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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	Application for Review Docket No. DENV 79-21-M
v.		Citation and Order No. 332803 September 20, 1978
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	RESPONDENT	Climax Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	PETITIONER	Civil Penalty Proceeding Docket No. WEST 79-24-M A.O. No. 05-00354-05014H
v.		Climax Mine
CLIMAX MOLYBDENUM COMPANY,	RESPONDENT	

DECISIONS

Appearances: Thomas Bastien and Harvey P. Wallace, Esquires, Denver, Colorado, for Climax Molybdenum Company; James R. Cato and Jerry R. Atencio, Attorneys, U.S. Department of Labor, Denver, Colorado, for MSHA James A. Kasic, Leadville, Colorado, amicus curiae, Oil, Chemical, and Atomic Workers International Union

Before: Judge Koutras

Statement of the Proceedings

These consolidated proceedings concern an imminent danger withdrawal order served on Climax by MSHA pursuant to section 107(a) of the Federal Mine Safety and Health Act of 1977, and a subsequent civil penalty proposal filed by MSHA pursuant to section 110(a) of the Act, seeking a civil penalty assessment based on the conditions described in the order for an alleged violation of the provisions of mandatory safety standard 30 C.F.R. 57.3-5.

Climax filed timely notices of contests in the proceedings and the parties engaged in extensive prehearing discovery, including the taking of depositions. A hearing was conducted in Denver, Colorado, May 8-9, 1980, and the parties appeared and participated therein. The parties filed posthearing briefs, and the arguments presented in support of their respective positions have been carefully considered by me in the course of these decisions.

Applicable Statutory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. 820(i), which requires consideration of the following criteria before a civil penalty may be assessed for a proven violation: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect of a penalty on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

3. Commission Rules, 29 C.F.R. 2700.1 et seq.

Issues Presented

1. Whether the conditions cited and described by the inspector in the order issued in these proceedings presented an imminent danger warranting the issuance of a withdrawal order pursuant to section 107(a) of the Act.

2. Whether the conditions described in the aforesaid order constituted a violation of the provisions of 30 C.F.R. 57.3-5, and if so, the amount of the civil penalty which should be assessed for said violation taking into consideration the criteria set forth in section 110(i) of the Act.

3. Additional issues raised by the parties are identified and disposed of in the course of these decisions.

Stipulations

The parties stipulated to MSHA's enforcement jurisdiction over the Climax Mine in question, the fact that Climax is a large mine operator, and the fact that an assessment of any civil penalty in this matter will not adversely affect Climax's ability to remain in business (Tr. 175-177). The parties also stipulated that any danger or hazard which may have existed at the time the citation and order issued affected only employees of the contractor Colo-Maaco and that no employees of Climax were exposed to any hazard resulting from the conditions cited in the order (Tr. 177-178). The parties also stipulated that abatement was achieved in good faith once the order issued (Tr. 177), and

Climax's history of prior violations for the 24-month period prior to the August 10, 1978, issuance of the order is reflected in the computer printout compiled by MSHA (Exh. G-4; Tr. 175-176).

Background

The facts developed in these proceedings reflect that MSHA inspectors David Park and Jack Petty conducted an inspection at the Climax Mine on August 10, 1978, and while walking through the surface open-pit area observed a condition which they believed constituted an imminent danger. Inspector Park issued an imminent danger order pursuant to section 107(a) of the Act, included a reference to section 104(d)(1) of the Act (unwarrantable failure finding), and cited a violation of mandatory safety standard 30 C.F.R. 57.3-5. The order was served on a representative of Colorado-Maaco, an independent contractor performing work at the open-pit area where the alleged imminent danger occurred. MSHA inspector Richard King subsequently conducted a "special investigation" pursuant to section 110 of the Act, and his investigation was prompted by the issuance of the imminent danger order. Inspectors Park and Petty also participated in that investigation, but it is not an issue in this case.

The order was modified by Inspector Park on August 10, 1978, to reflect a reference to section 104(a) of the Act rather than section 104(d)(1), and it was modified again by Inspector Park on September 20, 1978, to show Climax Molybdenum Company, Division of AMAX, as the responsible mine operator rather than the contractor Colorado-Maaco.

The section 107(a)-104(a) citation and order issued by Inspector Park, No. 332803, on August 10, 1978, describes the following condition or practice which he believed constituted an imminent danger and a violation of mandatory safety standard 57.3-5:

> An imminent danger situation existed at the open pit entry to the old intake vent drift where the Colorado-Maaco employees were working near a dangerous bank. Unconsolidated material was observed on the bank and a loose chunk fell to the working area as inspectors looked on. Dangers of the loose rock in the bank had been discussed by the Colorado-Maaco supervisory personnel on August 9, 1978.

Inspector Park described the area affected by the withdrawal order as the "old intake vent drift adit," and the order was terminated on August 23, 1978, after abatement of the cited conditions, and the abatement action is described as follows:

> A bench was excavated to hard rock above the pit wall at the old intake vent drift site. Ten rolls of wire mesh, approximately 70 feet in length and 6 feet in width, have been placed against the face and anchored from above by 15-7 feet reinforced rock bolts set in epoxy. The rolls have been laced to each other vertically on two to three foot intervals. Work may now resume at the old intake vent drift site.

MSHA's Testimony and Evidence

MSHA inspector David Park testified that he was first appointed as an inspector-trainee with MESA in April 1975, was assigned to a subdistrict office in Albany, New York, and was subsequently appointed an MSHA inspector when the 1977 Act became effective on March 9, 1978. He attended a 6-week MSHA training course at Beckley, West Virginia, and has taken subequent training courses at Beckley, MSHA's Denver Technical Support Center, and at Michigan State University. These training courses included courses in surface and underground mining ground-control methods. Prior to his employment with MSHA, he worked during the summer months in quarries in Pennsylvania, and was employed by Bethlehem Steel Company for 10 years in an underground iron ore mine in Pennsylvania, and this included numerous assignments at Bethlehem Steel's open-pit operations where he was involved with highwalls. He has conducted some 30 open-pit inspections while employed as an MSHA inspector and first visited the Climax Mine on July 19, 1978 (Tr. 1-16).

Inspector Park confirmed that he inspected the mine in question on August 10, 1978, that he was accompanied by his supervisor, Jack Petty, and Climax's general mine foreman Kenneth Diedrich, and he also confirmed that he did not present his inspector's credentials that particular day. He identified Exhibit G-1 as a "plan view" of the Climax Mine Storke level, indicated the areas traveled during the inspection by marking his route of travel on the exhibit, and identified Exhibit G-2 as a similar diagram showing the general open-pit area in question (Tr. 17-21). He stated that the conditions he observed which prompted him to issue the citation and order was a highwall approximately 80 feet high at a location identified as "the old vent drift", and the highwall was composed of solid rock, sandy material, a variety of seams in the rock, and some rock with evident cracks (Tr. 21). As the inspection party entered the open-pit area, he observed some workmen at the base of the highwall, and he also observed a workman in another area handling a trailing cable in a manner which he believed may have been contrary to safety standards. As he proceeded toward that man, his attention was drawn to the highwall area by the sound of a rock striking a solid object. He did not actually observe the rock dislodge, and he estimated the sound came from a distance of some 40 or 50 yards away. However, after hearing the sound, he turned in that direction and observed the rock rolling to its resting place. He believed the sound came from the area of the concrete form being constructed at the base of the highwall at the old vent drift adit and he believed the rock fell from above that location (Tr. 24-26).

