FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

January 13, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. YORK 2013-212-M A.C. No. 30-00287-330292 (2KX)
v.	:	
NORTH AMERICAN QUARRY AND CONSTRUCTION SERVICES, LLC, and AUSTIN POWDER COMPANY, Respondent.	:	Mine: Mt. Marion Pit and Mill
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	:	CIVIL PENALTY PROCEEDING Docket No. YORK 2015-134-M A.C. No. 30-00287-387349A
v.	:	
MARTY HARRINGTON, formerly employed by NORTH AMERICAN QUARRY AND CONSTRUCTION SERVICES, LLC, Respondent.	:	Mine: Mt. Marion Pit and Mill

ORDER GRANTING SECRETARY'S MOTION TO AMEND PETITION TO ADD AUSTIN POWDER COMPANY AS RESPONDENT

These dockets are before me upon the Secretary of Labor's petitions for the assessment of civil penalty pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815, and section 110(c) of the Mine Act, 30 U.S.C. § 820(c), filed against North American Quarry and Construction Services, LLC ("NAQCS") and Marty Harrington, respectively. The Secretary has now filed a motion to amend its civil penalty petition against NAQCS to add Austin Powder Company ("APC"), NAQCS's parent company, as a respondent under a "unitary operator" theory for purposes of joint and several liability. NAQCS and Marty Harrington ("Respondents") oppose the motion.

I. PROCEDURAL BACKGROUND

MSHA issued one citation and three orders to NAQCS resulting from an investigation into a fatal accident at the Mt. Marion Pit and Mill on November 1, 2012, and all four violations

were designated as flagrant violations, with total civil penalties amounting to $507,720.[1] These violations are contained in Docket No. YORK 2013-0212-M. On March 10, 2014, NAQCS filed a Motion to Stay, pending a related section 110(c) investigation. The Secretary agreed with the Motion to Stay, but requested that I allow discovery to continue as NAQCS had not yet responded to the Secretary's discovery requests. I issued an Order Granting Stay on April 14, 2014, which directed the parties to continue the discovery process during the stay. The Secretary ultimately filed a civil penalty petition under section 110(c) in Docket No. YORK 2015-0134-M against Marty Harrington, a foreman for NAQCS at the time of the accident. As a result, I lifted the stay in Docket No. YORK 2013-0212-M on December 8, 2015, and consolidated the two dockets for hearing.

The parties engaged in a contentious discovery process. On August 19, 2015, the Secretary sent NAQCS a set of interrogatories and document requests seeking information about NAQCS's relationship with APC. NAQCS objected to the interrogatory requests that dealt with APC, claiming that the information was irrelevant, overly broad, unduly burdensome, and protected by the work-product doctrine and attorney-client privilege. The Secretary requested the information again on October 21, 2015. On February 16, 2016, the Secretary served NAQCS with a notice of deposition concerning these topics. NAQCS did not comply with the notice and on February 25, 2016, the Secretary filed a Motion to Compel NAQCS to produce discovery and appear at a deposition focusing on the business relationship between NAQCS and APC. I granted the Secretary's Motion to Compel on March 18, 2016, and ordered NAQCS to produce the eight requested documents, to answer the Secretary's interrogatory, and to designate an individual to appear at the Secretary's deposition.

The parties jointly requested and were granted a 90-day extension and then a 9-day extension. On August 23, 2016, I issued a Notice of Hearing and Order to File Prehearing Report. The matter is currently set for hearing on March 27–31, 2017, in Albany, New York.

II. MOTION TO AMEND

On November 30, 2016, I received the Secretary's Motion to Add APC as a Respondent to Petition for Assessment of Civil Penalty Brought Against NAQCS (hereinafter "Sec'y Mot."), wherein the Secretary seeks to amend his petition to add APC as a respondent with NAQCS under the Commission's "unitary operator" theory. On December 12, 2016, I received NAQCS's Response in Opposition to the Secretary's Motion to Add APC as a Respondent (hereinafter "NAQCS Resp."). On December 15, 2016, I received Harrington's Joinder in

[1] The civil penalty petition for Docket No. YORK 2013-0212-M includes Citation No. 8712623 and Order Nos. 8712625, 8711442, and 8712624. The originally proposed penalty for the four violations was $517,700.00. The Secretary filed an Unopposed Motion to Amend Petition for Assessment of Civil Penalty on March 9, 2015, requesting that the total penalty be reduced to comport with the Secretary's Special Assessment Penalty Conversion Table for Flagrant Violations. I granted the Secretary's Motion on March 12, 2015.

