

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 12, 2008

AGAPITO ASSOCIATES, INC.,	:	CONTEST PROCEEDING
Contestant	:	
	:	Docket No. WEST 2008-1451-R
	:	Citation No. 7697010; 7/24/2008
v.	:	
	:	
SECRETARY OF LABOR,	:	Crandall Canyon Mine
MINE SAFETY AND HEALTH	:	Id. No. 42-01715
ADMINISTRATION (MSHA),	:	
Respondent	:	

ORDER DENYING MOTION FOR STAY OF PROCEEDINGS
ORDER STAYING DISCOVERY

This case is before me on a notice of contest filed by Agapito Associates, Inc. (“Agapito”) against the Secretary of Labor, acting through the Mine Safety and Health Administration (“MSHA”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815 (the “Mine Act”).¹ The Secretary filed a motion to stay this proceeding along with a memorandum in support of the motion. This case involves a citation issued to Agapito following the coal pillar failure at the Crandall Canyon Mine on August 6, 2007, that resulted in the deaths of six miners. As grounds for the motion, the Secretary states that MSHA made a criminal referral to the United States Attorney for the District of Utah (“U.S. Attorney”) and that the criminal referral arises out of the same facts, events, and conditions that lead to MSHA’s issuance of the citation at issue in this case. On September 3, 2008, the U.S. Attorney requested that the Secretary seek a stay of all civil proceedings, including discovery in all civil proceedings, in response to this criminal referral. The Secretary represents that the stay is necessary to “avoid interference with or infringement upon the criminal enforcement process which would arise from a related civil enforcement proceeding, including a proceeding related to jurisdictional issues.” Agapito opposes the Secretary’s motion for a stay primarily because it is not seeking an adjudication on the merits. Instead, it is seeking a ruling that it was not subject to Mine Act jurisdiction at the Crandall Canyon Mine.

The letter of the U.S. Attorney states that his office received a criminal referral from Congress and MSHA regarding the Crandall Canyon Mine. “Given the pending criminal

¹ Agapito entered a “special appearance for the purpose of contesting the Federal Mine Safety and Health Review Commission’s jurisdiction over the Contestant pursuant to section 3(d) of the” Mine Act. It also filed a motion for expedited consideration subject to its special appearance.

referrals, we request that MSHA petition the designated Administrative Law Judge for a stay of the pending civil actions pertaining to the Crandall Canyon mine until such criminal matters are resolved.” (Ex. A to Secretary’s Motion). The letter goes on to state that Agapito is “currently a subject in the pending criminal investigation as to their involvement in the potential criminal activity at the Crandall Canyon mine.” *Id.* The U.S. Attorney states that because the “evidence gathered to determine criminal liability may significantly overlap with the evidence needed to prove civil liability . . . this office has an interest in ensuring that neither [Agapito] nor any other entity obtain discovery from a civil proceeding that would unduly circumvent the more limited scope of discovery available in criminal matters.” *Id.* The U.S. Attorney explains that he is particularly concerned that Agapito will try to use this proceeding to conduct discovery which “would provide potential criminal targets with access to witnesses and documents which they would not otherwise be entitled to while the investigation is pending.” *Id.*

In the motion, the Secretary relies on the five factors set forth in *Buck Creek Coal, Inc.*, 17 FMSHRC 500 (April 1995). She argues that all five factors support her motion for stay. Agapito argues that these factors support its opposition to the motion for stay.

I. BRIEF SUMMARY OF THE PARTIES’ ARGUMENTS

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

The Secretary argues that the civil and criminal matters involve common evidence. She also contends that the underlying civil jurisdictional issue raised by Agapito in this case is intertwined with the merits of this case and with the criminal investigation. Agapito contends that, because it is only seeking a determination on the issue of jurisdiction, there will not be much common evidence. It maintains that the universe of facts applicable to the jurisdictional analysis is already well known to both parties so the jurisdictional question will primarily be a legal one. It argues that, if need be, the jurisdictional issue can be resolved by applying the facts set forth in MSHA’s investigation report on the accident that was issued on July 24, 2008.

B. The Timing of the Stay Request.

The Secretary contends that the timing of her motion favors a stay. The criminal referral was made without undue delay following the issuance of the citation and the motion for stay was filed immediately thereafter. In addition, the civil penalty case for the citation has not yet been docketed. Agapito states that no indictments have been issued and no grand jury has been empaneled. It maintains that its case could hang in limbo for the duration of the five-year statute of limitations based on a mere referral to the Department of Justice. Agapito contends that the timing of the request supports a denial of the motion.

