United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. Custom House
721 19th Street, Room 407
Denver, CO 80202-2517

SECRETARY OF LABOR, Complainant, v. BRENDEL CONSTRUCTION, INC., Respondent.	OSHRC Docket No. 18-0124

ORDER

This matter is before the Court on *Complainant's Motion For Reconsideration of the Court's Order on Motion to Amend ("Motion").* Respondent opposes the Motion.

On July 5, 2018, the Secretary made its first request to amend Citation 1, Item 1[1] to: (1) reflect a "Willful/Repeat" violation; (2) include the predicate violation as described in paragraph 3 of the Motion; and (3) allege, in the alternative, that the violation was serious. *See Secretary of Labor's Motion to Amend Complaint and Citation 1, Item 1, to Allege a Willful/Repeat Violation* ("Original Motion") at 3. What the Court infers from such a request is Complainant is either unable to allege a single characterization of the purported violation or seeks a tactical advantage by pleading all potential characterizations, thereby placing the onus on Respondent to defend against factual allegations that were not part of the original citation. In the requested relief section of the Original Motion, Complainant asked the Court for an amendment which alleges a Serious, Repeat or Willful violation. The Court DENIED the requested relief in an Order dated July 24, 2018 ("July 24, 2018 Order"). The Court's July 24, 2018, Order is the subject of Complainant's current Motion. The Court VACATES its July 24, 2018, Order and issues the following Order disposing of both the Original Motion and the current Motion.

[1] Citation 1, Item 1 was issued as a Willful violation.

Legal Standard for Amendment of a Citation and Complaint

Fed. R. Civ. P. 15, which governs amendments to pleadings, states that a court should "freely give leave [to amend a pleading] when justice so requires." Fed. R. Civ. P. 15(a)(2).[2] A judge's decision to grant an amendment to a pleading is reviewed for an abuse of discretion. *See Reed Eng. Group, Inc*., 21 BNA OSHC 1290 (No. 02-0620, 2005). If the amendment only adds another legal theory to the case, such an amendment is generally permissible. *See Schiavone Constr. Co.,* 5 BNA OSHC 1385 (No. 12767, 1977) (citing *J.L. Mabry Grading*, 2 BNA OSHC 3057 (No. 285, 1974)).

"[I]t is well-settled that prejudice to the non-moving party is the touchstone for the denial of an amendment." *Cornell & Co., Inc. v. OSHRC*, 573 F.2d 820, 823 (3d Cir. 1978). "[A] mere claim of prejudice is not sufficient; there must be some showing that the non-moving party 'was unfairly disadvantaged or deprived of the opportunity to present facts or evidence….'" *Dole v. Arco Chem. Co.,* 921 F.2d 484, 488 (3d Cir. 1990). "In the context of an action under OSHA, 'when an amendment puts no different facts in issue than did the original citation, reference to an additional legal standard is not prejudicial.'" *Dole v. Arco Chem. Co*., 921 F.2d at 488 (quoting *Donovan v. Royal Logging Co*., 645 F.2d 822, 827 (9th Cir. 1981)). Amendments made during the time frame permitted by a scheduling order will generally not prejudice Respondent, especially when the litigation schedule has been extended and the trial date continued. *See Morrison-Knudsen & Assoc*., 8 BNA OSHC 2231, 2236 (No. 76-1992, 1980) (amendments made well before the hearing rarely result in prejudice); *Higgins Erectors and Haulers, Inc.*, 7 BNA OSHC at 1738; *CMH Co., Inc*. 9 BNA OSHC at 1053 (amendment allowed when the case was "grounded upon the same occurrence as the original citation"); *Kaiser Aluminum and Chem. Corp*., 5 BNA OSHC 1180 (No. 3685, 1997) (amendments that did not change the factual allegations of a citation do not prejudice the employer).

The Court is required to ensure that fair notice is given before granting leave to amend. *Reed Eng'g Grp, Inc*.,, 21 BNA OSHC 1290, 1291 (No. 02-0620, 2005). *See Brennan v. Nat'l Realty and Constr. Co., Inc*., 489 F.2d 1257, 1264 (D.C. Cir. 1973) ("So long as fair notice is afforded, an issue litigated at an administrative hearing may be decided by the hearing agency

[2] Federal Rule of Civil Procedure 15 is applicable to Commission proceedings. *See Southern Colorado Prestress Co.*, 586 F.2d 1342 (10th Cir. 1978).

even though the formal pleadings did not squarely raise the issue."). Where fair notice is provided, administrative pleadings are liberally construed and easily amended. *Miller Brewing Co*., 7 BNA OSHC 2155, 2157 (No. 78-3216, 1980).

