

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 10, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDINGS
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2002-85
Petitioner	:	A. C. No. 46-07273-03731
v.	:	
INDEPENDENCE COAL COMPANY, INC.,	:	Justice No. 1 Mine
Respondent	:	
and	:	Docket No. WEVA 2002-172
BILL BURGETTE, employed by	:	A. C. No. 46-07273-03739 A
INDEPENDENCE COAL COMPANY,	:	
and	:	Docket No. WEVA 2003-8
	:	A. C. No. 46-07272-03741 A
	:	
GREG NEIL, employed by	:	
INDEPENDENCE COAL COMPANY,	:	
Respondents	:	Justice No. 1 Mine

ORDER GRANTING MOTION TO AMEND PLEADINGS

_____ These cases are before me upon petitions for assessment of civil penalty filed by the Secretary of Labor pursuant to Sections 105(d) and 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (1994), the “Act.” On August 28, 2003, the Secretary filed a motion to amend the pleadings “in order to incorporate into the citation and orders at issue, modifications issued by MSHA [the Department of Labor’s Mine Safety and Health Administration], dated August 20, 2003, which allege with greater specificity the charges set forth in the petition filed against the Respondents.”¹

These cases involve one citation and two orders issued by MSHA against Independence Coal Company, Inc. (Independence) pursuant to Section 104(d) of the Act. The Secretary has filed petitions for assessment of civil penalty against Independence and against two of Independence’s agents, Bill Burgette and Greg Neil, for knowingly authorizing, ordering, or carrying out, as agents of Independence, the alleged violations.

¹ Hearings which commenced on August 19, 2003, were continued to enable the Secretary to amend the charging documents to provide a more particular description of the charges including a specification of the dates and times of the alleged violations.

In a response to the Secretary's motion to amend filed September 8, 2003, the Respondents object only to that part of the proposed amendment appearing in Order No. 7190107-04, Section II, under paragraph 8 "Condition or Practice" insofar as it alleges a violation of the on-shift standard for examinations after the 8:30 a.m. roof fall, *i.e.*, Item No. 11 "10/30/00 by Bill Burgette, second shift." Respondents claim that the proposed amendment interjects a new issue into the case as to the adequacy of on-shift examinations made by Mr. Burgette after the 8:30 a.m. roof fall and prior to the "Section 103(k)" order issued by the Secretary later that day. The Respondents argue that while the original order in this case dealt with events before the 8:30 a.m. roof fall it did not address events after 8:30 a.m. Respondents object to the introduction of this issue after the commencement of trial claiming prejudice. They argue that the allegedly new issue would necessitate a re-opening of depositions and the recalling of at least one witness, Inspector Jackson Nunnery, at hearings. They further claim prejudice because the proposed amendment comes "almost three years after the event, and after six hours of testimony." Burgette claims, in addition, that the added "Section 110(c)" allegation was one "for which no investigation was performed and for which he has had no notice."

Although there is no provision in the Commission's rules for amending the charging documents, the Commission has held that modification of a citation or order is analogous to amendment of pleadings under the Federal Rules of Civil Procedure, Rule 15(a). *Secretary v. Wyoming Fuel Company*, 14 FMSHRC 1282 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911 (May 1990). In *Wyoming Fuel Company*, 14 FMSHRC at 1290, the Commission stated as follows:

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.

Respondents did not allege, and there is no evidence that the Secretary is acting in bad faith or is seeking amendment for the purpose of delay. Respondents argue only that they would be prejudiced because the proposed amendment of Order No. 7190107, would allegedly interject a new issue into the case, *i.e.*, the adequacy of an on-shift examination made by Mr. Burgette after the 8:30 a.m. roof fall and before the issuance of the "Section 103(k)" order. Respondents claim that these allegations were not contained in the original order and were not a part of this case when the hearing began. They further allege that the new allegations would cause delay because of the necessity to reopen depositions and recall at least one witness.

It is noted in examining the original Order No. 7190107, that the specific allegations now asserted were neither included nor excluded. Indeed, there was a lack of particularity in the

original allegations which led to the necessity for clarification provided by the proposed amended citation. While this lack of particularity may have been grounds for a motion to dismiss, no such motion was filed. I also note that Respondents do not claim that they were misled by the Secretary during discovery so that presumably, upon appropriate discovery, the Respondents could have determined that the Secretary had in fact included within the scope of original Order No. 7190107, a violation of the on-shift examination standard after the roof fall. Under all the circumstances I do not find that the proposed amendment would cause legal prejudice to the Respondents. Indeed, I find that the particularity provided in the proposed amended charging documents provide much needed specificity including the dates and times of the violations. Such particularity will better enable the Respondents to defend the charges and enable the trial judge to ascertain specifically what charges have been brought in the instant cases.

For all of the above reasons the Secretary's Motion to Amend Pleadings is granted.

Gary Melick
Administrative Law Judge
202-434-9977

Distribution: (Certified Mail)

Robert S. Wilson, Esq., Karen Barefield, Esq., Office of the Solicitor, U.S. Dept. of Labor, 1100 Wilson Blvd., 22nd Floor West, Arlington, VA 22209

Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, Spilman Center, 300 Kanawha Boulevard East, P.O. Box 273, Charleston, WV 25321-0273

/mca