

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
1331 Pennsylvania Avenue, N.W., Suite 520N
Washington, D.C. 20004

January 20, 2015

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

SPEED MINING, LLC,
Respondent.

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2013-372
A.C. No. 46-05437-308060-01

Mine: American Eagle Mine

ORDER GRANTING MOTION TO AMEND PLEADINGS

This case is before me upon the Petition for the Assessment of Civil Penalty filed by the Secretary of Labor (“Secretary” or “Petitioner”) pursuant to section 105 of the Federal Mine Safety and Health Act of 1977 (“Mine Act”). 30 U.S.C. § 815. Chief Administrative Law Judge Robert J. Lesnick initially assigned this case to Administrative Law Judge William S. Steele on March 14, 2014. Due to Judge Steele’s retirement, Chief Judge Lesnick reassigned this case to me on August 22, 2014, along with several others, and attached a copy of my Prehearing Order directing the Secretary and Speed Mining, LLC (“Speed Mining” or “Respondent”) either to settle this case or to position it for hearing. A hearing is scheduled in this matter and the related dockets for March 3–6 and March 9–13, 2015.

I. PROCEDURAL BACKGROUND – MOTION TO AMEND PLEADING

On December 22, 2014, the Secretary filed a Motion to Amend Pleading requesting that the gravity findings be modified for the three orders at issue in this case and the civil penalty assessments adjusted accordingly. (Mot. at 1.) Specifically, the Secretary seeks to amend the gravity determination in Order No. 7166095 by changing the type of injury likely to occur as a result of the alleged violation from “lost workdays/restricted duty” to “fatal,” with a concurrent increase in the assessed penalty from \$7,774.00 to \$25,810.00. (*Id.* at 2–3.) Likewise, the Secretary seeks to modify the gravity determination for Order No. 7166096 by changing the injury finding from “lost workdays/restricted duty” to “fatal,” with an increase in the penalty from \$4,099.00 to \$13,609.00. (*Id.*) Finally, the Secretary seeks to modify Order No. 7242474 by changing the likelihood finding from “unlikely” to “reasonably likely,” increasing the injury type from “lost workdays/restricted duty” to “fatal,” and marking the violation as “S&S,” with a concurrent increase in the penalty assessment from \$2,000.00 to \$25,810.00. (*Id.*)

Respondent timely filed a Response to Secretary of Labor’s Motion to Amend Pleading on January 5, 2015.¹

¹ In a letter on January 9, 2015, the Secretary requested permission to file a Reply in Support of His Motion to Amend Pleading. Commission Procedural Rule 10, 29 C.F.R. § 2700.10, governs the filing of motions before Commission Judges. Procedural Rule 10 does not allow for a reply to a statement in opposition. Although the Secretary has indicated that

II. PRINCIPLES OF LAW – AMENDING PLEADINGS

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.” *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (quoting Fed. R. Civ. P. 15(a)). Accordingly, amendments are to be liberally granted unless the moving party has been guilty of bad faith, the amendment would purposefully or unduly delay the proceeding, or where amendment would result in a legally recognizable prejudice to the operator. *Id.* at 1290 (citing *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990); 3 J. Moore & R. Freer, *Moore’s Federal Practice*, ¶ 15.08[2], 15–47 to 49 (2d ed. 1991)).

III. ANALYSIS AND ORDER GRANTING SECRETARY’S MOTION

The Secretary states in his motion that the proposed modifications comport with the facts of the alleged violations. (Mot. at 3.) The Secretary also asserts that the increased penalties better encourage future compliance with the safety regulations promulgated under the Mine Act. (*Id.* at 4.) On the other hand, Respondent claims the Secretary’s proposal comes after excessive delay, and that the proposed penalty increase will prejudice Speed Mining. (Resp. at 2, 6.)

Respondent first argues that the Secretary’s motion should be rejected simply because of the long delay between the initial Petition for Assessment in February 2013 and the proposed modification. (Resp. at 4.) Although Respondent argues that the Secretary’s request comes after excessive delay, Speed Mining does not allege that modifications would cause any *further* delay in the proceedings. On the contrary, the Secretary has not requested that the hearing in this case be postponed.