The civil penalty petition under section 110(c) for Docket No. YORK 2015-0134-M includes Citation No. 8712623-00019433A and Order No. 8712625-00019433A.

NAQCS's Response in Opposition to the Secretary's Motion to Add APC as a Respondent (hereinafter "Harrington Resp."), adopting and incorporating NAQCS's response. Thereafter, on December 16, 2016, I received the Secretary's Motion for Permission to File Reply to Respondent NAQCS' Opposition Memorandum to the Secretary's Motion to Add APC As Respondent to Petition for Assessment of Civil Penalty (hereinafter, "Sec'y Reply"), which I hereby grant.

For the reasons that follow, I hereby **GRANT** the Secretary's motion to amend his petition filed against NAQCS to include APC as Respondent with NAQCS, its wholly owned subsidiary, because the Secretary did not act with bad faith or undue delay in filing the motion to amend, NAQCS will not be prejudiced by the addition of APC as Respondent, and the hearing will not be delayed as a result.

A. Principles of Law

The Commission does not have a procedural rule regarding pleading amendments[2] but has analogized the modification of a citation to the amendment of pleadings under Federal Rule of Civil Procedure 15. *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990); Fed. R. Civ. P. 15.[3] Rule 15 states that after more than 21 days after filing initial pleadings, a party may amend its pleading "only with the opposing party's written consent, or the court's leave." Fed. R. Civ. P. 15(a)(2). Rule 15 further states that "[t]he court should freely give leave when justice so requires." *Id.* Rule 15's language has been interpreted to allow amendments unless one of the following factors is present, justifying denial: (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). Particularly, the Commission has explained that legally recognizable prejudice to the operator bars otherwise permissible modification. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992).

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[2] **Error! Main Document Only.**Commission Procedural Rule 1(b) states that "[o]n any procedural question not regulated by the Act, these Procedural Rules, or the Administrative Procedure Act . . . the Commission and its judges shall be guided so far as practicable by the Federal Rules of Civil Procedure." 29 C.F.R. § 2700.1(b).

[3] The Commission has held that granting or denying amendments is largely a discretionary matter with the ALJ to whom the motion is made. *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 38 (Jan. 1981). Relevant to this case, Commission ALJs have granted the Secretary leave to amend pleadings to add unitary operators as respondents. *See, e.g.*, *Quality Materials*, 36 FMSHRC 2334, 2334–35 (Aug. 2014) (ALJ) (granting Secretary's unopposed post-hearing motion to add related company as a unitary operator); *Sec'y of Labor o/b/o Shemwell v. Armstrong Coal Co., Inc.*, 34 FMSHRC 894 (Apr. 2012) (ALJ) (allowing Secretary to add entity to its temporary reinstatement application after determining the alleged joint employer was a unitary operator with named Respondent).

In reviewing the pleadings and analyzing below these five factors, I determine that justice requires adding APC as a respondent and Respondents have established nothing to justify denial of the Secretary's motion to amend the petition against NAQCS to add APC as a respondent.

B. Analysis

Although any unitary operator theory would need to be litigated fully at hearing, the Secretary presents compelling evidence to support his contention that APC and NAQCS were a unitary operator at the time relevant to the violations, and that justice requires that APC be included as a respondent in this matter.

1. APC as a Unitary Operator with NAQCS

The unitary operatory theory is a doctrine (akin to the "alter ego" theory in corporate law) under which the Commission has treated multiple entities as a single mine operator for purposes of Mine Act liability because the entities are so closely related that together they essentially constitute a single association/organization that operates, controls, or supervises a mine. *Berwind Natural Res. Corp.*, 21 FMSHRC 1284, 1305–18 (Dec. 1999). More than one entity in a company may be held liable based on the Commission's unitary operator theory. The Commission looks to the following factors to determine whether to treat entities as unitary operators for purposes of the Mine Act: (1) the interrelation of operations, (2) common management among the operations, (3) centralized control over mine health and safety, and (4) common ownership. *Berwind Natural Res. Corp.*, 21 FMSHRC at 1317. The court need not find that every factor of the *Berwind* test is met, and there is no hierarchy among the factors. The Commission has held that the proper test is to "weigh the totality of the circumstances to determine whether one corporate entity exercises such pervasive control over the other that the two entities should be treated as one." *Id.* For example, Judge Andrews consolidated a number of cases involving APC and its subsidiaries and found them to be a unitary operator. (Sec'y Mot. Ex. B); *Austin Powder Co.*, 38 FMSHRC 539, 544 (Mar. 2016) (ALJ).

