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CLIMAX MOLYBDENUM V. SOL (MSHA)
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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

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
RESPONDENT

CLIMAX MOLYBDENUM WORKERS,
LOCAL NO. 2-24410, OIL, CHEMICAL
AND ATOMIC WORKERS INTERNATIONAL
UNION,

RESPONDENT

Applications for Review

Docket No. DENV 78-541-M

Citation No. 333624
July 31, 1978

Docket No. DENV 78-545-M

Citation No. 331731
July 26, 1978

Docket No. DENV 78-546-M

Citation No. 332973
July 26, 1978

Docket No. DENV 78-547-M

Citation No. 332974
July 26, 1978

Docket No. DENV 78-548-M

Citation No. 332976
July 27, 1978

Docket No. DENV 78-549-M

Citation No. 333626
July 26, 1978

Docket No. DENV 78-550-M

Citation No. 333627
July 26, 1978

Docket No. DENV 78-551-M

Citation No. 333628
July 27, 1978

Docket No. DENV 78-552-M

Citation No. 333629

July 28, 1978

Climax Mine

ORDER APPROVING STIPULATIONS FOR RESOLUTION
OF NOISE CITATIONS AT THE CLIMAX MINE AND
GRANTING APPLICANT'S MOTION TO WITHDRAW
APPLICATIONS FOR REVIEW

Climax Molybdenum Company (Climax) filed applications for review in the above-captioned proceedings pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977. Answers were filed by the Mine Safety and Health Administration (MSHA) and Local No. 2-24410 of the Oil, Chemical and Atomic Workers International Union (Union).

Thereafter, the parties entered into an agreement to study the feasibility of possible noise controls on the equipment cited in the citations. Various orders of continuance were issued on this basis.

On November 20, 1980, Climax and MSHA filed a stipulation for resolution of the noise citations at the Climax Mine. The stipulation bears the signature of Mr. David A. Jones, Jr., who has represented the Union in these proceedings. The stipulation states as follows:

This Agreement is made and entered into between Climax Molybdenum Company, a Division of AMAX Inc. (hereinafter "Climax"), and the Department of Labor and Mine Safety and Health Administration (hereinafter collectively referred to as "MSHA") and executed in their behalf by their respective attorneys.

WHEREAS Climax has filed Applications for Review of certain citations issued by MSHA, being Citations 333624 (Docket No. DENV 78-541-M), 331731 (Docket No. DENV 78-545-M), 332973 (Docket No. DENV 78-546-M), 332974 (Docket No. DENV 78-547-M), 332976 (Docket No. DENV 78-548-M), 333626 (Docket No. DENV 78-549-M), 333627 (Docket No. DENV 78-550-M), 333628 (Docket No. DENV 78-551-M), and 333629 (Docket No. DENV 78-552-M), and

WHEREAS the parties entered an agreement for the study of feasibility of possible noise controls on equipment involved in the above-referenced citations on August 16, 1979, and

WHEREAS as a result of that study the parties now believe they can resolve their differences with respect to the above-referenced citations without the need of litigation.

NOW THEREFORE Climax and MSHA enter into the following agreement:

1. During the course of the above-referenced feasibility study, the Climax Mine of Climax has significantly expanded its noise control program with respect to rock drills and LHDs at the Climax Mine. MSHA recognizes that the Climax Mine has developed a substantial ongoing noise control program with respect to rock drills and LHDs and the Climax Mine agrees to continue its implementation of that program.

2. Climax and MSHA have previously agreed that Climax will not undergo major capital expenditures to evaluate the feasibility of cabs or panelling on LHDs, but rather the Climax Mine will review the results of the Henderson LHD work at the conclusion of that work. The Climax and Henderson Mines will continue their cooperation in this area. The Climax Mine will, as a part of this settlement, install mufflers on LHDs to the extent there is physical space available on the machine to do that. Some of the smaller sized LHDs are so compact that they may not be able to accommodate a muffler. Climax personnel will inform MSHA personnel of their findings on this issue as soon as they have made a determination regarding the availability of space for installation of a muffler on a retro-fit basis. The Climax Mine will continue its evaluation of sound-absorption material for use in the falling object protection structure on the LHDs. The parties acknowledge that it will take until January 1, 1981, to determine whether space is available and review potential mufflers for use on these machines and to conclude evaluation of sound-absorption materials. While there is some uncertainty as to a final installation schedule because of uncertainty as to availability of as yet unselected mufflers, and falling object protection structure materials, coverings, and installation techniques, the parties anticipate this installation can be accomplished by July 1, 1981. In any event, once a muffler for a particular LHD has been selected and falling object protection structure material, accompanying material coverings, and installation techniques have been selected, that muffler/material will be immediately ordered and installed as soon as practicable after it is received.