Inspector Park testified that he observed the highwall during the course of the entire morning of August 19, walked around the area at the base of the highwall where the construction was taking place, and later that morning observed the area from the top of the highwall. Photographs of the area were taken by him on August 11, and he identified one of them as Exhibit G-6, and he believed that the conditions depicted therein

were the same as on August 10 (Tr. 27-30). He also identified Exhibit G-7 as another pictorial view of the highwall taken August 11, and he marked the photograph where he believed fractured and unconsolidated materials existed (Tr. 31-35). He went

on to identify other photographs taken August 11, described the terrain, and indicated that the photographs fairly depicted the conditions as they existed on August 10 when the order issued (Tr. 35-38; Exhs. G-8, G-10, G-14). He stated that approximately seven employees of the contractor, Colorado-Maaco, were exposed to the potential hazards described in the order, and he marked photographic Exhibit G-14 with "X's" as the approximate location where he observed the employees. The rolling rock which he heard was in the "general area" where the employees were located and within an approximate distance of 20 feet (Tr. 41-43).

Inspector Park described the highwall as approximately 80 feet high, with some slope, and with some indentations, both vertical and hanging "in and out" (Tr. 44). Based on the conditions he observed during his inspection of August 10, 1978, Inspector Park characterized the highwall as follows (Tr. 46):

> Q. Based upon your experience and what you observed at the Climax Molybdenum mine on August 10, 1978, do you have an opinion regarding the situation you observed regarding the highwall as being hazardous?
>
> A. Yes, I do.
>
> Q. And what is that opinion?
>
> A. I believe it to be hazardous.
>
> Q. What exactly is a hazard?
>
> A. The nature of the material and its placement on the highwall poses the possibility of falling rocks which could lacerate or fracture or even possibly fatally injure someone.

When asked what formed the basis for his opinion that the conditions he observed presented a hazard on August 10, Inspector Park replied that fractured material presented a hazard because if it should fall from a height of 80 feet or less it would fall directly below and bounce, and if it struck someone it would inflict harm, and he believed fractured material was more likely to fall than unfractured material (Tr. 52). Inspector Park also testified that he was aware that blasting had taken place at the mine on August 8, but that it was not in the open-pit area, but somewhere underground in the general mining area (Tr. 52-53). He then clarified his answer and stated that he was mistaken and was not aware of the fact that blasting had occurred on August 8, but rather, he was aware of blasting as early as July 19, when he began his underground inspection of the Storke level. On August 10, blasting had taken place between 8:15 and 8:40 in the morning, but he could not state the location where the blasting was taking place (Tr. 54-55). He also indicated that changing weather conditions such as rain, ice, and freezing would affect the rocks, and would increase the likelihood of a fall (Tr. 55).

Inspector Park stated that after he issued his oral imminent danger order, employees were permitted to retrieve tools and materials from the "fringes" of the danger zone, and that it took them 3 minutes to do this. The tools and materials were lying in areas to the front and side of the construction form, and he observed no employee go up to the form itself to retrieve tools or materials (Exh. G-14, Tr. 56). When asked whether Climax management personnel were aware of the hazards presented, Mr. Park stated "yes," but he then clarified his answer by stating they were contractor supervisors (Tr. 58). When asked to identify any Climax supervisors who had prior knowledge of the hazards, he named two individuals, and again clarified his answer by identifying them as contractor personnel. These individuals told him that they had attempted to scale the highwall in the past, and one of them told him of his "concern for the condition of the highwall" (Tr. 60-61). Specifically, Mr. Park testified that one man made a statement to the effect that "we knew it was bad" (Tr. 61).

Inspector Park stated that even if he had not heard the rock fall on the day in question, he would still have issued an imminent danger order. He also confirmed that the two contractor employees with whom he spoke advised him that they had attempted to scale the highwall on August 9, the day before the order issued, and that a cherry picker and scaling bar were used for this task. Mr. Park believed that the cherry picker would only reach 30 feet up the highwall, and he observed unconsolidated and fractured material above that height. He could not remember asking the employees if they made any attempts to scale the upper half of the highwall. Abatement was achieved by fastening wire mesh netting over the highwall and attaching it with bolts (Tr. 66-67).

On cross-examination, Inspector Park confirmed that when he viewed the open-pit area he observed construction work going on, and a shovel was loading a truck, while a bulldozer was parked idly nearby. The area was noisy, and he confirmed that he peripherally observed the rock and marked the spot where he believed the rock came to rest on photographic Exhibit G-14 (Tr. 78). He also confirmed that he could not determine where the rock came from, but identified three locations on photographic Exhibit G-7, one of which was the location of the rock which concerned him. At the time he issued his verbal withdrawal order, he was some 10 feet from the man on the east side of the construction form and some 20 feet from the base of the bank. He could not identify the person whom he had ordered off the form but subsequently learned that his name was Chris Nelson, a foreman for Colorado-Maaco. Immediately following this incident, Inspector Park stated that he made a closer inspection of the bank by walking in front of the form and inspecting it from above by looking over the edge of the bank to observe the conditions at the top. After the order issued, he also observed one of the Colorado-Maaco employees in a cherry picker attempting to pry or scale rocks loose, and he confirmed that he spoke with some of the supervisory employees present and that they advised him that they did not believe the bank was dangerous (Tr. 79-82). None of

the employees told him that they had also observed the rock which he observed (Tr. 83). During the approximate 2 hours that he was on the scene, he did not see any rocks fall of their own volition, but he pushed some material down from the top of the bank with his feet (Tr. 83-84).

Inspector Park classified the rock formations where the citation issued as "probably sedimentary" (Tr. 85). He also confirmed that he permitted two employees to reenter the "fringe" area which had been withdrawn before the order was reduced to writing, and he did so for the purpose of allowing them to retrieve some of their tools, and they did not go back to perform abatement work, and they were in the area for approximately 3 minutes (Tr. 87). He did not believe these two employees were in any imminent danger (Tr. 87). When asked to explain why he permitted them to go into the area which he had closed because of the asserted imminent danger, he answered:

> I saw an area of imminent danger, part of it was more imminent than other areas. When I had my discussion with the two hourly employees about my granting them permission to reenter, I first asked them to explain where these tools were at and how long it would take for them to get them. I determined from that conversation that the tools and equipment were on the fringe area of the order, that they could be retrieved in a very short period of time and I had to make a judgment, I allowed them to get their tools.

(Tr. 88).

In pinpointing the area where he believed an imminent danger existed because of overhanging material, Inspector Park indicated that the word "adit" as described on the face of the order, was meant to describe the form at the base of the bank and the form area surrounding the adit as shown on Exhibit G-6 (Tr. 91). He was not present during the abatement and did not know who in particular was involved in that work (Tr. 92).

On redirect, Inspector Park gave his opinion as to how he believed the upper half of the 80-foot wall could have been scaled, and he had no knowledge that any attempts were made to scale the upper half of the wall on the day in question (Tr. 96). He defined "imminent danger" as "a condition or practice or a combination of them that might result in serious harm or even fatality before you can do something about it" (Tr. 97). The fact that the employees had been alerted to the danger was a factor which influenced his decision to permit them to reenter to retrieve their tools, and his alerting them made it less dangerous than their simply working on the form without knowing of any dangers (Tr. 97). His principal concern was that men would be hit by falling rocks, and he candidly admitted that the fact that they were alerted to this hazard could not have prevented rocks from falling (Tr. 98).

