



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.

ROY ROCK, LLC,

Respondent.

OSHRC DOCKET NO. 18-0068

ORDER GRANTING THE SECRETARY'S SECOND MOTION
TO AMEND CITATION AND COMPLAINT

This matter is before the Occupational Safety and Health Review Commission (the Commission) pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.* (the Act).

Complainant, the Secretary of Labor (Secretary), has filed a second Motion to amend citation and complaint (Motion), together with a second amended complaint. The Secretary moves to amend the citation and complaint to allege that Respondent violated a specific standard 1926.702(j)(1), rather than section 5(a)(1) of the Act, the general duty clause. In the amendment, the alleged violation description in the one-item serious citation remains unchanged. The Secretary contends that in proceedings before the Commission leave to amend pleadings prehearing should be "freely give[n] . . . when justice so requires." Fed.R.Civ.P. 15(a). The Secretary states that the Motion to amend was promptly filed when Respondent's summary judgment motion brought the applicability of specific standard 1926.702(j)(1) to the Secretary's attention. The Secretary contends that granting the amendment will not prejudice Respondent in presenting its defense to the amended citation and complaint.

Respondent filed a brief in Opposition to the Secretary's Motion (Opposition).¹ Respondent contends that the Secretary's Motion should be denied because it was not timely filed pursuant to the due dates stated in the prehearing schedule orders. Respondent contends that the delayed Motion filing is prejudicial to Respondent, as Respondent will incur additional costs to defeat the amended claim. Further, Respondent contends that the Secretary's amendment is futile as prehearing discovery reveals that Respondent did not violate standard 1926.702(j)(1) at the inspected construction worksite.

For the reasons set forth below, the Secretary's Motion is Granted.² The Secretary's November 15, 2018 second amended complaint is received.

Issues

1. Does justice require granting the Secretary's second Motion to amend the citation and complaint to allege that Respondent violated standard 1926.702(j)(1), rather than Section 5(a)(1) of the Act, the general duty clause?
2. If the Secretary's second Motion to amend the citation and complaint is granted, will Respondent have sufficient time to prepare its defense to the amended citation and complaint, before the scheduled hearing or during a reasonable continuance of the hearing?
3. Would granting the Secretary's motion to amend the citation and complaint to allege that Respondent violated standard 1926.702(j)(1) be futile, as the limited facts before the Court prehearing conclusively disclose that Respondent did not violate standard 1926.702(j)(1) at the inspected construction worksite?

Pleadings, Motions, Revised Hearing and Prehearing Schedule

The OSHA Parsippany, New Jersey Area Office conducted an inspection of Respondent's job site, located in Jersey City, New Jersey, between October 3, 2017 and November 9, 2017. On

¹ With the Opposition, Respondent filed Respondent Counsel's declaration and exhibits, relevant portions of the deposition transcripts of OSHA Compliance Officer Idrovo and OSHA Assistant Area Director Flynn.

² During a conference call on January 17, 2019, the parties were advised that the Secretary's second motion to amend the citation and complaint was granted. The Secretary's second amended complaint was received. *See* January 22, 2019 Second Notice of Rescheduled Hearing, Revised Scheduling Order and Special Notices

December 1, 2017, OSHA issued to Respondent a one-item serious citation and notification of penalty (citation). The citation alleged a violation of Section 5(a)(1) of the Act³, the general duty clause, on or about October 2, 2017,⁴ when an employee's fingers were injured when taking off a bar wheel from the Rod Chomper machine, at the rebar bending side of the machine, while another employee was cutting at the other end of the machine. At the time of the alleged violation, the citation states that the machine's power was not shut off or locked out. The penalty proposed is \$ 9,760.00. Respondent filed a notice of contest.

The Secretary filed a complaint on March 29, 2018. The citation was made a part of the complaint. Respondent filed an answer and affirmative defenses on April 16, 2018. In the answer, Respondent denied violating the Act as alleged in the citation and denied the appropriateness of the classification, proposed penalty, and abatement date. The answer raised nine affirmative defenses, including infeasibility and unpreventable employee misconduct.

On November 6, 2018, Respondent filed a motion for summary judgment. Respondent asserted that the Secretary's complaint should be dismissed because the Section 5(a)(1) general duty clause violation alleged was improper, as Respondent complied with all applicable OSHA construction industry standards, all OSHA training requirements, and all construction and general industry lockout / tagout (hazardous energy) requirements, at the inspected worksite. Respondent further asserted that the general duty clause violation alleged was impermissibly vague, failed to adequately identify the alleged hazard, and failed to identify a feasible means to eliminate or materially reduce the alleged hazard. *See* summary judgment motion pp. 15–19.

