United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. WIRE MESH SALES, LLC, Respondent.	OSHRC DOCKET No. 14-0378 & 14-0379

ORDER DENYING MOTION FOR STAY

The Respondent filed a Motion to Stay (Motion) dated November 25, 2014, to which the Secretary filed a response (Response) in opposition dated December 10, 2014. For the reasons described below, the Motion is denied.

Background

The Motion states that "[i]t is the Respondent's understanding that the Secretary, through the Solicitor of Labor, has made a referral to the Justice Department, recommending criminal prosecution of the Respondent and certain of its managers." The Respondent seeks a stay of all proceedings in these consolidated matters "pending the outcome of criminal proceedings or a determination by the Department of Justice that no criminal prosecution will occur," asserting that such a stay is "necessary until the criminal process is completed or terminated and the risk of self-incrimination is gone." (Motion, pp. 1 & 4). The Respondent states that if the requested stay were granted, that in addition to providing the periodic status reports that would be required by Commission Rule 63(c), "the Respondent would commit to having a qualified third-party consultant conduct periodic inspections of the worksite to ensure continuing abatement of the

cited conditions during the duration of the stay" and "would also agree to provide the OSHA Area Office in Jacksonville with written reports of such inspections within 15 working days of each visit." (*Id.*, pp. 4-5).

The Respondent contends that "given the pendency of the Justice Department's ongoing assessment of potential criminal prosecution, a stay is required to protect the rights of both the Company and any of its employees." (*Id.*, p. 1) The Respondent asserts that six officials and managers of the Respondent who had provided sworn statements to the Secretary in the course of the Secretary's investigation "are key witnesses" for the Respondent and that "the overwhelming percentage of Respondent's defense would be presented through [their] testimony." (*Id.*, pp. 2 & 4). The Respondent asserts that if these six individuals asserted their Fifth Amendment privilege, the Respondent "will be significantly impeded from defending the allegations of the Secretary," and would be denied "a fair hearing where it can adequately defend against the charges." (*Id.*). The Respondent asserts that "to proceed through discovery to an evidentiary hearing would result in a denial of due process by denying the Respondent the opportunity to mount an adequate defense." (*Id.*, p. 4).

In his Response, the Secretary states that "there is currently no active criminal proceeding," (Response, p. 4) and asserts that "there is no active criminal investigation supporting a stay of this case." (*Id.*, p. 5). The Secretary asserts that "contrary to Respondent's assertion that it believes the Secretary has referred this case with a recommendation for criminal prosecution, Respondent has no evidence that any referral has occurred." (*Id.*, p. 2). The Secretary states that the only information that the Secretary has conveyed to the Respondent about potential criminal proceedings is that there is a "standing policy as set forth in a Memorandum of Understanding that the Solicitor's office will refer all Willful citations that are

fatality related to the Department of Justice for it to review and consider whether to conduct a criminal investigation" (*id.*, p. 3), and that the "Respondent merely knows that there is a policy requiring a referral." (*Id.*, p. 5). The Secretary asserts that "the status of criminal investigations is not disclosed unless and until an investigation sufficiently proceeds to a point where the Department of Justice or a state prosecutor requests a stay," (*id.*, p. 1), and that "the Secretary will typically not inform parties if a criminal investigation is not being pursued." (*Id.*, p. 3).

The Secretary states further that none of the Respondent's managers or officers whose sworn statements were taken during the investigation asserted their Fifth Amendment right against self-incrimination, and that no individual has subsequently asserted that right in the course of these proceedings. (*Id.*, pp. 3, 8).

Discussion

The Fifth Amendment to the United States Constitution protects individuals from compelled self-incrimination in criminal cases. U.S. Const. amend. V. The "core protection" afforded by this clause of the Fifth Amendment is a prohibition against compelling a criminal defendant to testify against herself at trial. *United States v. Patane*, 542 U.S. 630, 637, 124 S.Ct. 2620, 2626 (2004). In addition to allowing refusal to testify at one's criminal trial, the privilege permits refusal to answer any official questions put to an individual "in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." *Minnesota v. Murphy*, 465 U.S. 420, 426, 104 S.Ct. 1136, 1141 (1984) (internal citation and quotation omitted). An individual does not lose this privilege because she is convicted of a crime. *Id.* The privilege against compelled self-incrimination "continues until the time for appeal has expired or until the conviction has been affirmed on appeal." *United States v. Duchi*, 944 F.2d 391, 394 (8th Cir. 1991); *accord Frank v. United States*, 347 F.2d 486, 491

(D.C.Cir.1965) ("Government may not convict a person and then, pending his appeal, compel him to give self-accusatory testimony relating to the matters involved in the conviction").

