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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,
APPLICANT

Applications for Review

Docket No. DENV 78-553-M

v.

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

Citation No. 331733
July 27, 1978

Docket No. DENV 78-554-M

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

Citation No. 331744
July 27, 1978

Docket No. DENV 78-555-M

Citation No. 331747
July 28, 1978

Climax Mine

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

Civil Penalty Proceeding

Docket No. WEST 79-340-M
A/O No. 05-00354-05025

v.

CLIMAX MOLYBDENUM COMPANY,
RESPONDENT

Climax Mine

DECISION

Appearances: Charles W. Newcom, Esq., Sherman and Howard, Denver, Colorado,
for Climax Molybdenum Company:
Edward H. Fitch, Esq., Office of the Solicitor, U.S. Department
of Labor, Arlington, Virginia, for the Mine Safety and Health
Administration;
David Jones, President, and James Kasic, Law Clerk, Climax
Molybdenum Workers, Local No. 2-24410, Oil, Chemical and Atomic
Workers International Union, Leadville, Colorado, for the Union

Before: Judge Cook

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I. Procedural Background

On August 28, 1978, Climax Molybdenum Company (Climax) filed applications for review in Docket Nos. DENV 78-553-M, DENV 78-554-M and DENV 78-555-M pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1978) (1977 Mine Act). Answers were filed by the Mine Safety and Health Administration (MSHA) on September 7, 1978. On October 31, 1978, the Climax Molybdenum Workers, Local No. 2-24410, Oil, Chemical and Atomic Workers International Union (Union) elected party status.

On September 12, 1978, a notice of hearing was issued scheduling the application for review proceedings for hearing on November 28, 1978, in Denver, Colorado. On November 8, 1978, Climax filed motions for continuance and commencement of discovery, and on November 9, 1978, filed a motion for a prehearing conference for the determination of issues. The three motions were granted. The requested prehearing conference was held on December 1, 1978, in Arlington, Virginia. Thereafter, on January 5, 1979, Climax filed amended applications for review.

On May 5, 1979, a notice of hearing was issued scheduling the application for review proceedings for hearing on November 6, 1979, in Denver, Colorado. On September 26, 1979, Climax and MSHA filed a joint motion for continuance. The motion was granted on October 3, 1979, and the cases were continued to January 15, 1980, in Denver, Colorado. On January 2, 1980, Climax filed a motion for continuance. The motion was granted on January 7, 1980, and the hearing was continued to March 11, 1980, in Silverthorn and Breckenridge, Colorado.

Extensive discovery was authorized and various telephone conferences were held at various stages of the proceedings.

The above-captioned civil penalty proceeding was filed by MSHA on September 24, 1979, pursuant to section 110(a) of the 1977 Mine Act alleging 12 violations of various provisions of the Code of Federal Regulations. The three citations at issue in the above-captioned application for review proceedings are also at issue in the civil penalty case. Climax filed its answer on October 15, 1979, and on October 24, 1979, the case was assigned to Administrative Law Judge John J. Morris of the Commission's Office of Administrative Law Judges located in Denver, Colorado. On January 18, 1980, MSHA filed a motion to withdraw the proposal for a penalty as relates to Citation Nos. 333241, 333339 and 333340. MSHA's motion was granted by Judge Morris on February 25, 1980.

Thereafter, Climax moved to transfer the civil penalty case to the undersigned and such transfer occurred on March 4, 1980. On March 7, 1980, a notice of hearing was issued consolidating the case with the above-captioned application for review proceedings and scheduling it for hearing on March 11, 1980, in Silverthorn Colorado.

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The hearing was held on March 11, 1980, in Silverthorn, Colorado, and on March 12, 1980, in Breckenridge, Colorado. Representatives of Climax and MSHA appeared and participated on both days. A representative of the Union appeared on March 11, 1980, and limited his participation to the delivery of a brief opening statement.

At the beginning of the hearing, MSHA filed a written motion in Docket No. WEST 79-340-M to withdraw the proposal for a penalty as relates to all remaining citations except the three at issue in the application for review proceedings. An order granting the motion is contained in this decision.

