SECRETARY OF LABOR, Complainant, v. PITT-DES MOINES, INC., Respondent.	OSHRC Docket No. 94-1355

DECISION

BEFORE: WEISBERG, Chairman; MONTOYA and GUTTMAN, Commissioners.

BY THE COMMISSION:

This case arises out of a fatal accident at the construction site of the United States Postal Service facility in Chicago, Illinois where Pitt-Des Moines, Inc. ("Pitt-Des Moines") performed structural steel assembly. Two workers were killed and five injured when a beam support failed causing the collapse of a portion of the building. The Secretary of Labor ("Secretary") cited Pitt-Des Moines in connection with the accident for willful and serious violations of the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 ("the Act"or "OSH Act"), and proposed a combined penalty of $147,000.[1]

[1]The citations alleged a willful violation of 29 C.F.R. § 1926.751(a) for failing to attach the steel parts with the requisite two bolts (or their equivalent), proposing a penalty of $70,000; a willful violation of § 5(a)(1), 29 U.S.C. § 654(a)(1), for failure to provide protection from fall and crushing hazards in the event of collapse, proposing a penalty of $70,000; and a serious violation of 29 C.F.R. § 1926.21(b)(2) for failure to instruct employees in hazard recognition and avoidance, proposing a penalty of $7,000.

Administrative Law Judge James H. Barkley dismissed the citations in their entirety following the Secretary's refusal to comply with a discovery order while the United States Department of Justice ("Justice Department") considered criminal indictment. At issue on review is whether the judge erred by dismissing the citation.[2] For the following reasons, we reverse the judge's decision and remand the case for reinstatement and entry of a stay of the administrative proceedings pending completion of the criminal proceedings.

I. BACKGROUND

OSHA issued the citations against Pitt-Des Moines on May 2, 1994, and after filing of the requisite pleadings Pitt-Des Moines commenced discovery on June 24 by serving the Secretary with interrogatories. Approximately six weeks later, on August 4, the Secretary moved for a stay "until the United States Attorney . . . makes a determination regarding prosecution . . . for criminal violations of section 17(e)[, 29 U.S.C.§ 666(e),] of [the Act]." Noting that the Justice Department had directed her to request the stay, the Secretary cited in support the factual and legal similarity of issues in the civil and criminal proceedings, the risk of subverting the narrower criminal discovery rules if Pitt-Des Moines were permitted to conduct discovery in the civil case, judicial economy, and lack of prejudice to respondent. By order dated August 23, Judge Barkley granted the stay "[f]or the reasons stated [in the Secretary's motion]," and directed the Secretary to file status reports every sixty days.

In mid-October, following the Secretary's first status report, Pitt-Des Moines requested that the stay be lifted due to the Secretary's alleged lack of diligence in transferring OSHA's files to the Justice Department, and prejudice it would suffer from continued delay.

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[2]We reject Pitt-Des Moine's contention that the only question before us is whether dismissal is a proper sanction for non-compliance with a discovery order. The discovery order itself and the lifting of the stay that preceded it must be examined in order to determine whether the dismissal should stand. *See Hastings v. North East Ind. School Dist.,* 615 F.2d 628, 631 (5th Cir. 1980) ("[a]ppeal of an order imposing sanctions necessarily includes a review of the underlying discovery order"); *Nat'l Util. Serv. Inc. v. Northwestern Steel & Wire Co*., 426 F.2d 222 (7th Cir. 1970); 8 Wright & Miller, *Federal Practice & Procedure*: Civil § 2006 (on appeal from dismissal for failure to comply with a discovery order, an appellate court "will consider whether the discovery order that led to the [dismissal] was proper").

Pitt-Des Moines later withdrew its request and, on December 2, Judge Barkley continued the stay and ordered both parties to submit status reports every sixty days. On February 1, 1995, the Secretary submitted a report stating that the Justice Department investigation remained active and requested continuation of the stay. That same day, Pitt-Des Moines requested that the stay be lifted for the Secretary's alleged violation of its terms. Pitt-Des Moines claimed that two compliance officers who investigated the accident improperly participated in the interview of an ironworker employed by Pitt-Des Moines. The Secretary opposed Pitt-Des Moines's motion and denied conducting any improper discovery. She explained that the referenced witness interview was part of the ongoing criminal investigation, the investigators participated in the interview at the Justice Department's request, and the Secretary's lead attorney in the civil action had not been privy to it. On February 8, 1995, noting that "[t]he Government has had ample time to make a charging decision in the case," Judge Barkley lifted the six-month stay solely for "the [G]overnment's lack of diligence in filing criminal charges . . . ."