Corporations do not have a Fifth Amendment right against self-incrimination. *Braswell v. United States*, 487 U.S. 99, 108 S.Ct. 2284 (1988); *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 92 n. 5 (2d Cir. 2012). The Respondent is a limited liability corporation. Thus, the situation presented here is *not* one in which a party to litigation "must choose between testifying at the civil trial or maintaining its silence." *Woolston Constr. Co., Inc.*, 15 BNA OSHC 1114 (No. 88–1877, 1991) ("*Woolston*") (noting that in any case "[t]here is no infringement of either the Fifth Amendment privilege against self-incrimination or the Due Process Clause of the Fourteenth Amendment when a party to civil litigation, faced with parallel criminal proceedings, must choose between testifying at the civil trial or maintaining its silence"). Moreover, the situation presented here is *not* one in which "a person, who is a defendant in both a civil and a criminal case, is forced to choose between waiving his privilege" or sustaining an adverse judgment and "not merely the loss of his most effective defense." *United States v. Premises Located at Route 13*, 946 F.2d 749, 756 (11th Cir. 1991) (internal quotes omitted).

"[T]he power to grant a stay is purely discretionary." *Woolston.* "Stays are not favored." Commission Rule 63(a); 29 C.F.R. § 2200.63(a).

In *Pitt–Des Moines, Inc.*, 17 BNA OSHC 1936 (No. 94-1355, 1997), the Commission described principles that guide consideration of a party's request to stay Commission proceedings pending the outcome of parallel criminal proceedings:

> The principal cases in this area establish that although there is no constitutional right to a stay, a court may stay civil proceedings pending the outcome of parallel criminal proceedings pursuant to its power to control its docket and sensibly coordinate its business. *See generally Landis v. North American Co.*, 299 U.S. 248, 255 (1936). *See also United States v. Kordel*, 397 U.S. 1 (1970); *Securities & Exchange Comm'n v.*

Dresser Indus., 628 F.2d 1368 (D.C.Cir.1980), *cert. denied* 449 U.S. 993 (1980). The overall objective is to permit disposition of cases "with economy of time and effort for [the court], for counsel, and for litigants," that the court must achieve by "weigh[ing] competing interests [in order to] maintain an even balance." *Landis*, 299 U.S. at 254–255. In determining whether to grant a stay, courts consider whether "the interests of justice" require such action, *Kordel*, 397 U.S. at 12 n. 27, and "make such determinations in the light of the particular circumstances of the case," *Dresser Industries*, 628 F.2d at 1375.

> The duration of a stay is determined in an individual case based on a showing of "the limits of any reasonable need," *Landis*, 299 U.S. at 257, and stays of indefinite duration are generally not entered "unless no alternative is available." *McSurely v. McClellan*, 426 F.2d 664, 672 (D.C.Cir.1970), *cert. denied*, 474 U.S. 1005 (1985). Federal courts, however, "have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action, sometimes at the request of the prosecution, ... sometimes at the request of the defense...." *Kordel*, 397 U.S. at 12 n. 27 (citations omitted). In some cases, however, courts have considered whether less drastic measures could be employed to protect the affected interests, such as issuing protective orders to delay certain discovery, *Gordon v. FDIC*, 427 F.2d 578, 580 (D.C.Cir.1970), limiting the stay until the taking of evidence is concluded in the criminal case, or preserving testimony by holding written interrogatories under seal pending completion of the criminal trial. *McSurely v. McClellan*, 426 F.2d at 672.

In *Woolston*, the Commission described the factors that should be considered in determining whether to stay administrative proceedings even where no indictment had been returned:

> While the strongest case for granting a stay occurs when an indictment has been returned, *SEC v. Dresser Industries, Inc.*, 628 F.2d at 1375–6, an indictment is not required. When determining whether to grant a stay of civil proceedings, the courts have traditionally looked to five factors:
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> (1) The interest of the plaintiffs in proceeding expeditiously with the civil action as balanced against the potential prejudice to the plaintiffs of a delay;
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> (2) The burden which any particular aspect of the proceedings may impose on defendants;
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> (3) The convenience to the courts:
>
> (4) The interests of persons not parties to the litigation; and
>
> (5) The public interest.

