

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

October 2, 1995

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. LAKE 94-72, etc.
	:	
BUCK CREEK COAL INC.	:	

BEFORE: Jordan, Chairman; Doyle, Holen and Marks, Commissioners

ORDER

BY: Jordan, Chairman; Doyle and Holen, Commissioners

On July 18, 1995, Buck Creek Coal Inc. (ABuck Creek@) filed with the Commission its third petition for interlocutory review of an order staying proceedings issued by Administrative Law Judge T. Todd Hodgdon in these consolidated contest and civil penalty proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1988) (AMine Act@ or AAct@). For the reasons that follow, we deny interlocutory review.

At the request of the Secretary of Labor and the Department of Justice, and over the objections of Buck Creek, the judge issued orders on September 8, 1994, and February 15, 1995, staying all proceedings based on an ongoing federal criminal investigation of Buck Creek. The Commission denied Buck Creek=s petition for interlocutory review of the September 8 order on grounds of mootness. The Commission granted Buck Creek=s petition for interlocutory review of the February 15 order and, in a decision issued on April 25, 1995, set forth five factors that should be considered by the judge in determining whether a stay should be granted. *Buck Creek Coal Inc.*, 17 FMSHRC 500, 503 (April 1995). Because the judge had not addressed these factors and the record did not show that the stay criteria had been met, the Commission vacated the blanket stay Awithout prejudice to the imposition . . . of a limited stay covering particular proceedings based on the [five] criteria[,] . . . including the commonality of issues and evidence between the civil and criminal matters.@ /d. at 505. At the time of the *Buck Creek* decision, the consolidated dockets contained more than 500 alleged violations. /d. at 503.

On May 12, 1995, the Secretary filed a motion to stay proceedings covering approximately 275 of the consolidated citations and orders. The judge denied this motion on the ground that the Secretary had failed to establish the **A**key threshold factor<sup>@</sup> of commonality of evidence between the civil and criminal proceedings. Order Denying Mot. for Stay at 1–4 (May 31, 1995), *quoting Buck Creek Coal Inc.*, 17 FMSHRC at 503.

On June 19, 1995, the Secretary renewed his motion for a 90–day stay, but limited the request to proceedings involving approximately 80 citations and orders. In support of his motion, the Secretary described the broad areas that form the basis of the criminal investigation, identified the **A**core violations<sup>@</sup> that prompted the Secretary’s referral to the Justice Department, and identified additional violations for which a stay was being sought because of their similarity to the **A**core violations<sup>@</sup>. S. Renewed Mot. for Limited Stay of Civ. Proceedings at 3–6 & App. In addition, the Secretary provided the judge with a sealed declaration from the Assistant United States Attorney purportedly describing the **A**parameters<sup>@</sup> of the criminal investigation. The judge reviewed the declaration *in camera*.

Buck Creek opposed the motion. It asserted that the Secretary’s request for stay failed to establish commonality of evidence between the criminal and civil proceedings and would prejudice Buck Creek’s right to **A**a fair and expedient determination of its rights<sup>@</sup>. B.C. Opp. to Renewed Mot. for Ltd. Stay of Civ. Proceedings at 1.

On July 17, 1995, the judge granted the Secretary’s motion for a limited stay. The judge found that the Secretary’s motion, as supplemented by the declaration of the Assistant United States Attorney, established the threshold factor of commonality between the civil and criminal proceedings. Order Granting Mot. for Stay of Proceedings and Denying Mot. to Compel (**A**Stay Order<sup>@</sup>) at 2–3. The judge concluded that each of the other criteria also indicated that a stay was warranted. Stay Order at 4. He noted that litigation of more than 420 other matters in this docket is unaffected by the Stay Order. / *d*.

On July 18, 1995, Buck Creek filed both a motion with the judge for certification of the Stay Order, and a motion for interlocutory review with the Commission, asserting that the judge’s order is erroneous as a matter of law and fact and poses legal questions requiring the Commission’s immediate review. Mot. for certif. at 1; mot. for interloc. review at 2. On August

7, 1995, the judge issued an order certifying the Stay Order for interlocutory review by the Commission.<sup>1</sup>

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<sup>1</sup> Commission Procedural Rule 76(b) permits the filing of a petition for interlocutory review only **A**[w]here the Judge denies a party's motion for certification of an interlocutory ruling . . . .<sup>29</sup> C.F.R. § 2700.76(b). Rule 76(b) also requires the petitioner to attach to the petition a copy of the order denying certification. Buck Creek filed its petition for interlocutory review of the February 15, 1995, stay order before filing a motion for certification with the judge and filed the instant petition for interlocutory review before the judge ruled on its motion for certification. Buck Creek is reminded to comply with the provisions of Rule 76(b).

Commission Procedural Rule 76(a)(2) provides that **A**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.<sup>2</sup> 29 C.F.R. § 2700.76(a)(2) (emphasis added). The granting of interlocutory review is a matter of the Commission's sound discretion. 29 C.F.R. § 2700.76(a). The Commission previously decided the question of law at issue when it set forth in *Buck Creek*, 17 FMSHRC at 503, the determinative factors applicable to requests for stays. On remand, the judge applied those factors in his Stay Order. Thus, we disagree with the judge's conclusion that Buck Creek's challenge to the July 17 Stay Order involves a controlling question of law. *See* Order of Certif. for Interloc. Review.<sup>2</sup>

For the foregoing reasons, Buck Creek's petition for interlocutory review is denied.

