FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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

May 8, 2023

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2023-0035
Petitioner,	:	A.C. No. 46-09569-564845
	:	
v.	:	
	:	
CONSOL MINING COMPANY, LLC,	:	Mine: Itmann No. 5
Respondent.	:	

ORDER GRANTING THE SECRETARY OF LABOR'S MOTION TO AMEND PETITION

This case is before me upon the filing of the Secretary of Labor's Petition for the 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 March 15, 2023, the parties notified my Law Clerk that they settled all but one citation in this docket, leaving only Citation No. 9568130 at issue.

On March 30, 2023, the Secretary of Labor ("Secretary") filed a Motion to Amend Petition. In the motion, the Secretary requests that I grant her request to modify the negligence for Citation No. 9568130. (Mot. at 1.) The citation's negligence was originally designated as "moderate," and the proposed penalty assessment is $2,194.00. In Citation No. 9568130, Inspector Nicholas Christian wrote the following verbatim—

> The roof and ribs where miners are required to work and travel are not being maintained on the A-Mains section. When observed multiple ribs were found to be broken loose from the mine roof and along both sides. These were found at the following locations:
> 1) #5 Entry 2 Crosscuts inby Feeder, measured 60" long x 8" wide and 12" thick
> 2) #4 Entry 2 Crosscuts inby Feeder, measured 60" long x 30" wide and 18" thick
> 3) #5 Entry 2 Crosscuts inby Feeder, measured 24' long x 18" wide and 24" thick
> 4) #4 Entry Feeder Line, measured 8' long x 29" wide and 14" thick
>
> All of these ribs were in areas where miners are required to work and travel throughout their work shift, therefore exposing them to hazards related to falling rock and materials.

> Standard 75.202(a) was cited 7 times in two years at mine 4609569 (7 to the operator, 0 to a contractor).

(Mot. at 1–2.)

On April 7, 2023, Respondent filed a Response opposing the Secretary's Motion to Amend Petition.

I. PARTIES' ARGUMENTS

In the motion, the Secretary seeks to modify the negligence finding from "moderate" to "high." (Mot. at 2.) In support, the Secretary points to the citation which alleges "obvious and extensive cracked and broken ribs in four areas where miners frequently travel and work." (Mot. at 2.) The Secretary also notes that CONSOL has been cited seven times in the previous two years under this same standard, including four citations in the month prior to the issuance of the current citation, which should have put "the operator on heightened notice to be aware of and correct hazardous rib conditions." (Mot. at 2.) The Secretary asserts that she "does not seek in this motion a determination of an appropriate penalty amount." (Mot. at 3–4.) Rather, via the motion, the Secretary seeks to give CONSOL adequate notice of the Secretary's intent to seek a higher civil penalty than initially proposed, so CONSOL will have the "full opportunity to develop its case and prepare for hearing." (*Id.*)

CONSOL opposes the Secretary's motion. (Mot. at 4; Resp. at 1.) CONSOL counters that Inspector Christian, who issued the citation in this case, also issued three of the recent citations relied upon by the Secretary, and thus, CONSOL asserts, Inspector Christian was aware of the previous citations when he originally determined the level of negligence. (Resp. at 2–3.) CONSOL notes that counsel for the Secretary has not yet answered written discovery nor taken depositions, and thus CONSOL believes the Secretary is filing this motion without all necessary information. (Resp. at 2.) CONSOL argues, "it would be unnecessary, inappropriate, and premature to overrule the negligence designation of the Inspector at this early state." *Id.* Further, CONSOL states that no evidence suggests the Secretary interviewed the Inspector or that the Inspector altered his opinion as to the level of negligence he originally designated. (Resp. at 3.) CONSOL posits that, because the court analyzes negligence *de novo* after hearing the evidence and may modify the Secretary's citation, the Secretary's motion is "unnecessary." *Id.*

Lastly, CONSOL argues that the Secretary's proposed amendment "prejudices the Respondent, since it represents a willingness on the part of the Secretary to overrule its Inspector, early in the process, without completing written discovery, depositions or considering the mitigating factors to be identified by the Respondent." (Resp. at 4.) CONSOL attaches the Secretary's Interrogatories and Requests for Production of Documents and First Request for Admissions to Respondent to its response. (Resp. at 6–10.) CONSOL hypothesizes that the Secretary's motion is "merely being utilized to exert inappropriate pressure on Respondent for exercising rights of discovery and a hearing." (Resp. at 4.)