Respondent contended that citing a general duty clause violation was inappropriate, if a specific standard applied to the case facts. Respondent noted that the Secretary did not cited Respondent for violating general industry standard 29 C.F.R. § 1910.147 (hazardous energy, lockout / tagout); construction industry standards 29 C.F.R. § 1926.20 (general safety and health provisions) and 29 C.F.R. § 1926.21 (safety training and education); or for violating concrete and masonry construction standard 29 C.F.R. § 1926.702(j) (lockout / tagout procedures). Respondent

³ Section 5(a)(1) of the Act, 29 U.S.C. § 654.

⁴ The date of the alleged violation was amended to state October 2, 2017, in the July 10, 2018 Order granting the Secretary's first motion to amend citation and complaint.

specifically contended that it had fully complied with standard 1926.702(j). *See* summary judgment motion pp. 11-15.

On November 30, 2018, the Secretary filed a response in opposition to Respondent's summary judgment motion, together with the declaration of [redacted].

On November 15, 2018, the Secretary filed a second Motion to amend the citation and complaint and a second amended complaint. The Secretary moved to amend the one-item serious citation and complaint to allege that Respondent violated standard 1926.702(j)(1), rather than the general duty clause, set forth in Section 5(a)(1) of the Act. In the amendment, the alleged violation description in the one-item serious citation remained unchanged. The Secretary reviewed Respondent's summary judgment motion, including Respondent's contention that concrete and masonry construction standard 1926.702(j)(1) applied to Respondent's inspected worksite, thereby preempting the alleged general duty clause violation. Following this review, the Secretary agreed that standard 1926.702(j)(1) was applicable to the inspected worksite. However, contrary to Respondent, the Secretary contended that Respondent did not comply with standard 1926.702(j)(1), therefore a violation of that specific standard was alleged in the second amended complaint. *See* Motion p. 5 n.1.

Respondent filed a brief in opposition to the Secretary's second Motion to amend citation and complaint, on November 29, 2018. On December 4, 2018, Respondent filed a motion to strike the declaration of [redacted], which had been submitted by the Secretary in opposition to Respondent's summary judgment motion.

During a conference call on January 17, 2019, the parties were advised that the Secretary's second Motion to amend the citation and complaint was granted. The Secretary's second amended complaint was received. Respondent Counsel stated that Respondent would deny the violation alleged in the second amended complaint. During the call, the parties also were advised that Respondent's summary judgment motion was denied.⁵

⁵ During the January 2019 conference call, the parties were advised that Respondent's motion for summary judgment was denied. Evaluating Respondent's summary judgment motion and reviewing the evidence presented in the light most favorable to the Secretary, the non-moving party, I found genuine disputes as to material facts present in this case. *See* Fed.R.Civ.P. 56;

During the call, Respondent's unopposed motion to postpone the hearing in this case, scheduled to begin on February 11, 2019, was granted. By agreement of the parties, the hearing was rescheduled to February 25 and 26, 2019, to ensure that Respondent had sufficient time to prepare its defense to the second amended complaint. During the call, the parties also agreed to a partially, revised, prehearing schedule. Respondent Counsel agreed that, with the additional time before the hearing began and the revised prehearing schedule, Respondent would not be prejudiced in preparing its defense to the second amended complaint. *See* January 22, 2019 Second Notice of Rescheduled Hearing.

Respondent filed an answer and affirmative defenses to the Secretary's second amended complaint, dated February 3, 2019. Respondent denied violating the Act as alleged in the second amended complaint and denied the appropriateness of the classification, proposed penalty, and abatement date. Respondent's answer again raised nine affirmative defenses, including infeasibility and unpreventable employee misconduct.