At the conclusion of the hearing, an agreement was reached addressing the posthearing filing of definitions contained in certain treatises. On April 28, 1980, Climax filed copies of definitions contained in treatises entitled, IEEE Standard Dictionary of Electrical and Electronic Terms, A Dictionary of Mining, Mineral, and Related Terms [U.S. Department of Interior], and the National Electrical Code. These exhibits were marked for identification as Exhibits 0-9, 0-10, and 0-11, respectively, and received in evidence on June 13, 1980.

Climax and MSHA filed posthearing briefs on May 16, 1980, and June 13, 1980, respectively. Climax filed a reply brief on July 1, 1980. The Union did not file a posthearing brief.

The transcript of the hearing was received by the undersigned Administrative Law Judge on June 4, 1980. Thereafter, it was discovered that the court reporting company had failed to forward with the transcript a total of 26 exhibits received in evidence during the hearing, i.e., Joint Exhibits 1-A through 1-H, 2-A through 2-I, 3-A through 3-H, and Exhibit 0-4. By a letter dated August 14, 1980, the three parties were apprised of this and were requested to submit substitute copies of the missing exhibits in conjunction with an appropriate stipulation. Additionally, the representatives of Climax and MSHA were directed to obtain the signature of the Union's representative on the stipulation filed at the hearing on March 11, 1980. Climax filed copies of Joint Exhibits 1-A through 1-H, 2-A through 2-I, and 3-A through 3-H, on September 8, 1980. The attached cover letter states that the parties "are in agreement that copies of these exhibits be placed in the record as substitutes for the missing joint exhibits. They bear identical numbers to the original exhibits. We are also in agreement that the cable which you have in your possession be substituted for missing Exhibit 0-4."

On September 9, 1980, MSHA filed a statement agreeing to the substitution. To date, the Union has not filed a written statement agreeing to the substitution. The Union did not introduce any exhibits in evidence during the hearing. However, copies of Climax's September 8, 1980, cover letter and MSHA's September 9, 1980, filing were served on the Union, and the Union has not filed a statement in opposition to the substitution. Accordingly, the substitution will be made and the exhibits will

be considered in deciding these cases.

Additionally, on September 15, 1980, an agreement to the March 11, 1980, stipulation bearing the Union representative's signature was filed.

II. Violations Charged in Docket No. WEST 79-340-M

Citation No.	Date	30 C.F.R. Standard
331733	July 27, 1978	57.12-82
331744	July 27, 1978	57.12-82
331747	July 28, 1978	57.12-10
333300	August 7, 1978	57.12-28
333331	November 27, 1978	57.12-1
333241	December 27, 1978	57.12-1
333242	December 27, 1978	57.12-25
333246	December 27, 1978	57.12-13
333335	December 27, 1978	57.12-13
333336	December 27, 1978	57.12-13
333339	December 27, 1978	57.12-1
333340	December 27, 1978	57.12-1

III. Witnesses and Exhibits

A. Witnesses

MSHA called as its witnesses Lawrence P. Filek, an electrical engineer at MSHA's Denver Technical Support Center; William S. Vilcheck, an electrical engineer at MSHA's Pittsburgh Technical Support Center; and James Atwood, a Federal mine inspector.

Climax called as its witnesses Edwin D. Matheson, an electrician in the Storke locomotive shop of the Climax Mine and Chairman of the International Brotherhood of Electrical Workers, Local No. 1823; Harden H. Williams, an electrical foreman at the Climax Mine; George E. Pupera, electrical superintendent at the Climax Mine; and Dr. Fred Leffler, Associate Professor of Electrical Engineering at the Colorado School of Mines.

B. Exhibits

1. The following joint exhibits were introduced in evidence:

Joint Exhibit 1-A is a copy of Citation No. 331733, July 27, 1978, 30 C.F.R. 57.12-82.
Joint Exhibits 1-B through 1-E are copies of various subsequent action forms pertaining to Joint Exhibit 1-A granting various extensions of the time period for abatement.

Joint Exhibit 1-F is a copy of the inspector's statement pertaining to Joint Exhibit 1-A.
Joint Exhibit 1-G is a copy of the termination of Joint Exhibit 1-A.

