

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

333 W. COLFAX AVENUE
DENVER, COLORADO 80204

25 JUL 1980

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|--|---|--------------------------------|
| SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), |) | CIVIL PENALTY PROCEEDING |
| |) | |
| Petitioner, |) | DOCKET NO. WEST 79-192-M |
| |) | MSHA CASE NO. 05-02337-05005 |
| |) | |
| v. |) | DOCKET NO. WEST 79-305-M |
| |) | MSHA CASE NO. 05-02337-05009 |
| CLIMAX MOLYBDENUM COMPANY, |) | |
| |) | MINE: CLIMAX MILL AND CRUSHERS |
| Respondent. |) | |
| |) | |

DECISION

APPEARANCES:

Robert Bass, Esq., and Eliehue Brunson, Esq., Office of T. A. Housh, Regional Solicitor, United States Department of Labor, Kansas City, MO. for the Petitioner,

Richard W. Manning, Esq., Climax Molybdenum Company, Golden, Colorado for the Respondent.

Before: Judge John J. Morris

WEST 79-192-M

Citation 331477

Petitioner, the Secretary of Labor, on behalf of the Mine Safety and Health Administration (MSHA), charges respondent, Climax Molybdenum Company, failed to provide handrails for the protection of its employees. MSHA asserts Climax thereby violated 30 CFR 57.17-2, ¹ a regulation promulgated under the statutory authority of the Federal Mine Health and Safety Act of 1969 (amended 1977), 30 U.S.C. § 801 et seq.

1/ The cited standard reads as follows:

57.12-30 Mandatory. Crossovers, elevated walkways, elevated ramps, and stairways shall be of substantial construction, provided with handrails, and maintained in good condition. Where necessary, toeboards shall be provided.

ISSUE

The issue is whether Climax violated the standards.

FINDINGS OF FACT

The evidence is uncontroverted. I find the following facts to be credible.

1. In the Climax Mill, there was an unguarded elevated walkway 30 feet in length **(Tr 6 - 7, 16, R1)**.

2. The walkway, five feet above the concrete, was 12 to 14 inches wide **(Tr 6 - 9)**.

3. A worker positioned himself on the planks in order to rotate the pipe every three years. According to maintenance records, the pipes had not been rotated in six years **(Tr 24)**.

4. In order to move the 30 inch pipe, it is necessary to remove the handrails.

5. No worker would be on the walkway other than to change, rotate, or remove the pipe **(Tr 25)**.

6. When the pipe is changed, rotated, or removed, workers tie off with safety lines **(Tr 25)**.

DISCUSSION

Climax contends that the cited area is not a walkway as defined in 30 C.F.R. 57.11-2. The basis for the argument is that the 2 x 12 planks do not lead to anything other than a blank walk. In addition, a worker must cross over the 30 inch pipe to reach the area.

I reject Climax's argument. MSHA defines tunnelway but not a walkway. Webster ² indicates one definition of a walkway is as follows:

A passageway in a place of employment (as a factory or restaurant) designed to be walked on by the employees in the performance of their duties.

Climax's employees use this area to gain access to the pipe. It accordingly constitutes a walkway.

The evidence, however, establishes that to perform their duties the handrails must be removed. The area is not otherwise used by workers. These facts establish impossibility of compliance with the regulation.

While the Commission has not addressed this defense, it is the writer's view that it is an affirmative defense. Respondent must show that compliance is functionally impossible. Further; alternative effective protection must be used to protect the workers. Here the Climax workers tied off when using the walkway. The facts establish the defense of impossibility of performance. OSHA Review Commission cases on this defense are Everhart Steel Construction Company, OSHA Docket No. 3217 (April, 1975); Hughes Brothers, Inc., No. 12523 (July 1978); Julius Nasso Concrete Corporation, et. al. No. 16012 (December 1977).

Climax has established impossibility of compliance and I therefore conclude that Citation 331477 should be vacated.

SETTLEMENTS

During the hearing, Climax moved to withdraw its notice of contest as to the four remaining citations in this case. Petitioner does not object and pursuant to Commission Rule 2700.11 the motions should be granted.

^{2/} Webster's Third New International Dictionary, unabridged, 1976.

