UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,	)	
Complainant,	)	
v.	)	OSHRC Docket No. 14-1499
HEXION, INC., formerly known as MOMENTIVE SPECIALTY CHEMICALS, INC.	)	
Respondent.	)	

ORDER GRANTING THE SECRETARY'S MOTION TO AMEND THE COMPLAINT AND DENYING RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

Background

On March 29, 2012, the Occupational Safety and Health Administration (OSHA) amended its Hazard Communication Standard (HCS) to incorporate the United Nations' Globally Harmonized System of Classification and Labeling of Chemicals (GHS). 77 Fed. Reg. 17,474. The amended HCS (HCS 2012) provided a transition period of more than three years for manufacturers, importers, distributors, and employers to transition to the new hazard communication requirements. During this period, manufacturers, importers, distributors, and employers had the option of complying with the requirements of either the original or amended version of the standard. 29 C.F.R. §1910.1200(j)(3). Manufacturers, importers, distributors and employers had to be in compliance with HCS 2012 by June 1, 2015. *See* 29 C.F.R. §1910.1200(j)(2).

On October 3, 2012, OSHA sent a letter to Hexion stating that it had "become aware" of

a potential issue with Hexion's material safety data sheet (MSDS), based on two studies, published in 2010 and 2011, indicating that bisphenol A (BPA) constitutes a potential reproductive hazard. The letter also stated that the HCS was revised on March 26, 2012 and that manufacturers have until June 1, 2015 to comply with the revised standard. (Resp. Ex. A).

On December 20, 2012, Respondent replied that the studies cited by OSHA in the October 2012 letter had significant flaws and that the studies' conclusions were inconsistent with the "total weight of evidence," which must be considered under HCS 2012. The letter concluded that, in Hexion's view, the total weight of the evidence, as required by HCS 2012, did not indicate that BPA is a potential reproductive hazard. (Resp. Ex. B).

OSHA responded on May 14, 2013, disputing Hexion's analysis of the weight of the evidence, informing the company that its current MSDS was not compliant with the standard and that it might be subject to a citation. Hexion was also directed to send a corrected MSDS to OSHA by April 14, 2013 (a month before the date of the letter).[1] (Resp. Ex. C).

An OSHA inspection of Hexion's facility took place on April 8, 2014. On September 10, 2014 OSHA issued a citation to Hexion alleging violations of the 1994 HCS (HCS 1994). The total proposed penalty was $2,975.00. Citation 1, Item 1(a) alleged a serious violation of 29 C.F.R. §1910.1200(d)(2). The item stated that:

> Chemical manufacturers, importers or employers evaluating chemicals shall identify and consider the available scientific evidence concerning such hazards. For health hazards, evidence which is statistically significant and which is based on at least one positive study conducted in accordance with established scientific principles is considered to be sufficient to establish a hazardous effect if the results of the study meet the definitions of health hazards in this section. Appendix A shall be consulted for the scope of health hazards covered, and Appendix B shall be consulted for the criteria to be followed with respect to the completeness of the evaluation and the data to be reported.

[1] Obviously, this is an error, since the date precedes the date of the letter by a full month. Given that the Secretary told Hexion that it had three months to update its MSDS, it is highly likely that the Secretary meant August 14, 2013, which was precisely three months after the date of the letter.

a. On or about April 8, 2014, Momentive Specialty Chemicals, Inc., 180 Broad Street, Columbus, Ohio: The employer did not completely identify and consider hazards associated with bisphenol A (BPA). Material safety data sheets did not contain reproductive health hazard effects associated with BPA and BPA containing products, such as but not limited to bisphenol A-157.

Item 1(b) alleged a serious violation of 29 C.F.R. §1910.1200(g)(2) and (g)(2)(iv). The item stated that:

29 C.F.R. §1910.1200(g)(2): Each material safety data sheet shall be in English (although the employer may maintain copies in other languages as well), and shall contain at least the following information:

29 C.F.R. §1910.1200(g)(2)(iv): The health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical:

a. On or about April 8, 2014, Momentive Specialty Chemicals, Inc., 180 Broad Street, Columbus, Ohio: Material safety data sheets did not contain reproductive health hazard effects associated with bisphenol A (BPA) and BPA containing products, such as but not limited to bisphenol A-157.

