



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3419

SECRETARY OF LABOR,

Complainant,

v.

NASH BUILDERS, LLC,

Respondent.

SIMPLIFIED PROCEEDINGS

OSHRC Docket No. 20-0049

**ORDER
APPLYING STATUTORY EXCEPTION
TO THE BANKRUPTCY CODE'S AUTOMATIC STAY**

This order concludes (1) that the Occupational Safety and Health Review Commission (Commission) has the authority to adjudicate whether a Commission proceeding is excepted from the Bankruptcy Code's automatic stay provision by that provision's "police and regulatory power" exception set forth in 11 U.S.C § 362(b)(4), and (2) that the exception applies, so this Commission proceeding is not subject to the Bankruptcy Code's automatic stay provision.

Background

On December 17, 2019, the area office of the Occupational Safety and Health Administration (OSHA) located in Pittsburgh, Pennsylvania issued a two-item serious citation to a company that the citation identifies as "Nash Builders, LLC" (Nash) located in Sewickley, Pennsylvania. The citation alleged two violations of fall protection standards codified at 29 C.F.R. Part 1926, Subpart M, and proposed penalties that totaled \$5,683. The citation arose out of OSHA inspection number 1441572, which occurred on October 30, 2019 involving a worksite located at 234 Broad Street in Sewickley, Pennsylvania.

Citation item one alleged employees had failed to use required fall protection but stated also that the violation had been corrected during the inspection, so no further corrective action was directed. Citation item two alleged that Nash had failed to train employees in precautions to be taken when exposed to fall hazards and required that Nash abate that violation no later than January 14, 2020.

In a one-page fax transmission received by the OSHA area office on January 7, 2020, with a fax cover sheet identifying “Nash Building Company,” a subject line of “Notice of Intent to Contest,” and bearing the signature of Mr. Monroe Nash, Mr. Nash handwrote the following:

I wish to contest the citations and penalties proposed for item 1 and 2 of the citation issued 17 Dec 19. The inspecting agent was rude, tried to intimidate me by yelling. 234 Broad St was not a jobsite of mine. I don't know who he saw; I do not have any employees. I don't have a company “Nash Builders, LLC.”

This written notice of contest was received within fifteen days of Nash's receipt of the citation, as required by 29 U.S.C. § 659(a), 29 C.F.R. § 2200.33.¹ Nash's timely contest triggered the Commission's jurisdiction under the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678 (OSH Act). 29 U.S.C. § 659(c). The notice of contest also tolled item two's abatement requirement for the duration of Commission proceedings. *See Reich v. Manganas*, 70 F.3d 434, 437 (6th Cir. 1995); 29 U.S.C. § 659(b) (specifying that the time for correcting a violation does not run until the entry of a final order by the Commission).

Following receipt of Nash's notice of contest, the OSHA area office duly transmitted the contested matter to the Commission. *See* 29 C.F.R. §§ 1903.17(a), 2200.33. On January 15, 2020,

¹ The present record does not reflect the exact date that Nash received the Citation, but the notice of contest was undoubtedly timely filed because it was faxed to the OSHA area office within fifteen working days of the date the citation had been issued. 29 U.S.C. § 659(a), 29 C.F.R. §§ 1903.17(a), 2200.33.

the Commission's Executive Secretary issued a "Notice of Docketing and Instructions to the Employer" that identified the Respondent by the name "Nash Builders, LLC" as reflected in the caption above.²

On January 28, 2020, the Commission's Chief Judge designated the matter to be resolved under the Commission's rules for Simplified Proceedings, 29 C.F.R. Part 2200, Subpart M, and assigned the matter to the undersigned Commission Judge for disposition.

The assignment to Simplified Proceedings suspended the ordinary pleading requirements of Commission Rule 34, 29 C.F.R. § 2200.34. *See* 29 C.F.R. § 2200.205(a) (providing that "the complaint and answer requirements are suspended" in Simplified Proceedings). In Simplified Proceedings, the original citation serves as the functional equivalent of the Secretary's complaint that is otherwise required by Commission Rule 34, and Nash did not need to file an answer. *Id.* As reflected in the caption above, the Secretary is the complaining party, and this proceeding is deemed commenced by the Secretary against Nash to enforce workplace health and safety standards that have been promulgated pursuant to the OSH Act.

