UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Secretary of Labor,	)	
	)	
Complainant,	)	
	)	
v.	)	OSHRC Docket No. 17-0531
	)	
PECO Energy Company,	)	
	)	
Respondent.	)	
	)	

ORDER GRANTING COMPLAINANT'S MOTION TO AMEND CITATION AND COMPLAINT

I. FACTS

1. Respondent alleges that PECO is a utility company which operates in southeastern Pennsylvania and provides electricity to about 1.6 million customers and natural gas to over 511,000 customers. As part of its business, PECO is involved in the operation and maintenance of electric transmission and distribution lines and equipment. Respondent further alleges that on August 27, 2016, it needed to replace a padmount transformer for a residential customer. The padmount transformer is a ground mounted electric power distribution transformer in a steel cabinet mounted on a concrete pad. Padmount transformers are used in power distribution to reduce the primary voltage on the line to the lower secondary voltage (service lines) supplied to utility customers. On August 27, 2016, a PECO employee allegedly suffered third degree electrical burns when he came into contact with 10kv when removing and replacing the faulty padmount transformer in Malvern, Pennsylvania (accident).

2. A citation was issued to Respondent in this matter on February 27, 2017 pursuant to the Occupational Safety and Health Act of 1970 (OSH Act or Act). As

issued, Citation 1, Item 1, alleged a Serious violation of 29 C.F.R. § 1910.333(a)(1) with a proposed penalty of $11,408.00, and Citation 1, Item 2, alleged a Serious violation of 29 C.F.R. § 1910.333(b)(2)(ii)(A) with a proposed penalty of $11,408.00 (together Citation).[1]

3. On March 16, 2017, PECO timely contested the Citation.

4. In communications with counsel for the Secretary in April 2017, counsel for Respondent put the Secretary on notice of Respondent's position that the cited standard, § 1910.333, is not applicable because § 1910.333 does not apply to "generation, transmission, and distribution installations."

5. On May 19, 2017, Complainant filed his complaint and attached and incorporated by reference the Citation and Notification of Penalty.

6. In its answer filed on June 6, 2017, Respondent included affirmative defenses that stated that the "standards allegedly violated by Respondent are inapplicable" and that the "cited standards are preempted by more specific standards."

7. The Court conducted a pre-hearing scheduling conference with the parties on August 16, 2017.

8. By Notice of Hearing and Scheduling Order, dated August 17, 2017 (Scheduling Order), the Court ordered that experts must be disclosed by December 1, 2017 and expert reports must be produced by December 8, 2017. The Court also ordered that rebuttal experts reports were to be produced by January 12, 2018. The Court further ordered that motions to amend pleadings were to be filed by November 10, 2017. Discovery was to be completed by January 26, 2018 and the trial was to commence on May 1, 2018.

[1] The Secretary's Motion does not seek to amend Citation 2, Item 1.

9. On November 9, 2017, the Secretary filed his Motion to Amend Citation and Complaint (Motion).[2] The Secretary seeks to amend the citation and complaint such that Citation 1, Item 1, alleges a grouped violation of four interrelated provisions of 29 C.F.R. § 1910.269; and Citation 1, Item 2, alleges a violation of 29 C.F.R. § 1910.269(c)(3)(ii). The Secretary asserts that the amended violations are based upon the same underlying alleged facts as the original violations, would remain classified as "Serious," and there would be no change in penalties.[3] He further asserts that there would be no prejudice to Respondent, since Respondent itself put the Secretary on notice in April 2017 of its position that § 1910.269 (rather that the cited standard § 1910.333) is applicable to the cited conditions.

10. Specifically, the Secretary seeks to amend the two violations issued under 29 C.F.R. § 1910.333 (Part 1910, Subpart S – Electrical, "Selection and use of work practices.") to violations under 29 C.F.R. § 1910.269 (Subpart R - "Electric power generation, transmission, and distribution."). Amended Citation 1, Item 1, alleges four grouped violations of four interrelated paragraphs of 29 C.F.R. § 1910.269. Item 1a alleges a violation of paragraph (l)(1)(iii); Item 1b alleges a violation of paragraph (w)(7); Item 1c alleges a violation of paragraph (m)(3)(vii); and Item 1d alleges a violation of paragraph (n)(2). The grouped penalty remains $11,408.00, which is the same as the original Citation 1, Item 1.

11. The original Citation 1, Item 1, alleged:

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[2] The Secretary filed his Motion pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure (Fed. R. Civ. P.) made applicable to this proceeding by Rule 2(b) of the Rules of Procedure for the Occupational Safety and Health Review Commission (Commission), 29 C.F.R. § 2200.2(b). The Motion was filed within the time-frame proposed by the parties and implemented by the Court in its Scheduling Order.

[3] The Secretary asserts that Citation 1, grouped Items 1a-1d, are based upon the same underlying facts as the original Citation 1, Item 1, namely the activities and conditions that existed at the time of the accident on August 27, 2016.

While replacing a pad transformer the employer failed to ensure that energy from an electrical source was deenergized prior to the employees performing work, thus exposing the employees to electrocution/electric shock on or about August 27, 2016.

12. The amended alleged violation description (AVD) language for Citation 1, Item 1a, alleging a violation of § 1910.**269(l)(1)(iii)**[4], is as follows:

While replacing a pad transformer the employer failed to ensure that energy from an electrical source was deenergized **in accordance with paragraphs (d) or (m),** prior to the employees performing work, thus exposing the employees to electrocution/electric shock on or about August 27, 2016.

