

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 Skyline, Suite 1000
5203 Leesburg Pike
Falls Church, Virginia 22041

August 22, 2002

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH :
ADMINISTRATION (MSHA), : Docket No. LAKE 2002-20
Petitioner : A. C. No. 12-02010-03609
v. :
: :
BLACK BEAUTY COAL COMPANY, : Air Quality No. 1 Mine
Respondent :

ORDER DENYING MOTION TO LIFT STAY

Proceedings in this case were stayed on February 6, 2002, pending completion of a 110(c) investigation, 30 U.S.C. § 820(c), involving Respondent’s employees. The Respondent has now filed a Motion to Terminate Stay of Proceedings. The Secretary opposes the motion. For the reasons set forth below, the motion is denied.

When the Secretary filed the original motion to stay, she indicated that the investigation was expected to be completed within 90 to 120 days. Pointing out that more than 120 days have elapsed, the Respondent states that three of its employees, who were present during the inspection which resulted in the citations in this case, no longer work for the company.

In response to the motion, the Secretary requests that the stay remain in effect because the matter has been referred to the U.S. Attorney for criminal investigation. Included with the response, is a letter from the U.S. Attorney’s office requesting that the Secretary seek a stay in the case.

The Commission has held that the following factors should be considered in determining whether to lift a stay in a case where the possibility of criminal prosecution exists: (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 (April 1995). After considering these factors, I conclude that the stay should remain in place.

Here it appears that the evidence in the civil and criminal matters will be the same. The Commission has noted that it is proper to stay civil proceedings if they “churn over the same evidentiary material” as the criminal case. *Id.* (citing *Peden v. United States*, 512 F.2d 1099, 1103 (Ct. Cl. 1975). Thus, I find that this factor supports retaining the stay.

Turning to the second factor, the Commission has held that where there has been no criminal investigation and, therefore, no reference to the U.S. Attorney for criminal prosecution there is a “reduced need for a . . . stay.” *Capitol Cement Corp.*, 21 FMSHRC 883, 890 (August 1999). The opposite, however, is true in this case. The matter has been referred to the U.S. Attorney for criminal investigation. Accordingly, I find that this factor also supports retaining the stay.

The third factor requires consideration of prejudice to the litigants. Black Beauty asserts that three potential witnesses have left its employ and that “at least one of these witnesses has moved to another state.” (Resp. Mot. at 2.) The Respondent does not contend, however, that these witnesses are unavailable or that their evidence cannot be memorialized, if it has not already been, to refresh recollections. Nor does the company aver that these are the only witnesses available to it. The company’s bare assertion, without more, is not sufficient to establish that it will be prejudiced if the stay continues. This does not preclude it from conducting its own investigation. Consequently, I find that this factor does not militate against retaining the stay.

The fourth factor also supports retaining the stay. Any witness who may be subject to criminal prosecution is likely to assert his privilege against self-incrimination if called to testify in the civil penalty proceeding. This would hinder rather than advance the efficient use of agency resources.

Finally, only the fifth factor results in the conclusion that the stay should be lifted. As the Commission observed over 20 years ago, “there is a substantial public interest in the expeditious determination of whether penalties are warranted.” *Scotia Coal Mining Co.*, 2 FMSHRC 633, 635 (March 1980).

After considering all of the factors involved in granting or denying a stay, it is clear that four of the five either support, or are not contrary to, retaining the stay. Accordingly, the Motion to Terminate Stay of Proceedings is **DENIED**.

T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

Distribution: (Certified Mail)

Barbara M. Villalobos, Esq., Office of the Solicitor, U.S. Department of Labor, 230 South Dearborn Street, Suite 844, Chicago, IL 60604

David Joest, Esq., Black Beauty Coal Company, 1970 Barrett Court, P.O. Box 1990, Henderson, KY 42420

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