

CCASE:  
CLIMAX MOLYBDENUM V. SOL (MSHA)  
DDATE:  
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TTEXT:

Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

CLIMAX MOLYBDENUM COMPANY,  
APPLICANT

v.

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
RESPONDENT

Application for Review

Docket No. DENV 79-300-M  
Citation No. 331857  
January 5, 1979

Climax Mill & Crushers  
Safety Line

ORDER GRANTING MOTION TO DISMISS

On January 31, 1979, applicant filed an application for review of Citation No. 331857, issued January 5, 1979, pursuant to Section 104(d)(1) of the Federal Mine Safety and Health Act of 1977. Respondent MSHA, on February 26, 1979, filed a motion to dismiss on the ground that the citation has been abated and that applicant is not entitled to review of an abated citation. In support of its motion, respondent cites the case of *United Mine Workers of America v. Andrus*, 581 F.2d 888 (D.C. Cir. 1978), and the decisions of numerous Commission Judges dismissing review petitions in circumstances identical to those in this case.

On March 7, 1979, applicant filed a response to MSHA's motion to dismiss and characterized the citation as a "citation and order" involving alleged imminent danger. Applicant asserted that it has a right to a review of both the imminent danger portion of the order and the abated citation. Subsequently, as a result of an Order issued by me on March 19, 1979, requiring the parties to clarify their own erroneous characterizations of the citation sought to be reviewed, it was discovered that no "imminent danger" is involved in these proceedings and that the issue presented is the reviewability of an abated citation.

After due consideration of the arguments presented by the parties, I conclude that respondent's position is correct, and I believe it is clear that applicant is not entitled to review an abated citation at this time, absent an assertion that the time fixed to abate was unreasonable, and in support of this I refer the parties to previous rulings on this issue by various Commission Judges in the cases of *Helvetia Coal Company*, PITT 78-322 (August 23, 1978); *Monterey Coal Co.*, VINC 78-372 (June 19, 1978); *Peter White Coal Mining Corp.*, HOPE 78-371 (June 16, 1978); *Itmann Coal Co.*, HOPE 78-356 (May 26, 1978).

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In view of the foregoing, respondent's motion to dismiss is granted without prejudice to applicant's right to contest the citation in any future civil penalty assessment proceeding which may be filed by MSHA pursuant to Section 110(a) of the Act. Applicant's opposition to the motion, including its supporting arguments, are rejected.

George A. Koutras  
Administrative Law Judge