On April 15, 2020, the undersigned's assistant received an email, subject "Secretary of Labor v. Nash Builders," from Attorney Ryan J. Cooney. The body of that email provided in its entirety as follows: "I represent Nash Builders. Nash Builders filed a chapter 7 bankruptcy on March 6, 2020. Accordingly, the above matter is stayed pursuant to 11 U.S.C. 362. Please confirm receipt of this email and confirm that the prehearing conference scheduled for today will not take

² Nash's notice of contest suggests that the company has been misnamed in the citation. If so, this misnomer may be corrected by an order to correct the error issued pursuant to Fed. R. Civ. P. 60(a).

place.”³ Attorney Cooney attached to this email an electronic copy of a “Notice of Bankruptcy Case Filing” dated March 6, 2020, that had been issued by the clerk of the U. S. Bankruptcy Court for the Western District of Pennsylvania in bankruptcy case number 20-20875 involving an entity identified as “Nash Building Company.” It states, in part: “A bankruptcy case concerning the debtor(s) listed below was filed under Chapter 7 of the United States Bankruptcy Code, entered on 03/06/2020 at 4:53 PM and filed on 03/06/2020.”

The next day, on April 16, 2020, the undersigned issued an order directing the Secretary to file a statement of position addressing: (1) whether the Commission has the authority to determine whether Commission proceedings are excepted from the Bankruptcy Code’s automatic stay by operation of the exception in 11 U.S.C. § 362(b)(4), and (2) if the Commission does have that authority, what is the effect of Nash’s apparent March 6th bankruptcy filing on this Commission proceeding. The order also provided a date for Nash to file a reply to the Secretary’s statement. The order was served on Nash and a courtesy copy was provided to Attorney Cooney (who to date has not entered an appearance on behalf of Nash pursuant to Commission Rule 23, 29 C.F.R. § 2200.23).⁴ The Secretary timely filed and served a statement of position and provided a courtesy copy to Attorney Cooney as well. Nash did not file a reply to the Secretary’s statement of position.

³ Attorney Cooney was mistaken in understanding that a telephone conference had been scheduled for April 15, 2020. Rather, a telephone conference had been conducted the day before, on April 14, 2020. No representative for the Respondent had called in for that telephone conference, which had been the third scheduled telephone conference in which no representative of the Respondent had participated.

⁴ After receiving Attorney Cooney’s initial email on April 15, 2020, the undersigned’s assistant replied to him and inquired whether he intended to enter a formal appearance in the matter under Commission Rule 23. 29 C.F.R. § 2200.23. Attorney Cooney’s email response suggested that he did not intend to enter a formal appearance. He stated: “I am bankruptcy counsel for Nash Builders, LLC. I am informing you of the bankruptcy filing and the obligation to stay all proceedings. Please confirm that this matter will be stayed.”

The Secretary's stated positions are (1) that the Commission has the authority to adjudicate whether an exception to the automatic stay applies to Commission proceedings, and (2) that this matter is excepted from the automatic stay. The undersigned concurs.

Discussion

Section 362 of the Bankruptcy Code is titled "Automatic Stay." 11 U.S.C. § 362. Subsection (a) thereof lists categories of matters that are automatically stayed by bankruptcy proceedings.⁵ 11 U.S.C. § 362(a). Matters within the scope of subsection (a) are subject to the automatic stay *unless* the matter is also within the scope of an exception to the automatic stay listed in subsection (b). *Id.* One of the exceptions in subsection (b) pertains to actions or proceedings

⁵ Section 362(a) provides in relevant part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

* * *

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title; ...

brought “by a governmental unit ... to enforce such governmental unit’s police or regulatory power” from the automatic stay.⁶ 11 U.S.C. § 362(b)(4).

This Commission proceeding is, as 11 U.S.C. § 362(a)(1) describes, a “continuation ... of a[n] ... administrative ... action or proceeding against the debtor that was ... commenced before the commencement” of Nash’s bankruptcy proceeding on March 6, 2020. As such, it is the type of proceeding that 11 U.S.C. § 362(a) identifies as being automatically stayed by a bankruptcy filing *unless* an exception in subsection (b) applies.

The issue of whether an exception in subsection (b) applies to these Commission proceedings may be addressed only if it is first determined that the Commission has the authority to pass on that question.