13. The amended AVD language for Citation 1, Item 1b, alleging a violation of § 1910.**269(w)(7)**, is as follows:

While replacing a pad transformer **when there was a possibility of voltage backfeed from sources of cogeneration or from the secondary system,** the employer failed to ensure **that electric lines and equipment were deenergized and properly grounded, and failed to comply with the requirements of paragraphs (l), (m) and (n) of this section,** prior to the employees performing work, thus exposing the employees to electrocution/electric shock on or about August 27, 2016.

14. The amended AVD language for Citation 1, Item 1c, alleging a violation of §1910.**269(m)(3)(vii)**, is as follows:

While replacing a pad transformer, the employer failed to ensure that **electric lines and equipment were properly grounded as required by paragraph (n)** prior to the employees performing work, thus exposing the employees to electrocution/electric shock on or about August 27, 2016.

15. The amended AVD language for Citation 1, Item 1d, alleging a violation of § 1910.**269(n)(2)**, is as follows:

While replacing a pad transformer, the employer failed to ensure that **electric lines and equipment were deenergized under the provisions of paragraph (m) and properly grounded under paragraphs (n)(3) through (n)(8**) prior to the employees performing work, thus exposing the employees to electrocution/electric shock on or about August 27, 2016.

[4] Underlined material in bold indicates language to the original citation 1, Item 1, that would be added by the Motion.

16. Citation 1, Item 2, is also amended to allege a violation under § 1910.269 rather than § 1910.333. The Secretary asserts that this is consistent with the position Respondent specifically communicated to the Secretary in April 2017. The Secretary further states that Amended Citation 1, Item 2, alleges a violation of 29 C.F.R. § 1910.269(c)(3)(ii) based on the same underlying facts as the original Citation 1, Item 2.

17. The original Citation 1, Item 2, alleged:

> While replacing a pad transformer the employer did not implement safe procedures for de-energizing circuits and equipment thus exposing the employees to electrocution/electric shock hazards on or about August 27, 2016.

18. The amended AVD language for Citation 1, Item 2, alleging a violation of § 1910.**269(c)(3)(ii)**, is as follows:

> While replacing a pad transformer the employer did not **hold additional job briefings when the work scope and the number of potential energized electrical sources increased significantly during the course of the work, resulting in a failure** to implement safe procedures for deenergizing circuits and equipment and exposing the employees to electrocution/electric shock hazards on or about August 27, 2016.

19. Complainant asserts that the proposed amendment does not change the gravity classifications (high severity, greater probability) of the alleged amended violations.

20. In his Motion, the Secretary argues Fed. R. Civ. P. 15(a)(2) permits a party to amend the complaint by "the court's leave," and "[t]he court should freely give leave when justice so requires." Complainant further asserts that "[w]here fair notice is given, administrative pleadings are liberally construed and easily amended." *Miller Brewing Co.*, 7 BNA OSHC 2155, 2157 (No. 78-3216, 1980).

He argues motions to amend should be granted unless the objecting party "would be prejudiced by the amendment." *Kokosing Constr. Co., Inc.*, 21 BNA OSHC 1629, 1631 (No. 04-1665, 2006) (citing *Brown & Root, Inc.*, 8 BNA OSHC 1055, 1058-59 (No. 76-3942, 1980)); *Kiser v. Gen. Elec. Corp.*, 831 F.2d 423, 428 (3d Cir. 1987). The Secretary further argues that "[t]here will be no prejudice to Respondent because the amended violations are based on exactly the same facts as the original violations. There is also no prejudice to Respondent because amending to violations under § 1910.269 is consistent with Respondent's own stated position about which standard is applicable to the conditions." (Motion at 5). Complainant continues by asserting there is no prejudice, because his Motion is being filed well in advance of the hearing, and "within the time-frame proposed by the parties and implemented by the Court" in its Scheduling Order. (*Id*.).

21. On November 22, 2017, Respondent filed its Response in Opposition to the Secretary's Motion to Amend Citation and Complaint (Opposition). Respondent asked the Court to deny the Secretary's Motion on multiple grounds. Respondent argued that the "Secretary is not just seeking to amend the Complaint, but rather is attempting to issue an entirely new citation with multiple new alleged violations well beyond the six-month statute of limitations established under § 9(c) of the Occupational Safety and Health Act of 1970 (OSH Act or Act)." (Opposition at 1). In addition, Respondent asserted that the Secretary's proposed amended citation seeks to cite PECO under a completely different standard (29 C.F.R. § 1910.269 as opposed to 29 C.F.R. § 1910.333) with multiple subparts alleging new specific facts that were not

part of the original citation or complaint.[5] Further, Respondent argues that the Secretary provided no substantive basis for how or why the proposed amended items relate back, other than suggesting that they involve the same underlying facts.[6] In its Opposition, Respondent acknowledges Fed. R. Civ. P. 15(c)(1)(B) states that an amendment relates back when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading . . . ."[7] Additionally, Respondent asserts that the Secretary has used discovery and retained an expert who authored the § 1910.269 standard as a mechanism to cure a legal deficiency in its citation and overcome an affirmative defense.[8] Respondent argues that it would be highly prejudicial to PECO to allow the Secretary to effectively issue a brand new citation alleging all new violations under a completely different standard relying on a whole new set of facts well after the close of the OSHA investigation, nine months after the statute of limitations expired and months into litigation.[9] Respondent asserts that the proposed amendments by the Secretary raise additional facts, different conduct and transactions, and alter the legal

