FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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January 27, 2014

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION, (MSHA), Petitioner	CIVIL PENALTY PROCEEDING Docket No. WEST 2013-526-M A.C. No. 24-02016-314135
v.	
PORTABLE INC., Respondent	Wash Plant

ORDER ON MOTIONS

This matter involves a section 104(a) citation, alleging that the Respondent impeded an MSHA inspection at its mine, in violation of section 103(a) of the Mine Act. Before the Court are two motions, both filed by the Secretary. First, there is the Secretary's January 10, 2014 Motion to Plead in the Alternative and, second, its January 22nd Motion for a Protective Order. Respondent, Portable's, Opposition to the motion to plead in the alternative and its Response to the protective order were filed and considered by the Court. For the reasons which follow, the Motion to Plead in the alternative is GRANTED, while the Motion for a protective order is DENIED. The motions are discussed in turn.

The Secretary's Motion to Plead in the Alternative

As stated in the Secretary's Motion, this case involves one citation, alleging the impeding of an inspection at Respondent's mine, in violation of Section 103(a) of the Mine Act. Here, the Secretary seeks to plead in the alternative that the Respondent also violated the same provision of the Act by providing advance notice of that inspection. Motion at 1. The Secretary points to Review Commission decisions and the Commission's procedural rules in support of granting such amendments where they present an alternative theory for recovery and where such pleading amendments are consonant with justice being achieved. Only two bases for denying such amendments have been recognized: where bad faith, dilatory conduct and undue delay are at the root of the request; or where granting the request would create prejudice. *Id.* at 3. In this instance, the Secretary emphasizes that its motion involves the same provision of the Act and puts forth only an alternative theory of recovery: "[t]he facts, witnesses, and evidence that the Secretary will proffer in litigating the alleged violation for impeding [ ] [the] inspection will largely mirror the evidence he uses to prosecute the alleged advance-notice violation." *Id.*
It notes that the proof for both theories "will refer to the exact same conduct as originally described in the citation" and therefore no prejudice will result to the Respondent. *Id.*

In its Opposition, Respondent, Portable, observes that in his deposition the issuing inspector stated that the citation he issued was based on being unduly delayed in commencing his inspection and further that he did *not* issue the citation on the basis that there had been advance notice given of the inspection. Portable contends that it would be prejudiced if the amendment is permitted because it would experience "undue difficulty in defending this lawsuit based on the Secretary's delay in both arriving at and asserting such claim." Opposition at 3. That "undue difficulty," however, is not identified other than it "would result in the accrual of additional time and expenses." *Id.* At the same time, Respondent notes that the Secretary has attempted to shut the door on an additional deposition of the inspector regarding the advance notice claim by its filing a motion for a protective order. This latter motion, it is contended, "further prejudices" Respondent. *Id.* at 4.

Upon consideration, the Court grants the Secretary's Motion to plead in the alternative. There is no dispute over the appropriate law to apply when the Secretary seeks to amend its complaint. Indeed, both sides point to *Wyoming Fuel Co.*, 14 FMSHRC 1282 (Aug. 1992), as guiding Commission precedent. Sec. Motion at 2, Respondent's Opposition at 3. As set forth in *Wyoming Fuel Co.*, and several other cases, such motions are evaluated by determining if the mine operator suffered prejudice by the amendment. As applicable here, that translates into whether the operator is "able to adequately prepare for hearing." *Sec. v. Black Beauty Coal Co.,* 34 FMSHRC 1733, 2012 WL 3255590, (Aug. 2012). There has been no showing that the Respondent will not be able to adequately so prepare. Further, it has been observed that the Federal Rules of Civil Procedure may be consulted, as a source of guidance, where the Commission's procedural rules do not fully address a question. In that regard, Rule 15(a) of Federal Rules provides that such amendments to pleadings should be liberally allowed, in the interest of justice being done.[1] As noted above, while the Respondent has alleged undue difficulty in defending the lawsuit, it has not supported that claim.

The Secretary's Motion for Protective Order

[1] As the Commission observed in *Wyoming Fuel,* "In Federal civil proceedings, leave for amendment "shall be freely given when justice so requires."Fed. R. Civ. P. 15(a). The weight of authority under Rule 15(a) is that amendments are to be liberally granted 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. See 3 J. Moore, R. Freer, Moore's Federal Practice.Par. 15.08[2], 15-47 to 15-49 (2d ed. 1991) ("Moore's"). And, as explained in *Cyprus Empire*, legally recognizable prejudice to the operator would bar otherwise permissible modification." *Wyoming Fuel* at *1290, also citing *Cyprus Empire Corp*., 12 FMSHRC 911, 916 (May 1990).