Based on evidence the Secretary gathered during discovery, APC and NAQCS's operations appear significantly interrelated and support the notion of being one entity. For example, the Secretary notes that the deceased miner in this matter signed an employment agreement with APC rather than NAQCS and was paid by APC. (Sec'y Mot. at 4.) I note that exhibits attached to the Secretary's Motion to Compel dated February 25, 2016 appear to support that allegation. (Sec'y Mot. to Compel, Exs. B, F.) Further, NAQCS employees were expected to abide by the APC Employee Handbook. (Sec'y Mot. at 4.) This fact is also supported by an exhibit attached to the Secretary's Motion to Compel. (Sec'y Mot. to Compel, Ex. C.) NAQCS was undercapitalized, according to information revealed during discovery, as it had only a petty cash account and no bank account; indeed, NAQCS customers paid APC and APC paid NAQCS's expenses. (Sec'y Mot. at 4-5.) Additionally, APC filed a tax return on behalf of NAQCS. (*Id.* at 5.) APC provided NAQCS with insurance for workers' compensation, property, vehicles, and employee health. (*Id.*) APC's website advertised for NAQCS as NAQCS did not have its own website, and the APC logo is on the vehicles NAQCS used. (*Id.*) An exhibit attached to the Secretary's Motion to Compel shows a NAQCS truck with an Austin

Powder logo on the side. (Sec'y Mot. to Compel, Ex. J.) The Secretary's evidence suggests APC performed the bulk of administrative services for NAQCS, including accounting, human resources and information technology. (Sec'y Mot. at 5.)

The common management between NAQCS and APC also appears to indicate that the two companies are more akin to a single entity. (Sec'y Mot. at 5-6.) In *Berwind* the Commission held that common management and officers weighed in favor of two entities being considered a unitary operator. *Berwind*, 21 FMSHRC at 1322. Here, NAQCS's only two board members, Michael Gleason and David True, were also on APC's board of directors. (Sec'y Mot. at 6.) True was President of APC with the power to appoint the NAQCS board. (*Id.*) Two of the three officers that worked at NAQCS also had significant roles at APC. (*Id.*)

The Secretary further alleges that APC exercised significant control over NAQCS's safety procedures and training. In *Berwind*, two companies that were considered unitary operators worked together in health and safety issues. *Berwind*, 21 FMSHRC at 1322. Here, the Secretary states APC created the new hire training program for NAQCS employees and required that certificates be sent to APC's headquarters. (Sec'y Mot. at 6-7.) This contention is supported by an exhibit to the Secretary's Motion to Compel. (Sec'y Mot. to Compel, Ex. G.) Moreover, NAQCS was required to comply with APC's safety programs for items such as hazardous communication and lockout/tag-out procedures. (Sec'y Mot. at 7.)

The common ownership prong also weighs in favor of the Secretary's argument that NAQCS and APC be considered a unitary operator. Common ownership was a significant factor in the Commission's *Berwind* decision to find that two entities were a unitary operator. *Berwind*, 21 FMSHRC at 1322. Here, NAQCS was a wholly owned subsidiary of APC at the time of the accident that led to the issuance of the citation and orders. (Sec'y Mot. at 7).

In sum, I determine that the Secretary has adduced evidence during discovery supporting the allegations in his motion that APC and NAQCS should be treated as a unitary operator, which justifies permitting amendment of his petition against NAQCS subject to the five factors under *Foman v. Davis*. Consequently, I must analyze whether the following factors are present. *Foman v. Davis*, 371 U.S. at 182.

2. Bad Faith, Repeated Failure to Cure Deficiencies, Futility or Undue Delay

First, in analyzing the factor of bad faith by the moving party, nothing indicates that the Secretary acted in bad faith by filing the motion to amend. The Secretary states he wishes to add APC for purposes of joint and several liability. (Sec'y Mot. at 2.) Respondents contend that adding APC serves no purpose and is not required for the interest of justice under Rule 15 because NAQCS is capable of satisfying the proposed civil penalty. (NAQCS Resp. at 8.) Yet the Secretary alleges that NAQCS does not have its own bank account and its expenses are primarily handled by APC. (Sec'y Mot. at 4–5.) The Secretary's allegations are compelling given evidence that NAQCS has only petty cash, which would be insufficient to cover a proposed civil penalty totaling more than half a million dollars. (*Id.*) I therefore determine that Respondents have not established that the Secretary acted in bad faith.

Second, the repeated failure to cure deficiencies factor is inapplicable to this analysis. Although the Secretary previously amended the petition, he did so to reduce the civil penalty and before he was aware of the extent of APC and NAQCS's relationship. Moreover, nowhere in their response do Respondents argue that the Secretary repeatedly failed to cure deficiencies. Thus, I determine that Respondents have failed to establish applicability of this factor.

