014, and it seeks to have the issue of MSHA's jurisdiction over Star after that date adjudicated without respect to the ongoing criminal investigation.

On November 17, 2013, two miners died from exposure to toxic levels of carbon monoxide in an unventilated mine drift. On August 29, 2014, two miners sustained injuries subsequent to a blast. As a result of these accidents and several other MSHA inspections, MSHA issued 171 citations and orders to Star that are pending before the Commission. For the reasons that follow, the Secretary's motion to stay all of the cases is **GRANTED**.

I. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

On May 22, 2015, the Secretary filed a motion to stay ("Sec'y Motion") the above proceedings for an unspecified amount of time. Acting at the request of an Assistant United States Attorney for the District of Colorado ("AUSA") to stay these proceedings, the Secretary argues that concurrent civil and criminal investigations will prejudice any criminal proceedings brought against Star and will otherwise impede the criminal investigation. The Secretary asserts all five factors in the *Buck Creek Coal* test support granting a complete stay. (Sec'y Brief in Support of Motion to Stay ("Sec'y Brief") at 8-15; *Buck Creek Coal, Inc.*, 17 FMSHRC 500, 503 (April 1995)).

On June 4, 2015, Star filed a response brief stating that it does not object to staying those cases concerning charges for conditions that occurred prior to May 8, 2014, but that it objects to staying cases involving charges after that date. Star states that it relinquished control of the mine on May 8, 2014, following a participating interest and asset purchase agreement with Fortune Revenue Silver Mines, Inc. ("Fortune"). (Respondent's Brief in Response to the Secretary of Labor's Motion for Stay of Proceedings ("Star Response") at 6). Furthermore, because Star no longer operated the mine after that date, the issue of MSHA's jurisdiction to issue citations to Star after that date should be resolved as quickly as possible. (*Id.* at 3). Star contends that all five factors in the *Buck Creek Coal* test weigh against granting a complete stay. (*Id.* at 7-10).

On June 15, 2015, the Secretary filed a reply to Star's response ("Sec'y Reply"). First, the Secretary argues that Star offered only conclusory statements concerning its ownership status after May 8, 2014 and failed to provide any dispositive details regarding its exact role after that date. (Sec'y Reply at 3-5). Second, if Star did relinquish control of the mine as it said it did, it violated Mine Act section 109(d) by failing to notify MSHA of such a change. Third, "[a]lthough transactional documents may provide terms referencing the parties' intentions with respect to control, it is also necessary to examine the actions of the parties with respect to the control and operation of the mine throughout the May 8 to October 1 period." (*Id.* at 7). Lastly, the Secretary reiterates that the *Buck Creek Coal* test does not support Star's argument in favor of a partial stay.

II. RESOLUTION OF THE ISSUES

The Secretary alleges that two miners were killed on November 17, 2013, because Star failed to properly ventilate the Monogahela drift thereby exposing miners to toxic levels of gas following the detonation of explosives. Additionally, the Secretary claims that the concussion from a blast on August 29, 2014, caused a miner to fall to the ground where he was stuck in the back by a large rock. Between these two incidents, over 150 citations or orders were issued against Star.

Star claims it relinquished operational control over Revenue Mine on May 8, 2014. MSHA was officially notified that Fortune was the operator of the mine effective October 1, 2014. Whether Star was a mine operator after May 8 is a question of fact. The issue whether it maintained some degree of control over the operation of the mine will be an element in the cases on the merits if they proceed to hearing before me; it is not a true jurisdictional issue. *Agapito Associates, Inc.*, 30 FMSHRC 1187, 1189-91(Dec. 2008)(ALJ); *see generally Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006) (“Employee-numerosity” requirement of Title VII relates to adequacy of the claim for relief, not whether the court has subject matter jurisdiction).

Given the information presented by the Secretary concerning the events at the mine between May 8 and October 1, it will be necessary to examine the actions of the parties with respect to the control and operation during this period and the interactions between Star and MSHA.¹ The Secretary alleges that between June 30 and September 11, 2014, MSHA issued Star 15 citations and orders of which 9 resulted from the August 29 accident. During these inspections, the MSHA inspectors were never advised by mine management that Star was no longer the mine operator. The Secretary alleges that Jeff Harris, Star’s safety manager, submitted an accident report on September 5, 2014, for that accident as required by 30 C.F.R. § 50.20. The Secretary states that Harris filed this report on behalf of “Star Mine Operations, LLC” and not “Fortune Revenue Silver Mines, Inc.” (Sec’y Reply at 3). In addition, the Secretary states that Fortune submitted the required form under 30 C.F.R. Part 41, which indicated that it became the operator of the mine effective October 1, 2014. The Secretary maintains that it is possible that the “contractual transfer of control that occurred in May rendered Fortune an independent contractor of Star’s that was responsible for some unknown degree of operational control that could revert back to Star should Fortune’s purchase of the assets not be completed by the deadlines set by Star and Fortune.” (Sec’y Reply at 4). In essence, the Secretary avers that “the factual basis for Star’s belief and assertion that it was not the ‘operator’ after May [8] is left to speculation.” *Id.*

The parties strongly disagree as to whether Star had any operational control over the mine between May 8, 2014 and October 1, 2014. Consequently, extensive discovery will be required for the parties to obtain the requisite information to analyze this issue and then present it to me for resolution. It will likely be difficult to separate the issue of the degree of Star’s control over the Revenue Mine after May 8, if any, from the merits of the citations and orders.