C. Prejudice to the Litigants.

The Secretary argues that the only prejudice to the litigants would come from a denial of her motion. Allowing “a civil case and civil discovery to proceed at the same time as a parallel criminal investigation may interfere with the criminal prosecution and may prejudice the parties.” (S. Motion at 8) (citations omitted). She contends that the strong potential for civil discovery to interfere with the criminal proceedings by the U.S. Attorney weighs heavily in favor of a stay. Agapito argues that resolving the jurisdictional question simplifies litigation for all parties and reduces significant prejudice against Agapito. Granting a stay will significantly prejudice Agapito if it has to defend itself in a highly public criminal investigation especially if it is later absolved of liability on jurisdictional grounds. It will have suffered irreparable harm to its goodwill and it will have expended substantial resources on an unnecessary criminal defense.

D. The Efficient Use of Agency Resources.

The Secretary argues that, if her request for a stay is denied and the parties proceed with discovery in preparation for a hearing, the Secretary would seek to depose Agapito’s principals and managers. With a criminal investigation underway, it can be expected that many if not all of Agapito’s witnesses will assert their Fifth Amendment privilege at such depositions. Granting a stay would conserve resources since all issues could be litigated in one setting rather than piecemeal. Agapito argues that the Commission has a longstanding policy of encouraging the resolution of threshold issues before reaching substantive determinations on the facts. Resolving the jurisdictional issue up front will result in the efficient use of the resources of the Commission and the Secretary.

E. The Public Interest.

The Secretary argues that the public interest is served when the government is able to criminally prosecute miner operators and their employees who willfully violate the Mine Act, safety standards, or other federal statutes without interference or prejudice from related civil proceedings. She maintains that the public interest is best served by the fair and orderly adjudication of civil and criminal cases. Agapito argues that granting a stay would impede the public’s interest in the expeditious resolution of Commission cases. The only matter currently pending is the resolution of the jurisdictional issue and that matter can proceed most swiftly to its conclusion by denying the stay.

II. DISCUSSION

A stay is not automatically granted when there is a potential that criminal proceedings may be brought against a mine operator or its employees. Indeed, general civil litigation and criminal litigation often proceed at the same time. The burden is on the Secretary to establish that a stay is warranted. A Commission administrative law judge has the discretionary authority to stay a civil proceeding pending the outcome of a parallel criminal case when the interests of

justice so require. This authority allows a court to “stay civil proceedings, postpone civil discovery or impose protective orders and conditions when the interests of justice seem to require such action.” *Securities & Exch. Comm'n v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375 (D.C. Cir.1980) (en banc). In determining whether to stay the proceeding or impose a stay on discovery, the court must balance the interests of the litigants, nonparties, the public and the court. *See, e.g., Bridgeport Harbor Place LLC v. Ganin*, 269 F. Supp.2d 6, 8 (D. Conn. 2002).

The only issue on the table in this case at the present time is whether MSHA has jurisdiction to enforce the citation it issued to Agapito. Agapito was not the “owner, lessee, or other person” who operated, controlled or supervised the Crandall Canyon Mine at the time of the subject accident. 30 U.S.C. § 802(d). The Secretary contends that Agapito was an “independent contractor performing services or construction” at the mine. In her motion, the Secretary states that she will argue that the “services provided by Agapito . . . in determining mine design [at Crandall Canyon], no matter where Agapito personnel were located when they performed the services, are sufficient to establish jurisdiction over Agapito as an operator.” (S. Motion at 4). The Secretary relies, in part, on *Joy Technologies, Inc., v. Secretary of Labor*, 99 F.3d 991 (110th Cir. 1996) and *Black Wolf Coal Co., Inc.*, 28 FMSHRC 699, 711-14 (July 2006) (ALJ) in making this argument. Agapito, on the other hand, contends that it was not an independent contractor who performed “services or construction” at the mine. It states that it is a geological consulting company that provides “advice, analysis, and consultation to mine operators” from its office in Grand Junction, Colorado. (A. Opposition at 2). As a consequence, it contends that it was not a mine operator subject to the jurisdiction of MSHA.²

Agapito is not seeking to adjudicate the merits of the citation it was issued but is only seeking a ruling from the Commission that it was not subject to the jurisdiction of the Mine Act at the Crandall Canyon Mine. The Secretary argues that Agapito’s status as an independent contractor is unavoidably intertwined with the issue of its liability both under the Mine Act and other relevant criminal statutes. “Discovery into the jurisdictional facts cannot be meaningfully segregated from that necessary either for prosecution of the pending citation or involved in the criminal proceeding.” (S. Motion at 3).

