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SOL (MSHA) V. CLIMAX MOLYBDENUM
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceeding Docket No. DENV 79-396-PM A.C. No. 05-00354-05010
v.		Climax Mine
CLIMAX MOLYBDENUM COMPANY,	RESPONDENT	

DECISION

Appearances: Thomas E. Korson, Esq., Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, for Petitioner Richard W. Manning and Katherine Vigil, Climax Molybdenum Company, Golden, Colorado, for Respondent

Before: Judge Lasher

This proceeding arose under section 110(a) of the Federal Mine Safety and Health Act of 1977. A hearing on the merits was held in Denver, Colorado, on January 3, 1980, at which both parties were represented by counsel. After considering evidence submitted by both parties and proposed findings of fact and conclusions of law proffered by counsel during closing argument, I entered a detailed opinion on the record.1 It was found that the violation charged in the withdrawal order did occur. My oral decision containing findings, conclusions and rationale appear below as it appears in the record aside from minor corrections in grammar and punctuation:

> This penalty proceeding arose upon the filing of a petition for assessment of civil penalty by the Department of Labor on March 5, 1979, in which the Government seeks a penalty against the Respondent, Climax Molybdenum Company, for causing or permitting a condition or practice described in Citation No. 331766 which was issued by inspector James L. Atwood on August 2, 1978, and which is more particularly described as follows: "The ore pass in 3180-9 stopes, subdrift F-finger, was not provided with a bumper block or berm.

Mobile preparation crews use this ore pass for a dumping location."

The standard involved is that provided in 30 CFR 57.9-54 which provides as part of some 73 specific loading, hauling, and dumping safety requirements which are applicable generally to surface and underground mines that: "Berms, bumper blocks, safety hooks, or similar means shall be provided to prevent overtravel and overturning at dumping locations."

At the outset, it is found, based upon stipulation provided by counsel, that this is a large mine having a payroll of some 1,500 underground employees and a daily production of molybdenum of 25,000 to 28,000 tons. It is also found that Respondent had a prior history of 122 previous violations. Since I do not know during what period of time that is involved, I make no specific finding with respect to that element.

The parties stipulated that payment of the proposed penalty of $106 would not affect Respondent's ability to continue in business. I so find and, in addition, find that in view of the Respondent's size and that Respondent is itself a division of AMAX, Inc., that it would be able to pay a much higher penalty including the maximum penalty in this case without affecting its ability to continue in business.

Finally, based upon the expressed stipulation of the parties, I find that the Respondent, after being served with the citation involved here, proceeded in good faith to achieve rapid compliance with the safety standard cited in the citation by providing a berm at the site allegedly in violation.

In terms of issues, the general issues are, of course, whether or not a violation did occur and, if so, what degree of negligence, if such exists, and what degree of seriousness should be attributed to the Respondent and the condition respectively.

The primary issue in this case is a legal one which arises out of the proper interpretation which should be placed on the safety standard cited, 30 CFR 57.9-54. More particularly, the question is whether the coverage of this regulation applies when dumping is not actually going on. The issue of the construction to be given the regulation comes up based upon the defenses asserted by Respondent in this proceeding, the chief and secondary supporting arguments of such a defense being that berms

are not required around finger openings except when dumping is going on and that the Respondent had a practice of using berms when dumping actually was in progress. Respondent contends that there was no dumping in progress when the alleged violation was observed by the inspector on August 2, 1978, and that its employees were instructed to use berms when carrying on dumping, and other similar contentions which relate back to the primary construction of the regulation which it urges.

Turning now to the evidence, the inspector testified and I find that on August 2, 1978, the opening reflected on Exhibit R-2, which sometimes has been referred to as the "ore pass," but generally called the "F-finger," was not filled up; that it was irregular in shape; that it was approximately 8 feet across (the Respondent contends the same was approximately 7-1/2 feet across) and that it was some 31 feet deep.

I find, based upon the inspector's testimony and that of Respondent's witness, Dick Robush, that the depth of the finger was approximately 23 feet, the first half of which was straight down and the second half of which sloped off at an angle of approximately 45 degrees. As reflected on Exhibit R-1, the finger extended from subdrift F down to an area sometimes referred to as the slusher drift area.

I would footnote that I would refer to the ore pass as the actual opening or top of the hole through which the ore was dumped into the finger.