Third, amending the petition to add APC would not be futile. *See, e.g.*, *Robinson v. Detroit News, Inc.*, 211 F. Supp. 2d 101, 114 (D.D.C. 2002) ("An amendment would be futile if it merely restates the same facts as the original complaint in different terms, reasserts a claim on which the court previously ruled, fails to state a legal theory, or could not withstand a motion to dismiss."). Here, the Secretary has a valid reason to include APC in the pleadings, inasmuch as information gathered during discovery indicates APC and NAQCS may be a single entity for purposes of joint and several liability. Consequently, I determine that Respondents have failed to establish the futility of amendment factor.

Fourth, with regard to undue delay, Respondents suggest the Secretary's motion to add APC to the petition is untimely because the accident giving rise to the citation and orders in this docket occurred in November 2012, more than four years ago. (NAQCS Resp. at 2.) The Secretary, however, maintains he only became aware that APC may be a unitary operator during the course of pre-hearing discovery, namely a deposition errata sheet executed on September 9, 2016, and documents produced by NAQCS on October 28, 2016. (Sec'y Mot. at 3.) The Secretary's argument is persuasive, as the Secretary filed the motion to amend on November 30, 2016, about a month after receiving the relevant discovery documents, a reasonable amount of time to confer with NAQCS regarding the issue and then file the motion. Moreover, NAQCS has hindered the progress of the case with its refusal to cooperate with the Secretary's discovery requests, which also caused delay. The hearing is still 2-1/2 months away, the parties have had ample time to complete discovery to this point, and counsel for NAQCS and APC (which are the same) are familiar with the unitary operator issue. Consequently, I determine that Respondents have not established that granting the Secretary's motion to amend to add APC as a respondent would cause undue delay in this matter.

3. Undue Prejudice to Respondents

In analyzing the undue prejudice factor, I note Respondents argue that adding APC to this proceeding would be unduly prejudicial, as it may possibly subject APC to duplicative litigation and delay the outcome of this case. These arguments all hinge on Respondents' assertions that APC will have to defend itself in a unitary operator case, requiring litigation on the same issue it has defended against in other dockets, and that requiring APC to address the unitary operator issue will also require this matter to be consolidated with the other APC unitary operator cases pending before another ALJ, thus delaying resolution of this matter.

For the reasons that follow, I am unpersuaded by the argument that NAQCS would be subject to multiple duplicative litigation, and thus unfair prejudice, if APC is added as a respondent.

First, Judge Andrews consolidated numerous cases involving APC's regional subsidiaries and ultimately ruled that those subsidiaries were unitary operators with APC. (Sec'y Mot., Ex.

B); *Austin Powder Co.*, 38 FMSHRC at 544. Although NAQCS is a subsidiary of APC, it appears the unitary operator analysis regarding NAQCS will be factually distinct from those Judge Andrews considered and therefore not duplicative. Indeed, NAQCS is unique from the other APC regional subsidiaries because those entities were spun off from APC in December of 2004, whereas NAQCS was acquired by APC at a different time in 2004 and has a unique name that does not include "Austin Powder."[4] Those "regional subsidiaries" were assigned the same MSHA contractor identification number; NAQCS was not.

Second, although Respondents presented two cases to support the notion that potential exposure to multiple and duplicative litigation is recognized as prejudice, their reliance on these cases is misplaced as they can be easily distinguished.[5] Further, there is no doubt that the prejudice of subjecting the nonmoving party to multiple duplicative suits should be considered in a motion to amend, but it is not an issue in this matter because litigation regarding NAQCS's relationship to APC will be distinct from the litigation involving the APC regional subsidiaries.

Third, the hearing in this matter will not be delayed by allowing the Secretary to pursue his unitary operator theory. I note that NACQS's relationship to APC is particular to this matter and, as such, the case at this juncture should not be consolidated with the dockets before Judge Andrews. Furthermore, Judge Andrews issued his order regarding APC and its regional subsidiaries on March 9, 2016, and no interlocutory appeal has been filed to date. Most importantly, APC had the opportunity to add NAQCS to the dockets before Judge Andrews but failed to do so. Indeed, both APC (in the matter before Judge Andrews) and NAQCS are represented by the same counsel. On October 20, 2014, Judge Andrews issued an Amended Order to Consolidate in the APC cases and put the onus "on the parties" to "report any other Austin Powder Co. dockets that should also be consolidated due to the similar unitary operator issue." (Sec'y Reply, Ex. B.)[6] In response to Judge Andrews' order on the unitary operator

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[4] The entities in the cases before Judge Andrews were Austin Powder Appalachia, LLC: Austin Powder MidSouth, LLC; Austin Powder Northeast, LLC; and Austin Powder Central States, LLC.

