



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. CUSTOM HOUSE
721 19TH STREET, ROOM 407
DENVER, COLORADO 80202-2517

Phone: (303) 844-2282

Fax: (303) 844-3759

SECRETARY OF LABOR,
Complainant,

v.

ARCO NATIONAL CONSTRUCTION
COMPANY, INC.,
Respondent.

OSHRC Docket No.: 15-0359

ORDER DENYING UNOPPOSED MOTION FOR STAY OF CIVIL PROCEEDINGS

I. Background

The matter before the Court is Respondent's Unopposed *Motion for Stay of Civil Proceedings* ("Motion"). Respondent requests this stay, which is unopposed by Complainant, due to a pending criminal investigation for potential criminal charges under 29 U.S.C. § 666(e) and 18 U.S.C. § 1001 which is being conducted by the U. S. Attorney's Office for the Western District of Missouri ("DOJ") against Respondent in another case entitled *Secretary of Labor v, DNRB, Inc., dba Fastrack Erectors*, OSHRC 15-0282. Respondent does not allege it is subject to this criminal investigation or any independent DOJ criminal investigation.

This case arose from an investigation of a fatal fall by the Occupational Safety and Health Administration ("OSHA") at a worksite located at 3500 E. 149th Street, Kansas City, MO. Respondent alleges that the individual who fell was not an employee of Respondent; he was an employee of *Fastrack Erectors*. OSHA issued citations to *Fastrack Erectors* in OSHRC Case 15-0282 and to the Respondent as reflected in this case.

Respondent in this case was issued one serious citation consisting of three items in this case. Item 1(a) alleges a violation of 29 CFR 1926.451(g)(1); Item 1(b) alleges a violation of 29 CFR 1926.453(b)(2)(iv); Item 2 alleges a violation of 29 CFR 1926.451(f)(14) and Item 3 alleges a violation of 29 C.F.R. 1926.760(a)(1). In the *Fastrack Erectors* case pending DOJ criminal investigation, Complainant issued one serious citation with three items and one willful violation consisting of seven items. In *Fastrack Erectors*, Complainant alleged a violation of the same standards implicated in this case (plus seven additional regulations not implicated in this case).

II. Standing

Respondent advances as the sole basis for its Motion that permitting further proceedings in this case would not be appropriate because proceedings in this case may impair or interfere with DOJ's criminal investigation and any criminal proceedings that may be undertaken in the Fasttrack Erectors case. Respondent does not state how it has standing¹ to argue that Complainant or the DOJ investigation will be damaged or "how" the DOJ investigation may be impaired. Respondent merely alleges that the DOJ's investigation "could" be impaired.

Under 42 U.S.C. § 1987 the United States attorneys have the power to institute prosecution against individuals for violating a federal statute. That statute does not vest in a private corporation or citizen any rights to "stand-in" for the U.S. Attorney and assert the government's interest in a matter. Courts have held that the Attorney General and United States attorneys could not be compelled by mandamus to alter the present scope and method of their investigation and conduct particular investigations. *See Peek v. Mitchell*, 419 F.2d 375 (6th Cir. 1970). The authority to act on behalf, or assert an interest of the federal government, rests with DOJ and not the Respondent in this action.

The Court finds Respondent has no standing to argue the interests of either DOJ or Complainant in the Fasttrack Erectors case. Despite finding Respondent lacks standing, alternatively should a reviewing court find Respondent had standing, the Court will address the substance of Respondent's Motion.

III. Discussion of Motion on the Merits

Neither party has cited any legal authority or case law for the position taken in this Motion, that a stay should be entered because there is a criminal investigation in another matter which emanates from the same worksite in which this Respondent is also cited for violating the Act. Thus, the Court will employ an analysis as to whether Respondent has a protected interest which would be impacted under the underlying principles recognized in cases for when stays are appropriate.

A. Respondent's Constitutional Right.

¹ Complainant is noted in the Motion as not opposing the Motion. Complainant made no other arguments or statements that he conferred with DOJ and that DOJ had requested the stay. Complainant also does not offer any argument as to how DOJ would be damaged in the *Fasttrack Erectors* criminal investigation. The only statement which Complainant authorized to be represented for him was that he did not oppose the Motion. If any party is best situated to conclude and identify to the Court any possible damage to the DOJ investigation in the *Fasttrack Erectors* criminal investigation it would be Complainant. Complainant relying on the arguments advanced by Respondent in the Motion results in the moving party/parties failing to meet its burden of proof and burden of persuasion that a stay should be granted. Finally, the DOJ is aware of the stay granted by this Court in the *Fasttrack Erectors* case. Under Commission Rule 21 if DOJ was concerned that prosecution of this case would impair or damage their investigation in the *Fasttrack Erectors case*, it could have sought to intervene for the purpose of asking this Court to enter a stay and provide evidence to the Court for it to evaluate. DOJ did not do so in this case.

