# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SUITE 9500
WASHINGTON, DC 20001

October 20, 2010

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| SECRETARY OF LABOR, | : | Docket Nos. | WEVA 2007-460 |
| MINE SAFETY AND HEALTH | : | | WEVA 2007-470 |
| ADMINISTRATION (MSHA), | : | | WEVA 2007-576 |
| | : | | WEVA 2007-608 |
| | : | | WEVA 2007-672 |
| v. | : | | WEVA 2007-767 |
| | : | | WEVA 2008-249 |
| PERFORMANCE COAL COMPANY | : | | WEVA 2008-888 |
| | : | | WEVA 2008-889 |
| | : | | WEVA 2008-890 |
| | : | | WEVA 2008-891 |
| | : | | WEVA 2008-892 |
| | : | | WEVA 2009-129 |
| | : | | WEVA 2009-281 |
| | : | | WEVA 2009-282 |
| | : | | WEVA 2009-283 |
| | : | | WEVA 2009-831 |

BEFORE: Jordan, Chairman; Duffy, Young, Cohen, and Nakamura, Commissioners

ORDER

BY THE COMMISSION:

These civil penalty proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2006) ("Mine Act" or "Act"). On June 2, 2010, Administrative Law Judge Margaret Miller issued orders granting in part and denying in part a motion to stay 44 dockets involving Performance Coal Company ("Performance") filed by the Secretary of Labor. Unpublished Orders dated June 2, 2010.[1] The Secretary filed unopposed petitions for discretionary review seeking review of the Judge's order denying the stay as to 17 of the dockets.

[1] The Judge issued seven orders granting in part and denying in part the Secretary's motion to stay in these proceedings. For purposes of this order, they are collectively referred to as the "June 2 Order."

On June 30, 2010, we issued an order that directed the matter for review, consolidated the proceedings for purposes of our review, and suspended the proceedings before the Judge. For the reasons that follow, we vacate our direction for review.

I.

Factual and Procedural Background

Performance operates the Upper Big Branch Mine ("UBB") in Raleigh, West Virginia. On April 5, 2010, that mine experienced a major explosion involving multiple fatalities. On May 17, 2010, the Secretary filed a motion to stay 44 dockets involving citations and orders issued to Performance by the Department of Labor's Mine Safety and Health Administration ("MSHA") at UBB. The Secretary explained that R. Booth Goodwin, II, Assistant United States Attorney ("AUSA") for the Southern District of West Virginia, sent Douglas White, the Associate Regional Solicitor for the Department of Labor, a letter dated May 14, 2010, stating that the U.S. Attorney's office is currently conducting a criminal investigation of violations that have occurred at UBB.

In the May 14 letter, the AUSA requested that MSHA petition the Judge for a "stay of the pending civil actions pertaining to UBB until the criminal matters are resolved, as well as any other cases that are subsequently docketed." S. Mot. to Stay, Ex. B at 1. The AUSA stated that a number of cases pending before the Commission potentially constitute separate violations of the provisions of the Mine Act setting forth criminal penalties for willful and knowing violations (*see* 30 U.S.C. § 820(c), (d)), and that each violation may also provide evidence that other violations were committed willfully and knowingly. *Id.* He further explained that each violation may provide a context that would be lacking if each were considered separately, and that the violations may involve identical factual issues. *Id.* at 1-2.

On May 20, 2010, Judge Miller heard argument on the Secretary's motion to stay. The Secretary's counsel noted that the criminal investigation conducted by the U.S. Attorney's office is much broader than the MSHA accident investigation. Tr. 6-7. She stated that, given the five-year criminal statute of limitations, the U.S. Attorney's investigation encompasses the previous five years. Tr. 7. The Secretary's counsel stated that the date of the earliest alleged violation at issue in the MSHA proceedings is June 3, 2006. Tr. 7. Therefore, all of the violations at issue in the proceedings before the Commission are within the scope of the criminal investigation. Tr. 7. The Secretary's counsel suggested that since the explosion at UBB was the worst disaster in 40 years, the scope of the criminal investigation will most likely be comprehensive and thorough. Tr. 20-21.

The Secretary's counsel further noted that continuing the civil proceedings before the Commission might prejudice, or interfere with, the criminal investigation and any potential prosecution. Tr. 13-14. She noted that liberal civil discovery procedures may provide criminal defendants with access to materials that would not be available to them under more limited

criminal discovery rules. Tr. 13. The Secretary's counsel also stated that the Secretary may not be able to fully develop the Secretary's case and effectively prosecute the civil proceedings if she is met with Fifth Amendment objections during discovery or at a hearing. Tr. 14-15.