In response to bench questions, Inspector Park stated that he modified his order to delete the unwarrantable failure finding which he made and he did so after researching the law further and reviewing his Inspector's Manual and discovering that an imminent danger finding, coupled with an unwarrantable failure finding, is inconsistent because an unwarrantable failure finding can only be made if there is no imminent danger (Tr. 100-101). He believed

the workers on the form saw the rock because after he heard the rock fall he observed the workers looking at each other and down

in the area where the rock came to rest (Tr. 101). The rock appeared to be 6 by 8 inches or "something like the size of a small cantaloupe melon" (Tr. 102-122). He did not believe the entire highwall was in danger of coming down on the men, but he was "convinced on the imminent danger of the different types of material above them and the condition of that" and his area of concern was an area of the highwall 50 to 60 feet wide (Tr. 103). The standard cited requires an operator to have a plan for scaling highwalls, and while he was aware that a plan existed, he has never reviewed it (Tr. 104).

Mr. Park believed a violation of section 57.3-5 existed because the bank was dangerous due to the nature of the material 80 feet above the area where the men were working, the material was overhanging, the conditions were not corrected promptly, and the area had not been posted or barricaded (Tr. 104). He had never observed highwalls of this nature at the Climax Mine in the past, but has observed them at other mining operations, and they looked like the one in question (Tr. 104). The inspection in question was his initial one at Climax under the new Act, and he made no inquiries to determine whether similar conditions had previously been cited under the Metal and Nonmetallic Metal Act (Tr. 106). He believed a rock slide could have occurred because of the sandy material and loose material at the top of the wall (Tr. 112). His prior statement concerning management's knowledge of the asserted dangerous conditions, and permitting workmen to work under those conditions, applied to the contractor, and he did not mean to suggest that Climax permitted its people to work in the alleged danger area (Tr. 113-114). He subsequently learned that the conditions were abated by the contractor (Tr. 114).

Mr. Park indicated that Climax personnel were engaged in mining operations some 75 yards away from the area affected by his order, but that no Climax supervisors were present when he issued the verbal order (Tr. 115), and the mining activities were taking place outside the area affected by the order (Tr. 116). He marked the area of the alleged imminent danger on Exhibit G-14 by parallel vertical lines indicating an area from the base of the highwall to the top (Tr. 123).

Jack Petty testified that on August 10, 1978, he was employed by MSHA as a supervisory mining engineer, and his job included supervising MSHA field inspectors. He is a graduate mining engineer from the Colorado School of Mines, and has undergone the usual MSHA training as an inspector. His experience includes inspection of open-pit mines, but he has no specific training with regard to highwalls, unconsolidated rock matter, or fractured materials (Tr. 125-127). He has some familiarity with rock formations, and has conducted other inspections at the Climax Mine (Tr. 129). He has no engineering training in highwalls, is not a soil engineer, but has conducted approximately 40 inspections involving open pits and rock walls (Tr. 129). He confirmed that he visited the mine in question on August 10, 1978, and was accompanied by Mr. Park (Tr. 132). He described the route traveled on the day in question, and

indicated that as he exited the underground mine onto the open-pit area, he glanced toward the Colo-Maaco construction site at the base of the highwall and proceeded toward that area. As he passed the construction site, "rock fell from the general area and it caught my attention

out of the corner of my eye" (Tr. 134). He commented to Mr. Park that he should return to the construction site area and he then proceeded to look into the situation concerning the miner handling a trailing cable for the purpose of determining whether he was wearing suitable gloves. Upon returning to the scene of the construction site, he testified that he observed the following conditions (Tr. 135-136):

> [W]e went back and looked at the bank above the pipe. Looking at the bank there appeared to be certain areas above the pipe where there was rock that could possibly have slid and killed people. There was what appeared to be loose rock, there was an area on the right side up above which had a small overhang and it apparently had a slide sometime previous to us being there. Just looking at the area there appeared to have been numerous rocks there that had they been adequately scaled, they would have been brought down. There was an area up to the left, up at the top of the bank, that w0as full of rock which had been loose and had consolidated somewhat.

Mr. Petty indicated the approximate dimensions of the highwall as 50 feet high by 40 feet wide, and after observing the area from the front and side vantage points he described an area to the right above the vent pipe "which had a fracture there where a block appeared to have slid from it, and there was a fairly large rock there still in that area" (Tr. 136). After the order issued, he went to the top of the wall and stated that "there were rocks there that would have come off, I pushed one off with my foot" (Tr. 137). He also described what he believed to be loose rock at the bottom around the sides of the vent pipe and it was "loose and somewhat consolidated" (Tr. 137). He considered the conditions which he observed to be hazardous, observed four to seven men working in the area where the hazard existed, and he believed that a rock could have rolled with sufficient force and weight to injure or kill some of the men working below (Tr. 139). Referring to photographic Exhibit G-6, he pointed out the locations in and around the vent-pipe construction area where he observed men working in the areas where he believed they were exposed to falling rock (Tr. 140).

Mr. Petty defined an imminent danger as "a condition or practice that exists that could result in serious bodily harm or fatal injuries to a miner working in the area" (Tr. 142). He has issued imminent danger in the past during the course of his inspection duties, and in his judgment, the conditions he observed with respect to the highwall in question on August 10, 1978, constituted an imminent danger (Tr. 144). He indicated that Mr. Park cited section 55.3-5, as a violation because the vent pipe under construction was considered part of the underground mine workings (Tr. 147). The wall did not appear to have been scaled, and he considered the wall to be unsafe ground, and while the use of a cherry picker is a proper method of scaling such a wall, he did not believe that scaling had been done high enough on the wall since the cherry picker could only

scale two-thirds of the wall from the ground up (Tr. 148-149).

On cross-examination, Mr. Petty conceded that he did not know whether the wall had been scaled, and he indicated that when he kicked the rock at the top of the wall it only went to the edge, and he then propelled it over and down the wall. Before going to the top of the wall, he knew nothing about it, and he went to the top about 30 minutes after the order had been issued (Tr. 150). He confirmed that while he was present, two men went into the closed area to retrieve their tools, but he could not estimate how long they took to obtain their tools (Tr. 151). He observed no adverse weather conditions on the day the order issued, and admitted that he was no expert on highwalls. He confirmed that he had a discussion with Colo-Maaco employee Chris Nelson on August 10, and that Mr. Nelson told him that the bank had been scaled the day before the order issued, and he did not disbelieve Mr. Nelson (Tr. 154). He confirmed that he saw a rock fall out of the corner of his eye, heard a sound, but could not attribute it to the falling rock. He marked Exhibit G-14 with letters "A" and "B" to indicate where he first saw the rock and where it came to rest (Tr. 155). Although Mr. Nelson told him the wall had been scaled with a cherry picker and a bar, the cherry picker could only reach two-thirds of the way up the wall (Tr. 157).

In response to bench questions, Mr. Petty stated that in the majority of cases it is his view that any highwall that is not properly scaled and has men working under it is an imminent danger. If no men were working under it, he would only issue a citation for failure to scale the wall (Tr. 158-159). Although he confirmed he saw an employee under the wall at the vent pipe location "hunching his shoulder over to avoid the rock", it was a split second peripheral observation on his part, and he made no attempts to confront the employee or to speak with him since his attention was diverted to the miner handling the cable in another area of the pit (Tr. 160). He had no idea where the rock came from or how far it fell off the wall (Tr. 161). He confirmed that Exhibits G-7 and G-8 depict fractured rock, and he conceded that such fractures result from the block-cave method of mining. He conceded that all rock fractures are not hazardous, but those which do not lie flat and are loose are because they possibly could fall on someone (Tr. 163). The dirt, loose rocks, and other materials depicted in Exhibits G-7 and G-8 are required to be cleaned out if the slope is sufficiently inclined enough and men are working under the material (Tr. 164). All of his examinations of the bank and materials were by visual observation, and he had no opinion as to whether or not the rock which he kicked over the wall would have dislodged itself had he not propelled it over the wall (Tr. 166), and he did not know how far the rock fell (Tr. 170). No Climax personnel were exposed to any hazard, but employees of the contractor Colo-Maaco were (Tr. 168).