I find that on August 2, 1978, the ore pass and the finger was not filled up. For all intents and purposes it was empty. I also find that the subdrift reflected on Exhibit R-1 and in which the ore pass was located was used as a trailway, that the ore pass abutted on one side a wall of the subdrift, that there was a 3/4-inch hemp rope suspended from the sides which hung approximately 3 feet off the ground and which had a sway in it which at the bottom was approximately three-fourths of a foot off the bottom. Part of the rope was out over the open hole.

At the time the inspector observed the condition there were equipment tracks imprinted in the bottom of the material which constituted the floor of the area, most of which followed the direction of the trailway and some of which were in the direction of the ore pass, the closest of which were some 3 to 4 feet away from the edge of the ore pass. I am unable to find when these tracks were made or by which specific type of mobile equipment the tracks were left.

I find that there was a sign in proximity to the allegedly violative condition which said "Danger--No Manway," and that the area in which the ore pass was located could at times become, as the inspector described it, smoky as a result of blasting which could take place in the mine at distances ranging from 100 yards to 1 mile from the subject area.

In this connection, I also find that while such smoky or dusty condition could in the abstract affect visibility to what extend the same would be affected cannot be found on this record and, further, that there was no such condition on the day the alleged violation was observed.

I find that when the citation was issued at 8:50 a.m., the first or morning shift was in progress, that no dumping was carried on on the morning shift, and that the last dumping which occurred into the finger in question through the subject ore pass occurred on August 1 during the swing shift (between 3:30 and 11:30 p.m.).

I find that the ore pass and finger in question, both parts of the same thing, had prior to August 2, 1978, been used as a dumping location and would have been used as a dumping location subsequent to such date. The meaning of this finding is that actual dumping had occurred at such site and would have occurred at such site subsequent to the issuance of the citation. I specifically find that on August 2, 1978, there was no berm, bumper guard, or other suitable means or material present at the site in question which would have prevented the overtravel of vehicles or overturning of vehicles--overtravel being a vehicle's going too far and going into the opening of the ore pass.

At the time the citation was issued, the only mobile equipment in the general area depicted on Exhibit R-2 were two loaders, a 1-yard loader and a 5-yard loader. The 1-yard loader was some 16 feet long, 5-1/2 feet high and 4-1/2 feet wide, and the 5-yard loader being some 26 feet long, 6 to 7 feet high, and 8-1/2 feet wide.

In this connection, I also find that, based upon the inspector's testimony, so-called "Wagner muckers"--a vehicle used for hauling which approximates the size of a standard-size automobile running on four wheels and powered by a diesel engine--constituted the majority of Respondent's mobile equipment operating in the area. As I have noted, the tracks found in the area cannot be attributed to any

specific piece of equipment including the Wagner mucker or the loaders previously described.

There were approximately four employees working in the general area depicted on Exhibit R-2 on August 2, 1978. It would have been impossible for the two loaders to proceed as depicted on Exhibit R-3 from the 400 production drift past the subdrift 22 into 3160 crosscut, and get closer than 7 feet to the ore pass opening. On the other hand, equipment could have directly turned into subdrift 22 and have been exposed to the hazard presented by the unfilled ore pass opening, which was not protected by a berm, bumper guard, or other suitable means or material to prevent overtravel or overturning.

Based upon the foregoing specific findings of fact, I make these following ultimate findings of fact: On August 2, 1978, when the citation was issued, no dumping was being conducted at the ore pass in question; the ore pass described in the citation was not protected in accordance with the specific requirements of the regulation cited, 29 CFR 57.9-54, in that no berms, bumper blocks, safety hooks, or similar means were provided to prevent overtravel and overturning; the ore pass and finger shown on Exhibit R-3 was used for dumping, even though at the specific time the inspector observed the same, dumping was not actually in progress; the ore pass in question constituted a very serious hazard to employees working or traveling in proximity to it due to its depth, its location--adjacent to a travelway, the condition of the protective rope--insofar as the same was not fastened properly, the possibility of impaired visibility, and all despite the precaution taken by management personnel in putting up a sign entitled "Danger--No Manway."

Since Respondent had other signs, some of which were more specific than the sign in question such as the ones which said "Danger--Open Finger" and one which said "Danger--Open Ore Pass," I find it possible that a sign which says "Danger--No Manway" might lead an employee into the belief that there was no danger from an open finger or an open ore pass. That is, by having specific signs which describe specific dangers, a (less) specific sign might be counterproductive. However, those are in my judgment minor considerations in comparison to the major considerations upon which (rests) my finding that the condition was a very serious hazard.

