

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.

AEROSPACE MANUFACTURING CT  
SYSTEMS, LLC,

Respondent.

OSHRC Docket No. 11-0315

**ORDER**

Before: ROGERS, Chairman; ATTWOOD, Commissioner.

BY THE COMMISSION:

Following a July 6, 2010 fatality at Aerospace Manufacturing CT Systems, LLC (“Aerospace”), the Occupational Safety and Health Administration conducted an inspection and issued the company a willful citation under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651-678 (“OSH Act” or “Act”). On May 3, 2011, two months after the Secretary filed a complaint in this matter, she referred the case to the Department of Justice (“DOJ”) for potential criminal investigation and proceedings.<sup>1</sup> On May 31, 2011, the Secretary filed a motion with Administrative Law Judge Patrick B. Augustine seeking a stay of the Commission’s proceedings. In her motion, she argued that a stay was necessary to prevent the proceedings before the Commission from interfering with any potential criminal prosecution and to prevent the Secretary from being prejudiced in her ability to conduct discovery in the pending Commission case. Aerospace filed an opposition to the Secretary’s motion, and on June 29, 2011, the judge denied the Secretary’s request for a stay because no indictment had yet been issued against Aerospace. The Secretary subsequently filed a motion for reconsideration with the judge on July

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<sup>1</sup> The criminal referral pertained to alleged willful violations for causing the death of an employee and making a false statement in a document submitted pursuant to the Act. *See* OSH Act §§ 17(e), (g), 29 U.S.C. §§ 666(e), (g).

18, 2011, which Aerospace opposed as untimely. The judge agreed with Aerospace and denied the Secretary's motion for reconsideration on August 1, 2011.

Pursuant to Commission Rule 73, 29 C.F.R. § 2200.73, the Secretary filed a Petition for Interlocutory Review ("PIR") of the judge's orders on August 9, 2011.<sup>2</sup> We granted the Secretary's petition on September 6, 2011. For the following reasons, we reverse the judge's June 29 and August 1, 2011 orders denying the Secretary's motions, and direct the judge to issue an order staying the proceedings subject to the provisions of Commission Rule 63(c), 29 C.F.R. § 2200.63(c), which requires that the parties submit periodic status reports as directed.

### **Discussion**

Under Commission precedent, civil proceedings may be stayed pending the outcome of parallel criminal proceedings "to permit disposition of cases 'with economy of time and effort for [the court], for counsel and for litigants.'" *C & S Erectors Inc.*, 18 BNA OSHC 1052, 1053, 1995-97 CCH OSHD ¶ 31,408, p. 44,388 (No. 96-1525, 1997) (alteration in original) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936); *Pitt-Des Moines, Inc.*, 17 BNA OSHC 1936, 1938, 1995-97 CCH OSHD ¶ 31,273, p. 43,939 (No. 94-1355, 1997)). Although indeterminate stays are strongly disfavored, the Commission "'ha[s] 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 . . .'" *C & S Erectors*, 18 BNA OSHC at 1053, 1995-97 CCH OSHD at p. 44,389 (quoting *United States v. Kordel*, 397 U.S. 1, 12 n.27 (1970)).

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<sup>2</sup> Under the Commission's rules, the Secretary was required to file her PIR seeking review of the judge's most recent order on or before August 8, 2011. See Commission Rule 73(b), 29 C.F.R. § 2200.73(b) (PIR must be filed within five days of receipt of the judge's ruling); Commission Rule 8(e)(2), 29 C.F.R. § 2200.8(e)(2) (for PIRs, filing is effective upon receipt); Commission Rule 4(a), 29 C.F.R. § 2200.4(a) (when computing a time period less than 11 days, the intervening Saturdays and Sundays shall be excluded). Although the Secretary mailed her PIR on August 8, the Commission did not receive it until August 9, 2011. Because this case could result in serious consequences for both parties and involves coordination with another federal agency, we find it appropriate to extend the time period for filing a PIR in this case. Commission Rule 5, 29 C.F.R. § 2200.5 (Commission may enlarge any time period prescribed by its rules). We also note that both of the Secretary's motions to the judge addressed the same substantive arguments, and both of the judge's orders rule on these substantive arguments. Therefore, we find it appropriate to discuss both orders in considering the merits of the Secretary's PIR.