Accord, Keating v. Office of Thrift Supervision, 45 F.3d 322, 324-25 (9th Cir. 1995) (noting also that in determining whether to stay administrative proceedings because of parallel criminal proceedings against an individual who is a party to the administrative proceedings, the "decision whether to stay … should be made in light of the particular circumstances and competing

interests involved in the case," which "means the decisionmaker should consider the extent to which the defendant's fifth amendment rights are implicated").

A weighing of the competing interests that would be affected by the grant or denial of the requested stay falls decisively against granting the requested indefinite stay.

Here, because the Respondent has no Fifth Amendment right against self-incrimination, the Fifth Amendment rights of a party are not implicated. The only relevant interest that the Respondent has asserted in favor of stay is that if some witnesses assert a Fifth Amendment right against self-incrimination, the Respondent would be impeded in its ability to present a defense.[1]

The Respondent makes the bare assertion that in defending this matter the Respondent intends to rely on the testimony of individuals who might choose to assert their right against self-incrimination, but the Respondent fails (1) to point to any concrete matters of fact upon which it would be then unable to present evidence, (2) to demonstrate how such information would be essential to an adequate defense, or (3) to show that there are no other means of substantiating such matter in defense. The Respondent thus fails to demonstrate that its ability to mount a adequate defense would actually be impeded if these proceedings are not stayed indefinitely.

Rather, the Motion is grounded on the mere possibility that some witnesses will assert a Fifth Amendment privilege, and concludes that any such an assertion of those rights would impede the Respondent in mounting a defense to the point of denying the Respondent due process. The motion falls far short of establishing any individuals are even likely to assert a

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[1] The Respondent's apparent contention that a stay should be granted because certain individuals should not be required to choose between either asserting or waiving their Fifth Amendment right against self-incrimination, is not a relevant consideration because the Respondent lacks standing to assert the Fifth Amendment rights of its corporate officers or managers. *Woolston.* The Fifth Amendment rights of these individuals are not implicated by the "interests to persons not parties to the litigation" factor that is set forth in *Woolston.* In any event, the Fifth Amendment amply protects their interests regardless of the ruling on the Respondent's motion for a stay.

Fifth Amendment privilege in the course of these proceedings, or that if any witnesses did, that the Respondent's ability to present a defense would be impeded to the point of denying the Respondent due process.

In contrast, if the Motion was granted and the ongoing discovery and the eventual hearing were stayed indefinitely, the resulting delay in the resolution of this case would be real and substantial. The Commission has observed that "[t]he statute of limitations applicable to the filing of criminal charges under the [OSH] Act is five years, and stays of such long duration are strongly disfavored." *C & S Erectors, Inc.*, 18 BNA OSHC 1052 (No. 96-1525, 1997); *see* 18 U.S.C. 3282. Here, if (1) a criminal prosecution is actually commenced, (2) convictions result, and (3) appeals therefrom are pursued, then the indefinite stay sought here could last considerably longer than the five-year limitations period.

In *Woolston*, the Secretary had recommended to the Justice Department that a criminal indictment be pursued, but as of the time of the administrative hearing, no indictment had been returned. (The record on the instant motion does not reflect that the Secretary has made any similar recommendation to the Justice Department.) Nevertheless, in *Woolston* the Commission upheld the administrative law judge's denial of the corporate employer's request for a stay, which had been asserted on the ground that a witness's invocation of his Fifth Amendment right against self-incrimination at the administrative hearing had impeded the employer's ability to present a defense. Here, as in *Woolston*, the motion for a stay presented the administrative law judge "with the likelihood of years of delay, without any reasonable assurance that criminal proceedings would be initiated." *Id.* Here, even more so than in *Woolston*, the "prospect of an interminable delay of the case" considerably outweighs the mere potential problem that would

face the Respondent in preparing a defense *if* one or more witnesses invoke the right against self-incrimination.

The Respondent has failed to carry its burden to establish that the interests of justice weigh in favor of granting its motion for a stay. The motion for a stay is accordingly DENIED.

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: December 29, 2014