[5] Respondent asserts that the new violations should be barred because they require different abatement.
[6] Respondent argues that the Secretary fails to establish how or why Fed. R. Civ. P. 15 is appropriate to allow the amendment to relate back to the original date of the pleading where the original Complaint was filed outside the six-month statute of limitations for issuing a citation. It also says that Fed. R. Civ. P. 15 does not permit amendments to pleadings when there has been undue delay, bad faith, dilatory motive by the movant or prejudice to the non-moving party. Respondent also asserts that the proposed amendments should be barred "[u]nder a theory analogous to laches". (Opposition at p. 11).
[7] *But see*, cited by PECO in its Opposition, *Reytec Construction Resources*, No. 13-1541, (O.S.H.R.C.A.L.J., Mar. 13, 2014) (order denying Secretary's motion to amend the citation and complaint where the allegations contained in the proposed amendment did not arise out of the same conduct, transaction, or occurrence as the original allegations).
[8] Respondent asserts that granting the motion effectively bars it from raising affirmative defenses.
[9] PECO asserts that it will be prejudiced because it will need additional time to identify and designate an expert witness to address the very technical issues raised under § 1910.269, such as grounding and backfeed from cogeneration, which were not present in the original citation. It argues that the proof required to defend against the allegations as amended is different than the proof that PECO had been previously led to believe would be necessary to defend this matter.

theory of the original claim.[10] As such, it argues PECO was never provided fair notice of the amended claims and it would be inappropriate to allow the amendment to relate back to the date of the original complaint or citation. Respondent also asks the question by "what authority does the Review Commission have to permit the amendment of a citation, as opposed to a pleading." (Opposition at 21). PECO questions the Commission's legal authority to use Fed. R. Civ. P. 15 to amend a citation which it argues is merely an exhibit to a complaint and not an actual pleading as defined by the Fed. R. Civ. P. Respondent also asserts that the Secretary gave no reasons for the amendment.[11] Lastly, Respondent asserts that the Act does not provide a mechanism for OSHA to amend a citation and in doing so the Commission exceeds the authority granted to it under § 12(g) of the Act. For the above reasons, PECO requests that the Secretary's Motion be denied and that it be awarded such other relief to which it may be entitled.

22. On December 8, 2017, the Secretary filed his Reply to Respondent's Opposition to Motion to Amend Citation and Complaint (Reply). In his Reply, Complainant argues that "[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). He further states that "[a] mere claim of prejudice is

[10] While acknowledging that there are some common facts between the Secretary's citation and items under § 1910.333 and those under § 1910.269, including that an employee was exposed to electrocution/electrical shock while replacing a padmount transformer and that the energy source was not de-energized before performing work on August 27, 2016, Respondent argues "everything else is completely different."

[11] Commission Rule 34(a)(3) states, "Where 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." In his Motion, the Secretary stated that the reason for amendment is that the Respondent itself had put the Secretary on notice of its position that § 1910.269, rather than the cited standard § 1910.333, is applicable to the conditions cited in the original citation. The Secretary further addressed all changes with particularity, providing both the language of the original citation and the language of the citation as it would appear if amended. The Secretary's Motion complies with 29 C.F.R. § 2200.34(a)(3) to any extent necessary.

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). The Secretary argues:

> It is hard to imagine a case in which a respondent would be less prejudiced as a result of a citation amendment than Respondent would be in this case. Respondent clearly anticipated months ago that Complainant might be filing a motion to amend the citation to allege violations under 29 C.F.R. 1910.269, and Respondent specifically structured the discovery schedule so that it would not be prejudiced if Complainant were to file such a motion to amend. Further, Respondent itself asserted throughout settlement discussions, as early as April 2017, that 29 C.F.R. § 1910.269 is the applicable standard. (Reply at 1).

The Secretary asserts that Respondent is now claiming that it will be prejudiced by Complainant amending the citation at this juncture in the litigation, even though this is precisely the time and sequencing Respondent proposed in jointly crafting the litigation schedule for motions to amend so that it would not be prejudiced that was used by the Court to create the litigation Schedule.[12] Complainant states that Respondent is now claiming it will be prejudiced if the citation is amended to allege a violation of the very standard that Respondent itself has asserted is the applicable standard since April 2017. He claims Respondent specifically structured the discovery schedule so that it

[12] The Secretary alleges that on August 15, 2017 he originally proposed a schedule in which the deadline for motions to amend would come after the completion of all discovery, including expert reports and depositions. *See* August 15, 2017, 9:20 a.m. email, attached as Exhibit A to the Reply. Later that day, Respondent responded and stated:

> Okay so I'm generally okay with this — my problem is that if you 're going to file a motion to amend the complaint/citations I don 't want to have an expert draft a report without knowing what your motion to amend will look like — make sense — total waste of an expert report if I'm not focusing on the right allegations! So I would prefer the motion to amend be done prior to experts. And I would like more than 7 days (May (sic) 10-12 days) to respond to your motion to amend. Otherwise I'm okay. Thanks!!

See August 15, 2017, 11:42 a.m. email, attached as Exhibit B to Reply. The Secretary argues Respondent clearly anticipated that Complainant might be filing a motion to amend, and sought to avoid any prejudice to itself by requesting that motions to amend be filed before affirmative and rebuttal expert witness reports. Consistent with Respondent's request, the deadline for motions to amend was set for November 10, 2017, and the deadline for affirmative expert reports was set for December 8, 2017, a month after the deadline for motions to amend. Complainant further noted that discovery did not close at that time until January 26, 2018.