In denying the Secretary's request for a stay here, the judge primarily focused on one point—the fact that a criminal indictment had not yet been issued against Aerospace—and agreed with Aerospace that the Secretary's motion was therefore premature. However, under Commission precedent, in determining whether to grant a stay, a judge must balance competing interests and consider whether the interests of justice require the stay. *C & S Erectors*, 18 BNA OSHC at 1053, 1995-97 CCH OSHD at pp. 44,388-89 (citing *Kordel*, 397 U.S. at 12 n.27; *Landis*, 299 U.S. at 254-55; *Sec. & Exch. Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir. 1980)). Accordingly, we agree with the Secretary that the judge failed to consider her request under the proper legal framework.<sup>3</sup>

The Secretary argues that absent a stay of the Commission's proceedings, effective prosecution of the criminal case would be compromised because Aerospace could circumvent the restrictive discovery rules that apply to criminal matters by taking advantage of the broad discovery opportunities available in the civil case. In addition, the Secretary claims that her ability to prosecute the case before the Commission would be impaired because Aerospace managers may exercise their right to invoke the Fifth Amendment to withhold potentially incriminating documents and information. The Commission has specifically recognized the

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<sup>3</sup> We also agree with the Secretary's assertion that the judge erred in ruling that (1) the Secretary and her counsel lack standing to assert the government's interests regarding a criminal prosecution, i.e. that those interests can only be asserted by the U.S. Attorney's Office; and (2) the Secretary's motion for reconsideration was untimely under Commission Rule 40(c), and she was required to establish good cause for the late filing under Federal Rule of Civil Procedure 60(b). As to the judge's first ruling, the Act authorizes the Secretary to represent the interests of the United States in civil proceedings, including those before the Commission. *See* OSH Act §§ 10, 14, 29 U.S.C. §§ 659, 663. And nothing in the Act indicates that, in a proceeding before the Commission, this authority excludes representing government interests that relate to parallel criminal proceedings also arising under the Act. Indeed, the Commission has acceded to the Secretary's exercise of such authority on a number of occasions. *See, e.g., C & S Erectors*, 18 BNA OSHC at 1052, 1995-87 CCH OSHD at p. 44,388 (granting Secretary's request to stay civil proceeding "to avoid interference with the criminal investigation"); *Pitt-Des Moines*, 17 BNA OSHC at 1937, 1995-97 CCH OSHD at p. 43,939 (granting Secretary's request for relief from judge's dismissal order and remanding for imposition of stay pending completion of criminal prosecution). As to the judge's second ruling, Commission Rule 40(c), 29 C.F.R. § 2200.40(c), applies only to motions seeking reconsideration of a judge's ruling on a procedural motion prior to the expiration of the time for response. The timing of all other motions for reconsideration, such as the one at issue here, is governed by Commission Rule 40(b), 29 C.F.R. § 2200.40(b), which requires that the motion be made as soon as the grounds therefor are known. Applying this provision, we find that the Secretary's motion was timely, which obviates any need to consider relief under Federal Rule of Civil Procedure 60(b).

potential for abuse that can arise from the difference between civil and criminal discovery rules as “a significant and legitimate factor weighing heavily in favor of a stay.” *C & S Erectors*, 18 BNA OSHC at 1053, 1995-97 CCH OSHD at p. 44,389; *Pitt-Des Moines*, 17 BNA OSHC at 1938-39, 1995-97 CCH OSHD at p. 43,940. Thus, a stay “furthers the public interest in ensuring effective enforcement of [both] the civil and criminal provisions of the Act, and achieves efficient use of government resources by precluding relitigation of issues resolved in the criminal proceeding.” *Pitt-Des Moines*, 17 BNA OSHC at 1939, 1995-97 CCH OSHD at pp. 43,940-41. These principles apply equally here, even at the earliest stages of investigation following a criminal referral, because the potential for discovery abuse could compromise any subsequent criminal prosecution. And we agree that there is also the potential at this point for Aerospace personnel to invoke constitutional protections against self-incrimination because a decision to develop a criminal case is under active consideration.

Aerospace claims that the Secretary’s referral to DOJ is merely a delaying tactic to unnecessarily postpone the government’s obligation to provide already overdue documents and to prevent Aerospace from preparing its case. Aerospace supports this claim by noting the timing of the Secretary’s criminal referral, which occurred after she commenced the civil proceeding before the Commission. But Aerospace admits that the Secretary informed the company of her intent to refer this case on January 7, 2011, several months *before* filing the civil complaint.<sup>4</sup> Furthermore, Aerospace has not shown that it would be prejudiced by a delay in receiving the referenced documents, as it may request any additional time needed for review once the stay is lifted. *See Pitt-Des Moines*, 17 BNA OSHC at 1939, 1995-97 CCH OSHD at pp. 43,940-41 (rejecting claim of prejudice from discovery delay where respondent “cited no particular witness whose continued availability is uncertain or other specific forms of prejudice except for that which is incident to faded memories”). Aerospace also contends that it would be unfairly prejudiced by a stay because it is unable to obtain the advice of state government safety and compliance experts regarding safety issues at its facility while the case is pending before the Commission. However, such officials are not Aerospace’s only source of such expertise—we fail to see how a stay prevents Aerospace from hiring private consultants.

