

SECRETARY OF LABOR,
Complainant,
v.
C & S ERECTORS, INC.,
Respondent.

OSHRC Docket No. 96-1525

ORDER

Before: WEISBERG, Chairman, and GUTTMAN, Commissioner.

BY THE COMMISSION:

On May 1, 1996, an employee of C & S Erectors, Inc., (“C & S”) fell to his death while laying deck at a C & S jobsite in Jonestown, Pennsylvania. The Secretary of Labor (“Secretary”) cited C & S 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 \$396,200.

Subsequently, the United States Department of Justice (“Justice Department”) commenced a criminal investigation of C & S pursuant to section 17(e) of the Act, 29 U.S.C. § 666(e), and directed the Secretary to request a stay of the civil proceedings in order to avoid interference with the criminal investigation. Administrative Law Judge John H. Frye, III denied the Secretary’s motion for a stay, and the Secretary sought interlocutory review of that ruling before the Commission. On July 2, 1997, we granted the Secretary’s petition

for interlocutory review and issued an interim stay pending our consideration of whether the judge erred by denying the stay request. For the following reasons, we reverse the judge's ruling and remand the case for entry of a stay, as described below, subject to the provisions of Commission Rule 63(c), 29 C.F.R. § 2200.63(c), which requires that parties submit periodic status reports as directed by the judge.

I. BACKGROUND

OSHA cited C & S on October 17, 1996. Several weeks later, the Justice Department informed C & S that it was the target of a criminal investigation for alleged willful OSH Act violations which caused the death of an employee. Over the next three months, the parties filed the requisite civil pleadings and exchanged interrogatories. The Secretary provided interrogatory answers to C & S on February 10, 1997, and C & S responded to the Secretary's interrogatories on April 7. C & S foreman Gene Stoops answered for C & S by asserting his Fifth Amendment privilege against self-incrimination on all but one question, to which he provided no response at all.

According to a sworn affidavit of an Assistant United States Attorney, the Justice Department directed the Secretary to request a stay of the civil case on April 22 "pending completion of the ongoing criminal investigation" in order to "avoid any interference with or infringement upon the criminal enforcement process which could arise from a parallel civil enforcement proceeding." The Secretary requested a stay on May 12, which the judge denied without written opinion.

In our July 2 order granting the Secretary's petition for interlocutory review, we issued an interim stay pending our review of the judge's ruling and requested that the Secretary submit a report on the status of the criminal investigation and its likely completion date, which we have now received. The Secretary, supported by a July 18 declaration from an Assistant United States Attorney, states that the criminal investigation is ongoing and that the Justice Department anticipates its completion within six months.

II. DISCUSSION

As we recently stated in *Pitt-Des Moines, Inc.*, 17 BNA OSHC 1936,1938, 1997 CCH OSHD ¶ 31,273, pp. 43,938, 43,939 (No. 94-1355, 1997), courts may stay civil proceedings 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.” *Landis v. North American Co.*, 299 U.S. 248, 254-255 (1936). In determining whether to grant a stay in “the particular circumstances of the case,” *Securities & Exchange Com'n v. Dresser Indus.*,¹ courts must “weigh competing interests [in order to] maintain an even balance,” *Landis*,² and consider whether “the interests of justice” require such action, *United States v. Kordel*.³ While it is clear that indeterminate stays are strongly disfavored,⁴ federal courts “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 *Pitt Des-Moines*, we found that the judge erred by failing to balance those factors favoring continuation of the stay against those opposing it, and ultimately concluded that the stay should be continued. 17 BNA OSHC at 1938, 1940, 1997 CCH OSHD at p. 43,940-41. Here, Judge Frye gave no reasons for denying the Secretary’s motion for a stay. The judge’s order simply states: “[T]he motion is denied.” In the absence of explanation, we have no basis upon which to review Judge Frye’s reasons for denying the stay. Accordingly, we examine the factors in *Pitt Des-Moines* to determine whether a stay is warranted.

¹ 628 F.2d 1368, 1375 (D.C. Cir. 1980), cert. denied 449 U.S. 993 (1980).

² 299 U.S. at 254-255.

³ 397 U.S. 1, 12 n.27 (1970).

⁴See *Landis*, 299 U.S. at 257; *McSurely v. McClellan*, 426 F.2d 664, 672 (D.C. Cir. 1970), cert. denied, 474 U.S. 1005 (1985).

The Secretary's stay request is predicated on the Justice Department's contention that the civil proceedings will interfere with or infringe on the criminal enforcement process. Courts have acted to prevent such interference by consistently recognizing that a stay may be necessary to avoid the potential for discovery abuse that can arise from the differences between the civil and criminal discovery rules. *See Pitt Des-Moines*, 17 BNA OSHC at 1938-39, 1997 CCH OSHD at p. 43,940. Although there is no evidence here that such abuse has occurred or is intended, we find that "the potential for discovery abuse is a significant and legitimate factor weighing heavily in favor of a stay." 17 BNA OSHC at 1939, 1997 CCH OSHD at p. 43,940. In addition, a stay would "ensur[e] effective enforcement of the civil and criminal provisions of the Act, and achieve[] efficient use of government resources by precluding relitigation of issues resolved in the criminal proceeding." 17 BNA OSHC at 1939, 1997 CCH OSHD at pp. 43,940-41.

C & S argues that it would suffer prejudice from a stay in the form of additional expense for separate counsel to defend against any criminal charges, and the absence of a "guarantee" that witnesses will still be available after the stay is lifted. We conclude that neither of these concerns amount to legally cognizable prejudice. *See Genesee Brewing Co.*, 11 BNA OSHC 1516, 1518, 1983-84 CCH OSHD ¶ 26,519, p. 33,763 (No. 78-5178, 1983) (extra case preparation and similar inconveniences do not amount to legal prejudice). Thus, any need for separate counsel would derive from the legal consequences of C & S' conduct rather than the timing of parallel proceedings. As to witness availability, C & S cites no authority for the notion that a "guarantee" is required. In the event there is a special need to preserve a particular witness' testimony, C & S may request leave to depose that witness while the stay is in effect. *See Texaco v. Borda*, 383 F.2d 607, 609-610 (3rd Cir. 1967) (finding that trial judge erred by denying request to depose seventy-one year old witness where duration of stay was indeterminate and underlying events occurred eleven years prior).

Finally, we note that the Secretary originally requested a stay pending completion of the criminal investigation. The statute of limitations applicable to the filing of criminal

charges under the Act is five years, and stays of such long duration are strongly disfavored. In view of the Secretary's recent status report indicating that completion of the criminal investigation is "anticipated" within six months of July 18, 1997, we conclude that a stay of that duration is appropriate at this time. As we recognized in *Pitt Des-Moines*, "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 [six month's] time." 17 BNA OSHC at 1939, 1997 CCH OSHD at p. 43,941. Here, the Justice Department commenced its investigation shortly after the citation issued in October 1996, and anticipates completion of the investigation by January 18, 1998. A stay of the civil case until that time is not indeterminate and provides a reasonable period for the Justice Department to complete its investigation. Accordingly, we reverse the judge's order denying a stay and remand the case to him for issuance of a stay until January 18, 1998. We expect that the parties will timely submit any status reports that the judge may request.⁵

/s/ _____
 Stuart E. Weisberg
 Chairman

/s/ _____
 Daniel Guttman
 Commissioner

Dated: September 9, 1997

⁵Any motion to lift the stay prior to January 18, 1998, or to continue it beyond that time may be considered by the judge pursuant to the principles discussed above and established in *Pitt Des-Moines, supra*.