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Joint Exhibit 1-H is a copy of Inspector Atwood's handwritten notes pertaining to Joint Exhibit 1-A.

Joint Exhibit 2-A is a copy of Citation No. 331744, July 27, 1978, 30 C.F.R. 57.12-82.

Joint Exhibits 2-B, 2-D, 2-E, and 2-F are copies of various subsequent action forms pertaining to Joint

Exhibit 2-A granting various extensions of the time period for abatement.

Joint Exhibit 2-C is a copy of a modification of Joint Exhibit 2-B.

Joint Exhibit 2-G is a copy of the inspector's statement pertaining to Joint Exhibit 2-A.

Joint Exhibit 2-H is a copy of the termination of Joint Exhibit 2-A.

Joint Exhibit 2-I is a copy of Inspector Atwood's handwritten notes pertaining to Joint Exhibit 2-A.

Joint Exhibit 3-A is a copy of Citation No. 331747, July 28, 1978, 30 C.F.R. 57.12-10.

Joint Exhibits 3-B through 3-E are copies of various subsequent action forms pertaining to Joint Exhibit 3-A granting various extensions of the time period for abatement.

Joint Exhibit 3-F is a copy of the inspector's statement pertaining to Joint Exhibit 3-A.

Joint Exhibit 3-G is a copy of the termination of Joint Exhibit 3-A.

Joint Exhibit 3-H is a copy of Inspector Atwood's handwritten notes pertaining to Joint Exhibit 3-A.

Joint Exhibit 4 is a booklet published by Climax containing general information about the Climax Mine.

Joint Exhibit 5 is a booklet published by Climax entitled "This is Climax Molybdenum."

Joint Exhibit 6 lists the type of electrical cables at issue in these proceedings.

Joint Exhibits 7 through 14 are photographs.

Joint Exhibit 15 is a copy of a memorandum dated January 22, 1975, from William W. Carlson, Mining Engineer, Metal and Nonmetal Mine Health and Safety, Duluth Subdistrict, Marquette, Michigan, to A. Z.

Dimitroff, Chief, Denver Technical Support Center,
Denver, Colorado, addressing the subject of

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electrocution hazard potential when powerlines are installed in contact with water and air lines.

Joint Exhibit 16 is a copy of a memorandum dated January 30, 1975, from the Electrical Engineer, Industrial Safety Group, to the Chief of the Denver Technical Support Center addressing powerlines in contact with metal pipelines.

Joint Exhibit 17 is a copy of a memorandum dated January 31, 1975, from the Chief of the Denver Technical Support Center, to William W. Carlson replying to Joint Exhibit 15.

Joint Exhibit 18 is a copy of the Nelson/Shepich Memorandum of February 21, 1975.

Joint Exhibit 19 is a copy of a memorandum dated August 19, 1975, from the Chief of the Mine Electrical Systems Group, to the Assistant Administrator for Metal and Nonmetal Mine Health and Safety containing an opinion on the interpretation of mandatory safety standard 30 C.F.R. 57.12-82.

Joint Exhibit 20 is a copy of a memorandum dated February 10, 1978, from the Electrical Engineer, Mine Electrical Systems Branch, to Allen D. Stoutenger, Mining Engineer, Rocky Mountain Subdistrict Office, Lakewood, Colorado, addressing mandatory safety standard 30 C.F.R. 57.12-82.

2. MSHA introduced the following exhibits in evidence:

M-1 through M-6 are photographs.

M-7 is a copy of an extract from the National Electrical Code.

M-8 is a copy of an extract from the American Electrician's Handbook.

3. Climax introduced the following exhibits in evidence:

O-1 is a booklet published by Climax entitled "Technical Information."

O-2 is the affidavit of Otto W. Drager.

O-3 is a copy of an extract from the National Electrical Code.

O-4 is a segment of electrical cable.

O-5 is a copy of an extract from the Anixter Brothers, Inc., supply catalog containing detailed specifications for the cables listed in Joint Exhibit 6.

O-6 is a copy of Dr. Leffler's resume.

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O-7 contains copies of pages from the 1978 Annual Book of ASTM Standards.

O-8 is a copy of an extract from the American Electrician's Handbook.