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). Respondent is a corporation. In addition, the situation presented in this case is not one in which a party to criminal litigation “must choose between testifying at the civil trial or maintaining its silence” since this Respondent is not subject to any DOJ investigation. *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”).

Utilizing the defined legal parameters discussed above, in this case, Respondent is not “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). In summary, Respondent in this case: (i) is not subject to any DOJ criminal proceedings or investigation; (ii) is not being forced to testify against itself in one proceeding to its detriment in another proceeding; and (iii) has no right under recognized constitutional principles that would be impacted and any rights violated if the stay were not granted.

B. Court’s Authority in Granting a Stay.

“[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).

i. *Absence of a Parallel Proceeding against Respondent.*

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. Under the precedent of these cases, Respondent would not be entitled to a stay of proceedings as there is no parallel criminal proceeding or investigation which impacts Respondent.

ii. Granting of Any Stay is not Supported.

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 defense²" *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. The Court concludes there are less drastic measures available to the parties to prevent evidence that may impact the DOJ investigation in *Fasttrack Erectors* that may have been inadvertently disclosed.

iii. Respondent Fails to Meet Five Criteria for Stay Enunciated in Woolston.

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:

² Even though Respondent filed the Motion requesting the stay, as previously noted there is no criminal parallel proceeding or investigation aimed at Respondent. Where stays have been granted in the past even without a constitutional right recognized, there was a criminal investigation or proceeding pending against a Respondent along with civil proceedings. This nexus is absent from our present case.

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:

- (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;
- (2) The burden which any particular aspect of the proceedings may impose on defendants;
- (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 decision maker should consider the extent to which the defendant's fifth amendment rights are implicated”). Even applying these factors to the present case where there are no parallel proceedings involving Respondent, it would not prevail under the above factors. Thus, 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 or even a stay of limited duration.

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 Respondent has asserted in favor of stay is that if some witnesses in this case testify or information is provided during discovery that information or testimony *might* impact the DOJ investigation in the *Fastrack Erectors* case.

Respondent makes the bare assertion that in defending this matter Respondent intends to rely on the testimony of individuals who might disclose information which could damage the investigation of DOJ in the *Fastrack Erectors* case. This sole argument is tenacious at best.

First, it is based on an assumption “testimony or discovery might” disclose something that could damage the investigation. Second, Respondent is in no position to know or not know what the U.S. Attorney is investigating, the facts known by the U.S. Attorney or the status of the investigation. Thus, Respondent would be in no position to know what might be testified to or disclosed as damaging the DOJ investigation. Third, there is nothing in the record to note DOJ has requested this action or to denote that this Respondent knows better than DOJ what might damage the investigation. Respondent fails (1) to point to any concrete matters of fact upon which it would be unable to present evidence to protect its position, or (2) to demonstrate how

such information would be essential to the DOJ investigation. Respondent thus fails to demonstrate that its ability to mount an adequate defense would actually be impeded if these proceedings are not stayed indefinitely. As the basis of its Motion, Respondent alleges that the investigation of DOJ in a totally different case involving different facts might be compromised if its case had to move forward. Respondent's responsibility is to protect its interest in defending its positions; not worry about what DOJ's interests may be in a different case.

The Motion is grounded on the possibility that some witnesses might disclose something that might damage DOJ in the *Fasttrack Erectors* investigation. Even if this did happen, the rights of Respondent would not be impeded in mounting a defense. The motion falls far short of establishing any individuals are even likely to engage in this conduct and even if it happened how Respondent's ability to present a defense would be impeded to the point of denying the Respondent due process.³

