

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1244 SPEER BOULEVARD #280  
DENVER, CO 80204-3582  
303-844-3577/FAX 303-844-5268

July 27, 2001

CDK CONTRACTING COMPANY,	:	CONTEST PROCEEDINGS
Contestant	:	
	:	Docket No. WEST 2001-154-RM
v.	:	Citation No. 7941750; 12/05/2000
	:	
	:	Portland Plant & Quarry
SECRETARY OF LABOR,	:	Mine Id 05-00037 L35
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, (MSHA),	:	
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2001-298-M
Petitioner	:	A.C. No. 05-00037-05504 L35
	:	
v.	:	Portland Plant & Quarry
	:	
CDK CONTRACTING COMPANY,	:	
Respondent	:	

**ORDER GRANTING SECRETARY’S MOTION TO AMEND CITATION TO ALLEGE VIOLATIONS OF TWO ALTERNATIVE SAFETY STANDARDS**

The Secretary filed a motion to amend Citation No. 7941750 and the penalty petition for WEST 2001-298-M to allege, in the alternative, that CDK Contracting Company (“CDK”) violated 30 C.F.R. § 56.14105 in addition to the allegation in the citation that CDK violated section 56.12106. The Secretary is not seeking to substitute the one allegation for the other but is seeking to have the citation and penalty petition amended to allege violations of both safety standards, in the alternative. In support of her motion, the Secretary states that under Fed. R. Civ. P. 8(e)(2) “a party may set forth two or more statements of a claim . . . alternately . . . either in one count . . . or in separate counts . . . .” The Secretary also relies upon the decision of former Commission Administrative Law Judge Lasher in *Mid-Continent Resources, Inc.*, 10 FMSHRC 191, 202-03 (Feb. 1988).

CDK opposes the motion. CDK states that under section 104(a) of the Federal Mine Safety and Health Act, 30 U.S.C. § 801, *et seq.* (“Mine Act”), the Secretary is required to “includ[e] a reference to *the provision* of the Act, standard, rule, regulation, or order alleged to

have been violated.” (emphasis added). CDK maintains that the Secretary is without authority to allege violations of alternative safety standards in a citation or order. In addition, it argues that it will be materially prejudiced by granting the Secretary’s motion because it will have to conduct additional discovery, undertake additional legal research, and prepare to defend against alternative legal theories at the hearing. In addition, because CDK will be ending its operations in Fremont County, Colorado, by the end of September 2001, many of its potential witnesses will no longer be available if the hearing is postponed from its currently scheduled date.

Although I appreciate CDK’s concerns, I conclude that the Secretary is authorized to amend her pleadings in this case to allege violations of two alternative safety standards. It is well settled that administrative pleadings are liberally construed and easily amended, as long as adequate notice is provided and there is no prejudice to the opposing party. The only issue is whether CDK is prejudiced by the amendment. The case cited by the Secretary does not discuss the issue raised by the Secretary’s motion and I was unable to find any other Mine Act cases on point. The Secretary, under the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, (“OSH Act”), frequently alleges violations of two alternative standards. For example, she often alleges a violation of a specific safety standard and the OSH Act’s general duty clause. She has also sought to amend a citation to include two alternative safety standards. “When an amendment puts no different facts in issue than the original citation, reference to an additional legal standard is not prejudicial.” *Donovan v. Royal Logging Co.*, 645 F.2d 822, 827 (9<sup>th</sup> Cir. 1981) *citing So. Colo Prestress v. Occup. Safety & H. R. Comm.*, 586 F.2d 1342, 1346-47 (10<sup>th</sup> Cir. 1978).

The contested citation alleges that an employee was injured by a descending elevator when he was helping to install a handrail in an area adjacent to the path of the elevator. The citation contains a rather detailed description of the accident. The MSHA inspector cited section 56.12016, which provides, in part, that electrically powered equipment shall be de-energized before mechanical work is performed on such equipment. The Secretary seeks to add, in the alternative, a violation of section 56.14105, which provides, in part, that repairs or maintenance of machinery or equipment shall be performed only after the power is off. The requirements of these two safety standards are similar. The proposed amendment does not place “different facts in issue than the original citation.” I find that there is no inherent prejudice in the proposed amendment.

The hearing on the contested citation is scheduled for October 10, 2001. Consequently, CDK has sufficient time to serve additional discovery and prepare alternative defenses. Because CDK is closing its operations at its Colorado site by the end of September, time constraints are present in these cases that are untypical. Consequently, it is hereby **ORDERED** that, if CDK serves additional discovery on the Secretary, the Secretary shall put forth its best efforts to respond to CDK’s discovery as quickly as possible. The Secretary’s answers and responses to interrogatories, requests for admissions, and requests for production of documents, under 29 C.F.R. § 2700.58, **SHALL** be provided to CDK within **18 days** of service.

For the reasons set forth above, the Secretary's motion to amend Citation No. 7941750 and her pleading in WEST 2001-298-M is **GRANTED**, subject to the provisions of this order.

Richard W. Manning  
Administrative Law Judge

Distribution:

Gregory W. Tronson, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550,  
Denver, CO 80201-6550

Danielle M. Bonett, Esq., Jackson & Kelly, 1099 18<sup>th</sup> Street, Suite 2150, Denver, CO 80202

RWM