Inspector Petty stated that the cited standard does not specifically detail what is required to render an alleged dangerous bank safe. It could be sloped to its angle of repose, it could be scaled to eliminate loose material, or it could be wire-meshed as an adequate protective measure (Tr. 289).

Climax's Testimony and Evidence

Gordon Matheson, a professional consulting rock mechanics engineer, testified that he was employed by Climax at one time but terminated his

employment during October 1979, and while at Climax he was employed as a senior geological engineer. He holds Bachelor's and Master's degrees from VPI in geology, and he indicated that his primary responsibility while with Climax was with the open pit. He was present in the vent-pipe construction area on August 1, 1978, for the purpose of examining the rock conditions so that he could give an opinion as to the stability of the foundation materials for an overpass that was being constructed in the area adjacent to the vent pipe structure. In his expert opinion, and based on his observations of the wall area in question, the possibility of any sort of large rock movement or large failure of the rock in the area was very unlikely (Tr. 179-187).

On cross-examination, Mr. Matheson conceded that while a large rock failure was unlikely, this did not foreclose the possibility that smaller rocks the size of grapefruits or basketballs could come loose from the formation on August 10, 1978, but due to the passage of time he could not recall whether loose rocks existed on that day. While the wall itself was stable, he did not examine it close enough to state whether the rock face had loose rocks on it or not (Tr. 183). He also conceded that his evaluation and opinion that the rock face was structurally sound did not take into account the fact that loose material in terms of smaller rocks may have been present on the face of the wall (Tr. 185).

Jerry Harris, testified that he is employed in "concrete work" and that during August through November 1978, he worked for Colo-Maaco at the Climax vent-drift construction site in question. He was the lead man on the rebar crew installing the concrete structure and had four to 10 men working for him at any one time. He recalled the MSHA inspectors who inspected the site on August 10, 1978, and he stated that he was working some 150 yards away when foremen Chris Nelson informed him that more scaling would have to be done on the wall. Mr. Nelson operated the cherry picker and he (Harris) went up above the drift sounding and checking the rocks with a scaling bar. However, he was unable to dislodge any rocks, but the day before he had also been up in the cherry picker and did knock out some loose rock, sounded others, and went from one side of the vent opening to the other knocking off loose rock (Tr. 186-190).

On cross-examination, Mr. Harris stated that the wall was 80 feet high and that the cherry picker would only reach a height of 40 feet, and no attempts were made to scale the wall any higher than where the cherry picker could reach. Although the foreman and superintendent went above the 40-foot height to look at the top of the wall, no attempts were made to scale it above the 40-foot level. He admitted that he told Inspector Park on August 10, 1978, that the wall was not safe and that no rocks were pried loose on that day, and that in order to scale a wall safely and properly it should be scaled at the top first before the bottom is scaled. He also admitted that he has had no training as to the sounding of rocks (Tr. 190-192).

In response to further questions, Mr. Harris stated that he

is familiar with the practice of "sounding" rocks, and he explained his prior statement

to Inspector Park regarding his concern for the highwall as follows (Tr. 192-193):

> I got down off the cherry picker and I walked down to the front of the RO and that's where I met Mr. Park and he asked me if I felt safe up there and I said no, the situation never went any further than that. Later on when they asked me for a deposition about it I wanted to explain myself a little bit further and I told them that it wasn't the fact that I didn't feel safe. I didn't feel safe in prying any more loose because the rock up above was consolidated or it had a little stuff that dirt, and the rest of the rock was solid and I didn't want to start prying away rock because you don't know what was coming down or what rock was holding the other one up.
>
> Q. In other words, if it wasn't going to come out, you didn't want to get it out?
>
> A. I didn't want to mess with it when I was half way up the cliff.

Mr. Harris confirmed that he was one of the four men who were permitted to go back into the area withdrawn by the order to retrieve power tools, personal tools, and a generator, and that this took about 15 to 20 minutes. The crew went into the area next to the construction form at the base of the wall and into the adit (Tr. 195). He also indicated that approximately an hour or two elapsed from the time he was advised the withdrawal order had issued and the time he went into the area to retrieve the equipment (Tr. 196). With regard to the scaling of the wall prior to the issuance of the order, he stated that he has never engaged in the scaling of the upper 40 feet of the wall, has never worked on an 80-foot highwall, and the reason he was never higher than the initial 40 feet was due to the limited operating height of the cherry picker (Tr. 199).

Kenneth Diedrich, now retired, but employed on August 10, 1978, as a general mine foreman at Climax's storke level, testified that he accompanied Messrs. Park and Petty during their inspection on that day. While approaching a miner in the open pit to ascertain whether he was wearing suitable gloves while handling a cable, he did not see or hear a rock fall. Employees were permitted to reenter the area closed by the imminent danger order to retrieve their tools and he observed that they were in that area for at least 10 minutes. The men went in as far as the area around the pipe and concrete form (Tr. 212-216).

James Whitmore, testified he was employed as a general foreman in the open pit during July and August 1978. He inspected the construction site in question during this time, met with the contractor, and explained Climax's pit policies and rules to them. The contractor expressed some concern over three rocks near the area where they intended to locate their trailer office,

and Climax tried to remove them with bores, but due to their size they had to be blasted down with dynamite. In his view, there were no other problems at the construction site, and he believed the bank in question was competent (Tr. 216-218).

On cross-examination, Mr. Whitmore indicated that the rocks were blasted out in either late July or early August. The blasting took place some 100 yards to the west of the vent-construction form where the imminent danger order issued. Prior to the contractor's arrival on the site in early August or late July, Climax experienced no problems with the wall and had a shovel in the lower pit, and its trucks were passing by the area all the time. In his view, there was no need to scale the wall above the construction site (Tr. 220).

In response to futher questions, Mr. Whitmore stated that during this time there was an ongoing inspection program in the open pit concerning the slopes, and the pit walls are scaled with the shovel prior to being moved out to the next bench, but no shovels were used above the vent drift walls to scale it (Tr. 221). He also indicated that he did not accompany the inspectors nor make any observations of the site on the day the order issued (Tr. 221). He explained the usual procedures for scaling highwalls, and they include observation, scaling with the shovel at 40- and 80-foot bench intervals, blasting, and barring (Tr. 222). The three rocks blasted down were to the west, or to the left, of the area depicted in photographic Exhibit G-6 (Tr. 223).

Upon review of photographic Exhibit G-7 and the area circled with a "C," Mr. Whitmore could not specifically characterize the material shown as "unconsolidated and loose material" without physically inspecting the area. He denied that such material was observed by him prior to August 11, admitted that as a general rule he does not physically go above a height of 40 feet unless there is a need to, and that he determined the wall was safe by visual inspection from the bottom up for a distance of some 80 feet (Tr. 226).

Dan Wilmot, former assistant superintendent at Climax's underground and open-pit mines, testified that prior to his retirement he was employed with Climax for approximately 30 years and is quite familiar with its mining operations. He identified Exhibits G-8 and G-14 as a photograph of the intake vent-construction site and stated that he was the assistant superintendent at the time that section was excavated. He described the hill area depicted as a highly mineralized, high-grade ore bed being developed in 1975, and that from 1977 to 1978 the area had been mined out. He described the process for scaling the wall in question by use of a shovel bucket from the first cut to the floor below for a distance of some 80 feet. A "catch" area is cut out to provide a catch for loose material. He confirmed that three rocks were blasted down, and following that shot, the area was observed and inspected. He observed the wall regularly during August 9 and 10, and believed it was competent and did not constitute an imminent danger. He observed persons in the area which was closed by the order, and this led

him to believe that the

order had been terminated. The mine had a daily "dig plan" in effect which included procedures for scaling or attempting to solidify loose rock (Tr. 227-235).

