

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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August 1, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2003-181-M
Petitioner	:	A.C. No. 42-00854-05557
	:	
v.	:	
	:	Bonanza Mines
AMERICAN GILSONITE COMPANY,	:	
Respondent	:	

**ORDER DENYING MOTION TO AMEND PETITION FOR
ASSESSMENT OF PENALTY**

This case is before me upon a petition for assessment of civil penalty under Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (the "Act"). On September 11, 2002, an inspector of the Department of Labor’s Mine Safety and Health Administration (“MSHA”) issued Citation No. 6274098 against American Gilsonite Company (“American Gilsonite”) at its Bonanza Mines in Uintah County, Utah. The citation alleged a violation of the Secretary’s safety standard at 30 C.F.R. § 57.6102(a)(1). That standard, entitled “Explosive Material Storage Practices,” provides: “(a) Explosive material shall be – (1) stored in a manner to facilitate use of oldest stocks first.” The body of the citation states:

At the powder/booster magazine located on the surface two boxes (both approximately ½ full) of Gelcoalite Z explosives were present. Both boxes showed severe signs of deterioration. The mine operator failed to establish a system for the use of the oldest stocks first; and a date of manufacture or shelf life of the explosives could not be provided. Employees were exposed to the possibility of injury due to its nature, as a chemical substance with severe deterioration.

On April 7, 2003, the Secretary filed a petition for assessment of a \$196 penalty for the citation. American Gilsonite filed its answer to the Secretary’s petition on June 24, 2003, and the case was assigned to the undersigned judge.

On July 18, 2003, the Secretary filed a motion to amend her petition for assessment of penalty to allege a violation of 30 C.F.R. § 57.6900 rather than the safety standard cited by the MSHA inspector. As grounds for the motion, the Secretary states that “[u]pon further investigation, the Secretary believes that the facts underlying this Citation more appropriately constitute a violation of 30 C.F.R. § 57.6900, rather than section 57.6102(a)(1).” (S. Motion

1). Section 57.6900 provides: “Damaged or deteriorated explosive material shall be disposed of in a safe manner in accordance with the instructions of the manufacturer.”

Citing Commission case law, the Secretary contends that she is entitled to amend her petition for assessment of penalty because American Gilsonite “will not be prejudiced by the granting of [the] motion insofar as the facts and circumstances underlying the violation are identical, as is the evidence the Secretary will rely upon at the hearing in this matter.” *Id.* at 2. The Secretary also maintains that because the parties have not yet engaged in discovery, American Gilsonite has ample opportunity to prepare its defense.

American Gilsonite maintains that it will be prejudiced by the granting of the motion because the proposed amendment places different facts at issue than the original citation. Under the citation as issued by the inspector, the facts at issue are “whether the explosive material was stored in a manner to facilitate the use of the oldest stocks first.” (A.G. Response 2). Under section 57.6900, the facts at issue would be “whether the explosives at issue were damaged or deteriorated” and “whether American Gilsonite failed to dispose of the explosives in a safe manner . . . in accordance with the manufacturer’s instructions.” *Id.* at 3. As a consequence, the critical facts at issue are completely different. A violation of the cited safety standard does “not hinge on whether the explosives were damaged or deteriorated, nor [does] it matter how American Gilsonite intended to dispose of the explosives.” *Id.* Under the proposed amendment, “the age of American Gilsonite’s explosives and its inventory system are meaningless and all the above-mentioned facts that did not matter before are now critical.” *Id.* at 4. American Gilsonite states that, because of the nature of the allegations in the citation, it did not believe that it was necessary to photograph the explosives, to preserve a sample of the explosives, or to have an expert examine the explosives and render an opinion on the “precise nature and extent of their ‘deterioration’ and stability prior to their return to the manufacturer for destruction.” *Id.* at 7. American Gilsonite believes that amending the citation at this time will severely prejudice its ability to defend itself.

The Commission has held that the modification of a citation is analogous to the amendment of pleadings under Fed. R. Civ. P. 15(a). *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). Leave to amend pleadings “shall be freely given when justice so requires.” Fed. R. Civ. P. 15(a). 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. *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1290 (Aug. 1992) (citation omitted). It is clear that this case does not fall into any of these exceptions.

Prejudice to the opposing party may also bar an otherwise permissible amendment. *Wyoming Fuel*, 14 FMSHRC at 1290; *Cyprus Empire*, 12 FMSHRC at 916; *Higman Sand & Gravel, Inc.*, 25 FMSHRC 175, 183 (April 2003) (ALJ). The issue here is whether American Gilsonite will suffer “legally recognizable prejudice” if the motion to amend is granted. *Wyoming Fuel*, 14 FMSHRC at 1290. For the reasons set forth below, I find that American Gilsonite will be legally prejudiced if I grant the Secretary’s motion.

The facts underlying a violation of section 57.6102(a)(1) is quite different from the facts underlying a violation of 57.6900. Although both standards concern explosives, their similarity ends there. Under the standard cited by the inspector, American Gilsonite would be required to produce evidence concerning its manner of storing explosives. If the citation is amended, American Gilsonite would be required to marshal evidence concerning the condition of the explosives cited by the inspector and the method of their disposal. American Gilsonite disposed of the explosives to abate the citation. Because the citation did not charge American Gilsonite with a violation of section 57.6900, American Gilsonite did not attempt to gather evidence as to the condition of the explosives. If American Gilsonite had been initially charged with a violation of section 57.6900, it could have had the cited explosives analyzed to determine whether they were sufficiently “damaged or deteriorated” to violate the standard or to create a safety hazard. The citation alleges that the violation was of a significant and substantial nature. Although the citation states that the cited explosives “showed severe signs of deterioration,” that was the backdrop for the inspector’s conclusion that the company was not properly storing the explosives to ensure that the oldest stocks were used first. The method of storing explosives was at issue in the citation rather than the degree of deterioration and manner of disposal of explosives. Thus, I find that the proposed amendment to the petition for assessment of penalty will legally prejudice American Gilsonite.

Commission Administrative Law Judge Gary Melick reached a similar conclusion in *Harmon Mining Corp.*, 15 FMSHRC 143 (Jan. 1993). In that case, the Secretary sought to amend a citation alleging a violation of section 75.520, requiring that safe switches be provided for electric equipment, to a violation of section 75.514, requiring that electrical connections and splices be mechanically and electrically suitable. The mine operator did not perform any tests on the electrical circuits because such tests would not be necessary to defend against the citation as written by the inspector. By the time the Secretary filed the motion to amend, the mine was closed and sealed. As a consequence, the judge found that the mine operator was “at an extreme disadvantage in attempting to defend itself . . . and would indeed suffer legal prejudice by the proposed amendment.” *Id.* at 148.

For the reasons set forth above, I find that the proposed amendment will legally prejudice American Gilsonite. Consequently, the Secretary’s motion to amend the petition for assessment of penalty in this case is **DENIED**.

Richard W. Manning
Administrative Law Judge

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