The Motions

1. Respondent's Motion to Dismiss the Complaint

On February 11, 2015, Respondent filed a Motion to Dismiss the complaint. Respondent seeks dismissal of the complaint on three grounds:

1. It fails to state a claim upon which relief can be granted, because Hexion was legally entitled to comply with either HCS 1994 or HCS 2012 during the current transition period of May 25, 2012 through June 1, 2015, but the complaint and the citation only allege that Hexion failed to comply with HCS 1994;

2. The complaint is barred by the six-month statute of limitations under Section 9(c) of the Occupational Safety and Health Act of 1970 (the Act), 29 U.S.C. §658(c), because the citation was issued more than six months after OSHA became aware of the alleged violations;

3. The complaint's claims are moot because they seek to enforce and abate alleged non-

compliance with HCS 1994 only, which will no longer have any legal effect by the time this matter is adjudicated on the merits and therefore there is no live controversy at all stages of the proceeding.

2. The Secretary's Motion to Amend

After Respondent filed its Motion to Dismiss the complaint, the Secretary, on March 16, 2015, filed its Motion to Amend the complaint and citation.

As amended, the citation would read as follows (amended language in bold type face):

Citation 1, Item 1(a):

> 29 C.F.R. §1910.1200(d)(2)**(2011)**: Chemical manufacturers, importers or employers evaluating chemicals shall identify and consider the available scientific evidence concerning such hazards. For health hazards, evidence which is statistically significant and which is based on at least one positive study conducted in accordance with established scientific principles is considered to be sufficient to establish a hazardous effect if the results of the study meet the definitions of health hazards in this section. Appendix A shall be consulted for the scope of health hazards covered, and Appendix B shall be consulted for the criteria to be followed with respect to the completeness of the evaluation and the data to be reported.
>
> **29 C.F.R. §1910.1200(d)(2): Chemical manufacturers, importers or employers classifying chemicals shall identify and consider the full range of available scientific literature and other evidence concerning the potential hazards. There is no requirement to test the chemical to determine how to classify its hazards. Appendix A to §1910.1200 shall be consulted for classification of health hazards, and Appendix B to §1910.1200 shall be consulted for classification of physical hazards.**
>
> **§1910.1200(d)(3)(i). Chemical manufacturers, importers, or employers evaluating chemicals shall follow the procedures described in Appendices A and B to §1910.1200 to classify the hazards of the chemicals, including determinations regarding when mixtures of the classified chemicals are covered by this section.**
>
> a. On or about April 8, 2014, Hexion, Inc., formerly known as Momentive Specialty Chemicals, Inc., 180 Broad Street, Columbus, Ohio: The employer did

not completely identify and consider hazards associated with bisphenol A (BPA). Material safety data sheets / **safety data sheets** did not contain reproductive health hazard effects associated with BPA and BPA containing products, such as but not limited to bisphenol A-157.

As amended, Item 1(b) would read as follows:

29 C.F.R. §1910.1200(g)(2)**(2011)**: Each material safety data sheet shall be in English (although the employer may maintain copies in other languages as well), and shall contain at least the following information:

29 C.F.R. §1910.1200(g)(2)(iv)**(2011)**: The health hazards of the hazardous chemical, including signs and symptoms of exposure, and any medical conditions which are generally recognized as being aggravated by exposure to the chemical:

29 C.F.R. §1910.1200(g)(2): The chemical manufacturer or importer preparing the safety data sheet shall ensure that it is in English (although the employer may maintain copies in other languages as well), and includes at least the following section numbers and headings, and associated information under each heading, in the order listed (*See* Appendix D to §1910.1200-Safety Data Sheets, for the specific content of each section of the safety data sheet):

29 C.F.R. §1910.1200(g)(2)(ii): Section 2, Hazard(s) identification

29 C.F.R. §1910.1200(g)(2)(xi): Section 11, Toxicological information

a. On or about April 8, 2014, Hexion, Inc., formerly known as Momentive Specialty Chemicals, Inc., 180 Broad Street, Columbus, Ohio: Material safety data sheets did not contain reproductive health hazard effects associated with bisphenol A (BPA), and BPA containing products, such as but not limited to bisphenol A-157. **Safety data sheets did not include reproductive toxicity effects associated with bisphenol A (BPA) and BPA containing products, such as but not limited to bisphenol A-157, in Sections 2 and 11.**

Also, in its Motion to Dismiss, Respondent indicated that it changed its name to Hexion, Inc. as of January 15, 2015. In view of Respondent's assertion, the Secretary moved to amend the complaint to name Hexion, Inc. as the Respondent.