On cross-examination, Mr. Wilmot confirmed that Exhibit G-10 accurately depicts the scene above the vent as he viewed it on August 10, 1978, and he indicated that the rock slope is almost vertical, but that the overall slope is greater. He conceded that unconsolidated material can be found to exist at any wall (Tr. 237). He was not aware that the contractor found it necessary to scale the wall on August 9, but if they did, and thought it required it, the contractor did what any competent operator would do (Tr. 237). Abatement was achieved through the joint efforts of Climax and the contractor by using a bulldozer on the wall and by installing a net-like material over the wall area above the adit to prevent any rocks and other materials from falling below, and he was not aware of any rocks dislodging during this process (Tr. 239-241).

In response to bench questions, Mr. Wilmot stated that the contractor arrived on the property during the latter part of July or early August and was there until November. The specific construction project in question had been in progress for about a week before the order issued and would have been completed in 2 or 3 more days. The wall area which was covered by the netting was approximately 30 to 35 feet wide and 80 feet in length (Tr. 243). He identified photographic Exhibit G-7 as the area over which the netting was installed (Tr. 247). He also indicated that it was possible that seven to 10 rolls of 5-foot wide netting were used in the abatement, and indicated that while this netting would have provided protection to the men below from any falling rock, it would not have protected them against a slope failure (Tr. 248).

Chris Nelson testified that he was formerly employed with Climax and with Colo-Maaco. While employed with Climax for some 6 years, his duties included blasting out blockages on the drifts and this entailed going up on the drift for distances of 50 to 60 feet. This work requires some judgment of rock stability. On August 10, 1978, he was employed as a labor foreman by Colo-Maaco at the cited Climax construction site, and he was operating a front-end loader in the pit when the inspectors arrived at the scene. Power tools were being used and the area was noisy. Upon being advised of the issuance of the withdrawal order, he and Jerry Harris obtained a cherry picker and Mr. Harris went up to check the rock and found that the face of the wall was in the same condition that it was in the previous day. Mr. Nelson stated that it was his own view that the condition of the wall was as safe as it was the previous 2 days (Tr. 250-253).

Mr. Nelson testified that the day before the order issued, on August 9, he operated the cherry picker and directed Mr. Harris in the scaling of the wall and whatever loose rock was present was taken down. On August 10, at the time the order issued, someone told him that the inspectors had observed a rock fall, but when he discussed it with his crew no one indicated to

him that they had observed a rock fall. After the order issued and the area was

roped off, he asked Inspector Park if the crew could go back in to retrieve their tools and he granted them permission to do so as long as they did not disturb any of the scaffolding or plywood forms. The crew went in and to the back side of the bulkhead which was under construction, and they were some 20 to 30 feet in from the face of the wall and were there for some 15 to 20 minutes. He identified Exhibit G-6 as the vent-drift adit where the construction was taking place and identified the area where the crew went in to retrieve the tools (Tr. 253-256).

Mr. Nelson stated that the inspectors rejected his suggestion to construct a timber bulkhead over the adit area as a means of abatement, and he personally worked on the subsequent abatement of the order. Abatement was achieved by building a road down to a bench with a D-9 Caterpillar, boring holes 7 feet deep in the wall to anchor the fence-netting meterial and he went up the face with a "bosun's chair" to sew and tie the netting seams together to produce a solid fence. He removed all of the small rocks from under the netting, and a "little rock" may have been dislodged while rolling out the netting material, but no rock as such came down during this process. He feels a responsibility for the men on his crew and believed that on August 10 the wall was a solid, safe, and workable wall (Tr. 258).

On cross-examination, Mr. Nelson confirmed that only the lower 40 feet of the wall was scaled, and that the only way to scale a wall is to "sound" the rocks by tapping them with a sounding bar. The purpose of scaling a rock wall is to knock loose rocks free of the wall and no one can say that it is solid without testing it. Another method of scaling is to bring someone over the side of the top of the wall or drag a tractor belt or steel chain across the wall knocking off loose rocks. He confirmed that very few rocks were knocked loose when the wire-mesh netting was being installed, and in response to a question as to whether the wire mesh made the wall safe because it knocked some of the loose rock free, he answered "anything is safer, yes" (Tr. 261).

Mr. Nelson stated that when he went in to retrieve his tools he was not concerned for his safety because he knew it was safe. He believed there was a conflict in the inspector permitting the crew to go into an area which he had just closed as an imminent danger (Tr. 262). He described the rock material depicted under the wire-mesh netting in Exhibits ALJ-2 and 4 as compacted rather than loose rock (Tr. 264). The soil-like material on the slope consisted of fractured rock at the bottom 40 feet, and red clay dirt mixed with rock at the upper sloped area, and it is not sandy, and a lot of rain would affect the rock embedded in the dirt (Tr. 264).

Ron Surface testified that he has been employed by Climax as a resident geologist for 11 years and prior to that time worked as a geologist for the company for some 6-1/2 years. He holds a B.S. degree in geology from Colorado College and prior to working for Climax was employed in consulting jobs as a geologist. He has

20 years of experience in mining and geology. His office designed and implemented the mine slope stability plan, and it was in operational use in August 1978. He described the terrain depicted in Exhibit G-7 as the highwall adjacent to and behind the vent-pipe construction

site and stated that it was not sedimentary rock, but rather, precambrian, younger, or silver-plume granite of igneous origin. There is no sedimentary rock in the Climax Mine ore body, but there is some several hundred feet to to the west of the adit site in question. The pit area in question was at one time a part of the underground mine. He arrived at the site the day after the order was issued, and based on his expertise he would say it was a stable wall (Tr. 265-270).

On cross-examination, Mr. Surface stated that while he was satisfied with the stability of the slope, loose rocks could have been present on the face of the wall (Tr. 270).

Inspector Park was recalled by MSHA and confirmed that he was at the mine on August 23, 1978, to ascertain whether the conditions cited in the order were abated. He traveled the wall face area as well as the top of the bank. He confirmed that the area marked with a "C" on photographic Exhibit G-7 is the area which concerned him and indicated that it was a portion of the hazard that the men were exposed to. He also marked an "X" on Exhibit ALJ-1 as the area which concerned him, and indicated that it was an area approximately 50 feet wide and 80 feet in height (Tr. 272276). He later testified that the circled area "C" on Exhibit G-7 did not exactly encompass the area he had in mind (Tr. 276), and that his concern was only with portions of the area (Tr. 281).

DISCUSSION

Procedural and Other Rulings

Party Status of the Union

At the hearing, the Oil, Chemical, and Atomic Workers International Union, Local No. 2-24410, (OCAW) Leadville, Colorado, sought leave to intervene as a party in these proceedings. MSHA did not object, but Climax did, and in support of its objection, Climax argues that it objects to the OCAW local being afforded party status on the ground that while they do represent a bargaining unit at the Climax Mine, the local does not represent the affected miners involved in the alleged imminentdanger incident. Climax asserts that those employees of Colo-Maaco allegedly exposed to the asserted hazard are not members of the Union, and citing 1 MSHC 2080, June 19, 1979, holding that the UMWA was not to be allowed party status because it did not represent the workmen in the Magma copper mines in question (Tr. 205), argues that OCAW should not be permitted party status in this case.

MSHA took the position that the union should be afforded party status where there is any possibility that its employees would be exposed to any imminent danger (Tr. 206). OCAW's representative indicated that the Union would be satisfied with an amicus curiae status allowing it to present a short argument and file briefs in the case, citing 1 OSMC, 1017, E.D. Michigan (1972) (Tr. 207). OCAW was granted party status and Climax's

motion was overruled (Tr. 207-210). My ruling made at the hearing is herein reaffirmed.