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. In the *Fasttrack Erectors* case (1) a criminal investigation is actually commenced, (2) a criminal proceeding could be commenced, (3) convictions could result, and (4) appeals therefrom are pursued, then the indefinite stay sought here could last considerably longer than the five-year limitations period. Staying a related case not under investigation by DOJ would not be in the public interest for this timeframe as witnesses become unavailable, evidence may be lost and any hazard goes unabated. In addition, this Court's experience is that the civil proceeding of a parallel criminal case is usually resolved at the same time the criminal case is resolved thereby bringing judicial efficiency and no further delay in prosecuting the civil proceeding. This public judicial economy interest is not present in this case as it is highly unlikely that this case would be resolved in any criminal proceedings involving *Fasttrack Erectors* as there is no commonality of parties and facts. Granting an indefinite stay in this case could well result in this case taking up to two years additional time to resolve assuming a stay is in place until the criminal phase in *Fasttrack Erectors* is concluded. This time passage could well be seven years assuming *Fasttrack Erectors* is resolved on the eve of the tolling of the five year statute of limitations. The public interest is not served by such delay where witnesses become unavailable and exhibits lost. The Court finds there is simply no compelling public interest in granting any type of stay under these circumstances.

³ As noted above, while corporations do not have a Fifth Amendment right against self-incrimination individuals do. If individuals in this case were to invoke their self-incrimination right while replying to discovery, absent a DOJ investigation of this Respondent or such individual giving testimony being associated with *Fasttracks Erectors*, the invocation of their right should not be sustained. In the later instance protections exist to protect the testimony of such individual from disclosure in other litigation.

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. 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 presents the administrative law judge "with the likelihood of years of delay, without any reasonable assurance that criminal proceedings would be initiated" against this Respondent. *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 Respondent in preparing a defense.

iv. Discoverable Evidence in this Case Should Not Impact DOJ Investigation

In this case, Respondent, in its Answer, denied that it violated the cited regulations because the individual killed at the worksite was not their employee. Affirmative Defense B. Thus, if this affirmative defense prevails, the case against Respondent would be vacated since to be responsible for a violation of the Occupational Safety and Health Act ("Act") an individual or entity must be an "employer" as defined under the Act, the regulations and controlling case law. Determining whether or not Respondent was an employer for the purposes of this civil proceeding would not impact any DOJ investigation in *Fasttrack Erectors*. If Respondent was found to be an employer of the exposed individual(s) then the analysis reverts to what this Respondent did to protect its employee(s) from hazards at the worksite, whether it had knowledge of the conduct and did it violate the Act. ARCO's conduct to protect its employee(s) at the worksite has nothing to do with what conduct *Fasttrack Erectors* engaged in, what actions it took or did not take, what policies they has in effect or did not have in effect and their knowledge of the actions as it relates to the citations issued to them.

Counsel representing the parties in this case can implement certain safeguards to protect against the disclosure of information involving *Fasttrack Erectors* in the discovery phase of this case. As noted above, since the cases are predicated on different factual scenarios there would be no need propound questions that may illicit this type of information. Where such information is illicit or unintentionally disclosed in discovery, the parties can protect such information from disclosure outside the confines of this case through a protective order.

IV. Conclusion

The Commission has recognized in *Pitt-Des Moines*, 17 BNA OSHRC at 1938-40, 1995 CCH OSHD at p. 43,939-41 the Court has a legitimate interest in managing its docket in the face of interminable delays and is a factor to be weighed in determining whether or not to grant an extension to the stay. *See also C & S Erectors*, 18 OSHC at 1052, 1053 1995-97 CCH OSHD ¶11,408, p. 44,388 (No. 98-1525, 1997). For the reasons stated, the parties have failed to carry its burden to demonstrate the necessity of stay being imposed.

The parties have available to it the following less drastic measures to insure that discovery in this case does not impinge on any DOJ criminal investigation in the *Fasttrack Erectors* case:

- Structure the questions during discovery so that information related to the *Fasttrack Erectors* case is not sought or inquired into.
- Determine if it is necessary to call any witness that may have knowledge of information in the *Fasttrack Erectors* case.
- Request the entry of a Protective Order to protect the deliberate or inadvertent disclosure of discovery material that may impact the *Fasttrack Erectors* case.
- Request any information that may impact the *Fasttrack Erectors* case be handled under seal pending completion of the DOJ criminal process.

The Motion is DENIED.

The Court's Minute Order dated August 21, 2015 staying the responses to pending discovery of any party is VACATED. Any responses to discovery that were due pending the Court's consideration of this Motion shall be due within ten days of the date of this Order.

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine
Judge, OSHRC

Dated: **August 25, 2015**