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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CLIMAX MOLYBDENUM COMPANY, A DIVISION OF AMAX, INC., APPLICANT	Applications for Review
v.	Docket No. DENV 79-102-M Citation No. 333646
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. DENV 79-103-M Citation No. 333647
AND	Docket No. DENV 79-104-M Citation No. 333648
OIL, CHEMICAL AND ATOMIC WORKERS' INTERNATIONAL UNION, LOCAL 2-24410, RESPONDENT	Docket No. DENV 79-105-M Citation No. 333649 Climax Mine

DECISION

Appearances: Hugh A. Burns, Esq., and Rosemary M. Collyer, Esq., Dawson, Nagel, Sherman & Howard, Denver, Colorado
W. Michael Hackett, Esq., Climax Molybdenum Company, for Applicant;
Robert A. Cohen, Esq., and Edward C. Hugler, Esq., Office of the Solicitor, U. S. Department of Labor, for Respondent MSHA;
David A. Jones Jr., Earl Dungan and Raphael Moure, Oil Chemical and Atomic Workers' International Union, Local No. 2-24410, for Respondent Union

Before: Administrative Law Judge Michels

These proceedings are applications for review of citations brought by Climax Molybdenum Company, Applicant, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. | 815. Applicant contested the merits of the citations, each of which charge a violation of mandatory standard 30 CFR 57.5-5 in that the silica bearing dust level for the surveyed miners allegedly exceeded the allowable concentration and it also contested the reasonableness of the length of the abatement time fixed in the citations.

The matters were first scheduled for hearing for February 27, 1979, but the hearing date was continued at the request of the parties. After a number of prehearing conferences, some of which were by telephone, these matters finally were set for hearing on July 9, 1979, in Denver, Colorado.

On July 2, 1979, Respondent filed a motion to dismiss alleging (a) that MSHA determined, upon review of the discovery material, that it could not "sustain the particular violations alleged", (b) that Climax has indicated it will continue to work on dust control, and (c) that for these reasons MSHA will vacate the citations. In effect Respondent requested dismissal on the ground of mootness.

Applicant opposed this motion and requested a full hearing. The parties were given an appropriate schedule within which to file the legal memoranda or positions on the issue of dismissal. A full opportunity was granted to the parties including the Local Oil, Chemical and Atomic Workers' Union, to discuss their positions on this issue at a conference in Denver, Colorado, held July 9, 1979.

Thereafter, on July 10, 1979, a ruling was made from the bench granting MSHA's motion to dismiss. This decision, with a few grammatical corrections, is set forth below:

Decision from the Bench

ADMINISTRATIVE LAW JUDGE MICHELS: The hearing will come to order.

As I stated before we went on the record, this is a continuation of the prehearing conference that began yesterday, at which time the parties presented their positions on the motion to dismiss which has been submitted by MSHA. And as I announced then, I would attempt to rule on that today. So I'll proceed to do that. This will be a ruling from the bench, and I think it will be self-explanatory. So this is the ruling on Respondent's motion to dismiss.

On July 2, 1979, MSHA moved to dismiss these proceedings on the following grounds: (a) based on its prehearing review, Counsel determined that it "cannot sustain the particular violations alleged;" (b) that Climax has shown indications that it will continue to work on the control of the dust at Climax Mine; and (c) that the citations are to be vacated. And I should note that subsequent filing has indicated that the notices are in fact now vacated.

Respondent Local No. 2-24410 of the Oil, Chemical and Atomic Workers Union has not filed a written response to

this motion, but its representatives have stated on the record that they concur in the motion to dismiss. And so they have been in effect heard on the motion.

On July 9, 1979, the Applicant herein filed a memorandum in opposition to MSHA's motion to dismiss. It has argued (a) that the presiding Judge has jurisdiction under the Act to direct the relief which it seeks regarding the interpretation and application of the dust control standard; (b) the controversy is not rendered moot by MSHA's vacation of the citations; and (c) that the case is not moot because justiciable issues have survived the vacation of the citation.

