

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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May 31, 2018

SECRETARY OF LABOR
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
Petitioner

v.

PENNSY SUPPLY INC.,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. YORK 2018-4-M
A.C. No. 07-00059-449176

Mine: Bay Road Plant #7

ORDER GRANTING MOTION TO AMEND

Before: Judge Rae

This case is before me upon the Secretary’s petition for assessment of civil penalty under section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815. On April 24, 2018, I set this matter for hearing on June 12, 2018, in Dover, Delaware.

On May 21, 2018, the Secretary filed a motion seeking to amend two citations contained in this docket, Citation Nos. 8802227 and 8802228, to allege the violations as section 104(d) citations with high negligence. (Mot. at 1.) Both citations were originally alleged as section 104(a) citations with moderate negligence. (*Id.*) The Secretary contends the amendments seek only to change the negligence and add an unwarrantable failure designation to each citation. (*Id.* at 2.) The Secretary states that he discovered new evidence during discovery that warrants the proposed amendments. (*Id.* at 3.) The Secretary also asserts that the amendments are not a result of bad faith, nor would they prejudice the Respondent or cause undue delay. (*Id.* at 3–4.)

The Respondent timely filed a response on May 22, 2018, asserting that the proposed amendments would require the Respondent to conduct further discovery and would therefore prejudice the Respondent and delay the hearing. (Resp. at 2.) The Respondent also argues that the proposed amendments are made in bad faith and that the Secretary has not offered any plausible excuse as to why the amendments could not have been made earlier. (*Id.* at 1–2.)

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” unless the moving party has been guilty of bad faith, has acted for the purpose of delay, or where the trial of the issue will be unduly delayed. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting Fed. R. Civ. P. 15(a)). Delay alone is not a sufficient basis upon which to deny a motion to amend, even when such motion

comes on the eve of trial. *Cypress Empire Corp.*, 12 FMSHRC 911, 916 (1990) (“Delay alone, regardless of length, does not bar a proposed amendment if the other party is not prejudiced.”)

In this case, the Respondent acknowledged receipt of the Secretary’s motion on May 21, 2018, approximately three weeks before the scheduled hearing. (Resp. at 1.) The Respondent has not raised any basis to find actual prejudice or reason for delay in this proceeding in its response to the Secretary’s motion. The Secretary avers that there are no new facts upon which the modification is sought, and the basis for reassessing the negligence is based upon information the Secretary learned during the discovery process, indicating that the facts were equally available to the Respondent, if not in the possession of the Respondent.

Based on the above, I conclude that the Secretary’s proposed amendments are not made in bad faith, to delay this proceeding, or prejudicial to the Respondent. I also find that the Respondent has not demonstrated actual prejudice as a result of the amendment to the negligence allegations. Accordingly, the Secretary’s motion to amend the petition is hereby **GRANTED**.

In granting the Secretary’s motion, the Secretary is hereby **ORDERED** to make the MSHA inspector available for a supplemental deposition telephonically, or otherwise, at the Respondent’s discretion. The deadline for submitting a supplemental witness and exhibit list by the Respondent is extended until close of business on June 11, 2018. The hearing will be conducted on June 12, 2018, as scheduled.



Priscilla M. Rae
Administrative Law Judge

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