United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, D.C. 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

PHILLIPS 66 COMPANY,

Respondent.

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INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL UNION 877,

Authorized Employee Representative.

OSHRC DOCKET No. 16-1762

ORDER DENYING RESPONDENT'S MOTION TO STRIKE SECRETARY'S AMENDMENTS TO CITATION 1, ITEM 1

The Respondent has filed a "Motion to Strike Amendments to Citation 1, Item 1," (Motion) dated June 8, 2017. The Secretary filed a response in opposition to the motion dated June 20, 2017. The Authorized Employee Representative has not filed a response to the motion. As described below, the Motion is denied.

Background

OSHA conducted a complaint investigation of the Respondent's refinery in Linden, New Jersey, in June 2016. OSHA personnel set out to investigate whether on or about May 19, 2016, employees at the refinery had been exposed to "hazardous atmosphere containing NH_3 and H_2S when a bleeder valve was opened in the area without following established procedures and safety protocols." (Motion, Attachment A to Exhibit 1).

Following the inspection, the Secretary issued the underlying citation on November 17, 2016 alleging three violations of the process safety management (PSM) standard codified at 29 C.F.R. § 1910.119. Only one of the three alleged violations—citation 1, item 1—is germane to the Motion. That citation item cited the Respondent for an alleged violation § 1910.119(f)(4), which requires an employer to "develop and implement safe work practices to provide for control of hazards during operations such as … opening process equipment and piping." The citation item alleged the violation had occurred on or about May 18, 2016 at the refinery's "Desulfurization Unit (DSU)," and it described the alleged violation as follows:

> The employer failed to implement their safe work practice (SWP – SEC9-103 – Hydrogen Sulfide (H2S)) for working with equipment which contains H2S when a production supervisor opened a bleeder valve on the D201 feed drum, without the use of respiratory protection.

The original citation item stated that the alleged violation had been "Corrected During Inspection," so it did not specify a date by which the alleged violation was required to be abated.

After the Respondent timely contested the citation, the Secretary filed a complaint dated May 19, 2017 pursuant to Commission Rule 34(a), 29 C.F.R. § 2200.34(a). Paragraph V of the complaint amends the original citation item's description of the alleged violation by making certain deletions and additions as follows [additions are underscored; deletions are strikethrough]:

> The employer failed to develop and/or implement their safe work practice ~~(SWP – SEC9-103 – Hydrogen Sulfide (H2S))~~ for working with equipment which contains H2S and NH3 when a production supervisor opened a bleeder valve on the D201 feed drum, without the use of respiratory protection.

The amendment also identified a date for abatement of the alleged violation.

The complaint averred the amendment was being made "to conform to the facts believed to be true by the Secretary," and alleged that the amendment arose "out of the same conduct,

occurrences or hazards described in the citation and will not result in irreparable harm to the employer in the preparation or presentation of its case." (Complaint, ¶ IV).

Discussion

The complaint propounded the amendment pursuant to Commission Rule 34(a)(3), which provides as follows: "Where the Secretary seeks in his complaint to amend his citation or proposed penalty, he shall set forth the reasons for the amendment and shall state with particularity the change sought." 29 C.F.R. § 2200.34(a)(3).

The Respondent argues the amendment should be stricken because (1) the Secretary failed to "set forth the reasons for the amendment" as required by the terms of Commission Rule 34(a)(3), (2) the proposed amendment does not arise "out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original" citation within the meaning of Fed. R. Civ. P. 15(c)(1)(B), so that the amendment does not relate back to the date of the original citation (November 16, 2016), and consequently is time barred by the six-month limitations period set forth in section 9(c) of the OSH Act, 29 U.S.C. § 658(c), and (3) the Respondent will be "prejudiced and irreparably harmed in the presentation of its case" if the amendment is allowed to stand. (Memorandum in support of motion, p. 6).