This issue, that is of the request for dismissal, was thoroughly argued, as I previously stated, during the prehearing conference yesterday. The parties are prepared for hearing pursuant to my instructions. However, it is my view, as I indicated at the conference yesterday, that the matter of the vacating of the citations and the request for dismissal is an issue which properly should be decided at this time before going to hearing. I will, therefore, proceed to make my decision. This is based upon the submissions of the parties, the arguments made on the record, and upon a review of the cases which have been submitted and submitted with the legal briefs.

I will enter a formal written order hereafter affirming this decision from the bench. And I would reserve the right, however, to make necessary corrections in such formal order.
Now, at this time I would ask that the parties bear with me for a rather lengthy statement that I have in which I want to elaborate on the reasons for my decision. And that decision is that I will grant the motion to dismiss.

I have studied the cases cited by the Applicant, and I will say quite briefly, because of the shortness of the time, that I am not convinced that these establish a clear basis for the continuing litigation in these proceedings where the charging documents have been vacated by the Government.

The Applicant as I understand it relies in part on the rule announced in the Southern Pacific Terminal Company v. Interstate Commerce Commission, 219 U.S. 498 (1910), in which the Court held to the effect that short term orders capable of repetition yet evading review are not dismissible on the grounds of mootness. It is my view that these

proceedings do not present an issue as precisely defined as it was in the Southern case; and further, that there is no evidence these citations are continuing or repetitive.

In Eastern Associated Coal Corporation, also cited by the Applicant, the Board permitted review of a vacated imminent danger order because there was a major issue left unresolved; that is, the continued issuance of such orders in circumstances where imminent danger did not exist. The operator in such instance, as I view it at least, was directly and immediately affected by future orders, because they would result in a closure of its mine.

Now, I recognize that an operator may also be affected by a citation, so I don't make a big point of that distinction because the Commission in its Energy Fuels decision, Denver 78-410, May 1, 1979, did point out the effect citations could have and did extend the right to a review of citations in appropriate circumstances. However, I believe it is clear that an operator nevertheless would not be affected so directly.

Moreover, at least it seems to me, in Eastern the problem was one of a recurring and continuing nature and like that in Southern, all the time evading review. It was a clear and precise issue under a particular provision of law as to which review might otherwise be denied to the operator. Such considerations do not in my view exist in these proceedings. There is no single issue of a clear and precise nature. The issues in fact as phrased by the operator are of a wide and varied nature, covering detailed questions which may arise in a litigated proceeding.

There is no evidence that issuance of the citations is a matter of repetition under circumstances which the operator is continually denied a review. It is possible that similar issues may arise in a future case or in future cases of a related nature. But there is no reason to believe on this record that in such a case the operator would not receive a full review of the merits.

Accordingly, I believe that such cases cited by the Applicant as supporting its request for a full hearing are distinguishable and are not sound precedent for the action it seeks. The Applicant also relies on a series of cases for the asserted proposition that "a case is not rendered moot where there is a need for a determination of the question involved to serve as a guide to the public agency which may" -- parts at this point are omitted -- "act again in the same manner." There is no showing here of the

issuance of citations in prior situations and their vacation which would suggest a continuing practice or the need to determine a question for guidance.

This is not to say that there will be no similar citations in the future. But if so, that future occasion would be the time to consider the possibility of the need for a decision to provide the guidance. Counsel for MSHA in his argument has clearly suggested, at least it seems to me, that some mistakes have been made. As a result, he has informed the Court that procedures have been modified and a policy directive is to be issued shortly. Thus, there is every reason to believe that the mistakes or errors of the past, if any, are not to be repeated.

Furthermore, these cases, that is the pending cases, are not the type in which it can be said with confidence that the issues in subsequent cases will be the same. In all probability they will be different. The testing will no doubt take place on different miners in different places and under different circumstances. While the general considerations may be the same, it seems clear that the facts will differ in relevant and important detail. Thus, a decision on the merits in these proceedings would not necessarily be dispositive of charges in other subsequent cases.