would not be prejudiced if Complainant were to seek to amend its citation and complaint. In his Reply, the Secretary asserts that there is no evidence of undue delay or bad faith. With regard to the claimed undue delay, he asserts that because the Motion was filed within the deadline agreed to by the parties and adopted by the Court, Complainant should not be required to justify the timing of its filing. He argues the entire purpose of including a specific deadline for motions to amend in the discovery schedule is so that all parties are on notice that the opposing party may file such a motion up until that date. Complainant notes that the parties were engaged in active settlement negotiations from April 2017 through August 2017, and engaged in discovery through October 2017. After Respondent produced over four hundred pages of documents on October 12, 2017, Complainant's expert witness completed his review of all of the documents. Complainant then reached a final conclusion, in conjunction with the expert witness, that § 1910.269 is the applicable standard, and on November 9, 2017 the Secretary filed an appropriate motion in a timely manner according to the schedule agreed upon by both parties. The Motion was filed nearly six months after the Complaint was filed, and approximately six months before the scheduled hearing at that time.[13] The Secretary further argues Respondent is attempting to muddy the waters in its many pages of argument devoted to paragraph (c) of Fed. R. Civ. P. 15, which he says is actually a very simple provision that is easily satisfied in this case. Citing to *Glover v.*

[13] Complainant cites to *Dole v. Arco Chem. Co*., 921 F.2d at 487 (no undue delay where complaint was filed on February 27, 1989, parties engaged in settlement negotiations and discovery from April through September, and Secretary filed motion to amend complaint on November 17, 1989, eight and a half months into the litigation) in support of its position that there was no undue delay. The Secretary's argument that amending the citation will not necessitate any delay in litigation has been rendered moot in view of the Court's December 14, 2017 order extending the discovery schedule and postponing the trial until August 7, 2018.

F.D.I.C., 698 F.3d 139, 146 (3d Cir. 2012), Complainant asserts that the "basis for liability" is the same in terms of "the factual occurrences" underlying the action. He argues the proposed amended citation, alleging violations of § 1910.269, rather than violations of § 1910.333, arises out of precisely the same factual occurrences and conditions alleged in the original pleading, i.e., an accident that occurred on August 27, 2016. The difference is the standard that Complainant alleges was violated as a result of those events and conditions. "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)). Complainant further asserts that the nature of Rule 15(c)(l)(B) was explained in *Tiller v. Atl. Coast Line R.R. Co*., 323 U.S. 574 (1945). In *Tiller*, the plaintiff amended her complaint after the limitations period had expired to add a claim based on the Federal Boiler Inspection Act to her original claim for relief under the Federal Employers' Liability Act. The Supreme Court held that the amendment related back and explained the nature of the standard:

> The original complaint in this case alleged a failure to provide a proper lookout for deceased…. The amended complaint charged the failure to have the locomotive properly lighted. Both of them related to the same general conduct, transaction, and occurrence which involved the death of the deceased. There was therefore no departure. The cause of action now, as it was in the beginning, is the same – it is a suit to recover damages for the alleged wrongful death of the deceased. There is no reason to apply a statute of limitations when, as here, the respondent has had notice from the beginning that petitioner was trying to enforce a claim against it because of the events leading up to the death of the deceased in respondent's yard. *Id*. at 581.

23. On December 13, 2017, Respondent filed its Sur-Reply to Secretary's Motion to Amend Citation and Complaint (Sur-Reply). In its Sur-Reply, Respondent asserts that leave to amend pursuant to Rule 15(a)(2) is discretionary, while leave to amend is not discretionary where Rule 15(c)(1)(B) is invoked, but only permissible where the moving

party demonstrates that the claim(s) being added relate back to the original pleading and therefore the statute of limitations is no bar. Respondent says Complainant has not only not met his burden under Rule 15(c)(1)(B), it has been prejudiced by the Motion. It asserts that the Motion does not propose to amend the provisions raised during previous discussions and instead raises issues and facts that Respondent was made aware of for the first time when the Secretary filed his motion on November 9, 2017, including the issue of grounding and secondary sources of energy, or the failure to conduct a job briefing. It reiterates that it lacked fair notice of those allegations. With discovery closing in 45 days per the original schedule, Respondent argues it cannot possibly conduct effective and meaningful discovery or determine whether an expert (including what specific area of expertise) is needed until the Court determines whether the Secretary's amendments are permissible. Respondent reiterated its assertion that the Secretary has shown undue delay and bad faith. It also re-stated its position that a citation is not a pleading and Fed. R. Civ. P. 15(c)(1)(B) cannot apply in this case. It re-asserted its position that this Court had no jurisdiction to grant the Motion. Citing to *Mayle v. Felix*, 545 U.S. 644, 658-59 (2005), it argues that factual overlap alone is not enough because the original complaint must have given fair notice of the amended claim to qualify for relation back under Rule 15(c). Respondent argues that the amended complaint raises additional issues that call into play very different facts and legal theories.

24. On December 14, 2017, the Court conducted a conference with the parties, at Respondent's request, to discuss any effect of the Court's consideration of the Secretary's pending Motion on the existing litigation schedule. The Court indicated that it expected to rule upon the Motion by the end of January 2018.

During the conference, the parties agreed to a revised litigation and hearing schedule taking into consideration the Court's expectation that it would rule upon the Motion by the end of January 2018.

25. By Notice of Revised Hearing Date and Scheduling Order, dated December 14, 2017 (Revised Scheduling Order), the Court issued a revised hearing date and discovery schedule that was agreed to by the parties. The Court continued the May 1, 2018 hearing date until August 7, 2018. The Court also extended discovery from January 26, 2018 through April 10, 2018 and extended the deadline for the identification of experts from December 1, 2017 to February 15, 2018 and the production of expert reports from December 8, 2017 to February 23, 2018.