O-9 contains copies of pages from the IEEE Standard Dictionary of Electrical and Electronics Terms.

O-10 contains copies of pages from A Dictionary of Mining, Mineral, and Related Terms.

O-11 is a copy of an extract from the 1978 National Electrical Code.

IV. Issues

A. The following issues are presented in the above-captioned application for review proceedings:

1. Whether the term "powerline," as used in 30 C.F.R. 57.12-82, encompasses not only the conductor, but also the other constituent parts of the cable used as a powerline, such as the insulation, filler and jacket.

2. If the term "powerline," as used in 30 C.F.R. 57.12-82, encompasses the conductor, insulation, filler and jacket, then whether the regulation requires the use of additional insulation where the powerline achieves contact with waterlines, telephone lines, and air lines.

3. If the regulation requires the use of additional insulation where the powerline achieves contact with waterlines, telephone lines, and air lines, then what type of additional insulation is needed to comply with the standard?

4. Whether mandatory safety standard 30 C.F.R. 57.12-10 is violated when the outer jacket of a telephone line achieves contact with the outer jacket of a cable used as a powerline.

B. Two basic issues are involved in the above-captioned civil penalty proceeding: (1) did a violation of the Code of Federal Regulations occur, and (2) what amount should be assessed, as a penalty if a violation is found to have occurred? In determining the amount of civil penalty that should be assessed for a violation, the law requires that six factors be considered: (1) history of previous violations; (2) appropriateness of the penalty to the size of the operator's business; (3) whether the operator was negligent; (4) effect of the penalty on the operator's ability to continue in business; (5) gravity of the violation; and (6) the operator's good faith in attempting rapid abatement of the violation.

V. Opinion and Findings of Fact

A. Stipulations

1. Climax Molybdenum Company and its Climax Mine are subject to the provisions of the Federal Mine Safety and Health Act of 1977.

2. The Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

3. At all times relevant to the above-captioned proceedings, MSHA inspector James L. Atwood was an authorized representative of the Secretary of Labor.

4. Citation No. 331733, Docket No. DENV 78-553-M was issued on July 27, 1978, by inspector James L. Atwood. A copy of that citation, together with subsequent action notices, Inspector Atwood's handwritten notes, and the Inspector's Statement, Form MSHA 7000-4, are attached hereto and incorporated herein by reference as Joint Exhibit 1.

5. On July 27, 1978, Inspector Atwood issued Citation No. 331744, Docket No. DENV 78-554-M. A copy of that citation, together with subsequent action notices, Inspector Atwood's handwritten notes, and the Inspector's Statement, Form 7000-4, are attached hereto and incorporated herein by reference as Joint Exhibit 2.

6. Citation Nos. 331733 and 331744 both involve alleged violations of regulatory standard 30 C.F.R. 57.12-82.

7. Citation No. 331747, Docket No. DENV 78-555-M was issued by Inspector Atwood on July 28, 1978. A copy of that citation, together with subsequent action notices, Inspector Atwood's handwritten notes, and the Inspector's Statement, Form MSHA 7000-4, are attached hereto and incorporated herein by reference as Joint Exhibit 3.

8. Citation No. 331747 involves an alleged violation of 30 C.F.R. 57.12-10.

9. The central question in the above-captioned actions is what constitutes suitable insulation or separation of powerlines from telephone lines, waterlines, or air lines.

10. Climax and MSHA agree that Inspector Atwood observed various places on the 600 Level and the Storke Level at the Climax Mine in which the outer jacket of an insulated and jacketed power cable was touching an air line, waterline or telephone line. The power conductors in these cables were carrying voltages ranging from 110 volts to 440 volts. The cables were in satisfactory condition.

11. MSHA and Climax are in agreement that each of the joint exhibits attached hereto should be admitted into evidence.

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12. The Climax Mine is located at the peak of Fremont Pass in Lake County, Colorado, approximately 13 miles northeast of Leadville, Colorado, at an altitude of 11,318 feet. It is one of the world's major producers of molybdenum and the second largest underground mine in the world.

13. The Climax Mine operates 24 hours per day employing a total of approximately 3,000 employees, roughly half of whom work underground. The mine has open pit operations which employ approximately 400 workers. The mine also has crushing and milling facilities employing approximately 400 employees. The remaining employees perform various administrative functions on the surface.