My principal difficulty, however, with the request to hold a hearing in spite of the vacation of the citations is that such a hearing would probably not accomplish anything that cannot now be accomplished or decided on the record as it stands. The Applicant analogizes this situation to that of a plaintiff-defendant in a civil case under the Federal Rules. Applicant has made no suggestion, however, that short of a summary judgment a plaintiff in a civil suit would gain more than Applicant will receive here; namely, a dismissal of the action.

The question of what is to be gained by a full trial is a very real one. As I view this, it is a foregone conclusion that MSHA will not succeed because it has declared it cannot prove its case. Thus, any hearing would be wholly one-sided in which the Court would receive a more detailed showing of the Applicant's position and further proof that it is entitled to dismissal. But if it is entitled to dismissal [after a hearing] and a decision to that effect, it is entitled to that on the record as it now exists. There is no need for a trial to prove what is already known; that is, that MSHA cannot sustain its burden of proof in these cases.

I realize that Applicant is seeking something more; namely, an affirmative ruling on certain statements which it has presented as the "issues of fact and law." I do not propose to give such an affirmative ruling on these issues. That would be a far-reaching departure from the relatively precise and established issues presented in cases such as Southern and the Board's Eastern Associated matter. It would in my view be tantamount to an advisory opinion on matters, some of which are purely procedural issues. These should not be decided other than in a strict adversary context in my view.

Applicant finds fault with MSHA and distinguishes these proceedings from Reliable Coal in part because MSHA here is making no "concession of error." This is not exactly true. MSHA in this conference has in effect, if not explicitly, conceded that the citations were erroneously issued. The Applicant, however, wants a concession of error along the precise lines of the issues framed by itself. That is unacceptable as I view the matter.

MSHA disputes the issues as phrased by the Applicant, and there is no clear certainty that all of such statement of issues would necessarily be the issues in a fully litigated proceeding.

I believe the Applicant, because of the vacation of the citations, has obtained in these cases all the relief it can reasonably expect to obtain. It is true, of course, that the vacation of the citations unfortunately leaves undecided some issues which may well have been decided in a litigated case and would then have been available for precedent and guidance. Some of these issues, however, such as whether MSHA has the burden of proving dust concentrations in excess of the TLV and the feasibility and practicability of any dust control measure not in use and whether MSHA has the burden of proving any feasibility of any dust control measures at the Climax Mine and others, are apparently procedural in nature.

It would not be appropriate to address these issues outside of the contested proceeding. A ruling on such issues in the posture of this proceeding would be akin to dicta and be of little use in the final resolution in some possible future case.

I cannot conclude this decision without a summary of the efforts which led to the present posture of the proceedings. The issues presented originated nearly nine months ago. Climax, according to its statement, has undergone great expense, time, effort, and money in order to

properly prepare for an administrative resolution of the issues. It alleges that, up until a week ago, MSHA has consistently refused to vacate the citations. The Applicant asserts that this action raises a specter that will shadow the entire enforcement procedures under the Act and that to condone the agency's action is to grant it a license to effect its desires over the operator though it has no real right to do so.

I don't view the action of MSHA as being oppressive as Applicant has claimed. If I did that, some appropriate remedy would I think be in order. Nevertheless, the conduct of MSHA as shown on this record cannot be entirely condoned. (FOOTNOTE 1) It seems unusual, to say the least, that MSHA could not have determined much earlier in the investigation that it had no case. Yet it continued its investigation and discovery at what has been a considerable cost to the Applicant in money and time. Moreover, there is at least a suspicion that MSHA is retreating now only to appear another day when it has better proof.