II. PRINCIPLES OF LAW AND ANALYSIS

The Commission has no specific rule regarding the amendment of pleadings, yet Commission Procedural Rule 1(b) states "[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). Federal Rule of Civil Procedure 15(a)(2) 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," but that "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2).

The Supreme Court has interpreted Rule 15 liberally to allow amendments to pleadings unless one of the following factors is present that justifies denial—(a) undue delay; (b) bad faith by movant; (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). The Commission takes a similar view when it comes to amending petitions, especially when the amendment does not prejudice the non-moving party in preparing its defenses. *See Cyprus Empire Corp.*, 12 FMSHRC 911, 914–16 (May 1990) (finding no abuse of discretion by ALJ who permitted Secretary's prehearing amendment to the citation where the non-moving party was not prejudiced by the amendment); *see also Wyo. Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) ("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"); *CDK Contracting Co.*, 23 FMSHRC 783, 784 (July 2001) (ALJ) ("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" in granting Secretary's motion to amend to allege violations of two alternative safety standards).

First, in applying the Supreme Court's test for Rule 15(a), I note that the Secretary's amendment causes no undue delay, because no hearing date had yet been set at the time the motion was filed and discovery was not yet complete. Second, CONSOL posits the Secretary filed its motion in bad faith "to exert inappropriate pressure on Respondent for exercising rights of discovery and a hearing." (Resp. at 4.) However, I find no indication of bad faith because an objective reading of the alleged violation in Citation No. 9568130 could justify a high negligence determination. Third, given this is the Secretary's first proposed amendment in this case, the repeated failure to cure deficiencies by previous amendments is inapplicable. Fourth, the amendment is not futile because the Secretary could reasonably prove high negligence at trial.

Fifth, I must determine if granting the motion to amend unduly prejudices Respondent. The Commission has held that "[m]ere allegations of potential prejudice or inherent prejudice should be rejected," and the non-moving party must demonstrate more than a danger of prejudice to show actual prejudice. *Long Branch Energy*, 34 FMSHRC 1984, 1992–93 (Aug. 2012). While CONSOL argues the proposed amendment would prejudice CONSOL since it is still "early in the process," CONSOL's argument is exactly contrary to Commission case law. (Resp. at 4.) Here, the Secretary filed her motion to amend on March 30, 2023, before the hearing was scheduled. Thereafter, on April 14, 2023, I scheduled this case in consultation with the parties to be heard—more than four months later—on August 23, 2023. In determining undue prejudice,

Commission Administrative Law Judges have found no prejudice for amendments made with significantly less time before hearing, including amendments made at hearing. *See Higman Sand & Gravel, Inc.*, 18 FMSHRC 951, 958–59 (June 1996) (ALJ) (granting Secretary's amendment and finding no prejudice where amendment was made for the first time at the hearing); *Bob Bak Constr.*, 28 FMSHRC 817, 822–23 (Sept. 2006) (ALJ) (granting Secretary's motion to amend pleading to add an alternative standard and finding no prejudice where amendment was first made at hearing). Early notice here weighs in favor of finding the amendment nonprejudicial.

Respondent also argues "it is premature to overrule the negligence designation of the Inspector." (Resp. at 2.) Yet this argument is inapposite. The Secretary is allowed to conform her pleadings to the evidence. *See Cyprus Empire Corp.*, 12 FMSHRC at 916 (finding that changes in the nature of the petitioner's claims or legal theories are permissible purposes for amendment). Further, the parties have just begun to actively engage in discovery. (Resp. at 2.) The Secretary's amendment—a change in the degree of negligence alleged in the pleadings—does not change the underlying facts and would not appear to require additional discovery. *See New NGC, Inc.*, 35 FMSHRC 3225 (Sept. 2013) (ALJ) (finding no prejudice in case not yet scheduled for hearing and granting motion to amend to allege violations of two alternative safety standards where the Secretary relied on facts already stated in the citation). Although the amendment gives notice of the intent to argue high negligence, regardless of what the Secretary pleads she must still educe evidence at hearing to prove the allegation.

Under Federal Rule of Civil Procedure 15(a) and Commission case law, Commission Judges may liberally grant amendments to petitions when justice requires. Given the lack of prejudice to Respondent, as well as the lengthy notice provided in advance of the hearing date, I conclude that allowing the Secretary to amend the pleading is appropriate.

III. ORDER

WHEREFORE, it is hereby **ORDERED** that the Secretary's Motion to Amend Petition is **GRANTED**.

Alan G. Paez
Administrative Law Judge

Distribution: (Via Electronic Mail Only)

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