



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. Custom House
721 19th Street, Room 407
Denver, CO 80202-2517

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket No. 16-1493

ILLINOIS POWER GENERATING COMPANY,

Respondent.

**ORDER DENYING STAY OR DISMISSAL OF PROCEEDINGS
ON SUGGESTION OF BANKRUPCTY**

This matter is before the Court on Respondent's *Suggestion of Bankruptcy*. The Complainant has not filed a response.

Respondent has filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Texas, Case No. 16-36326¹. Respondent argues that the filing of bankruptcy imposes an automatic stay preventing this proceeding from moving forward. Respondent's reliance on the provisions of the automatic stay provision of 11 U.S.C. § 362(a) is misplaced.

Although the automatic bankruptcy stay generally applies to judicial proceedings against the debtor upon filing of a Chapter 11 petition, the Bankruptcy Code provides a specific exception for actions brought pursuant to the government's exercise of its police and regulatory powers:

b) The filing of a petition under section 301, 302, or 303 of this title.... Does

Not operate as a stay...

(4) ...of the commencement or continuation of an action or proceeding by a

¹ Respondent seeks protection under the Chapter 11 reorganization provisions of the United States Bankruptcy Code indicating it intends to continue to operate as a business entity and an employer.

Government unit...to enforce such governmental unit's or organizations police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power[.]

See 11 U.S.C. § 362(b)(4).

The Third and Tenth Circuits have explicitly ruled that this exception to the automatic bankruptcy stay applies to actions brought by the United States Department of Labor to enforce violations of the Occupational Safety and Health Act. *Brock v. Morysville Bodyworks, Inc.*, 829 F.2d 383 (3d Cir. 1987). *See also Martin v. Occupational Safety and Health Review Commission*, 941 F.2d 1051 (10th Cir. 1991)(affirming entry of money judgment, but not enforcing collection thereof where Secretary “sought abatement of safety violation (prospective enforcement) and a monetary penalty” based on the government’s police or regulatory power exception). In addition, the Sixth Circuit has similarly held that this exception to the automatic bankruptcy stay in an action before the National Labor Relations Authority authorizes the entry of a money judgment but not the enforcement to collect it. *NLRB v. Edward Cooper Painting, Inc.*, 804 F. 2d. 934, 943 (6th Cir. 1986).

In *Brock*, the Court held that the United States Department of Labor could obtain enforcement of a final order affirming OSHA citations for abatement of health and safety violations against a Chapter 11 debtor. *Brock* at 389-90. However, the Court ruled that the Secretary could not obtain enforcement of the portion of the final order to obtain payment of a monetary penalty. *Id* at 389. In reaching its ruling, the Court relied upon Congress’s clear intent to exempt “abatement actions” and actions attempting to “fix damages” for violations of health and safety standards from the automatic bankruptcy stay. *Id*. The Court noted that Congress distinguished these actions from actions to “enforce a money judgment” which is not exempt from the automatic stay. *Id*.

In the present case, the Court will apply the rationale followed by the Third and Tenth Circuits since their decisions specifically addressed proceedings before the Occupational Safety and Health Review Commission. Those cases are directly on point to the issue raised by Respondent in this case. Complainant has filed a Complaint and seeks a judicial determination: (1) that Respondent violated the regulations set forth in the Complaint; (2) requiring abatement of the hazards for any violation affirmed; and (3) as to the amount of monetary penalties to be

assessed for the affirmed violations. These judicial determinations clearly fall within the type of actions held by the Third and Tenth Circuits *to be exempt* from the automatic bankruptcy stay. (Emphasis added).

However, during the pendency of Respondent's bankruptcy proceeding, while Complainant may pursue the determination of liability of Respondent for violating the Act and seek assessment of corresponding monetary penalties by the Court, Complainant would be prevented from enforcing the collection of any money penalties assessed by the Court for those violations from Respondent.² This type of activity clearly falls within the actions held by the Third and Tenth Circuits *to not be exempt* from the automatic bankruptcy stay. (Emphasis added).

The distinction made by the Third and Tenth Circuits between allowing a determination of whether a violation of the Act has occurred thereby triggering Respondent's abatement obligation and prohibiting the enforcement or collection of an assessed monetary penalty is logical and supports Congressional intent. Complainant's primary obligation under the Act, supported by expressed congressional intent, is to ensure ongoing employers provide a safe workplace. Abatement actions to correct found hazards is a prospective obligation of Respondent³ and thus does not implicate the boundaries of the Bankruptcy Code which is designed to address past actions/inactions/debt⁴. Abatement can be accomplished where an entity is an ongoing business. Thus, Complainant may seek enforcement of abatement of safety violations which is the type of action held by the Third and Tenth Circuits to be exempt from the automatic bankruptcy stay once this Court determines whether or not a violation of the Act has occurred in the first place to trigger Respondent's abatement obligation prospectively. Complainant will be prevented from collecting or seeking to enforce any monetary penalty

² Complainant may seek to recover the monetary part of any judgment this Court may render after trial by utilizing the provisions of the United States Bankruptcy Code which permits creditors to file a *Proof of Claim* in which their classification as a creditor will be established and prioritized and the amount owed can be determined. See 11 U.S.C. 501.

³ Abatement of hazards is not required until the Court has found Respondent has violated the Act. In this case that determination will now be made post commencement of Chapter 11 proceedings. Thus, the obligation to abate, and any corresponding expenditure of funds, is not prohibited by the Bankruptcy Code as a prospective obligation arising after the commencement of bankruptcy is not implicated by a bankruptcy stay provision.

⁴ The Bankruptcy Code's primarily focus is with debt, prioritization of debt, payment of debt to creditors and debt re-structure. The Third and Tenth Circuits view the proposed penalties of an OSHA violation as a debt (or at the most an unliquidated debt at this time) which squarely falls under the purview of the Bankruptcy Code since the actions arising to create the debt is retroactive, i.e. prior to the bankruptcy filing. Here the handling of past debt is not necessary to insure abatement compliance for a safe workplace.

awarded by this Court except through the procedures available to him through the bankruptcy proceeding. **Accordingly, this case will not be stayed or dismissed.**

Parties are directed to comply with the *Order to Confer and Submission of Joint Pretrial Recommendations* dated November 23, 2016.

SO ORDERED.

/s/ *Patrick B. Augustine*

Patrick B. Augustine
Judge - OSHRC

Dated: January 3, 2017
Denver, CO