Authority of the Inspectors and Alleged Citation of an Erroneous Standard

In support of its motion to dismiss, Climax argued that there is no proof or evidence that Inspectors Park or Petty were authorized representatives of the Secretary. The motion was denied (Tr. 211), as was Climax's assertion that the wrong section of the standard was cited (Tr. 211).

With regard to the authority of the inspectors who issued the citations, Climax argues in its posthearing brief that MSHA has failed to establish that the inspectors who conducted the inspection and issued the citation and withdrawal order were in fact acting in their capacity as authorized representatives of the Secretary of Labor, and that there is nothing in the Act which designates employees of MSHA as authorized representatives of the Secretary. This assertion and defense is rejected. While it is true that Inspector Park testified that he did not initially present his credentials on August 10, 1978, the record reflects that he had conducted numerous mine inspections concerning open-pit mines, including prior inspections at the Climax Mine, beginning on July 19, 1978. Mr. Petty testified that he and Mr. Park went to the mine on a follow-up compliance inspection, that when they arrived they made contact with Climax officials, and company officials accompanied them during the inspection (Tr. 132-133). He also testified that he had issued previous orders at the Climax Mine in his capacity as an inspector (Tr. 143). In addition, both inspectors testified in detail as to their appointments as inspectors, their training and duties, and I am satisfied that the record supports a finding that they were in fact duly authorized mine inspectors and that their inspection duties on the day in question were in complete accord with the provisions of the Act, and my previous ruling denying Climax's motion to dismiss on this somewhat frivolous claim is reaffirmed.

With regard to the asserted citation of the wrong standard, Climax argued at the hearing, and in its posthearing brief, that the cited standard, section 57.3-5, is part of the metal and nonmetallic metal standards for underground mines, and since the conditions cited occurred in the open-pit mine, the citation should be dismissed and vacated (Tr. 68-75, 147, 171-173). MSHA's brief does not address this issue, but an explanation was forthcoming from the inspectors during the hearing, and it is found at the referenced transcript pages, and for the reasons which follow below, Climax's arguments are rejected.

Section 57.3-5, is found under the general heading of Ground Control for Surface Areas of Underground Mines, and section 57.3-1 specifically puts an operator on notice that he must establish procedures for the safe control of pit walls and banks. Mr. Petty testified that he considered the surface vent-pipe construction site to be an extension of the underground mine, and Part 57 specifically deals to the surface area of such an underground mine (Tr. 171). He also testified that the correct standard was cited, and that the vent was considered part of the

underground workings since it was being constructed to supply ventilation to the underground portion of the mine (Tr. 147).

Section 55.3-5, which is a standard found in the applicable Part 55 standards dealing with open-pit mines, is identical to the language used in section 57.3-5, and aside from the question of which standard applies, on the facts here presented, it would have been a simple matter for MSHA to amend its pleadings and I cannot conclude that Climax would have been unduly prejudiced since the two standards contain identical requirements. However, I conclude and find that the inspectors cited the correct standard, and my previous ruling denying Climax's assertions to the contrary is reaffirmed.

The Concept of Imminent Danger

"Imminent danger" is defined in section 3(j) of the Act, 30 U.S.C. 802(j) as: "The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated."

Section 107(a) of the Act provides as follows:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such representative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the condition or practice which caused such imminent danger no longer exists. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

The legislative history with respect to the concept of "imminent danger," Committee on Education and Labor, House of Representatives, Legislative History of Federal Coal Mine Health and Safety Act of 1969 at page 44 (March 1970), states in pertinent part as follows:

> The definition of an "imminent danger" is broadened from that in the 1952 Act in recognition of the need to be concerned with any condition or practice, naturally or otherwise caused, which may lead to sudden death or injury before the danger can be abated. It is not limited to just disastrous type accidents, as in the past, but all accidents which could be fatal or nonfatal to one or more persons before abatement of the condition or practice can be achieved. [Emphasis added.]

And, at page 89 of the report:

The concept of an imminent danger as it has evolved in this industry is that the situation is no serious that the

> miners must be removed from the danger forthwith when the danger is discovered * * *. The seriousness of the situation demands such immediate action. The first concern is the danger to the miner. Delays, even of a few minutes may be critical or disastrous.

The former Interior Board of Mine Operations Appeals has held that an imminent danger exists when the condition or practice observed could reasonably be expected to cause death or serious physical harm to a miner or normal mining operations are permitted to proceed in the area before the dangerous condition is eliminated. The dangerous condition cannot be divorced from normal work activity. Eastern Associated Coal Corp. v. Interior Board of Mine Operations Appeals, et al., 491 F.2d 277, 278 (4th Cir. 1974). The test of imminence is objective and the inspector's subjective opinion need not be taken at face value. The question is whether a reasonable man, with the inspector's education and experience, would conclude that the facts indicate an impending accident or disaster, likely to occur at any moment, but not necessarily immediately. Freeman Coal Mining Corporation, 2 IBMA 197, 212 (1973), aff'd., Freeman Coal Mining Company v. Interior Board of Mine Operations Appeals, et al., 504 F.2d 741 (7th Cir. 1974). The foregoing principles were reaffirmed in Old Ben Coal Corporation v. Interior Board of Mine Operations Appeals, et al., 523 F.2d 25 (7th Cir. 1975), where the court, following Freeman, phrased the test for determining an imminent danger as follows:

> [E]ach case must be decided on its own peculiar facts. The question in every case is essentially the proximity of the peril to life and limb. Put another way: Would a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceeded, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

In a proceeding concerning an imminent danger order, the burden of proof lies with the applicant, and the applicant must show by a preponderance of the evidence that imminent danger did not exist. Lucas Coal Company, 1 IBMA 138 (1972); Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, 2 IBMA 197 (1973). However, since withdrawal orders are "sanctions" within the meaning of section 7(d) of the Administrative Procedure Act (5 U.S.C. 556(d) (1970)), and may be imposed only if the government produces reliable, probative and substantial evidence which establishes a prima facie case, MSHA must bear the burden of establishing a prima facie case. It should be noted that the obligation of establishing a prima facie case is not the same as bearing the burden of proof. That is,

although the applicant

bears the ultimate burden of proof in a proceeding involving an imminent danger withdrawal order, MSHA must still make out a prima facie case. Thus, the order is properly vacated where the applicant proves by a preponderance of the evidence that an imminent danger was not present when the order was issued. See: Lucas Coal Company, supra; Carbon Fuel Company, 2 IBMA 43 (1973); Freeman Coal Mining Corporation, supra; Zeigler Coal Company, 4 IBMA 88, 82 I.D. 111 (1975); Quarto Mining Company and Nacco Mining Company, 3 IBMA 199, 81 I.D. 328, (1973-1974); Kings Station Coal Corporation, 3 IBMA 322, 81 I.D. 562 (1974).

The Seventh Circuit also noted in its Old Ben opinion that an inspector has a very difficult job because he is primarily concerned about the safety of men, and the court indicated that an inspector should be supported unless he has clearly abused his discretion (523 F.2d at 31). On the facts presented in Old Ben, the court observed that an inspector cannot wait until the danger is so immediate that no one can remain in the mine to correct the condition, nor can the inspector wait until an explosion or fire has occurred before issuing a withdrawal order (523 F.2d, at 34). Thus, on the facts presented in this proceeding, MSHA must show that reasonable men with the inspector's education and experience would conclude that the condition of the highwall above the vent adit construction site in question, a condition which the inspector characterized as a "dangerous bank" consisting of "unconsolidated material" from which "a loose chunk fell to the working area as inspectors looked on", constituted a situation indicating an impending accident or disaster, likely to occur at any moment, but not necessarily immediately.