The Secretary's Motion for Protective Order is related to its Motion to plead in the alternative and it is evaluated in light of that fact. The essence of the Secretary's Motion for a protective order is that Portable has already had its opportunity to question the Inspector who issued the citation. It is true that the Respondent deposed the Inspector on December 18, 2013. The Secretary contends that because the issuing Inspector, during his deposition, made reference to the event and remarked that, looking back on what transpired that day, he believed the mine's conduct gave notice that he was present for an inspection, that testimony effectively notified the Respondent of the alternative violation theory. The Secretary continues that it was the Inspector's impression that the mine was trying "to delay [the inspection] as much as possible. The Inspector stated that, "Phone calls were made to the mine while [he] was outside waiting for them, for somebody to escort [him] in, you know, looking back at it now, you know, giving them notice that [he] was there." Sec. Motion at 2, quoting Inspector Bellfi's Deposition at 11:19-12:3. On this basis, the Secretary asserts that the Inspector's response should have prompted Respondent's Counsel to inquire further about the suggestion that Portable had given advance notice of the impending inspection.

The problem with the Secretary's criticism is that Portable *did inquire* about the suggestion, asking the Inspector directly if he believed that the operator had violated the advance notice prohibition. The Inspector responded that he did *not* believe advance notice had occurred. It is true that the Respondent did not belabor the point. It took the Inspector's denial as the answer. The Secretary apparently believes that the Respondent should not have taken the Inspector's "no" for an answer.

The Secretary contends that its Motion to Plead in the Alternative, discussed *supra*, was based "not on [Inspector] Bellfi's specific perceptions . . . but rather [on] the testimony of Portable's own employees."[2] Motion to Plead in the Alternative at 3. However, the Secretary does not disavow that it will use the issuing inspector's testimony to support its alternative pleading claim. It also asserts that, beyond having already had an ample bite at the apple, allowing a second deposition would be unreasonably cumulative or duplicative and therefore should be denied, following the guidance offered pursuant to Federal Rule of Civil Procedure 26(b)(2).

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[2] The Secretary also makes procedural complaints about Portable's effort to depose the Inspector a second time, noting that the Respondent's deposition notice did not specify a date and time, nor did it specify the reason for taking it. It also observes that Portable did not first confer with the Secretary before serving its deposition notice and that it did not seek leave of the Court to conduct the second deposition. Looking to the Federal Rules of Civil Procedure for guidance, the Secretary contends that these objections form independent bases to grant the protective order. Portable's Response states that a date and time were not specified simply because it wanted to confer with Secretary and arrive at an acceptable schedule. Subsequently, with no agreed-upon date, Portable served it notice for deposition for January 28th, in Denver, curing that objection.

Motion for Protective Order at 4-5.[3]

In its Response to the Secretary's Motion for a Protective Order, Portable maintains that, given the Inspector's very clear response, when asked if his citation was issued on the basis of an advance notice claim, that it was not so based, it had no cause to delve further. The Court agrees that, while the Inspector reminisced about the event and whether notice had been given that he was at the mine, the unequivocal response from the Inspector that he was not contending an advance notice violation closed the door on that theory, at least at that point in time. For the Secretary to contend that the Respondent should have rooted around further to see if it could stir up an additional basis for the citation's issuance makes no sense.

Portable notes that the resolution of this issue is largely within the judge's discretion. While the Federal Rules may be consulted for *guidance*, they are only that. Further, even if leave of court is required for a second deposition, in this instance it is warranted because, in light of the Secretary's motion to plead in the alternative, Portable has not had an ample discovery opportunity on that new allegation and therefore it is neither cumulative nor duplicative.

As the Court has noted, while the Secretary has filed separate motions, they are linked. The Respondent had no fair warning from the initial deposition of the issuing Inspector that an advance notice theory was looming. In fact, that theory was disavowed by the Inspector. Accordingly, the Secretary's Motion for Protective Order is DENIED.

Therefore, the Respondent may conduct a second deposition of the Inspector who issued the citation being litigated here. However, the Court trusts that, as Respondent has stated, the deposition will be conducted in Denver, where the parties are located, unless they mutually agree to another location. There is ample time to conduct the deposition, as the hearing is still three weeks away. The hearing date will not be rescheduled. The Respondent is directed to limit its questions to those reasonably related to the Secretary's alternative theory that the Respondent provided advance notice and to not ask questions that rehash those already propounded in the first deposition.

/s/ William B. Moran
William B. Moran
Administrative Law Judge

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[3] As an alternative, the Secretary proposes "allowing Portable to serve an additional five interrogatories about Belfi's impressions relating to advance notice." Motion for Protective Order at 6. What those five interrogatories would be or why, for that matter, the number would be "five," is not explained. Given that it is the Respondent's discovery, and although the Court may be called upon to impose limitations on discovery, it is not for the Secretary to set such terms.

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