*The Commission Has Authority to Determine
Whether the Exception in § 362(b)(4) Applies to a Commission Proceeding*

Courts have ruled that federal adjudicative agencies possess the authority to determine unilaterally whether an exception to the automatic stay applies to the agency’s proceedings. For example, in *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986), the Sixth Circuit addressed whether the National Labor Relations Board (NLRB) needed to petition the bankruptcy court for relief from the automatic stay before it could adjudicate an unfair labor practice proceeding that the NLRB had initiated prior to the employer’s bankruptcy filing. 804 F.2d at 936.

⁶ Section 362(b)(4) provides in relevant part:

(b) The filing of a petition under section 301, 302, or 303 of this title ... does not operate as a stay—

* * * *

(4) under paragraph (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit ... to enforce such governmental unit’s ... 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 ... police or regulatory power[.]

The court decided “that a governmental unit which determines that its police power or regulatory proceeding is excepted from the automatic stay under § 362(b)(4) is not required to petition the bankruptcy court for relief from the stay prior to continuing its proceeding.” *Id.* at 939. Section 362(b)(4) “provides that governmental actions to enforce police or regulatory powers are *automatically excepted* from the operation of the automatic stay.” *Id.* (emphasis added). Thus, “[t]here is no occasion ... to seek relief from a stay which has no application to the proceeding in question.” *Id.* Accordingly, “the NLRB, acting on the belief that its unfair labor practice proceeding was excepted from the operation of the automatic stay, permissibly proceeded with the hearing without obtaining relief from the stay in the bankruptcy court.”⁷ *Id.* The court noted further that while it would have been permissible for the NLRB to have petitioned the bankruptcy court for permission to proceed with its unfair labor practice proceeding, the Bankruptcy Act did not require that the NLRB do so. The court found support for this conclusion in the legislative history of 11 U.S.C. § 362, which states: “By excepting an act or action from the automatic stay, the bill simply requires that the trustee move the court into action, rather than requiring the stayed party to request relief from the stay.” *Id.* at 941 (quoting S. Rep. No. 989, 95th Cong., 1st Sess. (1978), *reprinted in* 1978 U.S.C.C.A.N. at 5837).

The Third Circuit cited this decision with approval when it concluded that it had jurisdiction to determine whether 11 U.S.C. § 362(b)(4)’s exception applied to a proceeding that the Secretary of Labor had commenced in the Third Circuit’s original jurisdiction under the OSH Act against an employer/debtor to enforce a final order of the Commission. *Brock v. Morysville Body Works, Inc.*, 829 F.2d 383, 387 (3d Cir. 1987) (citing *Edward Cooper Painting*, 804 F.2d at

⁷ The Sixth Circuit observed, however, that if the NLRB had been determined to have erred in concluding that its proceeding had been excepted from the automatic stay, then “the entire NLRB proceeding would be void *ab initio* as an act taken in violation of the stay.” *Id.* at 940.

939, approvingly).

The Federal Mine Safety and Health Review Commission (FMSHRC) reached the same conclusion. *Sec’y of Labor v. Jim Walter Resources, Inc.*, 12 FMSHRC 1521, 1529 (1990). FMSHRC, like the Commission, is an independent agency that adjudicates actions brought by the Secretary of Labor to enforce workplace health and safety standards. Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. In *Jim Walter*, FMSHRC relied on both *Edward Cooper Painting* and *Morysville Body Works* in holding it possessed “jurisdiction in this proceeding to determine the effect, if any, of the bankruptcy matter on continuation of this proceeding.” 12 FMSHRC at 1529.

No precedent contrary to the foregoing authorities has been cited by the parties or found. The Third Circuit’s decision in *Morysville Body Works* is especially compelling, as it is likely that a petition for judicial review or for enforcement of a final order in this proceeding would be filed in that court under 29 U.S.C. § 660. *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (stating that where it is probable that a decision will be appealed to a certain circuit, the Commission generally applies the law of that circuit). Considering the text of the statute and the relevant precedent, the Commission has the authority to determine whether one of its proceedings is excepted from the automatic stay under 11 U.S.C. § 362(b)(4).

*The § 362(b)(4) Exception
Applies to this Commission Proceeding*

The “police and regulatory power” exception found in 11 U.S.C. § 362(b)(4) applies to actions by “a governmental unit . . . to enforce such governmental unit’s . . . police or regulatory power.” 11 U.S.C. § 362(b)(4). The Bankruptcy Code defines the term “governmental unit” to include the “United States; . . . department, agency, or instrumentality of the United States. . . .” 11 U.S.C. § 101(27). Under this definition, the Secretary, the Department of Labor, and OSHA

are certainly “governmental units.” See *Jim Walter*, 12 FMSHRC at 1529 (stating “[t]here is no question that the Secretary, Department of Labor, and Mine Safety and Health Administration are all ‘governmental units’ within the meaning of the Bankruptcy Code”).

