

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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October 26, 2000

CEDAR LAKE SAND & GRAVEL CO.,	:	CONTEST PROCEEDINGS
Contestant	:	
v.	:	Docket No. LAKE 99-184-RM
	:	Citation No. 7832607; 9/11/99
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. LAKE 99-185-RM
ADMINISTRATION (MSHA),	:	Citation No. 7823608; 9/11/99
Respondent	:	
	:	Docket No. LAKE 99-186-RM
	:	Citation No. 7823609; 9/11/99
	:	
	:	Docket No. LAKE 99-187-RM
	:	Citation No. 7823610; 9/11/99
	:	
	:	Docket No. LAKE 99-188-RM
	:	Citation No. 7823611; 9/11/99
	:	
	:	Docket No. LAKE 99-189-RM
	:	Citation No. 7823612; 9/11/99
	:	
	:	Docket No. LAKE 99-190-RM
	:	Citation No. 7823613; 9/11/99
	:	
	:	Cedar Lake Sand & Gravel
	:	Mine ID 47-00792

ORDER GRANTING MOTION TO ALLOW MODIFICATION OF ORDERS

These cases are before me on Notices of Contest under section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). They have been on stay since November 15, 1999, pending the filing of the associated civil penalty proceedings. The Secretary has moved to amend Order No. 7832611 in Docket No. LAKE 99-188-RM and Order No. 7832613 in Docket No. LAKE 99-190-RM. The Contestant opposes the modification of Order No. 7832611. For the reasons set forth below, the motion is granted.

Order No. 7832611 alleges a violation of section 56.14100(c) of the Secretary's regulations, 30 C.F.R. § 56.14100(c), because: "A fatal accident occurred at this operation on August 6, 1999, when a front-end loader slid off an embankment and overturned. The front-end

loader had hydraulic system defects which affected the ability to control the loader when dumping or loading. . . .”¹ The Secretary wishes to modify the order by removing the words “hydraulic system” from the alleged condition or practice.

Order No. 7832613 alleges a violation of section 56.9300(b), 30 C.F.R. § 56.9300(b), in that:

Berms were not maintained to at least mid-axle height of the largest self-propelled mobile equipment that travels on the elevated impoundment roadway. The roadway was about 740 feet in length and averaged about 15 feet wide. A water and silt filled pond bordered the roadway on the south side where a drop off of about ten feet existed. An embankment bordered the north side where a drop off of about 18 feet existed. The height of the berms on both sides ranged from non-existent to 30 inches high. A Cat 980B front-end loader and other mine vehicles traveled the entire length of the roadway on a regular basis to check the discharge area of the wet plant, and to haul and dump the discharge material. The mid-axle height of the loader was 33 inches. Equipment tire tracks and stress cracks were observed along the edge of the roadway in several locations. . . .²

The Secretary proposes to delete the fourth sentence, “[a]n embankment bordered the north side where a drop off of about 18 feet existed,” and to change the fifth sentence to read: “The height of the berms on the *south side* ranged from non-existent to 30 inches high.”

The Commission has held that the modification of a citation or order is analogous to an amendment of pleadings under Fed. R. Civ. P. 15(a).³ *Wyoming Fuel Co.*, 14 FMSHRC 1282,

¹ Section 56.14100(c) provides that:

When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

² Section 56.9300(b) requires that: “Berms or guardrails shall be at least mid-axle height of the largest self-propelled mobile equipment which usually travels the roadway.”

³ The Commission’s Procedural Rules provide that on questions of procedure not regulated by the Act, the Commission’s rules, or the Admin. Procedure Act, 5 U.S.C. § 551 *et*

1289 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). The Commission has further noted that:

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) And, as explained in *Cyprus Empire*, legally recognizable prejudice to the operator would bar otherwise permissible modification.

Wyoming Fuel, 14 FMSHRC at 1290.

In this instance, there is no evidence that the Secretary is acting in bad faith or is seeking modification for the purpose of delay. Further, since the cases are on stay, trial will not be unduly delayed. The Contestant, however, argues that it would be prejudiced by the modification because then “the Government’s case would be a secret. Cedar Lake will be left with no earthly idea as to what ‘defect’ the Secretary believes afflicted the front-end loader” (Cont. Opp. at 4.) This seems to be somewhat overstating the matter.

While it appears that up until now the Secretary’s theory was that the loader’s hydraulic system was defective, removing that language does not leave the Contestant totally in the dark. Whatever the defect is, it still is alleged to be on the same front-end loader and it still is alleged to be one “which affected the ability to control the loader when dumping or loading.” In view of the Contestant’s assertion that “the front-end loader is not now and never has been defective,” (*Id.*), the modification should not have much impact on the company’s defense. This is not a drastic change in the factual matters in dispute, The issue is the same as it has always been, whether the front-end loader was defective.

On the other hand, it appears that the Contestant’s discovery on this issue has been mostly completed and it should not have to revisit all of its discovery on the order. Accordingly, while the Secretary’s motion is being granted, the Secretary is directed to furnish the Contestant, within 21 days of the date of this order, a written statement setting out the government’s theory with respect to Order Nos. 7832611 and 7832613 and identifying the evidence, testimonial and otherwise, that supports the theory.

seq., the Commission may apply the Fed. R. Civ. P., insofar as “practicable” and “appropriate.” 29 C.F.R. § 2700.1(b)

ORDER

The Secretary's Motion to Allow Modification of Orders is **GRANTED** and the orders are **MODIFIED** as requested in the motion. As a condition to granting the motion, the Secretary is **ORDERED** to provide the Contestant with a Bill of Particulars concerning Order Nos. 7832611 and 7832613, as set out above. In addition, the Contestant may conduct further discovery concerning the orders as it deems necessary.

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