Further, counsel for MSHA concedes that it has been a learning experience for MSHA though, of course, this has been in part at the operator's expense. Whether or not such tactics are permissible, the end result is to cause the operator a considerable amount of hassle and uncertainty. I understand, of course, that there are areas of enforcement here that are new to MSHA and thus, as was argued, some mistakes are to be expected. That, of course, is of little solace to the operator.

Counsel for MSHA has argued in effect, at least as I understand it, that the operator is not really deserving of too much sympathy here, that such actions that have occurred are normal and expected in the course of administrative enforcement. I cannot subscribe to that view. The regulations which all mines are subjected to call for considerable effort on the part of the operators. And in applying these regulations they should be treated as fairly and equitably as it is possible to do.

In this instance, a mistake or error apparently was made in issuing these citations, and the operator has been subjected, at least by its own account, to a great deal of expense and effort. It seems to me, at least in certain narrowly defined circumstances such as this where the operator has been so improperly (FOOTNOTE 2) cited and goes to a large expense to defend itself, that it is entitled to some kind of setoff. This will be in accordance with the Board rulings which have permitted setoffs where large expenses have resulted from mine closures. Applicant here is actually in a better position to claim a setoff since it has not been found to be in violation of the Act. (FOOTNOTE 3)

I'm, of course, reasonably certain that MSHA will resist the implementation of any such setoff on the ground that it will interfere with the enforcement of the Act. I don't see that enforcement would be affected. It is a matter in my mind of a simple equity and fairness. Since no penalty is involved in these proceedings, I am in no position, of course, to implement any setoff. However, as part of this decision, I hereby recommend to the Commission, in connection with possible future penalties which may be incurred by this company in other cases, that it consider in the interest of fairness and in light of the particular circumstances of these proceedings a setoff to at least in part compensate the operator for its costs in this litigation.

I make this recommendation with the condition that within ten days the operator requests such a setoff and submit a statement of its direct costs for the record. MSHA will have ten days thereafter to comment on this statement submitted by the operator if it chooses to do so.

This concludes my decision on the motion to dismiss. Accordingly, the motion to dismiss is hereby granted. As I view and understand the situation since I have granted the motion to dismiss, that would mean that there is nothing further to be resolved. And these proceedings are dismissed, and there is no further need for action.

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Subsequent to this decision, the following additional documents were received: Applicant's statement of direct costs for set off showing costs totalling $190,495.95, and its request that these costs be set off against future penalties; the Secretary of Labor's memorandum opposing the setoff claim and Applicant's supplement to its statement of costs for setoff. The Applicant's submissions have complied with the conditions set forth in the decision for a recommendation for a setoff to the Commission.

The decision from the bench granting the motion to dismiss the applications for review is hereby affirmed and these applications for review are dismissed.

Further, the preconditions having been met, I affirm my decision to recommend to the Commission, that in connection with possible future penalties which may be incurred by Applicant in other cases, the Commission consider, in the interest of fairness and in light of the particular circumstances of these proceedings, granting the Applicant a setoff to at least in part compensate it for its costs in these proceedings. I hereby so recommend.

Franklin P. Michels
Administrative Law Judge

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~FOOTNOTE_ ONE

1 This reference is not intended to be critical of particular counsel.

Also, no criticism is intended of MSHA's action in bringing these proceedings. Clearly, the Secretary must at times proceed even in doubtful areas if new technological breakthroughs in safety are to be achieved. The question is whether such experimentation should be all at the expense of the industry and, in particular, one member of the industry.

~FOOTNOTE_ TWO

2 The word "improperly" was used here in the sense of its meaning of "not appropriate" or "incorrect."

~FOOTNOTE_ THREE

3 The reference to Board cases was intended only to suggest that the concept of a "set off" has been sanctioned in the field of mine health and safety. It is obvious that the Board cases are not exact precedents for the action here recommended, except for the equitable principle involved. North American Coal Company 3 IBMA 93 (1974); Zeigler Coal Company 3 IBMA 366 (1974). It can hardly be contended, however, that the Commission must always follow these cases. It is clearly free to make its own determination.