Second Motion to amend citation and complaint

In the instant Motion, the Secretary moves to amend the citation and complaint to allege that Respondent violated a specific standard 1926.702(j)(1), rather than section 5(a)(1) of the Act, the general duty clause. In the amendment, the alleged violation description in the one-item serious citation remains unchanged. The Secretary contends that in proceedings before the Commission prehearing pleading amendments are governed by Federal Rule of Civil Procedure 15(a) which states that leave to amend should be "freely give[n] . . . when justice so requires." *See* Act § 661(g) ("Unless the Commission has adopted a different rule, its proceedings shall be in accordance with the Federal Rules of Civil Procedure"); Commission Rule 2(b); 29 C.F.R. § 2200.2(b)⁶ (same). It is further contended, that the Secretary moved promptly to amend the citation and complaint as soon as Respondent's summary judgment motion brought the applicability of standard

Commission Rules 2(b), 61; 29 C.F.R. §§ 2200.2(b), 2200.61. *Ford Motor Co. – Buffalo Stamping Plant*, 23 BNA OSHC 1593 (No. 10-1483, 2011). *See also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Therefore, Respondent was not entitled to judgment as a matter of law. *See* January 22, 2019 Second Notice of Rescheduled Hearing.

Further, during the call, the parties were advised that Respondent's December 4, 2018 motion to strike the declaration of [redacted] was denied. *Id.*

⁶ Occupational Safety and Health Review Commission, Rules of Procedure, 29 C.F.R. § 2200.00 *et seq.*

1926.702(j)(1) to the Secretary's attention. The Secretary contends that granting the amendment will not prejudice Respondent in presenting its defense to the amended citation and complaint.

In response, Respondent contends that the Secretary's Motion should be denied as the Secretary has not shown "good cause" to modify the prehearing scheduling orders issued in this case. *See* Fed.R.Civ.P. 16(b)(4). Respondent contends that the Secretary's second Motion to amend, filed after the motion deadlines and discovery close date stated in the prehearing schedule orders and after Respondent filed its summary judgment motion, is unduly prejudicial to Respondent, as Respondent will incur additional costs to defeat the amended claim. *See* Opposition pp. 1, 3–9, 11. Respondent also contends that the Secretary's second Motion to amend the citation and complaint to allege a violation of concrete and masonry construction standard 1926.702(j)(1) is futile, as the Secretary's identified witnesses, the OSHA compliance officer and OSHA assistant area director, concluded that Respondent did not violate any OSHA construction industry standards or any construction and general industry lockout / tagout (hazardous energy) requirements, at the inspected worksite. Opposition pp. 2-4, 7-8, 14-15.

Analysis

Justice requires granting the Secretary's second Motion to amend citation and complaint.

The Federal Rules of Civil Procedure 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.

Federal Rule of Civil Procedure 15(a)(2) states that, before trial "[t]he court should freely give leave [to amend] when justice so requires." Further, "[i]n an administrative proceeding . . . pleadings are liberally construed and easily amended." *N.Y. State Elec. & Gas Corp. v. Sec'y of Labor*, 88 F.3d 98, 104 (2d Cir. 1996); *Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1264 (D.C. Cir. 1973).

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. OSHRC*, 573 F.2d 820, 823

(3d Cir. 1978). 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). See *Kokosing Constr. Co., Inc.*, 21 BNA OSHC 1629, 1631 (No. 04-1665, 2006), *aff'd*, 232 Fed.Appx. 510 (6th Cir. 2007).

When determining whether an amendment will prejudice Respondent, the relevant 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. "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). See also *ConAgra Flour Milling Co.*, 15 BNA OSHC 1817, 1822 (No. 88-2572, 1992) (A general allegation of prejudice is insufficient, specific evidence of prejudice must be presented). "[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).

Respondent contends that the Secretary's motion to amend should be denied because the Secretary filed the motion after the close of the motion and discovery time periods stated in the prehearing scheduling order. Respondent's contention is rejected. Well established Commission policy is to decide cases based on their merits, rather than on procedural flaws. See *Duquesne Light Co.*, 8 BNA OSHC 1218, 1221-22 (No. 78-5034, 1980) (consolidated). See also *Usery v. Marquette Cement Mfg. Co.*, 568 F.2d 902, 909 (2d Cir. 1977) (The court must balance the need of justice in deciding cases on their merits, despite counsel error or oversight, against the need for maintaining orderly procedural arrangements.) Commission Rules permit modification of time periods by the Commission or assigned judge. See Commission Rules 5, 34, 40, 67; 29 C.F.R. §§ 2200.5, 2200.34, 2200.40, 2200.67. In this case, the Secretary filed the second Motion to amend the citation and complaint promptly after receiving Respondent summary judgment motion which brought to the Secretary's attention the applicability of standard 1926.702(j)(1) to Respondent's inspected worksite. The Secretary's filing does not reflect undue delay. I find that the Secretary's motion to amend was promptly filed.

