

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

October 29, 2003

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2003-222
Petitioner	:	A.C. No. 46-01438-03501 VVJ
	:	
v.	:	
	:	
HLC TRUCKING COMPANY, INC.,	:	Ireland River Loading Facility
Respondent	:	

**ORDER GRANTING MOTION  
TO AMEND PLEADINGS**

\_\_\_\_\_ 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 September 23, 2002, an inspector of the Mine Safety and Health Administration (“MSHA”) issued Citation No. 7119595 to HLC Trucking Company (“HLC”) at its Ireland River Loading Facility in Marshall County, West Virginia. The citation alleges a violation of section 77.1607(p) of the Secretary’s safety regulations respecting operation of loading and haulage equipment, requiring that “Dippers, buckets, scraper blades, and similar movable parts shall be secured or lowered to the ground when not in use.” 30 U.S.C. § 77.1607(p). The “condition or practice” is described in the citation as follows:

A[n] independent contractor mechanic was observed standing between the rear tandem tires of a Mack tandem dump truck (Ohio License PUV 7596) and leaning over the truck frame while the trucks dump bed was in the raised position. The truck bed was not blocked or secured against motion. The contract mechanic was removed from under the raised bed immediately and instructed [that] the bed had to be secured against motion before work could resume under the raised bed. The 104(a) citation is being issued in conjunction with Imminent Danger Order No. 7119594.

On July 7, 2003, the Secretary filed a petition to assess a \$450.00 penalty for the violation. HLC filed an Answer on July 25, 2003. A hearing is scheduled for November 18, 2003, in Wheeling, West Virginia.

The Secretary has filed a motion for leave to amend Citation No. 7119595 to allege a violation of a different safety regulation. Respondent opposes the motion or, alternatively, seeks additional time to conduct discovery respecting the new allegation. For the reasons set forth below, the motion is granted.

The Secretary proposes to change the regulation alleged to have been violated to section 77.405(b), respecting performance of work from a raised position. It requires that “No work shall be performed under machinery or equipment that has been raised until such machinery or equipment has been securely blocked in position.” The Secretary asserts that the proposed modification does not alter the substance of the alleged violation and that, therefore, there is no prejudice to Respondent.

Although there is no provision in the Commission’s Rules for amending citations, the Commission has held that modification of a citation or order is analogous to amendment of pleadings under Federal Rule of Civil Procedure 15(a).<sup>1</sup> *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:

The 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 seeking amendment for the purpose of delay. Respondent’s contest of the citation appears to be focused on challenging

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<sup>1</sup>The 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).

the inspector's observations, which remain unchanged, rather than the underlying safety standard allegedly violated. It follows that, because the standards at issue are very similar in nature, Respondent's evidence should be applicable to either. In any case, since the hearing is not scheduled until November 18<sup>th</sup>, Respondent has ample opportunity to further develop its defense.

Accordingly, the Secretary of Labor's Motion to Amend Pleadings is **GRANTED** and it is ordered that Citation No. 7119595 is **MODIFIED** to allege a violation of 30 C.F.R. § 77.405(b). Respondent may conduct additional discovery, as it deems necessary.

Jacqueline R. Bulluck  
Administrative Law Judge  
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