FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 14, 2000

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. YORK 2000-46-M
Petitioner	:	A. C. No. 30-03197-05505
v.	:	
	:	Phillipsport Pit
METRO RECYCLING AND CRUSHING,	:	
INC.,	:	
Respondent	:	

ORDER GRANTING MOTION TO AMEND PLEADINGS

This case is before me on a Petition for Assessment of Civil Penalty pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(d). It concerns one citation and two orders arising out of a fatal mine accident. The Secretary has moved to amend Citation No. 7716911 to allege alternative sections of the regulations. The Respondent opposes the motion. For the reasons set forth below, the motion is granted.

Citation No. 7716911 charges a violation of section 56.14202 of the regulations, 30 C.F.R. § 56.14202, because:

> A fatal mine accident occurred at this operation on March 18, 1999, when the plant superintendent was caught in an unguarded return roller on the discharge conveyor from the portable screening plant. He was cleaning the roller while the conveyor was running. Cleaning the roller while the belt was running exhibited a serious lack of reasonable care constituting more than ordinary negligence and is an unwarrantable failure to comply with a mandatory safety standard.

Section 56.14202 requires that: "Pulleys of conveyors shall not be cleaned manually while the conveyor is in motion."

Stating that there "may be some legal and factual controversy" concerning the definition of "pulley" in section 56.14202, the Secretary proposes to amend the citation to allege that the conduct violates section 56.14202 or section 56.14105, 30 C.F.R. § 56.14105. Section 56.14105 provides, in pertinent part, that: "Repairs or maintenance of machinery or equipment shall be

performed only after the power is off, and the machinery or equipment blocked against hazardous motion."

The company argues that allowing the Secretary to plead in the alternative would violate the provisions of section 104(a) of the Act, 30 U.S.C. § 814(a), and would be unfair and prejudicial. Neither of these arguments is persuasive.

Section 104(a) provides, in pertinent part, that: "Each citation shall be in writing and shall describe with particularity the nature of the violation, including a reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." The Respondent asserts that this requires that the Secretary identify the standard alleged to have been violated *with particularity*. However, what has to be described with particularity is the nature of the violation, not the standard. Under the proposed amendment, the description of the violation would remain unchanged. Furthermore, even if the standard violated has to be described with particularity, the proposed amendment accomplishes that purpose by referring to the two standards alleged to have been violated.[1]

Although there is no provision for amending citations in the Commission's Rules, the Commission has held that the modification of a citation or order is analogous to an amendment of pleadings under Fed. R. Civ. P. 15(a).[2] *Wyoming Fuel Co.*, 14 FMSHRC 1282, 1289 (August 1992); *Cyprus Empire Corp.*, 12 FMSHRC 911, 916 (May 1990). The Commission has further noted 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) . . . .

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[1] On the other hand, this provision of the Act would prohibit what the operator claims is the logical result of permitting the Secretary to plead alternatively, that the Secretary "could just allege a violation of 30 C.F.R.," because then there would be no reference to *the standard* alleged to have been violated.

[2] 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)

> And, as explained in *Cyprus Empire*, legally recognizable prejudice to the operator would bar otherwise permissible modification.

Wyoming Fuel, 14 FMSHRC at 1290.

In this case, there is no evidence that the Secretary is acting in bad faith or is seeking amendment for the purpose of delay. Nor does it appear, and indeed there is no argument, that the trial will be unduly delayed. It is scheduled to begin on December 19, 2000, and there does not appear to be any reason why it will not begin on that date. The Respondent, however, argues that it will be prejudiced by the modification because its ability to defend itself by demonstrating that no violation of section 56.14202 occurred will be nullified.

In the first place, the fact that it may have a defense to a violation of section 56.14202, but, perhaps, not to a violation of section 56.14105, does not demonstrate that the company will be prejudiced by allowing the amendment. As the Commission has long recognized: "The 1977 Mine Act imposes a duty upon operators to comply with all mandatory safety and health standards. It does not permit an operator to shield itself from liability for a violation of a mandatory standard simply because the operator violated a different, but related, mandatory standard." *El Paso Rock Quarries, Inc.*, 3 FMSHRC 35, 40 (January 1981). Secondly, the prejudice that would warrant denial of the modification of the citation is prejudice resulting from delay, or if the amendment involves a new theory of violation or requires additional discovery. *See generally* 3 James W. Moore *et al., Moore's Federal Practice*, § 15.15[2], (3d ed.1997).

In this case, there is no indication or allegation that any of this type of prejudice would occur. As noted above, there should be no delay. Nor does the amendment involve a new theory of violation. The factual allegations remain the same. Whether a violation of section 56.14202 or of section 56.14105, the matter will be decided on the language, "[h]e was cleaning the roller while the conveyor was running." In this regard, section 56.14202 is essentially an included offense in section 56.14105. For this reason, no extensive, additional discovery should be required. Thus, the Respondent has not demonstrated that it will be prejudiced by the modification.

In addition, it is clear that the Secretary could have moved to amend the citation to allege a violation of 56.14105 instead of section 56.14202 and, as discussed above, the company would have no apparent valid objection to such an amendment. Furthermore, if the Government proceeded to trial on the citation as alleged, it would appear that Fed. R. Civ. P. 15(b) would

permit it to move to amend the citation to conform to the evidence adduced at the trial.[3] *Faith Coal Co.*, 19 FMSHRC 1357, 1362 (August 1997).

Finally, Fed. R. Civ. P. 8(e)(2) specifically provides that: "A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses." Since the Federal Rules affirmatively permit alternative pleadings, the Secretary has a good reason for pleading in the alternative and the Respondent has not presented any valid reason why the modification should not be permitted, it is clear that the citation may be amended as requested.

Accordingly, the Secretary's Motion to Amend Pleadings is **GRANTED** and it is **ORDERED** that Citation No. 7716911 is **MODIFIED** to allege that the operator violated either section 56.14202 or section 56.14105 of the regulations.

T. Todd Hodgdon
Administrative Law Judge
(703) 756-6213

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[3] Fed. R. Civ. P. 15(b) provides that:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that is not within the issues made by the pleadings, the court may allow the pleading to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

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