

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 NEW JERSEY AVENUE, N.W., SUITE 9500
WASHINGTON, D.C. 20001

September 4, 2003

| | | |
|------------------------|---|-----------------------------|
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. SE 2003-92-M |
| Petitioner | : | A.C. No. 40-00106-05502 E24 |
| v. | : | |
| | : | |
| AUSTIN POWDER COMPANY, | : | Parsons Quarry |
| Respondent | : | |

ORDER GRANTING MOTION TO AMEND
PETITION FOR ASSESSMENT OF PENALTY

This case is before me on a Petition for Assessment of Civil Penalty filed by the Secretary of Labor (“the Secretary”) pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (“the Act”), 30 U.S.C. § 815(d). On August 22, 2002, an inspector of the Mine Safety and Health Administration (“MSHA”) issued Citation No. 6098714 to Austin Powder Company (“Austin Powder”) at its Parsons Quarry in Decatur County, Tennessee. The citation alleges a violation of section 56.6900 of the Secretary’s safety regulations, requiring that “Damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer.” 30 U.S.C. § 56.6900. The “condition or practice” is described in the citation as follows:

Damaged or deteriorated explosive material was not disposed of in a safe manner in accordance with the instructions of the manufacturer. Approximately 15 gallons of contaminated Hydrox 503 (ammonium nitrate solution in emulsified form) was placed in and near a plastic garbage can located at the storage bin facility. Employees that work in the area are exposed to an explosion hazard. According to the Material Safety Data Sheet (MSDS), this emulsion may explode when subjected to fire or shock.

On May 14, 2003, the Secretary filed a petition to assess a \$340.00 penalty for the violation. Austin Powder filed an Answer on May 19, 2003. A hearing was scheduled for August 28, 2003, in Memphis, Tennessee.

The Secretary moves to amend Citation No. 6098714 to change the description of the “condition or practice” and the section of the Regulations allegedly violated. Respondent opposes the motion and moves for dismissal of the case. Alternatively, in the event that the

Secretary's motion is granted, Respondent moves to continue the hearing.¹ For the reasons set forth below, the motion is granted.

The Secretary proposes to change the standard alleged to have been violated to section 56.4104(b), which requires that "Until disposed of properly, waste or rags containing flammable or combustible liquids that could create a fire hazard shall be placed in covered metal containers or other equivalent containers with flame containment characteristics. Additionally, the Secretary seeks to substitute the following language for the description of the violation:

Approximately 15 gallons of contaminated Hydrox 503 (Ammonium Nitrate solution in emulsified form) was not placed in a metal or other equivalent container. This material was placed in and near a plastic garbage can located at the storage bin facility. This created a fire hazard because, according to the Material Safety Data Sheet (MSDS), this emulsion may explode then [sic] subjected to fire or shock and has a flashpoint of 165 degrees Fahrenheit.

The Secretary takes the position that the facts underlying the proposed amendment are virtually the same as stated in the citation, as originally issued. Because the evidentiary focus is on the nature of the material, she argues, the proposed amendment only changes the characterization of the material from explosive to flammable. Moreover, she contends, because the facts remain the same as originally pled, and because no discovery has taken place in this case, Respondent is not prejudiced by the proposed amendment. By asserting that modification of the citation will not result in undue delay, the Secretary attests to her willingness to go forward with the hearing, as scheduled. Finally, the Secretary asserts that the essential facts of the case support the allegation of violation under either standard.

Respondent argues that it would be extremely prejudiced should a modification of the citation, so substantive in nature, be permitted so close to the hearing, that its defense has been prepared in reference to an explosives standard, and that it has not been afforded the opportunity to prepare a defense to a combustibles standard. Furthermore, Respondent asserts that, as early as September 13, 2002, during an informal conference on the citation, it had specifically informed MSHA that the cited material was not explosive, and that MSHA had rejected the company's position at that time. Finally, Respondent contends that the cited material is neither explosive nor combustible, so that no violation of either standard occurred. Respondent's arguments are not persuasive.

Although there is no provision in the Commissions's Rules for amending citations, the Commission has held that modification of a citation or order is analogous to amendment of

¹By mutual agreement of the parties, the hearing is rescheduled for November 6 or 7, 2003.

pleadings under Federal Rule of Civil Procedure 15(a).² *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990). The Commission has required a liberal application of Rule 15(a) explaining 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.

Guided by Rule 15(b), the Commission has also recognized that a citation may be modified even *after* a hearing, where the parties have, in fact, litigated an unpled claim:

This result is in accord with Rule 15(b) of the Federal Rules of Civil Procedure, which provides for conformance of pleadings to the evidence adduced at trial, and permits the adjudication of issues actually litigated by the parties irrespective of pleading deficiencies.

Faith Coal Company, 19 FMSHRC 1357, 1362 (August 1997); see *Berwind Natural Resources Corp.*, 21 FMSHRC 1284, 1323 at n.41 (December 1999).

There is no evidence that the Secretary is acting in bad faith or is seeking amendment for the purpose of delay. In fact, the Secretary expressed her willingness go to hearing, as scheduled, should permission to amend the citation be granted. Respondent’s argument that it would be prejudiced by the amendment appears to turn on lack of time to prepare a defense to the allegation that the stored material was combustible, since it acknowledges that, had the modification been made in September 2002, there would have been little prejudice.

By seeking to amend the citation, the Secretary has not altered the underlying facts of the citation, i.e., that contaminated Hydrox 503 was improperly stored. Respondent contends that the substance is neither explosive nor combustible. Assuming this to be true, however, places Respondent in the same position under either standard - - by proving the actual nature of the

²The Commission’s Procedural Rules provide that on questions of procedure not regulated by the Act, the Commission’s Rules, or the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, the Commission and its Judges shall be guided by the Federal Rules of Civil Procedure so far as “practicable.” 29 C.F.R. § 2700.1(b).

substance, Respondent may affirmatively rebut the Secretary's case. Moreover, since no discovery has been conducted to date, and Respondent has been granted a continuance of the hearing, Respondent has ample opportunity to further develop its defense.

Accordingly, the Secretary's Motion to Amend Petition for Assessment of Penalty is **GRANTED** and it is **ORDERED** that Citation 6098714 is **MODIFIED** to change the language of the "condition or practice" and to allege a violation of section 56.4104(b). In addition, Respondent may conduct discovery, as it deems necessary.

Jacqueline R. Bulluck
Administrative Law Judge
(202) 434-9987

Distribution: (Certified Mail)

Thomas A. Grooms, Esq., Office of the Solicitor, U.S. Department of Labor, 2002 Richard Jones Road, Suite B-201, Nashville, TN 37215

Adele L. Abrams, Esq., Law Office of Adele L. Abrams, P.C., 4740 Corridor Place, Suite D, Beltsville, MD 20705

ej