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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 79-393-PM
A.C. No. 05-00354-05007

v.

Climax Mine

CLIMAX MOLYBDENUM COMPANY,

RESPONDENT

DECISION

Appearances: James Cato, Esq., Assistant Solicitor, Mine Safety and Health Administration, U.S. Department of Labor, for Petitioner Rosemary Collyer, Esq., Charles Newcom, Esq., of Sherman and Howard, Denver, 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 September 11, 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.(FOOTNOTE 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, and the deletion of obiter dicta:

This matter arises upon the filing of a petition for assessment of civil penalty by the Secretary of Labor. This proceeding initially involved four citations. Two of those citations were the subject of a settlement agreement between the parties which has been approved by me. (One citation, No. 332991, was vacated with my approval at the end of the hearing (Tr. 161-162)). My decision with respect to the remaining citation, No. 332993, follows.

The subject citation was issued by Inspector Richard King on July 28, 1978, and charged Respondent with the following allegedly violative conditions: "Loose ground was observed in the back and on the ribs of the 613-25 stope subdrift. Several large slabs were taken down." The regulation cited by the inspector was 30 C.F.R. 57.3-22, a mandatory safety standard which provides: "Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary." It appears that the Government's primary allegation of violation is in reliance on the last sentence of the regulation.

Inspector King issued the citation in question while he was a member of an inspection party on July 28, 1978, at the Climax Mine. He was accompanied by mine management personnel and a union representative. During his inspection of the 613-25 stope he observed loose ground in the back and rib along a cutout in the 613 stope which is depicted on Respondent's Exhibit 1 where there is indicated a slight indentation. The 613 stope runs between the 614 crosscut and the 613 crosscut and behind the indentation shown on the diagram. As indicated, there is a steel rack and a manway. The condition, which will be subsequently described, was observed when the inspection party stopped to inspect the manway which is in the vicinity of the steel rack, which is set into the cutout which is approximately 3 feet in depth of the 613-25 stope.

The terminology or jargon in vogue at this mine is that the term "back" refers to the roof, and the word "ribs" as is the usual case, refers to the side wall. The inspector indicated that he observed several large slabs on the ribs extending over the back. I infer from his testimony that the large slabs referred to were large slabs of loose ground. He also found debris on the ground. One large slab was positioned over the steel rack which I find was set into the cutout at approximately waist-high height. To have access to the steel rack, a miner would necessarily have positioned himself directly under the loose ground. However, the record indicates that the steel rack, which at the time observed by the inspector had four to five pieces of steel resting on it, had not been used over a period in excess of two months. The steel rack was used to store steel which was used in

drilling, and the pieces of steel on the rack at the time were visibly bent or defective. No explanation was given why steel in such condition, i.e., having no utility, remained on the rack.

From the cutout or aperture-reflected on Respondent's Exhibit 1 - bad ground extended approximately 2 feet into the drift. The slabs referred to by the inspector were composed of grey rock the largest of which, according to the inspector, was from 2 to 3 feet long, 1 to 2 feet wide, and 6 to 12 inches thick, and of a weight which the inspector guessed to be 100 pounds. The inspector indicated that the slabs in question at the highest point would be 3 to 4 feet above the head of a miner. He indicated there were two other slabs nearly the size of the largest slab above described.

The evidence is clear that the subdrift 613-25 referred to above is a travelway. I find specifically, with reference to the language of the regulation, that the 613-25 subdrift was not a working place on July 28, 1978. I find that there was no imminent danger present as a result of the loose ground observed by the inspector and I find that the physical conditions with respect to loose ground described by the inspector, did, in fact, exist. This latter finding, however, does not automatically constitute a finding that a violation of the regulation occurred.

Respondent's evidence indicated that the standard working routine during the times material here-even on the day shift which began at 7:30 and ended at 3:30 p.m. - incorporated a daily scaling down of the travelway in question by either a safety miner, whose routine duties included the scaling or "barring down" of loose ground, or by a two-man crew specifically assigned to do such scaling work by the shift boss of the 12-man stope crew, Lonnie Arbaugh.