¹ On September 25, 2014, MSHA served a pattern of violations notice on Star pursuant to section 104(e)(1). (Sec’y Reply at 3). The Secretary alleges that Star did not advise MSHA upon receipt of this notice that it was no longer the operator of the mine. *Id.* Star did raise this issue when it challenged the pattern notice before the Commission. *Star Mine Operations*, 36 FMSHRC 3326 (Dec. 2015) (ALJ Paez). In that case, Star submitted copies of transactional documents as attachments to its response to the Secretary’s motion to dismiss. (WEST 2015-100-RM). Star alleged that the sales agreement “officially closed on October 1, 2014, after all payments were made” but that “Fortune became the operator of the Fortune Revenue Silver Mine under the agreement, and in fact [was] the operator and controller of the mine starting in early May 2014, pursuant to the agreement.” (Star’s Response to Motion to Dismiss in WEST 2015-100-RM at 3-4). Apparently, all section 104(e) orders have been issued to Fortune not Star.

The AUSA's letter to the Office of the Solicitor states that he is currently conducting a criminal investigation and asks that I stay all of the cases before me. (Sec'y Motion, Ex. B). He states that his office has an "interest in ensuring that the pending civil proceedings do not interfere with the criminal investigation." *Id.* He further states that "liberal civil discovery procedures may provide criminal defendants with access to materials that would not be available under criminal discovery rules." *Id.* (citation omitted).

I find that granting the stay is appropriate because permitting discovery to go forward on these issues would unnecessarily interfere with the criminal investigation. Under the *Buck Creek Coal* test the following factors must be evaluated: (1) the commonality of evidence; (2) the timing of the request; (3) any potential prejudice to litigants; (4) the most efficient use of resources; (5) the public interest. *Buck Creek Coal*, 17 FMSHRC 500, 503 (Apr. 1995).

First, the issue whether Star played any part in the operation of the mine between May 8 and October 1 is common to both these civil penalty cases and the criminal investigation. The evidence the AUSA will need to gather to determine criminal liability may significantly overlap the evidence needed to establish Star's status after May 8 in the present cases. I find the Secretary established an existing commonality of evidence.

Second, the Secretary referred the matter to the AUSA, who has started a criminal investigation and he is concerned with the conflicting boundaries of discovery between civil and criminal litigation. As a consequence, the stay request is not premature.

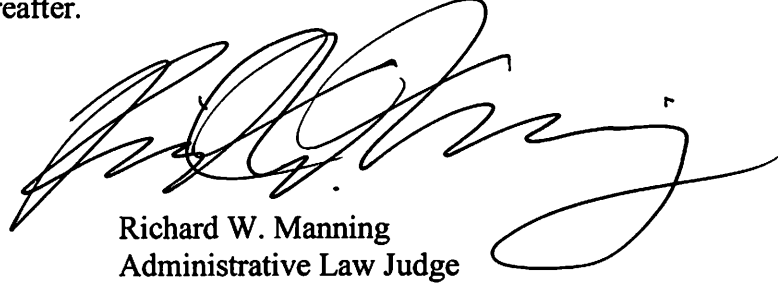
Third, because Star states that it is no longer in business, I find that it will not be significantly prejudiced by granting the motion to stay. Conversely, the prejudice faced by the AUSA if the stay is not granted includes exposure of his strategy, making available discovery that would not otherwise be available to Star, and interfering with the "integrity of a criminal investigation, e.g., by resulting in witness intimidation, perjury or manufactured evidence." (Sec'y Motion, Ex. B).

Fourth, because the AUSA may wish to conduct an independent investigation with respect to Star's control and operation of the mine after May 8, my ruling on this issue would not be the most efficient use of agency resources. The AUSA may investigate that issue regardless of my ruling on the issue.

Fifth, I believe the public interest is best served by allowing the criminal investigation to proceed without obstacles. The AUSA stated that his "office will assure [the parties and the Commission] that we will expedite our investigation in a manner consistent with our responsibility to investigate federal criminal violations so as to minimize potential prejudice to the litigants and the public in staying the civil proceedings." *Id.*

III. ORDER

For the foregoing reasons, the Secretary's request to stay all of the proceedings listed in the caption above is **GRANTED**. Counsel for the Secretary shall file a report with me and opposing counsel on the status of the criminal investigation by no later than **September 23, 2015**, and in 90 day increments thereafter.



Richard W. Manning
Administrative Law Judge

Distribution:

Tyler P. McLeod, Esq., Office of the Solicitor, U.S. Department of Labor, 1244 Speer Blvd., Suite 515, Denver, CO 80204-3516

Laura E. Beverage, Esq., and Kristin R.B. White, Esq., Jackson Kelly PLLC, 1099 18th Street, Suite 2150, Denver, CO 80202-1958

RWM