II. DISCUSSION

A. Complainant has satisfied the requirements of Fed. R. Civ. P. 15.

Fed. R. Civ. P. 15, which governs amendments to pleadings, requires leave of the court to amend the Secretary's Complaint, absent written consent of the opposing party.[14] Before trial, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Rule 15 "reinforce[s] the principle that cases 'should be tried on their merits rather than the technicalities of pleadings.'" *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir. 1986) (quoting *Tefft v. Seward*, 689 F.2d 637, 639 (6th Cir. 1982)). The rule

[14] Under the Commission procedural rules, the standard applicable to amending the citation and complaint is Fed. R. Civ. P. 15 provides:

(a) **Amendments Before Trial.**

(1) Amending as a Matter of Course. A party may amend its pleading once as a matter of course within:

(A) 21 days after serving it, or

(B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e) or (f) whichever is earlier.

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party' s written consent or the court's leave. The court should freely give leave when justice so requires. (emphasis in original).

assumes a liberal policy of permitting amendments to pleadings. *Ellison v. Ford Motor Co.*, 847 F.2d 297, 300 (6th Cir. 1988); *see also Holman v. Rock Fin. Corp.*, 388 F.3d 930 (6th Cir. 2004). It is well established that the Commission has allowed the "liberal amendment of pleadings" and that view has been upheld by the Circuit Courts. *See Long Mfg. Co. v. OSHRC*, 554 F.2d 903 (8th Cir. 1977); *Usery v. Marquette Cement Mfg. Co*., 568 F.2d 902 (2d Cir. 1977).

Courts are required to ensure that fair notice was given when granting leave to amend. *Reed Eng'g. Grp., Inc.*, 21 BNA OSHC 1290, 1291 (No. 02-0620, 2005).[15] Where fair notice is given, administrative pleadings are "liberally construed and easily amended." *Erickson Air-Crane, Inc.*, No. 07-0645, 2012 WL 762001 at *2 (OSHRC Mar. 2, 2012); *Miller Brewing Co.*, 7 BNA OSHC at 2157. Motions to amend should be granted unless the objecting party "would be prejudiced by the amendment."[16] *Kokosing Constr. Co., Inc.*, 21 BNA OSHC at 1631 (citing *Brown & Root, Inc.*, 8 BNA OSHC at 1058-59); *P.A.F. Equip. Co., Inc*., 7 BNA OSHC 1209 (No. 14315, 1979) (Commission has consistently approved the granting of pre-hearing amendments where there is no prejudice in the preparation or presentation of a parties' case at trial); *Cal. Stevedore and Ballast Co.*, 3 BNA OSHC 1080 (No. 1483, 1975) (amending citation and complaint changing the section of the Act alleged to have been violated permitted when made well in

[15] In *Reed Eng'g. Grp., Inc.*, the Secretary moved to amend the citation and complaint four days before the start of the trial. At the commencement of the hearing, Reed's counsel argued that it would be prejudiced because defending the amended citation required a proof of different facts and there had been no time to conduct further discovery. The Commission upheld the judge's decision to grant an amendment, but concluded that the judge erred in granting the amendment without also granting a continuance to allow Reed a reasonable opportunity to develop its defense. The Commission remanded the case to allow Reed time to conduct discovery and present evidence in defense of the amended citation. *Reed Eng'g. Grp., Inc.*, 21 BNA OSHC at 1291.

[16] Respondent has the burden of proving that such prejudice will occur. *See Kiser v. Gen. Elec. Corp*., 831 F.2d at 428.

advance of the hearing).

A court may ensure fair notice by providing a continuance. *See, e.g., United Cotton Goods, Inc.*, 10 BNA OSHC 1389, 1390 (No. 77-1892, 1982) (continuance could cure any possible prejudice).

Here, 29 C.F.R. § 1910.333(a)(1) [Original Citation 1, Item 1] and 29 C.F.R. §§ 1910.269(l)(1)(iii), (w)(7), (m)(3)(vii) and (n)(2) [Amended Citation 1, Grouped Item 1] seek to protect employees replacing a pad transformer from energy that was not deenergized prior to employees performing work at 2704 Cornell Court, Malvern, Pennsylvania, 19355, from being exposed to electrocution/electric shock on or about August 27, 2016. Similarly, both 29 C.F.R. § 1910.333(b)(2)(ii)(A) [Original Citation 1, Item 2] and 29 C.F.R. § 1910.269(c)(3)(ii) [Amended Citation 1, Item 2] require employers to implement safe procedures for deenergizing circuits and equipment while employees were replacing a pad transformer at 2704 Cornell Court, Malvern, Pennsylvania, 19355, to avoid employee exposure to electrocution/electric shock hazards on or about August 27, 2016. The violations of both original and amended standards are alleged to have occurred at the same date, time, and location: all while replacing a pad transformer. They are similar enough to satisfy any fair notice requirement.

Here, the Court finds that Respondent has received fair notice. To avoid any prejudice, by the Revised Scheduling Order, the Court issued a revised hearing date and discovery schedule that was agreed to by the parties with the understanding that the Court would rule upon the Motion by January 31, 2018, as has now been done.

