FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 6, 2013

SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. NEW NGC INCORPORATED, Respondent	CIVIL PENALTY PROCEEDING Docket No. CENT 2013-538-M A.C. No. 41-02670-323136 Mine: Posey Pit

ORDER

Before: Judge Rae

This case is before me upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d) (2000) ("the Mine Act" or "the Act").

On August 29, 2013, the Secretary filed a motion to amend Citation No. 8764751 to plead, in the alternative, that New NGC Incorporated (Respondent) violated 30 C.F.R. § 56.4104(b) in addition to the allegation in the citation that Respondent violated section 56.4104(a).[1] On September 5, 2013, Respondent filed a response in opposition to the Secretary's motion. For the reasons set forth below, the Secretary's motion is granted.

The Procedural Rules provide that the Commission's judges shall be guided by the Federal Rules of Civil Procedure "[o]n any procedural question not regulated by Act, these Procedural Rules, or the Administrative Procedure Act." 29 C.F.R. § 2700.1(b). Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend a complaint shall be "freely given when justice so requires." Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182

[1] The standard cited states waste materials shall not accumulate in quantities that create a fire hazard. 30 C.F.R. § 56.4104(a). The standard that the Secretary seeks to plead in the alternative requires such materials be placed in covered metal or other non-flammable containers prior to disposal. 30 C.F.R. § 56.4104(b).

(1962). The Commission has taken a liberal view when it comes to amending complaints, "especially when... they do not prejudice a party in preparing its defenses." *Brannon v. Panther Mining, LLC*, 31 FMSHRC 1277, 1279 (2009) (ALJ); *see also Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (1990); *El Paso Rock Quarries, Inc*., 3 FMSHRC 35, 38 (January 1981); *Bak Construction*, 2006 WL 2927263 at *6 (ALJ). Among the permissible purposes of such amendments are changes in the nature of the plaintiff's claims or legal theories. E.g., Moore's, supra, Par. 15.08[3]. Delay alone, regardless of length, does not bar a proposed amendment if the other party is not prejudiced. Moore's, Par. 15.08[4]. The Commission has further stated that, in accordance with F.R.C.P. 15(b), even the conformance of pleadings to the evidence adduced at trial may be permissible. *Faith Coal Co.*, 19 FMSHRC 1357, 1361-62 (1997). Provided adequate notice is given and there is no prejudice to the opposing party, administrative pleadings are to be liberally construed and easily amended. *CDK Contracting Company*, 23 FMSHRC 783, 784 (2001) (ALJ); *Bak*, 2006 WL 2927263 *1, * 6 (Sept. 11, 2006) (ALJ). The grant or denial of a motion for leave to amend is within the sound discretion of the court and will be reversed only for an abuse of discretion. *Jim Walter Resources*, No. SE 2010-351, 2013 WL 3865345 *4 (June 12, 2013) (ALJ), *citing Zenith Radio Corp. v. Hazeltine Research, Inc*., 401 U.S. 321, 330 (1971); *Foman*, 371 U.S. at 182.

The Secretary moves to amend the citation to add an allegation that Respondent violated section 56.4104(b) on the grounds that justice so requires it. He contends that Respondent will suffer no prejudice because formal discovery has not begun at this time, and the Secretary will rely mainly on facts stated in the body of the Citation and described in the Inspector's notes.

Respondent argues that the motion should be denied on three grounds. First, Respondent contends that the Secretary should not be allowed to allege the violation of multiple standards in a single citation. The issuing inspector was afforded the opportunity to inspect the site and, at the conclusion of the inspection, failed to identify any alleged violations of 30 C.F.R. §56.4101(b). Respondent asserts that the two standards impose distinct requirements on an operator and that the Secretary should not be permitted to argue the Respondent violated both standards. The inspector has been trained by MSHA to competently review the alleged hazards and determine the correct standard for issue, and failed to issue a citation for an alleged hazard under 30 C.F.R. §56.4104(b). Second, Respondent contends that it would be prejudiced if the motion is granted, as the Secretary requests the amendment as a change in litigation position after the parties have commenced litigation and negotiations. Citation No. 8764751was issued five months ago on April 2, 2013. Respondent argues that the Secretary has had ample opportunity to correct an error by the inspector, with no action. Respondent claims that it invested miner and financial assets to abate a citation under 30 C.F.R. § 56.4101(a), and that granting the Secretary's motion could impose new and additional abatement requirements under 30 C.F.R. § 56.4104(b). Finally, Respondent argues that it was not provided fair notice that an alleged violation existed under 30 C.F.R. §56.4104(b) at the time of inspection. MSHA's failure to cite a condition during an inspection should not be permitted because the Secretary's representative did not view the alleged hazard and cannot verify that a hazard existed at the time of issuance.