Current Commission Rule 34(a)(3) became effective in 1992, when it supplanted former Commission Rule 35(f), 29 C.F.R. § 2200.35(f) (1992). *See* 51 Fed. Reg. 32006 & 32021 (Sep. 8, 1986); 57 Fed. Reg. 41676 & 41685 (Sep. 11, 1992). Former Rule 35(f) allowed the Secretary to amend the originally issued citation "without leave of the Judge" [*see* 51 Fed. Reg. at 32008] "once as a matter of course in the complaint before the answer is served," but required such an

amendment to meet three conditions, including the requirement that the "amended allegation arises out of the same conduct, occurrence or hazard described in the citation."[1]

The nearest analogue in the Federal Rules of Civil Procedure to Commission Rule 34(a)(3) is Fed. R. Civ. P. 15(a)(1), which allows a party to "amend its pleading once as a matter of course" within 21 days after specified events. Although Fed. R. Civ. P. 15(a)(1) allows a party to amend a pleading without motion as a matter of course, such an amended pleading will be deemed to relate back to the date of the original pleading only if it meets the requirements set forth in Fed. R. Civ. P. 15(c)(1). *See* 6A Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1496.1 (3d ed. 2010) (observing that the "language of subdivision (c) seems to embrace all amended pleadings in uniform fashion").

The provisions of Commission Rule 34(a)(3) that allow the Secretary to amend the original citation as a matter of course are consistent with the longstanding recognition that citations are "drafted by non-legal personnel who are required to act with dispatch," and that "[t]o inflexibly hold the Secretary to a narrow construction of the language of a citation would unduly cripple enforcement of the Act." *General Dynamics Land Systems Div. Inc.*, 15 BNA OSHC 1275, 1281 (No. 83-1293, 1991) (*citing Donovan v. Williams Enterprises, Inc.*, 744 F.2d 170 (D.C. Cir.

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[1] Former Commission Rule 35(f), 29 C.F.R. § 2200.35(f) (1992), provided:

> (f) *Amendment of the citation and complaint.* A contested citation, notification of proposed penalty, or notification of failure to abate may be amended once as a matter of course in the complaint before an answer is served if:
>
> (1) the amended allegation arises out of the same conduct, occurrence or hazard described in the citation;
>
> (2) the amendment does not result in incurable harm to the employer in the preparation or presentation of its case; and
>
> (3) the complaint clearly identifies the change that is being made in the allegation.
>
> All other amendments of the Secretary's allegations, as well as any amendments of the employer's responses, are governed by Federal Rule of Civil Procedure 15.

1984) (noting that enforcement of the Act would be crippled if the Secretary were inflexibly held to a narrow construction of citations issued by his investigators).

Compliance with Rule 34(a)(3)

The complaint states the reason for the amendment is to "conform to the facts believed to be true by the Secretary." Considering that Commission Rule 34(a)(3) allows the Secretary to utilize his original complaint as the vehicle for amending the originally issued citation as a matter of course without leave of the judge, the Secretary's somewhat vague and broadly stated reason for the amendment nevertheless meets the minimum requirements of Rule 34(a)(3) that the complaint "shall set forth the reasons for the amendment."

Relation Back Under FRCP 15(c)(1)(B)

The Respondent argues the amendment "should be stricken as untimely" because it fails to satisfy the requirements of Fed. R. Civ. P. 15(c)(1)(B) for the amendment to relate back to the date of the original citation because the amendments did not arise "out of the conduct, transaction, or occurrence set out … in the original" citation within the meaning of Rule 15(c)(1)(B), and that consequently the amendment falls outside the six-month limitations period contained in section 9(c) of the OSH Act, 29 U.S.C. § 658(c). (Motion, p. 12).

An assertion that an alleged violation is time barred by section 9(c) is an affirmative defense that must be pled. *See* Fed. R. Civ. P. Rule 8(c) (identifying "statute of limitations" as an affirmative defense that must be pleaded). Section 9(c) is not a jurisdictional bar to the assertion of a claim after six months. *Gen. Dynamics Corp.*, 15 BNA OSHC 2122, 2127 n. 10 (No. 87-1195).

The motion to strike the amended citation item is thus in the nature of a motion under Fed. R. Civ. P. Rules 12(c) & 12(h)(2) for judgment on the pleadings on the affirmative defense

that the amended citation item is time barred. The Motion is based in part on factual matters that are outside the pleadings, and thus pursuant to Fed. R. Civ. P. Rule 12(d), the Motion must be treated as a motion for summary judgment under Fed. R. Civ. P. Rule 56.[2]

In meeting a motion for summary judgment, the party opposing summary judgment must be allowed a "reasonable opportunity to present all the material that is pertinent to the motion" to demonstrate the existence of a dispute of material fact that would preclude the grant of summary judgment. Fed. R. Civ. P. 12(d); *cf. Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (observing that Fed. R. Civ. P. 56 "mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case" [emphasis supplied]).