B. The amendments are not barred by the six-month statute of limitations.

Section 9(c) of the Act prohibits the issuance, not the amendment, of a citation

more than six months after the occurrence of the violation. *CMH Co., Inc.*, 9 BNA OSHC 1048, 1052 (No. 78-5954, 1980). Fed. R. Civ. P. 15(c) is applicable to Commission proceedings. *S. Colo. Prestress Co. v. OSHRC*, 586 F.2d 1342 (10th Cir. 1978). Under Fed. R. Civ. P. 15(c), amendments that relate back to the date of the original pleading are not barred by section 9(c) of the Act.[17] *Higgins Erectors and Haulers, Inc.*, 7 BNA OSHC 1736, 1738 (No. 78-3398, 1979).[18] *See also Bloomfield Mech. Contracting, Inc. v. OSHRC*, 519 F.2d 1257, 1262-63 (3rd Cir. 1975). In *Miller Brewing Co.*, 7 BNA OSHC at 2157, the Commission agreed that the Secretary should be allowed to amend his citation to allege violations of two specific standards in addition to the general duty clause violation originally alleged. The Secretary had moved to amend the citation three days before the scheduled start of the trial. Although the trial date was postponed due to counsel's illness, the judge denied the Secretary's motion to amend on the date the hearing was originally scheduled to occur. Granting the Secretary's petition of interlocutory appeal, the Commission stated that "[w]here fair notice is given, administrative pleadings are liberally construed and easily amended." *Id.*

Respondent relies upon the judge's order denying Complainant's motion to amend his complaint and citation in *Reytec Constr. Res., Inc., supra,* to support its position that section 9(c) of the Act prohibits the Secretary's proposed amendment of

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[17] Fed. R. Civ. P. 15(c) provides:
(c) **Relation Back to Amendments.**
(1) When an Amendment Relates Back. An amendment to a pleading relates back to the date of the original pleading when: …
(B) the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading; or ….

[18] In *Higgins Erectors and Haulers, Inc.,* the Secretary sought to amend his original complaint that alleged a violation of section 5(a)(1) of the Act with an allegation that Higgins alternatively violated 29 C.F.R. § 1926.500(b)(1). The Commission noted that the requirements in the alternative pleading were very similar to the deficiencies alleged in the citation and original complaint and that Higgins was put on notice of the allegedly hazardous condition to which its employees were exposed. *Higgins Erectors and Haulers, Inc.*, 7 BNA OSHC at 1737.

Citation 1, Item 1, because it alleges new facts that are tantamount to issuing a new citation that must have been issued within six months of the violation.[19] In *Reytec Constr. Res.,* the Secretary originally alleged the company violated 29 C.F.R. § 1926.501(b)(15), a violation of the construction industry's fall protection standard. Nearly eight months before the scheduled trial, the judge denied the Secretary's Motion to Amend Citation and Complaint. The Secretary sought to amend the original citation item to instead allege a violation under 29 C.F.R. § 1926.853(g).[20] In its Opposition to the Secretary of Labor's Motion to Amend Citation and Complaint, Respondent stated it assumed that the Secretary intended to reference a violation of a demolition standard under section 1926.859(g), instead of section 1926.853(g). The Judge did not address Respondent's assumption or discrepancy in his order disposing of the Secretary's Motion to Amend. Instead, the judge found that the proposed amendment did not arise out of the same conduct, transaction, or occurrence as the original citation item, and did "not relate back to the original date of the issuance of the citation under Fed. R. Civ. P. 15(c)(1)(B)." He stated:

> [t]he hazard described in the proposed amendment differs from the hazard originally cited. In the cited citation the hazard was an employee working on a surface six feet above a lower level. In the proposed amendment the proposed

[19] Respondent also relies on *Delek Ref., Ltd. v. Occupational Safety & Health Review Comm'n*, 845 F.3d 170, 176 (5th Cir. 2016), to support its position that the amendment is time barred by the statute of limitations. In *Delek*, the Secretary issued a citation in 2008, alleging violations that occurred as far back as 1994. The 5th Circuit Court of Appeals held that because the occurrences fell well beyond the six-month statute of limitations, the relation back provision did not apply. The case at hand is distinguishable from *Delek* in that the accident occurred on August 27, 2016 and the citation was issued on February 27, 2016, precisely six months from the date of the accident that triggered the start of the statute of limitations. Here, the Secretary is seeking to amend the citation to allege a violation that occurred within those six months. The Court notes that Respondent did not raise statute of limitations as an avoidance or affirmative defense in its answer. *See* Fed. R. Civ. P. 8(c) (identifying "statute of limitations" as an affirmative defense that must be affirmatively stated in a pleading.). Section 9(c) is also not a jurisdictional bar to the assertion of a claim after six months. *Gen. Dynamics Corp., Elec. Boat Div.*, 15 BNA OSHC 2122, 2127 n.10 (No. 87-1195, 1993).

[20] The Court, here, notes that there is no standard at 29 C.F.R. § 1926.853**(g).** (emphasis added).

> hazard is working on weakened or deteriorated floors, or walls, or loosened materials. The abatement required under the cited standard is implementation of a personal fall arrest system. Under the proposed amendment the abatement required is shoring or bracing the work deck. The factual basis has now changed from one of a personal fall arrest system to having the deck shored or braced. *Reytec Constr. Res.,* order denying Complainant's Motion to Amend Complaint and Citation at p. 4.

The Judge in *Reytec Constr. Res.* found that the original citation did not provide Respondent with fair notice of its obligations under 29 C.F.R. § 1926.853(g) that the violation was based on the lack of having the deck shored or braced.

The facts and circumstances in *Reytec Constr. Res.* are readily distinguishable from the case before this Court, and the result is different. Here, the original citation and complaint gave Respondent adequate notice of the allegedly hazardous conditions at issue. The general test for determining where there is a change in the cause of action is whether the original and the amended charges arise out of the same conduct, transaction, or occurrence.[21] Fed. R. Civ. P. 15(c)(1)(B); *see also Glover v. F.D.I.C.*, 698 F.3d at 146 (the "basis for liability" must be the same in terms of "the factual occurrences" underlying the action); *Duane Smelser Roofing Co.*, 4 BNA OSHC 1948 (No. 4473, 1976), *aff'd in relevant part, rev'd in part and remanded*, 617 F.2d 448 (6th Cir. 1980) (section 9(c) allows for an amendment to a citation to relate back to the date of the original citation, though the amendment cannot allege that the violation occurred more than six months before the original citation was issued).