The common thread in the Secretary’s arguments is that, because civil discovery is broader than the discovery available during a criminal investigation, denying the motion for a stay would allow Agapito to unfairly obtain information about the government’s criminal investigation. On the other hand, the Secretary contends that she will need to conduct discovery to determine what services were rendered by Agapito to support her claim of jurisdiction. She states that she needs this information in part because key Agapito personnel refused to cooperate

² The citation at issue alleges a violation of 30 C.F.R. § 75.203(a). It states that Agapito “inaccurately evaluated the conditions and events at the mine when determining if areas of the mine were safe for mining” and, based on its results, “recommended to the operator that mining methods were safe and pillar and barrier dimensions were appropriate when in fact they were not.”

with MSHA's accident investigation. She argues that this same information would be highly relevant to a criminal inquiry.

A determination whether Agapito was subject to Mine Act jurisdiction at Crandall Canyon is rather straight forward. Jurisdiction either existed or it did not; there can be no shades of grey. Whether the company was an independent contractor at the mine is an important preliminary issue that must be decided before the merits of the citation can be considered. Agapito is entitled to a resolution of this issue as long as it does not unduly interfere with the criminal investigation. Agapito is prepared to resolve this issue without discovery. Agapito states the "universe of facts applicable to the jurisdiction" issue is already known by both parties. (A. Opposition at 6). The Secretary insists that discovery is necessary so that she can determine the purpose of visits to the mine by Agapito personnel.

MSHA's accident investigation report discusses Agapito's work for the Crandall Canyon Mine in great detail.³ Although Agapito does not "concede the substantive truthfulness or accuracy of the report," it has consented to "arguing case law relevant to the jurisdictional analysis based on the record as disclosed in the report." (A. Opposition at 6 n. 5).

Taking into consideration the factors set forth by the Commission in *Buck Creek*, I find that the Secretary did not provide sufficient justification to stay this proceeding for the limited purpose of determining whether Agapito was an independent contractor under the Mine Act. It is clear that the Secretary carefully analyzed the services that were performed by Agapito and, based on this analysis, determined that Agapito was subject to MSHA jurisdiction. This information is set forth in her accident investigation report, which is available to the public. The Secretary also describes in her report the trips that Agapito personnel made to the mine as part of the services it provided. I hold that discovery is not necessary to resolve the jurisdictional issue and, as a consequence, all discovery is suspended until further notice. The facts related to the merits of the citation are not so intertwined with the jurisdictional facts as to merit delaying the resolution of the issue.

The U.S. Attorney's investigation of Agapito has only just begun. When Commission judges stay cases because of a criminal referral, the criminal issues typically do not get resolved for many years. In such instances, Commission cases are significantly delayed. Such a lengthy delay in resolving the jurisdictional issue in this case is unnecessary and would unfairly penalize Agapito. Resolving the jurisdictional issue now will not unduly interfere with the criminal investigation, especially since all discovery is suspended. In addition, deciding the jurisdictional issue at the present time is an efficient use of agency resources and is in the public interest. This Commission was created in large part to "secure the just, speedy, and inexpensive determination of all proceedings." 29 C.F.R. § 2700.1(c).

³ <http://www.msha.gov/Fatals/2007/CrandallCanyon/FTL07CrandallCanyon.pdf>

The Secretary's accident investigation report is an official record of MSHA and I can take official notice of its contents. I am amenable to resolving the jurisdictional issue based on this report and briefs filed by the parties. In the alternative, one or both parties may wish to request a hearing on this issue. If the Secretary believes that she needs to further develop the record as to the nature of the services were rendered to the mine operator, she is free to do so at a hearing.

III. ORDER

The Secretary's motion to stay this proceeding is **DENIED**. For the reasons set forth above, all pending and proposed discovery in this case is **STAYED** until further notice. The parties shall confer and counsel shall schedule and initiate a conference call with me to discuss suggested methods for proceeding in this case.

Richard W. Manning
Administrative Law Judge

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