As discussed below, Complainant's proposed amendment, which proposes multiple, alternate characterizations, fails to provide fair notice to Respondent. *See Roanoke Iron & Bridge Works, Inc.,* 5 BNA OSHC 1391 (No. 10411, 1977) (Multiple alternative theories of prosecution create doubt as to whether the employer has been afforded fair notice of the violation with which it is charged.)

Discussion

As Complainant has acknowledged, the Commission has adopted notice pleading which is designed to guarantee fair notice is given to a respondent. *National Realty & Construction Co. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir. 1973) (citations omitted). While Complainant is not required to lay out every single fact that he will rely upon to establish his case, the concept of notice pleading should not be construed to relieve Complainant of complying with the pleading requirements of the Act and the regulations adopted by the Secretary of Labor, which dictate the content of the complaint and notification of proposed penalties.

Section 9(a) of the Act provides that a citation must "describe with particularly the nature of the violation, including reference to the provision of the Act, standard, rule, regulation, or order alleged to have been violated." 29 U.S.C. § 658. OSHA has also adopted a regulation, which provides that, after or concurrent with the issuance of a citation, the employer should be notified of the proposed penalty or that no penalty is being proposed. *See* 29 C.F.R. § 1903.15. To give effect to the requirement of fair notice, these two legal requirements must be read together. The regulations require citations to include a reference to the provision of the rules or regulations for which a respondent is being cited. When read in conjunction, the Court finds these provisions require setting forth the classification of the alleged violation. This is due in no small part to the fact that the characterization of a citation item determines the amount of the penalty.

A regulation must be read as a coherent whole and, if possible, construed so that every word has some operative effect. *See Am. Fed'n of Gov't Emps., Local 2782 v. FLRA*, 803 F.2d 737, 740 (D.C. Cir. 1986) ("regulations are to be read as a whole, with each part or section . . . construed in connection with every other part or section") (internal quotation marks and citation

omitted); *E. Smalis Painting Co*., 22 BNA OSHC 1553, 1580 (No. 94-1979, 2009) (same); *Summit Contractors, Inc*., 23 BNA OSHC 1196, 1202-03 (No. 05-0839, 2010) (noting rule of statutory construction that every word be given effect), *aff'd per curiam*, 442 F. App'x 570 (D.C. Cir. 2011) (unpublished).

Under the requirements of the Act and related regulations, fair notice requires three things: (i) notice of the nature and location of the violation; (ii) the standard alleged to have been violated; and (iii) a notification of proposed penalties, *which is driven by the classification of the alleged violation*. The Original Motion and the current Motion fail to establish the penalty associated with the proposed classification amendments. If the motion to amend were granted, Respondent would not have fair notice of vital information that would allow it to decide whether and how to proceed and would be prejudiced by such omission.

As the Court noted in its July 24, 2018 Order, each classification requires different facts in order to be proved. Presented with the moving target Complainant has proposed, Respondent would be prejudiced in its ability to determine whether it wants to proceed at all (i.e. Respondent may well take a different approach if the Citation was classified serious vs. repeat or willful and the proposed penalty) or how it wishes to proceed (i.e. determination of litigation strategy which may include witness to be called, exhibits to be introduced, and employment of expert witnesses). The multiple, alternative theories for relief simply do not provide fair notice, even under the fairly liberal requirements of notice pleading.

As the Eighth Circuit Court of Appeals recognized in the case of *Nakdimen v. Baker*, 100 F.2d 195 (8th Cir. 1929):

> Pleading and a distinct issue are essential in every system of jurisprudence, and there can be no orderly administration of justice without them. If a party can allege one cause of action and then recover upon another, his complaint will serve no useful purpose, but rather to ensnare and mislead the adversary.

Nakdimen, 100 F.2d. at 197.

Permitting Complainant to amend the Complaint and Citation 1, Item 1 as it has proposed would relieve Complainant of his prosecutorial responsibility to plead as required by the Act and associated regulations described above. If the Court were to sanction this approach, which it does not, the pleading requirements discussed herein would be rendered superfluous because

Complainant could meet his burden in the future by merely alleging all potential characterizations without regard to the requirements of fair notice.

Finally, the cases discussed by Complainant in the current motion are not dispositive since none of the cases deal with permitting Complainant to amend the citation and complaint to allege all three possible classifications permitted under the Act.

The Original Motion and the Motion are DENIED.

SO ORDERED.

/s Patrick B. Augustine

Patrick B. Augustine
Judge - OSHRC

Dated: August 16, 2018
Denver, CO