14. The mine presently has two underground production levels. One level (referred to as the Storke Level) has been in production since 1952. The second underground level (the 600 Level) has been in production since 1972. Development work has begun on a third underground level which will be known as the 900 Level.

15. Open pit production began in 1974.

16. Total production at the mine is approximately 50,000 tons of ore per day.

17. Molybdenum ore is mined underground by the block caving method. A cave is created above the production areas by drilling and blasting. After the rock is fractured by blasting, creating the cave, the force of gravity causes the rock to continue to break. The rock then falls from the cave into raises (fingers) that run at a 45-degree angle into a slusher drift. Each slusher drift (also called a dash) has six finger raises. The fractured rock falls through the raise into the slusher drift. Each slusher drift has a 150-horsepower electrical motor which powers a dipper that is pulled back and forth in the slusher dash. The dipper pulls the rock towards a draw hole which is 3.9 feet wide and 8 feet long. The rock falls through the draw hole into ore trains that are sitting on tracks in a haulage drift which is located approximately 10 feet below the floor of the slusher drift. The haulage drift is perpendicular to the slusher drift. The block caving method is illustrated in Joint Exhibit 4, especially the drawings on pages 8-10. Joint Exhibit 5, "This is Climax Molybdenum," also describes the mine's operations.

18. This action involves only power cables in the drifts of the mine which have track for haulage of ore, or other materials, by rail. The Climax Mine has approximately 24 miles of haulage drifts. These drifts contain an estimated 367,000 feet of cable of the types in issue here (see paragraph 21). There are approximately 24 miles of air lines and 24 miles of waterlines in these drifts.

19. As a general rule, air lines and waterlines are on one side of the drift and power cables are on the other side of the drift.

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20. All of the power cables involved in this action carry voltages having low potential (low potential is defined in 30 C.F.R. 57.2 as 650 volts or less). In fact, none of these cables carry in excess of 440 volts.

21. The types of cables involved in this action are listed in Exhibit 6.

22. The power cables in issue in this action never carry voltages greater than the manufacturer's insulation rating for that cable.

23. These power cables may from time to time be on the same side of the drift as an air line or a waterline for a variety of reasons. These reasons include the following:

A. It is sometimes necessary to move air or waterlines or power cables from one side of the drift to the other in order to transmit air, water, or electricity to a particular location.

B. At intersections of drifts, air lines, waterlines, or power cables will frequently cross.

C. The distribution of power within production areas leads to numerous crossovers which are unavoidable. Power for slusher operations is distributed via cable referenced in paragraph 21 above. The main distribution cable is the 500 M.C.M. cable. 2/0 feeder cables are spliced into that 500 M.C.M. cable to run power into a switch vault. Switch vaults are 70 feet apart in production areas on alternate sides of the haulage drift. (There are approximately 300 switch vaults in the mine. Approximately 150 are in production areas. At any given time, approximately 50 more switch vaults are active in supplying power to fans or other electrical equipment.) From the switch vault power is distributed to the motors in two slusher dashes. Slusher motors are also on alternating sides of the haulage drift, thus requiring at least one additional crossover of power cable and also frequently requiring that the power cable run parallel to the air and waterlines for several feet. These types of crossovers are illustrated in the photographs attached hereto as Joint Exhibits 7 through 14. Exhibit 7 shows a place where two drifts "Y" together. Exhibits 8, 9, and 10 illustrate the normal configuration of drifts with power cable on one side and pipelines on the other side of the drift. These exhibits also show power cable crossovers. Exhibit 11 is a closeup of cable crossing a drift running from a switch vault, across the back and up into a slusher dash. Exhibit 12 shows a switch vault on the same side of a drift as the power cable bundle, with the feeder cable out to the slusher dashes. Exhibit 13 shows another switch vault which provides power for two slusher machines; that switch vault is on the pipeline side of the drift. Exhibit 14 shows a small switch vault which supplies power to a nonproduction area.

24. The dielectric strength of air or a substance refers to the ability of air or that substance to offer a high resistance to the passage of electricity through it.