3. As a part of its ongoing noise control program, the Climax Mine will continue to evaluate and implement, if found feasible, possible noise controls as they become commercially available for use on the rock drills and LHDs involved in the citations listed above. Climax and MSHA

are in agreement that the primary burden for the basic research and development of new engineering noise controls for rock drills and LHDs should fall upon the manufacturers of mining equipment. As controls are being developed by manufacturers and evaluated by Climax, Climax will, if necessary, make in-mine adjustments to the equipment and work with the manufacturers for equipment modifications in determining whether the equipment will be feasible for use at the Climax Mine; this cooperation will continue to be an integral part of Climax's noise control program. At this time, it does not appear that there are feasible controls for ring drills because of icing problems. When the icing problem is resolved, additional controls will be evaluated. Climax will evaluate and implement, if found feasible, any additional controls recommended by MSHA for ring drills. The mini-bore drill will be muffled.

4. With respect to jackleg drills, Climax will continue to pursue its evaluation of the Canadian PRM 15 muffler and the so-called "Aurora Muffler." In the interim, the rubber-tire muffler will be installed on all unmuffled jackleg drills, except for the LeRoi drills, and that will be taken as compliance with the standard until such time as a feasible control with significantly greater noise attenuation is available. At the conclusion of these reviews, the Climax Mine will then determine whether one of these two mufflers or the rubber-tire muffler is suited for installation on a retro-fit basis on its jackleg drills. At the present time, because of maintenance problems, mufflers cannot be retro-fitted onto the LeRoi jackleg drill. However, Climax has begun the process of phasing LeRoi drills out of its operation. That phaseout will be completed as soon as feasible replacement drills are located and can be acquired. Because of the prior experience which Climax has had, for example, with the Holman jackleg, it is acknowledged that a wide-scale implementation of the rubber-tire muffler or other rock drill engineering noise controls may give rise to problems of feasibility not discovered during initial testing. Should that occur, issues of feasibility may need to be reevaluated to determine whether or not the control should remain in place.

5. With respect to the citations themselves, the parties agree as follows:

- a. Citation 333624, involving a Jarvis-Clark LHD and a Gardner-Denver 83 jackleg drill, will be abated and Climax will pay a penalty of \$25.

- b. Citation 331731, involving a mini-bore drill, will be abated and Climax will pay a penalty of \$25.
- c. Citation 332973, involving a ring drill, will be vacated.
- d. Citation 332974, involving a ring drill, will be vacated.
- e. Citation 332976, involving a ring drill, will be vacated.
- f. Citation 333626, involving a Jarvis-Clark LHD, will be vacated.
- g. Citation 333627, involving a jumbo drill, will be vacated.
- h. Citation 333628, involving a LeRoi jackleg drill and Remington chain saw, will be abated and Climax will pay a penalty of \$25.
- i. Citation 333629, involving a Wagner ST5E LHD will be abated and Climax will pay a penalty of \$25.

The parties have agreed that penalties for the abated citations will be assessed at \$25 per citation because of the amounts spent in evaluating possible noise controls and the degree of good faith shown by Climax in pursuing its noise control program as a means to abate the citations.

6. Climax and MSHA agree that their personnel will continue to communicate regarding developments with respect to noise control. The extent of time required for in-mine evaluation of any potential noise control will vary depending upon the control, the piece of equipment involved, and the commercial availability of the control. In the future, MSHA will make a reasonable attempt to advise Climax Mine personnel of any new potential engineering noise controls which may be feasible for use at the Climax Mine and allow a reasonable time for in-mine evaluation and implementation of that control, if it is found feasible, before any citations are issued. It is acknowledged that ultimately Climax and MSHA may disagree as to the feasibility of a particular engineering noise control. In the event that Climax Mine

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personnel are in the process of or have already evaluated the particular control referred to them, information regarding the results of that evaluation will be made available to MSHA technical personnel upon request.