I do not find Respondent's argument persuasive that the Secretary lacks authority to allege multiple violations in a citation. 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. Likewise, I am not persuaded by Respondent's argument that it was not provided fair notice because the inspector did not view the alleged hazard. Whether the inspector can verify the hazard goes to credibility, which is an issue for me to decide at hearing. The only issue for the purposes of this Order is whether Respondent is prejudiced by the Secretary's amendment. *See CDK*, 23 FMSHRC at 783.

The Commission has stated "[m]ere allegations of potential prejudice or inherent prejudice should be rejected," and a Respondent must demonstrate more than a danger of prejudice to show actual prejudice. *Long Branch Energy*, 34 FMSHRC 1984, 1993 (2012); *PBS Coals*, 2013 WL 3152306 at *16 (May 2013). The Commission has given examples of actual prejudice, which include the inability of witnesses to appear at hearing or "lateness so great as to unduly delay a hearing." *Long Branch*, 34 FMSHRC at 1992. The majority of other examples of prejudice arise when motions are filed during or after hearing has occurred. *Cumberland Coal Resources*, 32 FMSHRC 442, 446-49 (May 2010) (denying Secretary's motion to amend her pleadings at oral argument); *Jim Walter Resources*, No. SE 2010-351, 2013 WL 3865345 *4 (June 12, 2013) (ALJ) (denying Secretary's motion to amend citation to align it with inspector's revised assessment of citation at hearing); *Consolidation Coal*, 33 FMSHRC 2632, 2633 (Oct. 2011) (ALJ) (denying Secretary's motion to amend as untimely when filed almost three months after hearing and days before briefs were due); *cf. Boart Longyear Co*., No. WEST 2012-248-RM, 2013 WL 3947971 *2 (ALJ) (denying motion prior to hearing where the two safety standards at issue were not "virtually identical" and the evidence presented regarding both would not be "equally applicable."). Accordingly, the Commission and its Judges have generally been more willing to grant motions to amend prior to a hearing.[2]

Respondent's arguments that it would suffer prejudice are unpersuasive given the procedural posture of this case. It is not in litigation. It has not yet been scheduled for hearing and only informal exchanges of information have been made in an attempt to settle it and two other dockets pursuant to my pre-hearing order. While it is true the company may feel compelled to amend its answer and conduct additional discovery, the expenses "inherent in such activities are the necessary consequences of litigation, costs the company (and any litigant) must be prepared to bear." *Brannon*, 31 FMSHRC at 1279. The fact that the citation was written 5 months ago is not persuasive. This is a relatively new case, and most cases that come up for hearing are significantly older. Furthermore, there is no indication that MSHA is going to require Respondent to perform any other action to abate this citation so there is no additional expense involved in this instant case. Any suggestion otherwise at this point is pure speculation. Furthermore, there has been no evidence of bad faith or dilatory motive on the part of the

[2] This interpretation is consistent with the language of Rule 15 of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 15. Rule 15(a) allows amendments before trial to a party as a matter of course within "21 days" after serving its pleading or "if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." In all other cases, a party may amend its pleading with the opposing party's written consent or the court's leave and the court should "freely give leave when justice so requires." For amendments made during and after trial, however, the rules are somewhat stricter. In such cases, the rule permit an amendment only when it aids in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits.

Secretary. Accordingly, Respondent's arguments fail and I find that it will not be prejudiced by the addition of the allegation of the violation of 30 C.F.R. § 56.4104(b).

WHEREFORE, the Secretary's Motion to Amend is **GRANTED**.

/s/ Priscilla M. Rae
Priscilla M. Rae
Administrative Law Judge

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