[5] The Sixth Circuit held that duplicative litigation could be prejudicial and would be weighed in its decision regarding a labor union's motion for *intervention. United States v. City of Detroit*, 712 F. 3d 925 (6th Cir. 2012). The Sixth Circuit weighed the potential unfairness of multiple litigation, but as it was applied to intervention, and to the moving party. The Tenth Circuit in *Garcia v. Hall* recognized that the risk of multiple litigation could be prejudicial, but ultimately declined joinder of an insurance company in a suit because to do so would have destroyed diversity jurisdiction. *Garcia v. Hall*, 624 F.2d 150 (10th Cir. 1980). Neither case is binding nor persuasive under the particular circumstances of this pending matter.

[6] The history of the APC cases before Judge Andrews, and this case before me, have raised concerns regarding NAQCS counsel's candor with the court. Judge Andrews's Order dated October 20, 2014, required the parties to report any other APC dockets that would present the unitary operator theory. This Order was distributed to APC counsel, which included attorneys David Hardy, Christopher Pence, Eric Silkwood, James McHugh, and Scott Wickline from the law firm Hardy Pence, PLLC. David Hardy, a partner at Hardy Pence, represents NAQCS before me. Hardy filed NAQCS's pleadings, from the Answer to Petition on December

issue, APC submitted a list of thirteen operating companies with which it contracted, but APC failed to identify NAQCS on its list. The Secretary apparently was unaware of the extent of NAQCS's relationship with APC until discovery progressed in this matter, so the Secretary was not on notice. The Secretary indicates that NAQCS's name and its absence from the spin off agreements that covered the other regional subsidiaries made it difficult to ascertain whether NAQCS should have been involved in the consolidated matters. Of course, NAQCS was in the best position to include itself in the APC unitary operator litigation before Judge Andrews, but neglected to do so. NAQCS cannot now prevent the Secretary from presenting a unitary operator theory in this case because it and/or APC chose to exclude NAQCS from other litigation involving APC and its regional subsidiaries.

Lastly, no other arguments were presented by the Respondents to establish any legally recognizable prejudice to NAQCS that would bar an otherwise permissible modification. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992). Indeed, the Commission has explained that for purposes of determining legally cognizable prejudice the danger of prejudice is not enough; rather, the non-movant must make a specific showing of actual prejudice, i.e., prejudice that is "real" or "substantial," such as the inability to call witnesses or an inadequate opportunity to prepare for hearing. *See Long Branch Energy*, 34 FMSHRC 1984 (Aug. 2012). Respondents have not made that showing here.

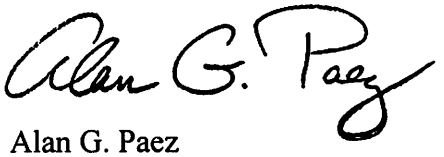
In sum, after analyzing the factor of undue prejudice under *Foman v. Davis*, 371 U.S. at 182, I conclude that granting the Secretary's motion to amend the petition to add APC as a respondent with NAQCS does not unduly prejudice either NAQCS or APC.

I have reviewed the pleadings, Fed. R. Civ. P. 15, and the five factors under *Foster v. Davis* in considering whether to grant the Secretary's motion to amend its petition to add APC as a respondent with NAQCS. Consequently, I conclude that justice requires that the Secretary should be permitted to amend its petition to include APC as a respondent.

6, 2013 to NAQCS's Response in this matter. Additionally, Hardy engaged in discovery with the Secretary. Judge Andrews consolidated additional APC cases on December 23, 2014, and March 27, 2015. Thus, Respondent's counsel was aware of Judge Andrews's order to include potentially related dockets after this docket was filed. In fact, NAQCS answered the penalty petition and this matter was assigned to me months before Judge Andrew's decision, so counsel for NAQCS was aware that it possibly presented a unitary operator argument, but neglected to bring it to my attention. Instead, NAQCS delayed discovery in this matter. NAQCS's argument regarding multiple, duplicative litigation is disingenuous; even if the litigation would be duplicative—and I determine it is not—NAQCS's counsel created the dilemma.

III. ORDER

Accordingly, the Secretary's motion to amend the civil penalty petition in Docket No. YORK 2013-212-M to add APC as a respondent with NAQCS is hereby **GRANTED.**



Alan G. Paez
Administrative Law Judge

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