On March 28, 1995, following the Commission's March 23 denial of the Secretary's petition for interlocutory review and stay of proceedings, Judge Barkley ordered the Secretary to comply with Pitt-Des Moines's written discovery requests and to make the two compliance officers involved in the case available for depositions. By letter of March 31, 1995, the Secretary notified Judge Barkley that she would not provide the requested discovery. Acknowledging that the likely consequence would be dismissal, the Secretary explained that the risk of interference with the potential criminal proceeding was unacceptable and paramount where abatement was not at issue.[3] Judge Barkley dismissed the case on April 28, 1995 for "the [G]overnment's failure to bring a criminal proceeding and its refusal to proceed in the civil proceeding." On August 28, 1996, the Justice Department

[3]Although the Secretary also cited the risk of violating the secrecy provisions of Federal Rule of Criminal Procedure 6(e)(3)(A)(ii) regarding the grand jury, she has since disclaimed any reliance on that provision.

issued a two-count criminal indictment against Pitt-Des Moines alleging a failure to provide proper training and to properly secure the steel beams used in the construction project.

II. DISCUSSION

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 Com'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.

Here, Judge Barkley concluded that the Government had ample time to decide whether to indict, and cited only one reason for lifting the stay: "the [G]overnment's lack of diligence in filing criminal charges . . . ." While it is clear that indefinite stays are strongly disfavored, the duration of the stay is only one of the factors to consider. The judge failed to balance his legitimate concern for limiting the stay's duration against the validity and weight of any of the other circumstances presented. Accordingly, we find that Judge Barkley erred by failing to "weigh competing interests," *Landis*, 299 U.S. at 254-255, and by failing to make his determination "in light of the particular circumstances of the case," *Dresser,* 628 F.2d at 1375.

The principal factor favoring a stay in this case is the potential for subversion of the criminal discovery process. The Federal Rules of Criminal Procedure, Rules 15-17, provide for discovery that is "highly restricted" in contrast to the "nearly total mutual disclosure" provided by the civil discovery rules. *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1203 (Fed.Cir. 1987). Relevant precedent reveals that the concern for discovery abuse is well founded and routinely cited by the courts in considering stay requests. *See Campbell v. Eastland,* 307 F.2d 478, 487 (5th Cir. 1962), *cert. denied*, 371 U.S. 955 (1963) (citing the generally "far more restrictive" criminal discovery rules, court stated that "[a] litigant should not be allowed to make use of the liberal discovery procedures applicable to a civil suit as a dodge to avoid the restrictions on criminal discovery and thereby obtain documents he would not otherwise be entitled to for use in his criminal suit"). *See also Afro-Lecon*, 820 F.2d at 1202-04; *Dresser Industries,* 628 F.2d at 1376*; Peden v. United States,* 512 F.2d 1099, 1103-1104 (Ct.Cl. 1975)*; United States v. One Cadillac Coupe DeVille,* 41 F.R.D. 352, 353-354 (S.D. N.Y. 1966).[4]

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[4] Although the "[t]he strict limitations on discovery in criminal cases, embodied in Federal Rules of Criminal Procedure 15-17, do not take effect until after a grand jury has returned an indictment," *Dresser Industries*, 628 F.2d at 1381, the court in *Peden* noted that "it has long been the practice to 'freeze' civil proceedings when a criminal prosecution involving the same facts is warming up *or* underway." 512 F.2d at 1103 (emphasis added). Citing

(continued...)

In view of the complexity of the discovery rules and extensive litigation they have engendered, we do not attempt to determine the precise differences between criminal and civil discovery. Rather, we rely on the above-cited case law, and Pitt-Des Moines's admission that criminal discovery is at least somewhat more limited, to conclude that the potential for discovery abuse is a significant and legitimate factor weighing heavily in favor of a stay. We also note, however, that here the Secretary commenced both the civil and criminal actions. Thus, Pitt-Des Moines cannot be charged with initiating the civil action in order to better defend itself in the event a criminal indictment would issue. Nonetheless, improper use of discovery remains a significant concern.[5] *Afro-Lecon,* 820 F.2d at 1203 ("[t]he broad scope of civil discovery may present to both the prosecution, and at times the criminal defendant, an irresistible temptation to use that discovery to one's advantage in the criminal case").