Here the amended violations arise out of the same factual occurrences alleged in the original pleading. The violations in this case stem from an accident that occurred on August 27, 2016. The amended citation alleges violations under 29 C.F.R. §§ 1910.269

[21] The Commission has determined that the purpose of Rule 15(c) should be "to avoid the harsh effects of a statute of limitations." *CMH Co., Inc*., 9 BNA OSHC at 1052.

based upon the same chain of events, occurrences and conditions at the time of the accident on August 27, 2016 at 2704 Cornell Court, Malvern, Pennsylvania, 19355.[22] *See also Tiller v. Atl. Coast Line R.R. Co.*, 323 U.S. at 581.

Respondent also argues that reliance on Fed. R. Civ. P. 15(a)(2) to amend a citation is only proper where the amendment is sought during the statute of limitations. The Court finds Respondent's assertion to be incorrect in that it suggests that a party may only rely on one section of Fed. R. Civ. P. 15 at a time. If the statute of limitations has expired by the time a party seeks to amend a pleading under Rule 15(a)(2), as often happens, the party may simultaneously employ Rule 15(c) to allow such an amendment to relate back to the original pleading. Leave to amend under Rule 15(a)(2) is appropriately granted if the amendment also satisfies the relation back requirements of Rule 15(c). *See Arthur v. Maersk*, 434 F.3d 196, 202 (3rd Cir. 2006) (combined, Fed. R. Civ. P. 15(a) and (c) ensure that an inadvertent error in pleading will not preclude a party from securing relief on the merits of a claim).

Accordingly, pursuant to Rule 15(c), the amendments relate back to the date the citation was issued and are not barred by the statute of limitations.

C. Granting the amendment now does not result in undue prejudice to Respondent.

Respondent alleges that the proposed amendment would result in undue prejudice because, among other things, it would need to conduct new discovery, retain a new expert, and find new fact witnesses.[23] Respondent argument of prejudice is

[22] Under the six-month limitation, the citation, issued on February 27, 2017, may allege violations of the Act that occurred on or after August 27, 2016. *See Dravo Corp.*, 3 BNA OSHC 1085, 1086, n.2 (No. 1487, 1975). *See also Gen. Dynamics Corp., Elec. Boat Div.*, 15 BNA OSHC at 2127-31 (section 9 (c) is a statute of limitations and not a jurisdictional bar to amendment of a citation after the six-month period expires).

[23] Respondent also argues that granting the Motion effectively bars it from raising affirmative defenses. Respondent cites no case law in support of such a proposition and the Court is aware of none. *Compare*

unsubstantiated. "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 at 488. Amendments made during the time frame permitted by the Scheduling Order, as here, 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 will rarely result in prejudice.); *Higgins Erectors and Haulers, Inc.*, 7 BNA OSHC at 1738; *Henkels & McCoy, Inc.*, 4 BNA OSHC 1502, 1504 (No. 842, 1976).[24] *See also Dole v. Arco Chem. Co.*, 921 F.2d at 488 (quoting *Donovan v. Royal Logging Co.*, 645 F.2d 822, 827 (9th Cir. 1981)) ("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.'"); *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). Respondent has ample time to gather evidence in advance of the trial and present any such evidence at trial in opposition to the violations set forth in the amended complaint and citation. Respondent's assertions of prejudice relating to discovery and witnesses

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with Clarkson Constr. Co. v. OSHRC, 531 F.2d 451 (10th Cir. 1976) (OSHA enforcement proceedings do not violate the due process requirements of the Constitution by chilling an employer's right to initiate a hearing even though a higher penalty may be assessed by the Commission). Similarly, an employer has no right to foreclose the Secretary from taking steps or presenting evidence to overcome an affirmative defense raised by an employer in an answer before, or at, a hearing.

[24] In *Henkels & McCoy, Inc.*, 4 BNA OSHC at 1505, the Commission permitted amendments in a case that had not reached the stage of "well-developed litigation," as here. It stated the employer's argument that the amendment would introduce untried factual issues "misses the mark because there has not yet been a hearing." *Id.*

have been allayed by the Court extending discovery and continuing the start of the trial date.

"A citation and proposed penalty are preliminary steps in the Act's enforcement scheme." *Long Mfg. Co.,* 554 F.2d at 907. Respondent "does not have any vested right to go to trial on the specific charge mentioned in the citation…." *Id.* Under the circumstances of this case, changing the alleged violations of standards from 29 C.F.R. § 1910.333 to 29 C.F.R. § 1910.269 is permitted where there is no surprise in the change in the nature of the charge, and no legal prejudice. *Id.* The Court finds that granting the proposed amendments does not give the Secretary an "unfair advantage" or deprive Respondent of a "fair opportunity to present evidence." *See Avcon Inc.,* 23 BNA OSHC 1440, 1453 (No. 98-1168, 2011).

Complainant timely filed his Motion pursuant to the Court's Scheduling Order. Respondent has had sufficient and fair notice of the proposed amended complaint and citation and has ample time to prepare for and litigate the issues related thereto at trial. 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 even though the formal pleadings did not squarely raise the issue.").