Discussion

A. The Secretary's Motion to Amend

The Federal Rules of Civil Procedure (Fed.R.Civ.P.) apply to Commission proceedings.

Section 12(g) of the Act states that "[u]nless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedures." 29 U.S.C. §661(g). Commission Rule 2(b); 29 C.F.R. §2200.2(b). The Commission has no rule applicable to amending a citation after a complaint has been filed. Accordingly, the Federal Rules apply. Fed.R.Civ.P. 15(a)(2) states that, before trial "[t]he court should freely give leave [to amend] when justice so requires."

The decision to amend a pleading is at the sound discretion of the trial court. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). *See also Cornell & Co., Inc. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir. 1978). The Commission has held that motions to amend pleadings will not be granted if the objecting party would be prejudiced by the amendment, or if there was intent to deceive the opposing party. *See Kokosing Constr. Co., Inc.*, 21 BNA OSHC 1629, 1631 (No. 04-1665, 2006), *aff'd*, 232 Fed.Appx. 510 (6th Cir. 2007). S*ee also ConAgra Flour Milling Co.,* 15 BNA OSHC 1817, 1821-23 (No. 88-2572, 1992). "[I]t is the opposing party's burden to prove that such prejudice will occur." *Kiser v. Gen. Elec. Corp.*, 831 F.2d 423, 428 (3d Cir. 1987), *citing Sanders v. Clemco Indus.*, 823 F.2d 214, 217 (8th Cir. 1987). Judges must also ensure that the objecting party has sufficient time to prepare its case, and should grant a continuance where appropriate. *Kokosing Constr. Co.,* 21 BNA OSHC at 1631, *citing Reed Eng'g Group, Inc.*, 21 BNA OSHC 1290, 1291 (No. 02-0620, 2005) ("'fair notice' must be given to a non-moving party; this may be accomplished through granting a continuance").

Respondent opposes the Secretary's Motion to Amend on two grounds:

1. Respondent argues that the amendment would result in undue prejudice. Respondent contends that, to allow the amendment under these circumstances, would cause it to file a second

Motion to Dismiss the citation and complaint for violation of Section 9(c) of the Act. This would cause it to needlessly incur redundant attorney fees and expenses. It notes that in *Principal Life Ins. Co. v. United States,* 75 Fed.Cl. 32, 33 (2007), *recons. denied,* 76 Fed. Cl. 326 (2007), the United States Court of Federal Claims denied the government's motion to amend its answer to add recoupment counterclaims based on undue prejudice and delay. In so ruling, the court found that the taxpayer was entitled to be notified of the existence of such counterclaims before proceeding with the litigation, and held that granting the government's motion to amend would require the expenditure of additional resources and set off a new round of motions. *Id.* at 33.

The Commission has held that the Secretary's prehearing amendment should be permitted unless the employer would be prejudiced in the preparation or presentation of its case. *Bland Constr. Co.,* 15 BNA OSHC 1031, 1041 (No. 87-992, 1991), *citing Anoplate Corp.,* 12 BNA OSHC 1678, 1687 (No. 80-4109, 1986). Where an amendment adds new factual issues against which an employer is unprepared to defend, a judge may allow the amendment if the prejudice can be cured. The question is whether, in the time remaining until the hearing, or during a reasonable continuance of the hearing, the employer can prepare its defense. *Bland Constr. Co.,* 15 BNA OSHC at 1041-1043. "Extra case preparation and similar inconveniences do not amount to legal prejudice." *Genesee Brewing Co.,* 11 BNA OSHC 1516, 1518 (No. 78-5178, 1983). *See Southern Scarp Materials Co., Inc.,* 23 BNA OSHC 1596, 1601 (No. 94-3393, 2011).

In *Principal Life Ins. Co. v. United States,* the case relied upon by Respondent, Principal sued the government for a tax refund. After the trial and after the court determined that Principal was entitled to a refund, the government sought to amend its answer asserting various offsets.