The operator's counsel agreed with the Secretary's argument that staying the Commission proceedings would be appropriate. Tr. 21. The operator's counsel stated that although Performance itself would not invoke a Fifth Amendment right, mine managers would invoke their Fifth Amendment rights and the company might not have any fact witnesses to present its defense in the civil proceedings. Tr. 24-26. The operator's counsel also clarified that the parties were asking for more of a temporary stay than a blanket stay. Tr. 21-22. She stated that if the cases were stayed approximately six months, the parties could revisit the older cases and determine whether any grand jury investigation had taken place at that time. Tr. 22.

In considering the motion to stay, the Judge applied the following five factors set forth in *Buck Creek Coal Co.*, 17 FMSHRC 500, 503 (Apr. 1995) for determining whether a Commission case should be stayed because of the pendency of a related criminal investigation or prosecution. Those factors are: (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. June 2 Order at 2. The Judge stated that the "threshold issue" in determining whether to stay a proceeding pending before a Commission Judge is whether there is a commonality of evidence between the civil and criminal matters. *Id.* at 2. The judge noted that the Secretary was unable to provide information about the criminal investigation, such as which violations were being investigated, the focus of the investigation, or the length of the investigation. *Id.* Although she acknowledged that both parties claimed that they would be prejudiced by a denial of the stay, the Judge concluded that the Secretary had failed to "meet the threshold issue,'" particularly with regard to violations that occurred in 2006 and 2007. *Id.* Accordingly, the Judge denied the stay as to the 17 dockets that involved citations and orders issued before January 1, 2009. *Id.* at 2, 3. The Judge left "the door open for the United States Attorney to present further evidence regarding the necessity of a stay for the earlier cases, either by supplemental motion or *in camera* review." *Id.* at 3.

II.

Disposition

In the unopposed petitions, the Secretary argues that the Judge abused her discretion by denying the stay as to the 17 dockets. She asserts that the Judge misapplied all five *Buck Creek* factors. PDR at 11-19. The Secretary submits that, although the Judge's June 2 Order is not a final disposition of the proceedings, the Commission may review the order under the collateral order doctrine. *Id.* at 8-11. Because we conclude that the Judge's June 2 Order is not presently

reviewable under the collateral order doctrine, we do not reach the Secretary's arguments that the Judge erred in applying the *Buck Creek* factors.[2]

The collateral order doctrine is a practical construction of the final judgment rule which has been applied in federal courts. The final judgment rule, as set forth in 28 U.S.C. § 1291, permits appeal only from "all *final* decisions" of a district court. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the Supreme Court recognized that appeals of a small class of decisions which appear interlocutory in nature must be permitted if those decisions "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. The Court cautioned, however, that appeal gives an upper court "a power of review, not one of intervention." *Id*. Thus, if a matter remains "open, unfinished or inconclusive," there may be no "intrusion by appeal." *Id.*

The Supreme Court has clarified that there are three prongs that must be satisfied under the collateral order doctrine. Specifically, an order that does not conclude an action may nonetheless be immediately appealable if it: (1) conclusively determines a disputed question; (2) resolves an important issue separate from the merits of the action; and (3) is effectively unreviewable on an appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). In order to be reviewable, the order must satisfy all three requirements. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987). The Supreme Court has "warned" that the issue of appealability must be determined for the entire category to which a claim belongs, without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citations omitted).

The Commission has not previously applied the collateral order doctrine to immediately review a non-final Judge's order. We conclude that we should not do so in these proceedings because the first prong of the collateral order doctrine, that the order "conclusively determine" a disputed question, has not been satisfied.

That the order "'conclusively determine a disputed question,' has been interpreted to mean that the district court has clearly said its last word on the subject." 19 James Wm. Moore et al., *Moore's Federal Practice* ¶ 202.07[1], at 202-28 (3d ed. 2010) ("*Moore's*"). The Supreme Court

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[2] We note, however, that 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. *See, e.g., Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995). No single factor is meant to be dispositive, so that the lack of evidence on a single factor at a preliminary stage of proceedings does not necessarily indicate that proceedings should not be stayed. Rather, that factor is weighed with other factors, and if available evidence weighs in favor of a stay, the stay should be granted. The *Buck Creek* factors must also be weighed against a background of coordinated and consistent government action between agencies.

has "allowed collateral order review where there was 'no basis to suppose that the District Judge contemplated any reconsideration of his decision,' *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12-13 . . . (1983), and prohibited it where the relevant order was left 'subject to revision.' [*Coopers & Lybrand*, 437 U.S. at 469]." *Harris v. Kellogg Brown & Root Svcs., Inc.*, ___ F.3d ___, 2010 WL 3222089 at *3 (3d Cir. 2010). Thus, "'[t]entative' rulings can never satisfy the 'conclusively determined' requirement." *Id.*, *quoting Digital Equip.*, 511 U.S. at 869 n.2; *Coopers & Lybrand*, 437 U.S. at 469 n.11; *Cohen*, 337 U.S. at 546.