WEST 79-305-M

Citation 331860

MSHA in this penalty proceedings charges Climax failed to provide handrails for a storage area thereby violating 30 C.F.R. 57.11-2. ³

The evidence is uncontroverted and I find the following facts to be credible.

7. A flat roof shed was located inside a larger building (Tr 31-44).

8. The 10 foot high shed was 7 feet deep at the top; it had no handrails (Tr 31, 32, 42, G1).

9. It was 7 feet beneath the roof of the larger building at the front of the shed angling to zero feet at the back (Tr 41-43, G1, R2, R4).

10. At the time of the inspection there were empty -cardboard boxes a foot from the edge of the roof of the shed (Tr 36, 38, 40).

DISCUSSION

To establish a prima facie violation of a standard, petitioner must establish two things. First, that the described factual situation falls within the terms of the standard. Second, that there were one or more employees who were exposed to the hazard or who had access to the hazardous condition. MSHA's proof of the first category fails. The top of the shed is not one of the areas described in the standard. It is not a crossover, an elevated walkway, an elevated ramp, nor a stairway.

It follows that Citation No. 331860 should be vacated.

3/ Note 1.

SETTLEMENT

During the hearing, Climax moved to withdraw its notice of contest as to Citation 332562. Petitioner does not object. Pursuant to Commission Rule 2700.11, the motion should be granted. ⁴

CONCLUSIONS OF LAW

CASE WEST 79-192-M

1. Respondent established the defense of impossibility of compliance with 30 C.F.R. 57.11-2 (Facts 1 - 6).

2. Citation **No.** 371477 and the proposed penalty **therefor** should be vacated.

3. On respondent's motions to withdraw the following citations and their respective proposed penalties should be affirmed:

Citation Numbers 329264, 329265, 329268, 329273

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4. Respondent did not violate 30 C.F.R. 57.11-2 and Citation 331860 should be vacated together with proposed penalty.

5. On respondent's motion, Citation No. 332562 and the proposed penalty should be affirmed.

Based on the foregoing findings of fact and conclusions of law, I enter the following:

ORDER

CASE WEST 79-192-M

Citation **No.** 331477 and all proposed penalties **therefor** are vacated.

^{4/} The motion to vacate appears on pages 42 - 43 in the case involving the parties. The caption is noted as Docket WEST 79-303-M, WEST 79-304-M, WEST 79-306-M.

Based on the foregoing findings of fact and conclusions of law, I enter' the following:

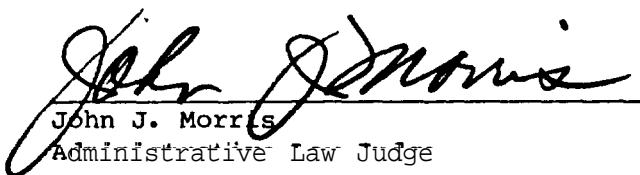
ORDER

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Citation No. 331477 and all proposed penalties **therefor** are vacated.
citations No. 329264, 329265, 329266, and 329273 and the proposed penalties **therefor** are affirmed.

CASE WEST 79-305-M

Citation No. 331860 and the proposed penalty **therefor** are vacated.
Citation No. 332562 and the proposed penalty **therefor** are affirmed.


John J. Morris
Administrative Law Judge

Distribution:

Robert Bass, Esq., Eliehue **Brunson**, Esq., Office of the Solicitor,
United States Department of Labor, 1585 Federal Building, 1961 Stout
Street, Denver, Colorado 80294

Michael Hackett, Esq., Richard W. Manning, Esq., Climax Molybdenum
Company, 13949 West Colfax Avenue, Golden, Colorado 80401

John **R. Tadlock**, Esq., Oil, Chemical, and Atomic Workers International
Union; 1636 **Champa** Street, Denver, Colorado 80461

Mr. David A. Jones, Jr., Oil, Chemical, and Atomic Workers International
Union, **P.** 0. Box 949, Leadville, Colorado 80461

Mr. Edwin Matheson, International Brotherhood of Electrical Workers,
Local No. 1823, **P.** 0. Box 102, **Minturn**, Colorado 81645