It is apparent from a simple comparison of the original and amended citation items that both arise out of the same occurrence—the opening of "a bleeder valve on the D201 feed drum, without the use of respiratory equipment" on or about May 18, 2016. The amendment thus appears facially to have "arose out of the … occurrence set out … in the original" citation within the meaning of Fed. R. Civ. P. 15(c)(1)(B) and thus to relate back to the date of the original citation.

But even assuming that the Motion makes a *prima facie* showing that the amended citation did not arise out of the same conduct, transaction or occurrence set forth in the original

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[2] Fed. R. Civ. P. 12(d) provides as follows:

> **(d) Result of presenting matters outside the pleadings.** If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

citation item, and thus would be time barred, judgment on that issue would be premature at this stage of the proceedings, because there has not been adequate time for discovery.[3] *Celotex Corp.*

Prejudice

Inasmuch as Commission Rule 34(a)(3) allows the Secretary to employ his original complaint as a vehicle for amending, without motion and as a matter of course, the originally issued citation, the rule effectively establishes the conclusive presumption that such an amendment does not prejudice the cited employer.[4] Such a conclusive presumption is consistent with the view that such an amendment early in the proceedings is very unlikely to result in prejudice to an opposing party. *See* 6 Wright et al., *supra*, § 1480 (noting that a Fed. R. Civ. P. "Rule 15(a) amendment cannot prejudice an opposing party in any significant way").

It should be noted that even though the Secretary may amend the original citation as a matter of course under Commission Rule 34(a)(3), such an amendment will be deemed to relate back to the date of the original citation only if it meets the requirements of Fed. R. Civ. P. 15(c)(1). *See* 6A Wright et al., *supra*, § 1496.1.

In any event, even if a demonstration of prejudice were a cognizable basis on which to strike an amendment made as a matter of course pursuant to Commission Rule 34(a)(3), the Respondent has not met its burden to demonstrate prejudice. The Respondent's demonstration of prejudice rests principally on the averment set forth in the affidavit of an employee of the

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[3] The denial of the Motion is without prejudice to any subsequent appropriate motion for summary judgment on the limitations issue, and is further without prejudice to any contention made after the close of the evidence that the amended citation item is time barred because it fails to meet the requirements of Fed. R. Civ. P. 15(c)(1)(B) to relate back to the date of the original citation.

[4] Notably, current Commission Rule 34(a)(3) did not preserve the requirement of former Rule 35(f), which it supplanted, that such an amendment made without motion as a matter of course "not result in incurable harm to the employer in the preparation or presentation of its case." 29 C.F.R. § 2200.35(f) (1992).

Respondent that "the Refinery has not fully gathered evidence to support a defense of OSHA's allegations relating to NH_3." This averment is insufficient to establish that the amendment will prejudice the Respondent either by giving the Secretary an "unfair advantage" or depriving the Respondent of "a fair opportunity to present evidence." *See Avcon Inc.* 23 BNA OSHC 1440, 1453 (No. 98-1168, 2011). This averment in the affidavit indicates simply that as of the date of the affidavit the Respondent "has not fully gathered" such evidence. This averment is insufficient to provide an evidentiary basis that would support the conclusion that going forward the Respondent will not reasonably be able to marshal such evidence.

Order

The Respondent's Motion to Strike Amendments to Citation 1, Item 1, is denied.

In view of the Respondent having conditionally responded and conditionally asserted affirmative defenses to the amended citation 1, item 1, in the Respondent's Partial Answer dated June 8, 2017, those conditional responses and affirmative defenses are deemed operative, so the Respondent is not required to file a further responsive pleading to the complaint, but if it elects to do so, such further answer to the complaint shall be filed no later than 20 days from the date of this order.

SO ORDERED.

/s/
WILLIAM S. COLEMAN
Administrative Law Judge

DATED: June 30, 2017