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<sup>4</sup> We also note that (1) Aerospace has not identified anything that would have indicated to the Secretary that the referral was pointless, i.e., that the Department of Justice would necessarily reject the case, and (2) the Secretary made the referral well within the five-year statute of limitations. *See* OSH Act § 17(e), 29 U.S.C. § 666(e); 18 U.S.C. § 3282.

Accordingly, we conclude that a stay is appropriate to accommodate the completion of the criminal review process and, if initiated, any subsequent criminal proceedings. Thus, we reverse the judge's orders denying a stay and direct him to issue a stay of the proceedings for a reasonable period of time.<sup>5</sup> We also direct the judge to order the parties to file periodic status reports in accordance with the provisions of Commission Rule 63(c), 29 C.F.R. § 2200.63(c).

SO ORDERED.

/s/  
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Thomasina V. Rogers  
Chairman

/s/  
\_\_\_\_\_  
Cynthia L. Attwood  
Commissioner

Dated: September 22, 2011

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<sup>5</sup> Any motion to lift the stay, or to continue it, should be considered by the judge pursuant to the legal principles discussed above and in *C & S Erectors*, 18 BNA OSHC at 1053-54, 1995-97 CCH OSHD at p. 44,388-90, and *Pitt-Des Moines*, 17 BNA OSHC at 1938-40, 1995-97 CCH OSHD at p. 43,939-41.

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OSHRC DOCKET  
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**ORDER**

This matter is before the court on the Complainant's *Motion for Stay* ("Stay") of Proceedings ("Motion"). The court has reviewed the Complainant's *Memorandum in Support of Motion for Stay of Civil Proceedings* and Respondent's *Response Memorandum in Opposition to Complainant's Motion for Stay of Civil Proceedings*.

The Complainant requests a *Stay* of these proceedings for two reasons: (1) the Complainant has made a referral to the U.S. Attorney for the District of Kansas for consideration of criminal proceedings; and (2) the U.S. Attorney would be prejudiced if this action would be allowed to proceed while considering whether or not to pursue criminal proceedings.

The case for staying civil proceedings is a "far weaker one" when no indictment has been returned. *Securities and Exchange Comm'n v. Dresser Indus.*, 628 F.2d 1368, 1375 (D.C. Cir) *cert. denied*, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980); *Federal Savings and Loan Insurance Corporation v. Molinaro*, 889 F.2d 899 (9<sup>th</sup> Cir. 1989). In general, federal courts do not grant stays of parallel civil proceedings unless there is an indictment of the Respondent/Defendant. See *Securities and Exchange Commission v. Brown*, 2007 WL 4191998 (D.Minn); *In re Par Pharm Inc. Sec. Litig.*, 133 F.R.D. 12, 13-14 (S.D.N.Y 1990) noting the 2<sup>nd</sup> Circuit will deny a stay of civil proceedings where no indictment has been issued. See *StateFarm Mut. Auto Ins. Co. v. Bechkam-Easley*, 2002 WL 31111766 (E.D.Pa); *United States v. Private Sanitation Inds. Ass'n of Nassau/Suffolk*, 811 F.Supp. 802, 805 (E.D.N.Y. 1992)

In this case the only event that has occurred is the Complainant referring this matter to the U.S. Attorney for the District of Kansas for *possible* criminal proceedings, (emphasis added). The Solicitor's Office represents the interests of the memorandum, argues that the U.S. Attorney will be prejudiced, but has no standing to advance whatever the position of the U.S. Attorney is. The Complainant's *Motion* is devoid of any reference to discussing this matter with the U.S. Attorney's office or the fact that the "real party" in interest as it relates to the stay is the U.S. Attorney – not the Complainant. If the U.S. Attorney's office takes the position that it would be prejudiced in its investigation, then the U.S. Attorney has the procedure available to protect its interest by filing a *Petition for Leave to Intervene* ("Petition"). See Fed.R.Civ.P. 24 and Commission Rule 21.

The *Motion* is **DENIED**. These proceedings will be held in abeyance for twenty (20) days in order for the U.S. Attorney for the District of Kansas to decide to file a *Petition*. If not filed within that date, the court will proceed to schedule a *Pretrial Conference* with the Parties.

*/s/ Patrick B. Augustine*

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Patrick B. Augustine  
Judge, OSHRC

Dated: June 29, 2011