The court noted that amendments are to be freely granted except where the opposing party would be "substantially" prejudiced or the requested amendment was "unreasonably delayed." 75 Fed. Cl. at 33. The court noted that the government's motion "would undoubtedly set off a new wave of motions, if not require further discovery and a trial." *Id.* This, the court intimated, constituted legal prejudice. Moreover, the court noted that, even if the prejudice did not exist, the government "provided no explanation whatsoever as to why it waited more than four years - until after the trial and an opinion on the merits in this case - to first raise these issues." *Id*. at 33-34.

In the instant case, while the Secretary made his Motion to Amend after filing the complaint, it was made before Respondent's answer was filed, a hearing scheduled, discovery held, or settlement negotiations begun, and early enough in the proceedings to allow Respondent an opportunity to prepare a full defense. Outside an additional potential expense for filing an additional Motion to Dismiss, Hexion does not suggest that the amendment would interfere with its ability to prepare its defense.

I find that the amendment would not cause Respondent any prejudice.

Respondent disputes the Secretary's assertion that the Commission does not have a rule to amend a citation after a complaint has been filed. It notes that Commission Rule 34(a)(3); 29 C.F.R. §2200.34(a)(3) provides that "[w]here the Secretary seeks in his complaint to amend his citation or proposed penalty, he shall set forth the reasons for amendment and shall state with particularity the change sought." According to Hexion, the basis for the amended claims was known to the Secretary more than a year before the complaint was filed. Yet, the Secretary's Motion fails to offer any explanation or justification as to why he was not able to set forth the reasons for the amendment.

The Commission rule cited by Respondent applies only when the Secretary seeks to amend the citation or proposed penalty in the complaint. It does not apply after the complaint has been filed. As noted, the applicable rule is Fed.R.Civ.P. 15(a)(2) which plainly states that the "court should freely give leave when justice so requires."

2. Respondent also asserts that the Motion to Amend should be denied as futile because both the underlying and the amended citation are time barred under the six month statute of limitations provision of Section 9(c) of the Act, 29 U.S.C. §658(c). Respondent asserts that the Secretary first learned of the alleged deficiency in its MSDS for BPA no later than May 14, 2013 when OSHA first advised Hexion that its "MSDS(s) is not compliant with the standard" under "either a hazard determination (HCS 1994) or a hazard classification (HCS 2012) BPA." This was more than a year before the original citation was issued on September 10, 2014.

As will be discussed, *infra*, I find that the citation is not barred by Section 9(c) of the Act. Therefore, it does not constitute a basis for denial of the Secretary's Motion to Amend.

Finally, Respondent does not object to the Secretary's Motion to Amend the complaint to reflect the name change of Respondent. Respondent alleges no prejudice from the amendment. Accordingly, the Motion is granted. *See John Hill, d/b/a Leisure Resources Corp.,* 7 BNA OSHC 1485 (No. 78-0047, 1979).

Finding that the amendment would not be barred by Section 9(c) of the Act, and that Respondent has not established that it would be prejudiced by the amendment, the Secretary's Motion to Amend the citation and complaint is **GRANTED**.

Under Fed.R.Civ.P. 15(c)(1)(B) the amendment relates back to the date of the original citation. *See Vicon Corp.,* 10 BNA OSHC 1153, 1157 (No. 78-2923, 1981), *aff'd* 691 F.2d 503 (8th Cir. 1982).

B. Respondent's Motion to Dismiss

Respondent Moves to Dismiss the Complaint and makes three arguments in support of its motion.

1. Respondent first asserts that the citation and complaint fail to state a claim upon which relief can be granted. Hexion points out that the time between May 25, 2012 and June 1, 2015 constituted a transition period during which it was legally entitled to comply with either HCS 1994 or the revised standard, HCS 2012. The citation and complaint only allege that Hexion failed to comply with HCS 1994. Respondent asserts that it is not enough for the Secretary to allege that it violated only one of the standards applicable during the transition period, because it could fulfill all applicable HCS requirements during this period by complying solely with the other standard. Because Respondent was entitled to comply with either HCS 1994 or HCS 2012, the Secretary's failure to allege a violation of HCS 2012 is fatal to the citation.

As discussed, *supra*, the Secretary's Motion to Amend the citation and complaint to allege violations of both HCS 1994 and HCS 2012 is granted. Therefore, Respondent's argument that the Secretary failed to state a claim upon which relief can be granted is moot.

