

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

Office of Administrative Law Judges  
1331 Pennsylvania Avenue, N.W., Suite 520N  
Washington, D.C. 20004

January 9, 2018

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. SE 2017-236-M
Petitioner,	:	A.C. No. 38-00600-443931 (1BU)
	:	
v.	:	
	:	
BLANCHARD MACHINERY COMPANY,	:	Mine: Haile Gold Mine
Respondent.	:	

**ORDER GRANTING SECRETARY’S MOTION TO AMEND PLEADING**  
**AND**  
**ORDER ACCEPTING APPEARANCE**

This case is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. It is hereby **ORDERED** that Conference and Litigation Representative (“CLR”) Brandon E. Russell be accepted to represent the Secretary in accordance with the Notice of Limited Appearance he filed with the penalty petition. *Cyprus Emerald Res. Corp.*, 16 FMSHRC 2359 (Nov. 1994).

**I. Procedural Background**

On November 1, 2017, Chief Administrative Law Judge Robert J. Lesnick notified the parties that Docket No. SE 2017-236-M had been designated for Simplified Proceedings and was assigned to me. On November 14, 2017, I discontinued Simplified Proceedings and issued my Prehearing Order requiring the parties either to settle this matter or position it for hearing by April 3, 2018.

On December 7, 2017, the CLR on behalf of the Secretary filed a Motion to Amend Citation requesting amendments to Citation No. 8792386. (Mot. at 1–4.) Respondent timely filed a response on December 15, 2017, asserting that the Secretary’s motion to amend should be denied as futile. (Resp. at 1–4.)

**II. Principles of Law**

The Commission has held that modification of a citation is analogous to the amendment of pleadings under Federal Rule of Civil Procedure 15(a), which states that leave for amendment “shall be freely given when justice so requires.” *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting Fed. R. Civ. P. 15(a)). Accordingly, amendments are to be liberally granted unless one of the following factors justifying denial is present: (a) undue delay; (b) bad faith by moving party; (c) repeated failure to cure deficiencies by previous amendments; (d) undue prejudice to the opposing party; or (e) futility of amendment. *Foman v. Davis*, 371 U.S.

178, 182 (1962); see *Wyoming Fuel Co.*, 14 FMSHRC at 1290 (citing *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990); 3 J. Moore & R. Freer, *Moore's Federal Practice* ¶ 15.08[2], 15–47 to 49 (2d ed. 1991)).

An amendment is futile if it could not survive a motion to dismiss for failure to state a claim. *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995) (citing *Glick v. Koenig*, 766 F.2d 265, 268–69 (7th Cir. 1985)). The Commission's Procedural Rules do not provide formal guidance on a motion to dismiss for failure to state a claim. However, Commission Judges have treated such filings as motions for summary decision. See, e.g., *Kerlock v. Asarco, LLC*, 36 FMSHRC 2404, 2405 (Aug. 2014) (ALJ); *Sec'y of Labor on behalf of Chaparro v. Comunidad Agrícola Bianci, Inc.*, 32 FMSHRC 1517 (Oct. 2010) (ALJ); *Sec'y on behalf of Brewer v. Monongalia Cnty. Coal Co.*, 38 FMSHRC 1876 (July 2016) (ALJ). Commission Procedural Rule 67(b) provides that a motion for summary decision shall be granted only if “the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows: (1) [t]hat there is no genuine issue of material fact; and (2) [t]hat the moving party is entitled to summary decision as a matter of law.” 20 C.F.R. § 2700.67(b).

### III. Discussion and Analysis

In his motion, the Secretary requests that the cited standard be modified from “30 C.F.R. § 47.41(a)(1)” to “30 C.F.R. § 56.4402.” (Mot. at 2.) Section 56.4402 provides that “[s]mall quantities of flammable liquids drawn from storage shall be kept in safety cans labeled to indicate the contents.” 30 C.F.R. § 56.4402. Additionally, the Secretary proposes to amend Section 8 of the citation to now read:

A five (5) gallon safety can was observed was sitting in rear of the International service truck without labeling containing the appropriate information on it. The 1/3 full contained had what appeared to be oil based substance (Gasoline Fuel) in it. The purpose of the label is to reduce the possibility of injury or illness by ensuring that each miner is provided correct information about *the hazardous properties of the contents* and appropriate protective measures to be taken. Should a miner *allow gasoline vapors to contact any ignition source, it would result a flash fire and potential burns.*

(Mot. at 2) (emphasis notes changed language.) The Secretary states that the proposed amendments more accurately depict the violation that occurred, but do not substantively change the factual basis of the violation alleged by the Secretary. (*Id.*) The Secretary asserts that the amendments would not prejudice Respondent because the facts and witnesses remain the same, the parties have not yet completed discovery, and a hearing date has not yet been scheduled. (*Id.* at 3.)

In its response to the motion, Respondent contends only that the proposed amendments are futile. (Resp. at 3.) Respondent argues that it did not violate the proposed amended standard, 30 C.F.R. § 56.4402, because it is exempted from coverage by 30 C.F.R. § 47.44. (*Id.*)

Respondent claims that amending the citation to allege a violation of section 56.4402 instead of section 47.41 is futile because Respondent meets an exception to both sections, and therefore did not violate either. (*Id.* at 4.)

In order to establish that the Secretary's proposed amendments are futile, Respondent must prove it would be entitled to summary decision as a matter of law, even if the proposed amendments were accepted. *See Perkins*, 55 F.3d at 917; *see, e.g., Kerlock*, 36 FMSHRC at 2405; *Chaparro*, 32 FMSHRC 1517; *Brewer*, 38 FMSHRC 1876. In this regard, Respondent asserts that the alleged facts of the violation fit an exception to the container labeling requirements provided in section 47.44. Section 47.44 states that "[t]he operator does not have to label a temporary, portable container if he or she ensures that the miner" using the portable container "[k]nows the identity of the chemical, its hazards, and any protective measures needed," and "[l]eaves the container empty at the end of the shift." Respondent claims that section 47.44 applies because the gasoline was kept in a "temporary, portable container," the operator of the vehicle where the container was kept knew of the container's contents, and the container was emptied at the end of his shift. (Resp. at 3-4.)

Despite Respondent's arguments, there remain genuine issues of material fact as to whether the "five (5) gallon safety can" that the Secretary identified in Citation No. 8792386 was a "temporary, portable container" and thus covered by the exception found in section 47.44. As such, Respondent has not established that the proposed amendments would not survive a motion for summary decision at this juncture and are thus futile.

Respondent has not offered any arguments that the Secretary's proposed amendments would unduly delay the hearing, are motivated by bad faith, fail to cure deficiencies by previous amendments, or would unduly prejudice Respondent. I therefore see no reason to disallow the Secretary's proposed amendments.

#### IV. Order

Accordingly, the Secretary's Motion to Amend Pleading is **GRANTED**. It is hereby **ORDERED** that the pleadings in Citation No. 8792386 are **AMENDED** in accordance with the Secretary's motion, as indicated in the motion and in my discussion *supra* Part III.



Alan G. Paez  
Administrative Law Judge

Distribution: (Via Electronic Mail & U.S. Mail)

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