Additionally, on November 20, 1980, Climax filed a motion to withdraw the applications for review. The motion states as follows:

COMES NOW Climax Molybdenum Company, a Division of AMAX, Inc., by and through its undersigned attorneys, and moves that the Court approve the Stipulation for Resolution of Noise Citations at the Climax Mine, direct that the above-captioned citations be vacated, or abated and assessed, as provided in that Stipulation, and dismiss the above-captioned Applications for Review.

As grounds therefor Climax states as follows:

1. As more fully outlined in the Stipulation for Resolution previously filed with the Court, the parties have agreed after extensive technical study that their differences with respect to the above-captioned citations can be resolved without the need for lengthy, complex and expensive litigation.

2. This motion has been discussed with Robert Cohen, counsel for MSHA, and David Jones, President of the O.C.A.W., and they agree that it should be granted. WHEREFORE, Climax Molybdenum Company respectfully moves that this Court grant the relief requested herein.

By letter dated November 28, 1980, the parties were advised that the agreement to pay civil penalties, as set forth in paragraph No. 5 of the stipulation, was beyond the scope of an application for review proceeding, and, accordingly, that one of several alternative courses of action would have to be followed before action could be taken on the stipulation and the motion to withdraw the application for review. In response thereto, the parties filed a supplemental stipulation on December 9, 1980. The supplemental stipulation states as follows:

1. With respect to the civil penalty matters set forth in Paragraph 5 of the Stipulation previously filed, Climax and the Secretary of Labor agree as follows:
A. MSHA's Office of Assessments has not yet proposed civil penalties for the citations mentioned in Paragraph 5 pursuant to Part 100, Title 30, Code of Federal Regulations, because none of the citations have as yet been abated.

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B. Upon the Administrative Law Judge's approval of the Stipulation and Climax's Motion to Withdraw its Applications for Review, Climax and the Secretary of Labor will follow the following procedures to dispose of the civil penalty matters:

- i. Counsel for the Secretary will recommend to MSHA's Office of Assessments that a civil penalty of \$25.00 be proposed for each of the following citations:

333624 (Docket No. DENV 78-541-M)

331731 (Docket No. DENV 78-545-M)

333628 (Docket No. DENV 78-551-M)

333629 (Docket No. DENV 78-552-M)

- ii. Climax will pay said proposed \$25.00 assessments within 30 days after the civil penalty is assessed by MSHA.

2. The Oil, Chemical and Atomic Workers International Union, Local No. 2-24410, has been informed of this Supplemental Stipulation; however, because the Union is not a party to the civil penalty proceedings, the Union's signature has not been included.

The proposed disposition of these cases, as set forth in the stipulations filed by MSHA and Climax, have been reviewed. It appears that approval of the stipulations will adequately protect the public interest.

It is understood, in accordance with the agreement set forth in the December 9, 1980, supplemental stipulation, that upon approval of the November 20, 1980, stipulation and the granting of the motion to withdraw the applications for review, MSHA will recommend that the Office of Assessments propose \$25 civil penalties for each of the following citations: Citation Nos. 333624, 331731, 333628, and 333629. It is further understood that Climax will pay such civil penalties within 30 days of the date of assessment. Accordingly, it is considered unnecessary to specifically order the termination or abatement of the citations and the assessment of civil penalties.

In view of the ultimate disposition of these cases, i.e., dismissal, it is considered inappropriate to enter an order vacating Citation Nos. 332973, 332974, 332976, 333626, and 333627. It is understood that MSHA will fulfill the agreement by vacating these citations.

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In view of the foregoing, Climax's motion to withdraw its applications for review is GRANTED. IT IS THEREFORE ORDERED that the stipulations filed on November 20, 1980, and December 9, 1980, be, and hereby are, APPROVED, and that the above-captioned proceedings be, and hereby are, DISMISSED.

John F. Cook
Administrative Law Judge