Findings and Conclusions

Docket DENV 79-21-M

Imminent Danger

In this docket the question presented for determination is whether the conditions described by Inspector Park on the face of the imminent danger portion of the order he issued on August 10, 1978, No. 332803, constituted an "imminent danger" within the meaning of section 107(a) of the Act. On the face of his order, Inspector Park stated that he observed unconsolidated material on the bank in question and that "a loose chunk fell to the working area as inspectors looked on". At first blush, it would appear that Mr. Park and Mr. Petty were standing near the highwall observing the men working beneath it, and that a "chunk" of unconsolidated material fell from the highwall where the employees were working. However, Mr. Park's testimony is that from a distance of some 40 or 50 yards, while observing a workman handling a cable in a manner which he believed may have been contrary to safety standards, he heard a sound which appeared to come from the highwall area where the employees were working, and when he glanced in that direction he peripherally observed a single rock about the size of a cantaloupe rolling to its resting place. He did not actually observe the rock dislodge or fall, and while he stated that he observed several of the workmen in the

area looking at each other, he made no attempt to speak with them, could not identify

them, and the supervisory personnel with whom he spoke with could not confirm that they also observed the rock in question. In addition, during a period of some 2 hours while he was at the scene he saw no other rocks fall, except for one which he dislodged with his foot at the top of the wall and then kicked over the edge with his foot.

The basis for Mr. Park's opinion that the highwall conditions he observed were hazardous was his assertion that the situation presented a possibility that falling rock could lacerate or fracture, thereby resulting in serious injuries to the men working at the base of the highwall. He also initially alluded to the fact that blasting had taken place in the area 2 days before his inspection, and that coupled with changing weather conditions such as rain, ice, and freezing, he implied that these added factors somehow contributed to the danger. However, he subsequently clarified his testimony and indicated that any blasting would have occurred as early as July 19, and while blasting occurred on August 10, he could not state where it had taken place. As for any adverse weather conditions, he conceded that none were present at the time the citation and order issued.

With regard to the incident concerning his granting permission for several employees to re-enter the area which had been closed by his order for the purpose of retrieving their tools and equipment, Mr. Park stated that he permitted them to enter the "fringe" area which had been withdrawn and that part of the asserted imminent danger area was more "imminent" than others.

Finally, Mr. Park's initial finding of an "unwarrantable failure" violation pursuant to section 104(d)(1), was modified to reflect a section 104(a) citation after he discovered that such a finding was inconsistent with his imminent danger finding.

Inspector Petty testified that he too observed the rock in question out of the corner of his eye, and while he heard a sound, he could not attribute it to the rock which he claimed had fallen. He candidly admitted that his observation of the rock was a split second peripheral observation, and rather than proceeding immediately to the area, he and Mr. Park waited until they resolved the question concerning the employee handling the cable in the pit area without proper gloves. He did not know where the rock came from or how it fell off the wall. He too kicked a rock loose with his foot from the top of the wall after the order issued, but it only rolled to the edge of the wall, and he had to propel it over with another kick of his foot.

Finally, Mr. Petty expressed the view that in the majority of cases, any highwall which is not properly scaled and has men working under is in itself an imminent danger, but if no men were working under the wall, he would only issue a citation for failure to scale the wall.

On the facts presented in this case, when the inspectors

initially heard and observed what they believed was a rock which had fallen from some undisclosed location on the highwall, they did not proceed directly to that area, but rather, continued about their business concerning a miner who was

apparently handling a power cable without wearing suitable gloves. Thus, the assertion by Inspector Park on the face of his order that a chunk of material fell while the inspectors looked on is a somewhat distorted and misleading conclusion which ordinarily would lead one to believe that an accident was likely to happen at any moment unless corrective action were taken immediately. The fact is, however, that the inspectors obviously were not concerned that the situation required their prompt attention since they did not immediately proceed to the area. Further, once the area was withdrawn, the inspectors permitted employees to re-enter to retrieve their tools, and while Mr. Park stated that they only entered the "fringe" area, three employees testified that they actually went into the adit area around and behind the concrete form to retrieve their tools and other equipment and that they were in the area for more than just a few minutes.

Regarding the actual conditions which existed on the highwall in question at the time the order issued on August 10, a professional engineer and a resident geologist testifying on behalf of Climax, stated that while it was possible that unconsolidate material may have been present, they were satisfied with the overall stability of the highwall and that it was highly unlikely that a massive rock movement or slide would occur. Construction Foreman Nelson testified that he checked the wall after the order issued and found it safe, and that he discussed the conditions of the wall with his crew and no one indicated to him that they had observed any rock fall. Assistant Superintendent Wilmot, a man with 30 years of mining experience, while conceding that unconsolidated material can exist on any highwall, testified that his inspections and observations of the highwall in question convinced him that the wall was stable and competent. General foreman Whitmore testified that he inspected the construction site, observed the highwall, and determined that it was safe. Lead man Harris testified that he and Mr. Nelson scaled part of the wall the day before the order issued and knocked down some loose rock but that after the order issued he scaled it again but could not dislodge any rock.

Inspector Park testified that the 80 foot highwall was composed of sandy materials and solid rock, with a variety of seams, some of which had evident cracks. He also observed unconsolidated and fractured rock on the upper portion of the highwall which was apparently out of the range of the 30-foot cherry picker which had been used to scale the lower portion of the wall. His inspection of the highwall was limited to his observations, and except for some material which he kicked down with his foot, during the 2 hours or so that he was on the scene he observed no rocks or materials fall from the highwall. And, while he alluded to the presence of some "overhanging" materials on the highwall, I take note of the fact that no mention of such a condition is made in the order he issued.

Inspector Petty's testimony regarding the highwall conditions is consistent with Mr. Park's evaluation of the highwall, and he candidly believed that most highwalls which are

not properly scaled and with men working under them are imminently dangerous per se.

After careful consideration of all of the testimony and evidence adduced in this proceeding, I cannot conclude that the conditions described by Inspector Park in his order constituted an imminent danger on the highwall above the adit construction site in question on August 10, 1978. While the testimony by the inspectors may support a conclusion that there were some areas of loose unconsolidated materials scattered about the upper reaches of the highwall, including the area to the right of the adit area, as depicted in the photographic exhibits, I simply cannot conclude from the inspector's testimony in support of their imminent danger finding that the prevailing conditions on the highwall presented a situation which constituted an impending accident or disaster likely to occur at any minute. I believe that Mr. Park's real concern was over the fact that from his vantage point in the pit, there appeared to be some loose and unconsolidated material which had not been scaled down from the upper portion of the highwall, and that since the vertical range of the cherry picker used for scaling was limited to a distance of some 40 feet up the highwall, I am convinced that he believed some other methods of scaling should have been used. I am also convinced that Mr. Park was impressed by the 80 foot height of the highwall and that he issued the imminent danger order as a means of insuring routine immediate compliance with section 57.3-5, rather than any real assessment on his part of any imminently dangerous condition. I conclude that such a use of imminent danger orders to achieve compliance with routine or unusual situations which do not present an immediate threat to life and limb is an unwarranted abuse of such orders.

