FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
1244 SPEER BOULEVARD #280
DENVER, CO 80204-3582
303-844-3577/FAX 303-844-5268
January 10, 2003

AGGREGATE INDUSTRIES, WEST CENTRAL REGION, INC., Contestant	:	CONTEST PROCEEDINGS
	:	Docket No. WEST 2002-317-RM
	:	Citation No. 7914271; 01/22/2002
v.	:	
	:	Docket No. WEST 2002-318-RM
	:	Citation No. 7914268; 01/24/2002
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	
	:	Docket No. WEST 2002-319-RM
	:	Citation No. 7914269; 01/24/2002
	:	
	:	Docket No. WEST 2002-320-RM
	:	Citation No. 7943951; 01/31/2002
	:	
	:	Fort Collins Plant
	:	Id. No. 05-04733
	:	
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	CIVIL PENALTY PROCEEDINGS
	:	
	:	Docket No. WEST 2003-32-M
	:	A.C. No. 05-04733-05501
	:	
v.	:	Docket No. WEST 2003-33-M
	:	A.C. No. 05-04733-05502
AGGREGATE INDUSTRIES, WEST CENTRAL REGION, INC., Respondent	:	
	:	Fort Collins Plant
	:	

ORDER GRANTING SECRETARY'S MOTION TO AMEND CITATION TO ALLEGE VIOLATIONS OF TWO ALTERNATIVE SAFETY STANDARDS

The Secretary filed a motion to amend Citation No. 7914271 and the penalty petition for WEST 2003-33-M to allege, in the alternative, that Aggregate Industries, West Central Region, Inc., ("Aggregate Industries") violated 30 C.F.R. § 56.14105 in addition to the allegation in the citation that Aggregate Industries violated section 56.12106. The Secretary is not seeking to substitute the one allegation for the other but is seeking to have the citation and penalty petition amended to allege violations of both safety standards, in the alternative. In support of her motion, the Secretary states that under Fed. R. Civ. P. 8(e)(2) "a party may set forth two or more statements of a claim . . . alternately

. . . either in one count . . . or in separate counts . . . ." The Secretary also relies upon the decision of former Commission Administrative Law Judge Lasher in *Mid-Continent Resources, Inc.*, 10 FMSHRC 191, 202-03 (Feb. 1988), and my order in *CDK Contracting, Inc.*, 23 FMSHRC 783 (July 2001).

Aggregate Industries opposes the motion. As grounds for its opposition, Aggregate Industries states that the Secretary failed to comply with Commission Rule 2700.10, which requires that a moving party confer with the opposing party before filing a motion. Furthermore, it argues that the Secretary's motion is unfairly prejudicial to Aggregate Industries. It maintains that the Secretary's responses to its discovery were misleading and disingenuous at best. Aggregate Industries argues that the Secretary is bound by her statements and responses to discovery. The Secretary knew or should have known that the safety standard that she originally cited did not support the alleged violation set forth in the citation. "Now the Secretary wants to continue the charade by arguing that the Secretary may plead alternative violations." (Opposition at 4). The Secretary's motion is not based on the "sudden discovery" of new evidence. *Id.* at 5. Aggregate Industries is unfairly prejudiced by its reasonable reliance on the Secretary's discovery responses and her belated attempt to "take advantage of her previously inconsistent and misleading representations after substantial discovery." *Id.* Granting the Secretary's motion "would deny justice to Aggregate [Industries] by rewarding the Secretary's abusive pleading and discovery tactics." *Id.* at 6.

The Secretary denies that her motion is prejudicial to Aggregate Industries. She states that counsel for Aggregate Industries questioned the issuing inspector about both safety standards during his deposition. In addition, she notes that a hearing has not yet been scheduled in these cases and the parties have ample time to conduct further discovery. Finally, the Secretary argues that Aggregate Industries misconstrues the Secretary's responses to written discovery and ignores the "legitimate bases for the objections she interposed to them." (S. Reply at 2).

I conclude that the Secretary is authorized to amend her pleadings to allege violations of two alternative safety standards. 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. The civil penalty proceeding at issue, WEST 2003-33-M, was assigned to me on December 17, 2002, so it is still in the prehearing stage and no hearing has yet been scheduled. As a consequence, adequate notice has been provided. The only issue is whether Aggregate Industries is prejudiced by the amendment. The proposed amendment does not seek to change the underlying condition or practice described in section 8 of the citation. "When an amendment puts no different facts in issue than did the original [OSHA] citation, reference to an additional legal standard is not prejudicial." *Donovan v. Royal Logging Co.*, 645 F.2d 822, 827 (9th Cir. 1981) *citing So. Colo Prestress v. Occup. Safety & H. R. Comm.* , 586 F.2d 1342, 1346-47 (10th Cir. 1978).

The contested citation alleges that a fatal accident occurred on January 21, 2001, when an employee accidently bumped the start button in the control room for the log washer while

another employee was in the log washer unplugging the drain. The MSHA inspector cited section 56.12016, which provides, in part, that electrically powered equipment shall be de-energized before mechanical work is performed on such equipment. The Secretary seeks to add, in the alternative, a violation of section 56.14105, which provides, in part, that repairs or maintenance of machinery or equipment shall be performed only after the power is off. The proposed amendment does not place different or new facts in issue. In addition, Aggregate Industries has sufficient time to serve additional discovery and prepare alternative defenses. I find that there is no inherent prejudice in the proposed amendment.

Although counsel for the Secretary should have discussed the motion with counsel for Aggregate Industries as required by Commission Rule 10(c), the fact the he did not do so should not defeat the motion, especially where it is obvious that the parties would not have reached an agreement on the issues raised by the motion. Rule 10(c) is designed to require a moving party to try to reach an accommodation with the opposing party before filing a motion.

Aggregate Industries contends that the Secretary's discovery responses are misleading and inconsistent with her proposed amendment. It argues that she should be bound by her discovery responses. If its allegations are true, Aggregate Industries can present these responses at the hearing in an attempt to rebut the Secretary's case.

For the reasons set forth above, the Secretary's motion to amend Citation No. 7914271 and her petition for assessment of penalty in WEST 2003-33-M is **GRANTED**.

Richard W. Manning
Administrative Law Judge

Distribution:

James J. Gonzales, Esq., Holland & Hart, 555 Seventeenth St., Ste 3200, Denver, CO 80202-3921 (Fax and First Class Mail)

John Rainwater, Esq., Office of the Solicitor, U.S. Department of Labor, P.O. Box 46550, Denver, CO 80201-6550 (Fax and First Class Mail)

RWM