2. Hexion next asserts that the citation and complaint must be dismissed on the grounds that the action is barred by the six month statute of limitations provision of Section 9(c) of the Act.[2]

Respondent argues that Section 9(c) requires that a citation be issued within six months of the occurrence of a violation or, for uncorrected violations, within six months of the date the Secretary discovered or reasonably should have discovered the violative condition. *See Austin Indus'l Specialty Servs., LP,* 24 BNA OSHC 1994, 2005-06 (No. 11-2555, 2013), *aff'd* 765 F.3d

[2] Section 9(c) states that: "No citation may be issued under this section after the expiration of six months following the occurrence of any violation."

434, 442-43 (5th Cir. 2014).

Respondent likens the alleged failure to maintain an appropriate MSDS to a record-keeping violation. It cites to *AKM LLC v. Secretary of Labor,* 675 F.3d 752, 759 (D.C. Cir. 2012) where the court rejected the Secretary's argument that the alleged record-keeping violations should be treated as continuing violations. *Id.* at 756. The court stated that "the 'mere failure to right a wrong … cannot be a continuing wrong which tolls the statute of limitations,' for if it were, 'the exception would obliterate the rule.'" *Id.* at 757, *citing Fitzgerald v. Seamans,* 553 F.2d. 220, 230 (D.C. Cir. 1977). Consequently, "the Secretary's continuing violations theory would transform the failure to right a past wrong into a reason not to start the limitations clock - a result our precedents plainly proscribe." *Id.* at 758.

I find Hexion's reliance on *AKM* to be inapposite. *AKM* involved a record-keeping violation. The failure to maintain an appropriate MSDS is not a record-keeping violation that occurs upon failure to enter the record. Rather, the alleged failure to maintain a compliant MSDS constitutes a continuing violation that recurs every time an employee is exposed to a hazard. In *Central of Georgia Railroad Company* the Commission discussed the meaning of "occurrence:"

> For section 9(c) purposes, a violation of section 5(a)(2) of the Act "occurs" whenever an applicable occupational safety and health standard is not complied with and an employee has access to the resulting zone of danger. Therefore, it is of no moment that a violation *first* occurred more than six months before the issuance of a citation, so long as the instances of noncompliance and employee access providing the basis for the contested citation, occurred within six months of the citation's issuance.

5 BNA OSHC 1209, 1211 (No. 11742, 1977) (emphasis in original), *aff'd in relevant part* 576 F.2d 620 (5th Cir. 1978).

The purpose of the HCS is to "make employees aware of the hazards arising from chemicals used in the workplace and ensure that they have access to information regarding

means of protecting themselves from such hazards." *Safeway Store No. 914,* 16 BNA OSHC 1504, 1505 (No. 91-373, 1993).

Assuming, *arguendo,* that BPA presents reproductive hazards, employees were exposed to a hazard every time they worked with BPA, without access to an appropriate MSDS informing them of the hazards presented by the chemical. Under such circumstances, the statute of limitations would begin to run when either an appropriate MSDS was provided or the chemical was removed from the workplace.[3] Neither is alleged to have occurred here more than six months prior to issuance of the citation. Respondent's theory would provide it with a virtual "get out of jail" free card to continue to expose employees to BPA without providing employees with the information necessary to protect themselves from a potentially hazardous substance. Congress could not have intended that Section 9(c) produce such a result.

3. Finally, Respondent asserts that the citation is moot because they seek to enforce and abate alleged non-compliance with HCS 1994 only, which will no longer have any legal effect by the time this matter is adjudicated on the merits and therefore there is no live controversy at all stages of the proceeding.

Having granted the Secretary's Motion to Amend the citation and complaint to include the current version of the standard, I find that this argument no longer applies.

Accordingly, Respondent's Motion to Dismiss is **DENIED**.

SO ORDERED.

/s/ Carol A. Baumerich
Honorable Carol A. Baumerich
Judge, OSHRC

Dated: October 2, 2015
Washington, D.C.

[3] Where the hazards created by the violation of a standard persist, a party may continue to violate the standard until its obligation to act pursuant to the standard is satisfied. *See AKM*, 675 F.3d at 758. *See also Id*. at 763 (Garland, J., concurring).