The Supreme Court has addressed the first prong of the collateral order doctrine in the context of motions to stay federal litigation pending the resolution of parallel state proceedings. In *Moses H. Cone*,[3] the Supreme Court found immediately appealable a district court's order granting a motion to stay litigation in federal court pending the resolution of the same issue in a concurrent state court proceeding. The Supreme Court "contrasted two kinds of nonfinal orders: those that are "'inherently tentative,' . . . and those that, although technically amendable, are made 'with the expectation that they will be the final word on the subject addressed.'" 460 U.S. at 12-13 & n.14. The Court concluded that the order granting the stay of litigation in that case was not tentative because such an order contemplated that the state proceeding would be an adequate vehicle for the resolution of the issues between the parties. *Id.* at 28.

In contrast, in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*,[4] the Supreme Court recognized that the decision in that case to *deny* a stay was inherently tentative and did not satisfy the first prong of the collateral order doctrine. The Court stated that a district court that denied the motion did not "necessarily contemplate" that the decision would close the matter for all time. 485 U.S. at 278. It opined that given the nature of the factors considered in that case and "the natural tendency of courts to attempt to eliminate matters that need not be decided from their dockets, a district court usually will expect to revisit and reassess an order denying a stay in light of events occurring in the normal course of litigation." *Id.* Similarly, in *Sinclair Oil Corp. v. Amoco Production Co.*, 982 F.2d 437, 441 (10th Cir. 1992), the Court determined that the district court's motion denying a stay was not immediately appealable because it was expected that the district court would "revisit and reassess" its order.

Here, we conclude that Judge Miller's denial of the stay was tentative in nature. In her written order, the Judge explicitly stated, "I leave the door open for the United States Attorney to present further evidence regarding the necessity of a stay for the earlier cases, either by supplemental motion or *in camera* review." June 2 Order at 3. In addition, during the hearing,

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[3] *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), *superseded by statute on other grounds as stated in Bradford-Scott Data v. Physician Computer Network*, 128 F.3d 504, 506 (7th Cir. 1997).

[4] *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 287-88 (1988), *superseded by statute on other grounds as stated in In re Piper Funds, Inc. v. Piper Capital Mgmt., Inc.*, 71 F.3d 298, 300 (8th Cir. 1995).

the Judge repeatedly noted that she was denying the stay "at this point," but that she was willing to review any evidence provided by the U.S. Attorney. Tr. 37 ("I'm leaving it open a little bit, if the U.S. Attorney wants to be a little more forthcoming with what they're doing."), 42, 73, 88.

We do not find persuasive the parties' argument that the Judge's denial of the stay motion was conclusive because the U.S. Attorney "has not provided any further information to the ALJ, and has informed the Secretary that he does not intend to do so." PDR at 10. The Judge would likely revisit and reassess her motion denying the stay during the normal course of litigation, as more specific information becomes available through the investigative process.

Because we conclude that the first prong of the collateral order doctrine has not been satisfied, we need not reach the remaining two prongs. Accordingly, we conclude that the Judge's June 2 orders are not reviewable under the collateral order doctrine.[5]

[5] We also need not reach the question of whether the Secretary's petitions for discretionary review may be deemed to be petitions for interlocutory review under Commission Procedural Rule 76, 29 C.F.R. § 2700.76. Rule 76(a)(2) provides in part that the Commission may grant interlocutory review "upon a determination that the Judge's interlocutory ruling involves a controlling question of law and that immediate review may materially advance the final disposition of the proceeding." 29 C.F.R. § 2700.76(a)(2). The parties have conceded that the petitions cannot properly be considered as seeking interlocutory review under Rule 76, stating that, "The ALJ's order here does not involve a 'controlling question of law.'" PDR at 8 n.3.

III.

Conclusion

For the foregoing reasons, we hereby vacate the direction for review that we issued on June 30, 2010, our consolidation of these proceedings, and our stay of proceedings before the Judge.[6]

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Mary Lu Jordan, Chairman

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Michael F. Duffy, Commissioner

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Michael G. Young, Commissioner

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Robert F. Cohen, Jr., Commissioner

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Patrick K. Nakamura, Commissioner

[6] Given the amount of time that has passed since the issuance of the June 2 orders, we suggest that judicial economy might be served if the parties informed the Judge of the current status of the MSHA and criminal investigations, including any facts that might support a renewed motion to stay.

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