As this Commission proceeding is brought by a “governmental unit” within the meaning of 11 U.S.C. § 362, the next question is whether that governmental unit is seeking to enforce its “police” or “regulatory” power in this proceeding. 11 U.S.C. § 362(b)(4). Proceedings to enforce such powers include those to “stop violation of fraud, environmental protection, consumer protection, *safety*, or similar police or regulatory laws, or attempting to fix damages for violation of such a law.” *Morysville Body Works*, 829 F.2d at 388 (quoting legislative history addressing the exception at H.R. Rep. No. 595, 95th Cong., 2d Sess. 343, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6299 (emphasis supplied by court)).

The Third Circuit has “found that paragraph (4), together with paragraph (5), exempts from the automatic stay equitable actions brought by state and federal agencies to correct violations of regulatory statutes enacted to promote health and safety.”⁸ *Id.* Likewise, the automatic stay provision does not preclude “proceedings by governmental units attempting to fix damages for violation of such a [health and safety] law.” *Id.* at 389 (quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. 343, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6299); *accord Edward Cooper Painting*, 804 F.2d at 942-43 (quoting *In re Herr*, 28 B.R. 465, 469 (Bankr. D. Me. 1983) and stating that “once

⁸ The phrase “together with paragraph (5)” in this quotation is a reference to the former 11 U.S.C. § 362(b)(5), which Congress struck from the statute in 1998 in order to consolidate it into 11 U.S.C. § 362(b)(4). Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105–277, § 603, 112 Stat. 2681 (1998). That 1998 Act wove the following language from stricken 11 U.S.C. § 362(b)(5) into current 11 U.S.C. § 362(b)(4): “[including] the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit’s police or regulatory power[.]” *Id.* Accordingly, case law such as *Morysville Body Works* that refers to the subsequently stricken 11 U.S.C. § 362(b)(5) remains germane when applying current 11 U.S.C. § 362(b)(4).

proceedings are excepted from the stay by section 362(b)(4), courts have allowed governmental units to fix the amount of penalties, up to and including entry of a money judgment”). The Third Circuit accordingly granted the Secretary’s petition to enforce the component of the Commission’s final order requiring the employer/debtor to abate violations of the OSH Act, ruling that this component of the Secretary’s petition was excepted from the automatic stay. *Id.* at 388-89.

But the Third Circuit ruled that another component of the Secretary’s petition to enforce the Commission’s final order was not excepted from the automatic stay. The court drew a distinction when it came to the Secretary’s petition to enforce a money judgment against the employer/debtor for the monetary penalty that had been assessed by the Commission’s final order. *Id.* at 389. Such an action is distinct from ones that adjudicate an employer’s responsibility for OSH Act violations, or that direct employers to correct violations, or that fix monetary penalties for violations. *Id.* A petition to collect monetary penalties assessed as a result of a governmental regulatory action is akin to enforcing “a money judgment” and therefore is *not* excepted from the automatic stay. *Id.*; *Jim Walter*, 12 FMSHRC at 1530 (observing that “[t]he courts have recognized that adjudicatory bodies presiding over a governmental ‘police or regulatory’ action may enter a money judgment against a respondent-debtor but may not permit collection of that pecuniary judgment in an enforcement action”). In other words, actions to determine whether there has been a violation of the OSH Act are permissible even if the final decision may require an employer to act or may assess a monetary penalty. *Id.* What is stayed during the pendency of the bankruptcy proceedings is an action or proceeding to collect a monetary penalty. *Id.*

Conclusion

The Secretary seeks a final order of the Commission (1) finding that Nash violated the OSH Act in the manners alleged in the citation, (2) ordering Nash to correct the alleged unabated violation (item two), and (3) assessing monetary civil penalties. Each of these potential components of a final order of the Commission is excepted from the automatic stay by the automatic exception of 11 U.S.C. § 362(b)(4).

SO ORDERED.⁹

s/ William S. Coleman
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: July 17, 2020

⁹ A copy of this order shall be sent to bankruptcy counsel for Nash for his information.