Respondent objects to the Secretary's motion to amend because the Secretary's revised legal theory, citing violation of a specific standard rather than the general duty clause, arose following the Secretary's review of Respondent's summary judgment motion, setting forth Respondent's legal defenses and theories. Opposition pp. 1, 7, 10-13, 15-16. The Secretary's changed legal theory does not justify denial of the Secretary's Motion to amend. *See Usery v. Marquette*, 568 F.2d at 906-909 (Commission erred in refusing to allow the Secretary to amend the complaint to allege a general duty clause violation, should the Commission find the specific construction standard cited inapplicable to the hazard cited at Respondent's worksite). *See also Kokosing Constr. Co.*, 21 BNA OSHC at 1631 (The Commission has previously stated that whether Respondent's claims would have prevailed under the standard originally cited "does not affect a determination of prejudice.").

Federal Rule of Civil Procedure 15(c)(1)(B) states that "[a]n amendment to a pleading relates back to the date of the original pleading when . . . the amendment asserts a claim . . . that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." In the Secretary's second amended complaint, the alleged violation description in the one-item serious citation remains unchanged. *See Coastal Pile Driving*, 6 BNA OSHC 113 (No. 15043, 1977) ("Amendments are routinely permissible where, as here, they merely add an alternative legal theory but do not alter the essential factual allegations contained in the citation.").

Justice requires granting the Secretary's motion to amend the citation and complaint to allege that Respondent violated standard 1926.702(j)(1).

Respondent has sufficient time to prepare its defense to the amended citation and complaint.

When determining whether an amendment will prejudice Respondent, the relevant 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. On January 17, 2019, the parties were advised that the Secretary's second Motion to amend the citation and complaint was granted. During a conference call that date, the parties agreed to a partially, revised, prehearing schedule and rescheduled hearing dates, to ensure that Respondent had sufficient time to prepare its defense to the amended complaint. Respondent Counsel agreed that with the additional time before the hearing began and with the partially, revised, prehearing

schedule Respondent would not be prejudiced in preparing its defense to the second amended complaint. *See* January 22, 2019 Second Notice of Rescheduled Hearing. Respondent filed an answer to the second amended complaint, dated February 3, 2019.

Granting the Secretary's motion to amend the citation and complaint to allege that Respondent violated standard 1926.702(j)(1) does not prejudice Respondent. Respondent was granted sufficient time to prepare its defense to the amendment.

Granting the Secretary's motion to amend the citation and complaint is not a futile act.

Respondent contends that the Secretary's second Motion to amend the citation and complaint to allege a violation of concrete and masonry construction standard 1926.702(j)(1) is futile, as the Secretary's identified witnesses, the OSHA compliance officer and OSHA assistant area director, during prehearing depositions, testified that the OSHA construction lock out / tag out standards did not apply to Respondent at the inspected worksite. Respondent places great weight on the deposition statements of the OSHA compliance officer and assistant area director regarding the appropriate legal theory for the Secretary to advocate in this case, whether a specific construction standard or the general duty clause. *See* Opposition pp. 2–4, 7-8, 14-15. However, the Secretary is not bound by the “narrow construction of citations issued by his inspectors,” compliance officers who are not legal professionals. *See Nat'l Realty & Constr. Co. v. OSHRC*, 489 F.2d at 1264.

Granting the Secretary's motion to amend the citation and complaint to allege that Respondent violated standard 1926.702(j)(1) is not a futile act. The limited facts before the Court prehearing, do not conclusively disclose that Respondent did not violate standard 1926.702(j)(1) at the inspected construction worksite. Respondent's motion for summary judgement and the Secretary's opposition reveal that there are genuine disputes regarding material facts present in this case.

Conclusion

1. Justice requires granting the Secretary's second Motion to amend the citation and complaint to allege that Respondent violated standard 1926.702(j)(1), rather than Section 5(a)(1) of the Act, the general duty clause.

2. Respondent has sufficient time to prepare its defense to the amended citation and complaint, before the agreed dates for the rescheduled hearing.
3. Granting the Secretary's motion to amend the citation and complaint to allege that Respondent violated standard 1926.702(j)(1) is not a futile act, as the limited facts before the Court prehearing, do not conclusively disclose that Respondent did not violate standard 1926.702(j)(1) at the inspected construction worksite.

Order

The Secretary's Motion is Granted. The Secretary's November 15, 2018 second amended complaint is received.

SO ORDERED.

Dated: February 22, 2019
Washington, D.C.

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