The north stopes, where the travelway in question is located, were being developed at the pertinent times herein by this 12-man crew, who shortly after the commencement of their shift at 7:30 a.m. would assemble for a meeting at the lunchroom, which is located near the 614 crosscut and duly depicted on Respondent's Exhibit 1. Various safety subjects would be discussed and assignments made by Arbaugh as a matter of daily routine, following which the crew would commence their work. On the day in question, most members of the 12-man crew proceeded down the 614 crosscut, walked down the 230-foot travelway in "subdrift 613-25E", then proceeded down the 613 crosscut into the 6240 crosscut. On July 28, 1978, Arbaugh assigned miners Thibado and Holmberg to do barring down work, which they commenced to do at the intersection of the 614 crosscut and the 613 subdrift. The two

miners, Thibado and Holmberg, commenced work at approximately 7:30 a.m. at this intersection and were in the process of continuing their scaling work when they were interrupted by the arrival of the inspection party, at which time they stopped their work as a safety precaution while the inspection party passes. They resumed their work after the passing of the party.

The inspector discovered the loose ground, as previously described, at approximately 9:30 a.m. At this time one of the members of the inspection party, Jose Romero, a repair foreman with Respondent, was standing in the subdrift opposite the steel rack on the right side of the subdrift. That is near the right rib of the subdrift, as the same is depicted on Respondent's Exhibit 1. Romero called to Thibado and Holmberg whose work had progressed to within approximately 20 to 30 feet of the cutout. Romero called for the crew to come forward and to "get a bar over here," meaning to take down the loose ground observed by the inspector. This was accomplished by one of the two scalers at the time who was assisted to some extent by Romero.

There is a conflict in the testimony as to how long it took to take down the loose ground in the vicinity, and also as to the extent of the loose ground observed by the inspector. In view of my ultimate conclusion in this case, I make no particular findings with respect to those two issues, other than to find as I have previously, that it was loose ground, that it was a substantial amount of loose ground, that it was the amount of loose ground as described by the inspector, and that the same did constitute a hazardous condition which could have resulted in a variety of injuries to miners who may have been hit by falling rock -- the degree of the injury depending upon the part of the anatomy struck, the weight of the rock in question, and the height of the same.

I fully credit Respondent's evidence that on a daily basis in proximity to the inspection, the travelway in question would have been examined and scaled by either, as I have previously indicated, the safety miner or by a specific crew designated for that purpose by Arbaugh. I find that the travelway thus would have been "periodically" examined, as that term is used in the subject regulation. I also find that it would have been scaled at least daily.

The question remains whether or not the travelway was scaled or supported as necessary within the language of the regulations. To some extent this raises the question of what is reasonable under the circumstances. There is no evidence of other employees having been struck or injured

along the travelway in question by loose ground which was falling. The travelway is 8 feet wide and Respondent indicated that, with reference to the loose ground in the cutout in question, it would have been possible for miners passing through to do so without placing themselves in a perilous position under the rock. I infer from the evidence presented that scaling operations which are being conducted sometimes by members of the stope crew, which would have been traveling down the travelway, would have alerted the crew to the conditions. I find on the basis of all the evidence in the record that it would have been common knowledge that there was loose ground in these areas. The regulation requires that ground conditions along travelways shall be examined periodically and scaled or supported as necessary. Daily scaling of this area, I find, was a sufficient compliance with the requirement of the safety standard. Petitioner has argued that the employees were not specifically warned of the specific condition in question, and that accordingly the "as necessary" requirement of the regulation was not being complied with. I find no merit in this for the reasons previously stated. In view of my finding that there would have been common knowledge of the loose ground conditions, a specific warning, would have been unnecessary.

As is frequently the case, the regulation provides considerable leeway in the obligations it places upon the mine operator. The requirement is that travelways should be examined periodically with no particular hint of what "periodically" means. Again, the requirement that the travelway be scaled or supported "as necessary" pinpoints no specific function, activity, or physical condition in the mine. The concept "as necessary" suggests a high degree of discretion on the part of management personnel. Thus, a high degree of proof to establish a violation rests upon the Government in the face of such a regulation. I am unable, and no judge can be able, to state unequivocally that that was a safe condition along the subdrift in question on the morning of July 28, 1978, to the satisfaction of anyone reading this record. Indeed, there was a significant hazard present had a miner gone into the cutout and, in particular, attempted to remove steel from under the steel rack. Nevertheless, having found the Respondent - as a result of its examining and scaling activities which have been described at length in the record - to have been in compliance with the requirements of the regulation in question, I find no merit in the petition for penalty assessment. The citation involved, No. 332993, must be vacated.

My ruling at the hearing granting the Secretary's motion to vacate Citation No. 332991 for lack of evidence is affirmed.

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ORDER

(1) All proposed findings of fact and conclusions of law submitted to me prior to the entry of this decision which have not been expressly incorporated in this decision are rejected.

(2) Citations Nos. 332991 and 332993, dated July 28, 1978, are vacated.

Michael A. Lasher, Jr.
Judge

~FOOTNOTE_ONE

1 Tr. 153-161