D. The Commission has the authority to permit amendments to a citation.

The Court rejects Respondent's assertion that the Commission lacks the authority to permit amendments to a citation.[25] The Commission has noted the general principle

[25] The Commission's authority to amend an OSHA citation is recognized at 29 C.F.R. § 2200.34(a)(3), which provides the Secretary with a mechanism to amend an OSHA citation when filing his complaint. This is consistent with the longstanding recognition that citations are "drafted by non-legal personnel who are required to act with dispatch" and "[e]nforcement of the Act would be crippled if the Secretary were

that a citation is not the sole vehicle by which a contesting employer may be notified of an alleged violation. *Henkels & McCoy, Inc.*, 4 BNA OSHC at 1504. A defective citation "may be cured by a subsequent pleading." *J. L. Mabry Grading, Inc.*, 1 BNA OSHC 1211, 1213 (No. 285, 1973) (defective or incorrect citation may be cured by subsequent pleading to set forth different section of governing regulations, where newly alleged provision prohibits essentially the same practices as those regulated by the originally cited but inapplicable regulations, and respondent employer was not misled or otherwise prejudiced by allegation of inapplicable section of governing regulations).

29 C.F.R § 2200.30(d) provides that "[a] copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes." In this instance, the citation was attached to the Complaint as Exhibit A and incorporated by reference into the Complaint. *See* Complaint, ¶ 1, at p. 1). Accordingly, the citation in this case is part of the Complaint and may be amended under Fed. R. Civ. P. 15(a)(2) before trial with the opposing party's written consent or the Court's leave. *See Central Site Dev.*, 26 BNA OSHC 1985 (No. 16-0642, 2017).

E. The timing of the Secretary's Motion does not rise to the level of undue delay, nor does it support a showing of bad faith.

Respondent argues it has been prejudiced because the Secretary filed his Motion after undue delay. It further asserts that the Secretary has shown bad faith and should be barred from filing his Motion "[u]nder a theory analogous to laches." Complainant

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inflexibly held to a narrow construction of citations issued by his inspectors." *Brennan v. Nat'l Realty and Constr. Co., Inc.*, 489 F.2d at 1264.

argues that the parties specifically structured the discovery schedule, with the Court's approval, so that Respondent would not be prejudiced if Complainant was to file a motion to amend. Since his Motion was filed within the deadline agreed to by the parties and adopted by the Court, Complainant states that he should not be required to justify the timing of its filing. He notes that on August 15, 2017, Respondent proposed a schedule in which Respondent: 1) anticipated that Complainant might be filing a motion to amend, and 2) sought to avoid any prejudice to itself by requesting that motions to amend be filed before affirmative and rebuttal expert witness reports were due. The Secretary asserts that, consistent with Respondent's request, the deadline for motions to amend was set for November 10, 2017, and the deadline for the production of affirmative expert reports was set for December 8, 2017, a month after the deadline for motions to amend.

The timing of the Secretary's Motion does not rise to the level of undue delay. The motion was originally filed six months before the then scheduled hearing and within the time frame proposed by the parties and implemented by the Court. The near six-month gap from the time the Secretary filed his complaint on May 19, 2017 until November 9, 2017 when he filed his Motion is neither so egregious nor unexplained as to warrant refusal of leave to amend. *See Arthur v. Maersk, Inc.,* 434 F.3d at 204-05 (holding that a period of eleven months from commencement of an action to filing a motion for leave to amend a complaint was neither excessive nor unreasonable);[26] *Brown & Root, Inc.*, 8 BNA OSHC at 1058-59 (holding that as long as the party opposing an amendment to a citation had an adequate opportunity to prepare and present its defense to the amended allegations at a trial, any delay in making the amendment does not constitute

[26] The Court noted that its research as of 2006 showed that no appellate court has ever approved the denial of a leave to amend based on a delay of less than 6 months. *Arthur v. Maersk, Inc.,* 434 F.3d at 204.

prejudice that warrants denying amendment even though trial preparation time and expense may have been directed towards issues eliminated from the case).[27]

The evidence before the Court does not support a finding of bad faith by the Secretary. Nor does it support applying laches against the Secretary.[28] *See Mayfair Constr. Co.*, 5 BNA OSHC 1877, 1878 n.3 (No. 2171, 1977) ("The prejudice normally contemplated in applying laches stems from such factors as loss of evidence and unavailability of witnesses which diminish the defendant's chances of success."). These factors are not shown here.

III. CONCLUSION

Justice requires that the complaint be allowed to be amended in this instance. Respondent has been given fair notice. Any prejudice is cured by the Court extending discovery and granting a continuance of the hearing date.

IV. ORDER

WHEREFORE IT IS ORDERED THAT the Secretary's Motion to Amend is GRANTED. The Secretary shall file his amended citation and complaint and serve them upon Respondent by February 7, 2018. The Secretary's amended complaint and citation shall be the operative amended complaint and citation in Docket No. 17-0531 for the hearing and all other purposes.

Respondent shall file its answer to the amended complaint and citation in Docket No. 17-0531 within (20) twenty days after service of the amended complaint and citation by Complainant upon Respondent.

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[27] *See also Dole v. Arco Chem. Co.*, 921 F.2d at 487.

[28] The doctrine of laches is generally not applicable to the United States when asserting sovereign or governmental rights. *Chesapeake & Del. Canal Co. v. United States*, 250 U.S. 123, 125 (1919). *See also Dayton Tire v. Sec'y of Labor*, 671 F.3d 1249 (D.C. Cir. 2012) (Commission's twelve-year delay in issuing its decision did not justify setting aside the Commission's penalty).

SO ORDERED.

/s/
The Honorable Dennis L. Phillips
U.S. OSHRC Judge

Dated: January 31, 2018
Washington, D.C.