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Mary Lu Jordan, Chairman

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Joyce A. Doyle, Commissioner

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<sup>2</sup> We disagree with the view apparently held by our dissenting colleague, that appeal of an interlocutory order based in part on the inspection of documents *in camera* automatically satisfies the Commission's requirements for interlocutory review. Slip op. at 4, 5. A judge's reliance on documents inspected *in camera* is not determinative of whether the judge's stay order **A**involves a controlling question of law<sup>2</sup> the resolution of which may **A**materially advance final disposition of the proceeding.<sup>2</sup> 29 C.F.R. § 2700.76(a)(2).

Arlene Holen, Commissioner

Commissioner Marc Lincoln Marks, dissenting:

I dissent.

I would grant interlocutory review in this case pursuant to Judge T. Todd Hodgdon's Order of Certification for Interlocutory Review (AOrder@). In his Order, Judge Hodgdon concluded that his Order Granting Stay of Proceedings involves a controlling question of law. Contrary to my colleagues and for the reasons set forth below, I agree.

In *Buck Creek Coal Inc.*, 17 FMSHRC 500 (April 1995) (ABuck Creek@), for the first time we set forth the analytical framework that our judges are to employ in deciding the propriety of granting stays in civil proceedings when parallel criminal proceedings are under way. *Buck Creek*, 17 FMSHRC at 503. That analytical framework requires the consideration of five factors. *Id.* In deciding whether to grant the Secretary's motion for a stay of approximately 80 citations and orders, Judge Hodgdon recognized that the Acommonality@factor is the key threshold factor that must be established in the record before a stay may be granted. Order Granting Motion for Stay of Proceedings and Denying Motion to Compel at 2, citing *Buck Creek*, 17 FMSHRC at 503. The judge concluded that the Secretary's motion failed to establish that there was a commonality of evidence and issues in the civil and criminal matters. Order Granting Motion for Stay of Proceedings and Denying Motion to Compel at 3. However, without further comment or analysis, the judge concluded that certain *in camera* documents provided by the Assistant U.S. Attorney were sufficient to satisfy the key threshold Acommonality@factor. I have reviewed the documents submitted to the judge for *in camera* review and I am not satisfied that they establish the key threshold Acommonality@factor.

In my view, it is incumbent upon the Commission to review the judge's determination that the documents submitted to him for *in camera* review satisfies the key threshold Acommonality@factor set forth by the Commission for the first time in *Buck Creek*. The five-factor analytical framework involves mixed questions of law and fact. I agree with Judge Hodgdon's assessment that his analysis in this connection involves a controlling question of law and that the Commission should review his determination. See Order of Certification for Interlocutory Review. My colleagues conclude that when the Commission set forth the analytical framework five months ago in *Buck Creek* it also Adecided the question of law at issue@in the present case. Slip op. at 3. Their conclusion is wrong. The question of law here is whether the meager *in camera* material provided by the Assistant U.S. Attorney satisfies the key threshold Acommonality@factor in each of the 80 stayed citations and orders. I find it extraordinary that my colleagues had the foresight to Adecide[] the question of law at issue@here five months ago. I confess that I have no such prophetic capabilities and, so, I will confine myself to deciding such questions of law on a case-by-case basis.

Further, interlocutory review would Amaterially advance the final disposition of the proceeding.@ 29 C.F.R. 2700.76(a)(1)(i). This Aproceeding@includes approximately 560 citations and orders in 448 contest of citations/orders dockets and 66 contest of civil penalty dockets. These dockets have been assigned to one judge and lumped into one Aproceeding@for

administrative convenience. The 80 stayed citations and orders constitute 35 of the 66 civil penalty dockets. Buck Creek has expressed a desire to proceed on all the contested citations and orders. If the stay is allowed to stand, no progress will be made on the 80 stayed citations and orders constituting 35 of the 66 civil penalty dockets.

Parallel civil and criminal proceedings are unobjectionable under our jurisprudence and the Constitution does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings. *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1995). Further, in order for a judge to issue a stay, the petitioning party must establish that a stay is appropriate. Once a stay is granted in civil proceedings, the stayed case(s) will not, by definition, materially advance to a final disposition. Buck Creek has a legitimate interest in the expeditious resolution of the civil cases. Consequently, before this Commission sanctions the extraordinary action requested by the Secretary it should consider whether the judge's action staying the 80 citations and orders passes muster under our newly minted analytical framework. This is particularly so when, as here, Buck Creek has not had the opportunity to confront the *in camera* documentation that the judge exclusively relied on in making his determination that the key threshold criterion had been satisfied.

Finally, I note that this case is in the pre-indictment stage. As a general rule, stays will . . . not be granted before an indictment is issued. *Trustees of Plumbers Pen. Fund v. Transworld Mech., Inc.*, 886 F.Supp. 1134, 1139 (S.D.N.Y. 1995); *see also S.E.C. v. Dresser Industries, Inc.*, 628 F.2d 1368, 1376 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980). The Commission has been called upon by both Buck Creek and Judge Hodgdon to determine whether the judge appropriately granted the motion for stay. Because I find that the criteria for interlocutory review has been met in this case, I would grant such review.

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Marc Lincoln Marks