On the facts presented in this case, I believe it is clear that Inspector Park over-reacted by issuing the imminent danger order. In addition, while it is true that his testimony in support of his order came approximately 2 years after the order issued, I find it to be somewhat colored and contradictory, particularly with respect to the discrepancy in the order which states that a "chunk of material fell while the inspectors looked on," when in fact it turns out that a single rock may have been observed rolling to its resting place by the inspectors out of the corner of their eye from a distance of some 50 yards away. In addition, I am not too impressed by Mr. Park's explanation concerning his initial finding of an unwarrantable failure, and his subsequent modification of that finding, nor am I impressed by his attempts to include weather conditions and blasting activities as part of his initial determination of the asserted imminent danger, when in fact he had no facts to substantiate such claims. The weather was clear at the time the order issued, and the inspector simply did not know the extent of, or the details of any blasting in the area. Finally, the fact that the inspectors did not go immediately to the area where they claimed they saw a rock fall, the fact that they failed to interview any of the workers who they believed may have observed the rock fall, and the fact that they permitted miners to re-enter the area after they were withdrawn, adds to the doubts which I have concerning the presence of any imminent danger at the work site in question at the time the order issued.

In view of the foregoing findings and conclusions, I find that the preponderance of the reliable and probative evidence and testimony adduced in this proceeding simply does not support a finding that an imminent danger existed on August 10, 1978, and the Order is VACATED.

Findings and Conclusions

Docket No. WEVA 79-24-M

Fact of Violation

This docket concerns a proposal for assessment of civil penalty filed by MSHA seeking a civil penalty for an alleged violation of the provisions of mandatory safety standard 30 C.F.R. 57.3-5, which provides as follows:

> Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded and posted.

It is clear that while a condition or practice described by an inspector on the face of an order or citation may not constitute an imminent danger pursuant to section 107(a) of the Act, it may nonetheless constitute a violation of a mandatory safety standard for which a civil penalty may be assessed pursuant to section 110(a). In these consolidated proceedings, while I have vacated the imminent danger order issued by Inspector Park, there still remains the question as to whether the petitioner has established by a preponderance of the evidence that the conditions described on the face of the combined order-citation constitute a violation of section 57.3-5.

The conditions described by Inspector Park which are relevant to any determination as to whether section 57.3-5 has been violated are: (1) his characterization of the highwall bank as dangerous, and the assertion that men were working near it; (2) his asserted observations of unconsolidated material on the bank; and (3) the asserted presence of loose rock in the bank. Although he testified that he observed certain overhanging areas on the bank, no mention of that condition is made on the face of the order-citation, and I have given his testimony no weight in this regard, nor will I consider his after-the-fact testimony concerning the presence of any overhangs as any form of an amendment to the charges as cited on the face of the citation.

The record adduced in this case supports a finding that in certain areas and locations along the extent of the highwall bank in question loose rock and other unconsolidated materials were present. Respondent's evidence establishes that while some scaling took place the day before the citation issued, it was limited to the lower 40 feet of the bank because of the operational limitations of the cherry picker used for this chore. Although respondent's witness Wilmot testified as to certain procedures used for scaling highwalls through the use of a shovel

bucket and the establishment of a "catch" area, I am not persuaded that respondent has established that this was in fact done

on the day before the citation issued and that all loose and unconsolidated materials had been taken down. As a matter of fact, Mr. Wilmot candidly admitted that such loose materials and rocks are present on all highwalls. Further, while Climax's engineers testified that the stability of the bank was such that any sort of large rock movement was highly unlikely, both Mr. Matheson and Mr. Surface conceded that loose materials and rocks may have been present on the wall, and the crew that scaled the wall candidly admitted that they did not scale above the 40-foot height of the wall.

I find that petitioner MSHA has established that there were several areas on the highwall above and to the right of the adit construction site in question, which contained some loose rocks and unconsolidated materials which had not been scaled, and that the men working at the adit were working near those areas. I conclude that such unscaled loose and unconsolidated materials as shown in Exhibits G-7 and G-8 constitute an unsafe ground condition within the meaning of section 57.3-5, and the failure of the respondent Climax to insure that the area was scaled of such materials constitutes a violation of the cited standard. Specifically, I find that the failure by Climax to scale the upper 40 foot portion of the highwall in question to insure that all loose and unconsolidated materials were removed while the crew was working at the adit construction site in question, constituted a failure on its part to insure that such unsafe ground conditions were promptly corrected. Accordingly, I find that petitioner MSHA has established a violation of section 57.3-5, and the section 104(a) citation is AFFIRMED.

Gravity

I find that the violation in this case was serious. Although I am not totally convinced that the construction crew working at the adit construction site were directly in a position to receive serious injuries from falling rock on the day in question, the fact is that the presence of loose unconsolidated materials above and nearby their work site presented a potential hazard to them should the materials shift or fall. In my view, the intent of the cited standard is to insure that all such identifiable material is scaled and removed so as to preclude its falling or bouncing in the area where men might be working.

Negligence

While the record reflects that the adit construction site involved construction work being carried out by one of Climax's contractors, the primary responsibility for insuring a safe work site for the workers there rested with Climax, and I am convinced that this was in fact the case since Mr. Wilmot went through great detail in establishing the procedures utilized by Climax to scale all highwalls on the mine site. As a matter of fact, the record reflects that when the contractor pointed out several rocks which presented a potential hazard, Climax had them taken down. I believe that Climax had a duty to inspect the highwall and to scale it in its entirety. Its failure to completely scale

and remove all materials, particularly on the

upper 40 foot portion of the bank, resulted from Climax's failure to take reasonable care to prevent the cited conditions, and I conclude and find that this constitutes ordinary negligence.

Good Faith Compliance

The record supports a finding that Climax exercised good faith compliance in achieving abatement, and I take note of the fact that abatement was achieved in this case by the installation of a somewhat elaborate netting system to contain all of the material above the adit construction site. Respondent's abatement efforts in this regard have been considered by me in the assessment of a civil penalty for the citation in question.

Prior History of Violations

Respondent Climax's prior history of violations is reflected in Exhibit G-4, an MSHA computer printout reflecting 167 paid violations for the 2-year period covering August 11, 1976, through August 10, 1978. I take note of the fact that the prior history of violations contains no prior violations of section 57.3-5, and for a large operator, I cannot conclude that respondent's prior history in indicative of a poor history of violations, and that fact is also taken into consideration by me in the assessment of the civil penalty in this case. I have also considered the fact that the adit construction site was under the direct supervision of a contractor and that none of Climax's employees were exposed to a hazard. In this regard, the "independent contractor" question is not an issue in this case since the state of the law at the time this citation was issued was such as to hold the mine operator-owner accountable for citations resulting from a contractor's failure to comply with a mandatory standard, and Climax's counsel candidly recognized the fact that Climax, rather than the contractor, is in fact the responsible party.

Size of Business and Effect of Civil Penalty on Respondent's Ability to Remain in Business

The parties stipulated that respondent Climax is a large mine operator and that a civil penalty assessment will not adversely affect its ability to remain in business. I adopt this stipulation as my finding on this issue.

Penalty Assessment

It is clear that I am not bound by the initial proposed civil penalty arrived at by MSHA's assessment procedures and that I may assess a penalty de novo based on my consideration of the record adduced at the hearing in this proceeding. Accordingly, based on the entire record as a whole, and taking into account Climax's prior history of violations and its somewhat extraordinary efforts in achieving abatement in this case, I conclude that a civil penalty of $800 is appropriate in the circumstances. Accordingly, respondent Climax is assessed that amount for the section 104(a) citation which has been affirmed in

this case.

ORDER

Respondent Climax IS ORDERED to pay a civil penalty in the amount of $800 within thirty (30) days of the date of this decision in satisfaction of Citation No. 322803, issued on August 10, 1978, for a violation of mandatory standard 30 C.F.R. 57.3-5. Upon receipt of payment by MSHA, these proceedings are DISMISSED. It is further ORDERED that the section 107(a) imminent danger order issued on August 10, 1978, is VACATED.

George A. Koutras
Administrative Law Judge