A stay of the civil proceedings also furthers the public interest in ensuring effective enforcement of 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. Although Pitt-Des Moines points out that a stay of the criminal case until completion of the civil case might achieve the same objective (failure to prove a violation under the lesser civil standard would likely obviate litigation under the stricter criminal standard), Pitt-Des Moines would have had the benefit of full civil discovery prior to the criminal trial. Finally, although Pitt-Des Moines generally claims it is prejudiced from any

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[4](...continued)
Dresser, the Commission has acknowledged that "[w]hile the strongest case for granting a stay occurs when an indictment has been returned, . . . an indictment is not required." *Woolston Constr. Co.*, 15 BNA OSHC 1114, 1121, 1991-93 CCH OSHD ¶ 29,394, p. 39,572 (No. 88-1877, 1991), *aff'd per curiam* 15 BNA OSHC 1634, 1991-93 CCH OSHD ¶ 29,703 (D.C. Cir. 1992) (unpublished).

[5]S*ee United States v. One Cadillac Coupe DeVille,* 41 F.R.D. at 353-354 (court granted government's request for stay of civil case where government initiated both civil and criminal actions).

continued delay in obtaining discovery, it has cited no particular witness whose continued availability is uncertain or other specific forms of prejudice except for that which is incident to faded memories.

In balancing the factors favoring a stay against our concern for limiting its duration, we find that six months' duration is simply too short. In this regard, we note that the Secretary does not control the pace or content of the Justice Department's proceedings, and experience indicates that the Justice Department can rarely, if ever, complete its review within that time. Accordingly, we conclude that Judge Barkley erred by lifting the stay and dismissing the citation.

The Commission's decision in *Woolston Constr. Co.* does not suggest a different result. In *Woolston*, the Commission affirmed an administrative law judge's complete denial of the respondent's stay request despite the Secretary's referral to the Justice Department for criminal indictment. The respondent argued that its ability to defend itself in the civil case would be impaired by forcing its principals "to choose between testifying at the administrative hearing or maintaining their Fifth Amendment right not to testify on matters which could incriminate them." 15 BNA OSHC at 1120, 1991-93 CCH OSHD at p. 39,571. The Commission rejected this argument, noting that the Fifth Amendment privilege against self-incrimination does not extend to corporations and that a party cannot assert the constitutional rights of another person. 15 BNA OSHC at 1121, 1991-93 CCH OSHD at p. 39,572. Nonetheless, the Commission acknowledged that while a stay was not compelled by constitutional considerations, "federal courts may defer civil proceedings when the interest of justice requires such action." *Id.* (citations omitted). The Commission's decision ultimately rested on a balancing of the two predominant factors in the case: the problems for the tribunal associated with managing an indefinite stay, and the mere "inconvenience" to respondent from not granting the stay. Observing that "a limited stay . . . would have been useless, since the stay would have had to have been continuously renewed until [the Justice Department] either announced a decision not to prosecute or the [five-year] statute of limitations expired," the Commission concluded that the judge's legitimate interest in

clearing his docket in the face of possible interminable delay did not amount to an abuse of discretion.[6] 15 BNA OSHC at 1122, 1991-93 CCH OSHD at p. 39,573. In contrast, we find that the factors favoring a stay in this case significantly outweigh our concern for limiting its duration. Moreover, in view of the criminal indictment issued against Pitt-Des Moines while Judge Barkley's decision was pending on review before the Commission, we need not consider what time limits would have been reasonable prior to any final Justice Department action on the criminal referral.

For the reasons discussed above, we conclude that Judge Barkley erred by lifting the stay after just six months and dismissing the case and, accordingly, we reverse his decision. Moreover, we remand the case for reinstatement and issuance of a stay pending completion of the criminal prosecution now that an indictment has issued.[7]

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[6]The Commission also found that even if the judge had abused his discretion by not granting the stay, it would have been harmless error because the judge did not rely on the testimony that would have been refuted by the individual who asserted his Fifth Amendment right. *Id.*

[7]We note that such a stay is also warranted in view of Seventh Circuit's recent decision in *S.A. Healy Co.*, 96 F.3d 906 (7th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 13, 1997) (No. 96-1299), which raises questions concerning double jeopardy implications for parallel civil and criminal OSH Act proceedings.

/s/
Stuart E. Weisberg
Chairman

/s/
Velma Montoya
Commissioner

/s/
Daniel Guttman
Commissioner

Dated: March 24, 1997