Respondent also has not shown that the Secretary’s delayed amendment request has legally prejudiced Speed Mining. While I am similarly concerned about the amount of time this case has languished with little discernable progress, the mere passage of time does not present the kind of legally recognizable prejudice that would justify denying Petitioner’s motion.² Speed Mining has not presented evidence of a legal prejudice.³ *See, e.g., Zenith Radio Corp. v.*

Respondent has not taken a position on his request to file a reply, the Secretary has failed to establish a basis entitling him to submit a reply. Accordingly, the Secretary’s request is denied.

² In a similar context, the Commission has found that an 11-month delay in the Secretary’s filing of a civil penalty petition was by itself insufficient to show the operator suffered a “real” or “substantial” prejudice from the delay. *See Long Branch Energy*, 34 FMSHRC 1984, 1992–93 (Aug. 2012) (analyzing prejudice in the context of Commission Rule 28(a), 29 C.F.R. § 2700.28(a), which governs the amount of time the Secretary has to file a civil penalty petition). Instead, an operator must demonstrate the prejudice by a specific showing. *Id.*

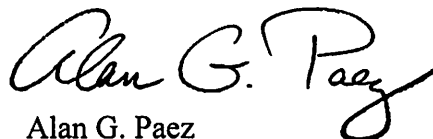
³ In support of its argument, Respondent cites to *Steir v. Girl Scouts of the USA*, 383 F.3d 7, 11–12 (1st Cir. 2004), and *Rhodes v. E.I. du Pont de Nemours & Co.*, No. CIV.A. 6:06-CV-00530, 2009 WL 3380351 (S.D.W. Va., Oct. 16, 2009). In neither case, however, did the judge deny the plaintiff’s motion to amend the complaint wholly because of the passage time. In both

Hazeltine Research, Inc., 401 U.S. 321, 330 (1971); *Williamsburg Wax Museum, Inc. v. Historic Figures, Inc.*, 810 F.2d 243, 247 (D.C. Cir. 1987); *Deasy v. Hill*, 833 F.2d 38, 40 (4th Cir. 1987), *cert. denied*, 485 U.S. 977 (1988). The parties have nearly two months to prepare for the hearing of this matter. Moreover, the parties have not engaged significantly in either discovery or settlement negotiations despite my notice of hearing issued October 21, 2014; consequently, amending the pleadings does not notably set back the development of this case. (*See Resp.* at 5.)

Similarly, Respondent fails to explain how the Secretary's suggested increase in the penalty assessments amounts to legal prejudice. The proposed modifications do not relieve the Secretary of his burden to prove the cited violations by a preponderance of the credible evidence. *See In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1838 (Nov. 1995) (citing *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)), *aff'd sub nom., Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096, 1106-07 (D.C. Cir. 1998). Furthermore, Commission Administrative Law Judges are not bound by the Secretary's proposed penalties but by the Mine Act and the Commission's interpretation of the statute. *See Mining & Prop. Specialists*, 33 FMSHRC 2961 (Dec. 2011). If the Secretary's proposed penalties are inappropriate, Respondent will have ample opportunity to show as much at hearing.

Without a showing that the Secretary's proposed amendment is motivated by bad faith, would unduly delay the hearing, or would otherwise legally prejudice Respondent, I see no reason to disallow the Secretary's proposed amendment. Here, Speed Mining's response falls well short of these rationales. Accordingly, the Secretary's motion is **GRANTED**.

It is **ORDERED** that the pleadings in Order Nos. 7166095, 7166096, and 7242474, are hereby **AMENDED** in accordance with the Secretary's motion. These three orders will be the subject of an upcoming hearing and decision.



Alan G. Paez
Administrative Law Judge

Distribution: (Via Electronic Mail & U.S. Mail)

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Steir and *Rhodes*, permitting the amendment would have forced the re-opening of discovery to investigate the new claims, disrupting the hearing schedule and likely delaying any trial. *Steir*, 383 F.3d at 12-13; *Rhodes*, 2009 WL 3380351 at *2. Such undue delay is not present here.