In this sense and in this respect, I fully credit the testimony of the inspector that in the event of an overturn of equipment, a fatality would probably occur. There was

really no challenge to this evidence with respect to seriousness. The general description of the condition itself would lead me to find the same absent the inspector's testimony.

I turn now to the primary question which is the construction of the regulation. I first note that it's a long-established principle of mine safety law that ambiguous provisions of the law are to be construed liberally so as to enhance the safety aspects of the language. I construe that to mean that if there is an ambiguity, a regulation should be construed liberally to promote health and safety. However, I find no ambiguity whatsoever in this regulation.

I'm going to be very explicit in saying I find the argument of Respondent that the regulation should be limited to only those times when dumping is going on to be wishful thinking at best and very cynical at worst. This regulation says that berms, bumper blocks, or similar means shall be present at dumping locations. Is an open hole in the ground 7-1/2 feet long a "dumping location" only when dumping is in progress when it's (been) used for dumping within some 15 to 20 hours before it's seen to present a very serious violation? Is a piano that's not in use not a piano because there's no musician sitting there playing it?

This site was used shortly before this violation was discovered as a dumping place and was intended to be used as a dumping place subsequently. The regulaton does not say that berms, etc., shall be provided while dumping is going on. It says it shall be used at "dumping locations." In my judgment, if there was ever a dumping location, this was it, since it was one that was used very shortly before the violation was found. It would be impossible to enforce such a regulation absent having an inspector present at every single such location 24 hours a day, because you would then get down to where someone would say, "Well, it wasn't a dumping location, we were using it for ventilation or some other purpose at the time the violation was discovered."

This regulation is not just for the benefit of the employees actually engaged in dumping at some particular time. The hazard is to anybody that happens to be going along there at any time whether dumping is going on or not. The hazard is for a piece of equipment to overturn or to fall into that hole whether or not it's in the process of dumping. Are we to discriminate and limit the protection afforded by such a regulation, the hazard

which it is designed to protect being so obvious, in such a way?

I find no ambiguity whatsoever and I am surprised at the position that the Respondent has taken which, as it has pointed out, has resulted in a practice wherein the berms are taken away after the dumping is over. I find, in that connection, Inspector Atwood's testimony that it was not possible for the berms to have been removed without leaving traces of their presence, to be credible. Although I credit this testimony, I do not find it necessary to make an express finding of fact in resolving the ultimate issue in this case. More specifically, I do not find it necessary to determine whether there was a berm there or not at the time the dumping occurred the previous day or other times when dumping occurred. The fact this hole was present at 8:50 a.m. on August 2, 1978, presenting a hazard as it did without the berms or other similar means of protection constitutes a violation, and I so find.

The remaining question is whether or not, in permitting the violation, the Respondent was negligent. The facts of this case indicate that this was a willful act. I'm not saying it was a willful violation. It was a willful act on the part of the Respondent based upon its understanding that it was in compliance with the regulations.

The negligence aspect of the case is not susceptible to being analyzed in terms of the normal precepts of negligence law. I do accept the Respondent's statement that in this case it had a sincere good faith belief that it was not violating the standard in question. I thus find that it is not a willful violation. If I found a willful violation, I'd have to refer this for criminal action.

Analyzing it in terms of willfulness, I would therefore find that the willfulness is excused by the good faith belief--and what I believe to be mistaken belief--that they were not in violation. This would, therefore, in my judgment equate with a low degree of negligence were we to analogize it to negligence.

Summing up then, I find that this is a large mine operator. I find that, based upon the history of previous violations, there is no reason to increase any penalty. I find that the penalty that I'm to assess will not interfere with Respondent's ability to continue in business. I have found this to be a very serious violation which was attributable to the Respondent's good faith belief that it was in compliance with the standard. And I footnote that I make such

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finding even though I don't find much ambiguity or any ambiguity in that standard myself. Standing in some mitigation is the fact that Respondent proceeded rapidly to abate the violation found. Weighing all those factors and again noting that I had found either willfulness or gross negligence I would have given a penalty close to the maximum which is $10,000 in this case, a penalty of $1,500 is assessed. Respondent is directed to pay the same within 30 days of issuance of my subsequent written decision which will incorporate the oral decision which I have placed on the record.

ORDER

Respondent, Climax Molybdenum Company, is ORDERED to pay a penalty of $1,500 to the Secretary of Labor within 30 days from the issuance date of this decision.

Michael A. Lasher, Jr.
Judge

~FOOTNOTE 1

Tr. 127-139.