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25. A powerline is a conducting material capable of carrying electrical power. A communication line (because of the low current flow) is not a powerline.

26. The court should be aware of three prior cases involving 30 C.F.R. 57.12-82.

27. The first case is Docket No. DENV 79-92-PM, Secretary of Labor v. Kerr-McGee Nuclear Corporation. The facts in that case involved a situation in which the outer jacket of a power cable assembly was in contact with a metal pipeline. That power cable assembly consisted of conductors, each of which were surrounded by insulation having a manufacturer's rating equal to or greater than the voltage applied to the power conductors. The insulated power conductors were then surrounded by an outer jacket which was in satisfactory condition. The only thing that came in contact with the metal pipeline was the outer jacket. By motion filed May 21, 1979, MSHA moved to vacate the citation issued on those facts because there was "insufficient evidence available to support the alleged violation."

28. In a case involving similar facts, Docket No. WEST 79-252-M, MSHA v. Sunshine Mining Company, by motion served November 7, 1979, MSHA also moved to vacate a citation issued under 30 C.F.R. 57.12-82 because "there [was] insufficient evidence to sustain the allegations contained in the citation." The facts in the Sunshine Mining case were essentially the same as those in the Kerr-McGee case.

29. In a decision dated November 29, 1979, Secretary of Labor v. Ozark Mahoning Co., Docket No. VINC 79-138-PM, Judge Stewart found a violation of 30 C.F.R. 57.12-82. The similarity between the facts of that case and the facts of this case are uncertain since he indicates in discussing one of the citations that the "outer jacket of the cable was comprised of neoprene and rubber insulation" and on the other citation that the powerline "was protected only by factory insulation." Here each of the cables are insulated and covered with a separate heavy-duty outer jacket approved for use in mines by the Bureau of Mines.

30. Attached as Joint Exhibits 15 through 20 are various letters and interpretive memoranda issued by MSHA regarding 30 C.F.R. 57.12-82. These constitute all of the published and unpublished interpretive letters or memoranda regarding that standard.

31. The primary purpose of this litigation is for Climax and MSHA to resolve a conflict between them regarding interpretation of the regulatory provisions in issue in this action. Climax and MSHA thus agree that in the event the court should determine that a violation(s) occurred, the appropriate civil penalty would be the amount the citation(s) was assessed for by the Office of Assessments. These amounts are as follows: Citation No. 331733--\$72; Citation No. 331744--\$78; and Citation No. 331747--\$66.

32. Climax is a large operator within the meaning of the 1977 Mine Act.

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33. Climax demonstrated good faith in attempting rapid abatement of the practices described in Citation Nos. 331733, 331744 and 331747.

B. Opinion and Findings of Fact

1. Occurrence of Violations

The principal question presented in the above-captioned cases is what constitutes suitable insulation where powerlines achieve contact with telephone lines, waterlines, or air lines. The basic facts are relatively uncomplicated. The parties, however, demonstrate considerable disagreement both as to the legal significance of the facts and as to the proper interpretation of the cited mandatory safety standards.

Citation Nos. 331733, 331744 and 331747 were issued at the Climax Mine by Federal mine inspector James L. Atwood during the course of the first inspection of that mine conducted pursuant to the provisions of the 1977 Mine Act (Tr. 203). Citation Nos. 331733 and 331734 were issued on July 27, 1978, addressing identical practices detected by Inspector Atwood on the 600 Level and Storke Level, respectively. These citations charge Climax with violations of mandatory safety standard 30 C.F.R. 57.12-82 in that energized powerlines of various voltages were in contact with pipelines in various places. (FOOTNOTE 1) The term "pipelines," as used in the citations, refers to both air lines and waterlines (Tr. 213), and the term "powerlines" refers to the outer jacket on insulated and jacketed cables (Tr. 223).

Citation No. 331747 was issued on July 28, 1978, addressing a practice detected by Inspector Atwood on the 600 Level. The citation charges Climax with a violation of mandatory safety standard 30 C.F.R. 57.12-10 in that several telephone lines were observed hanging with and touching energized powerlines. The citation further alleges that the practice existed in all areas of the 600 Level. (FOOTNOTE 2) The inspector testified that he checked a total of 10 telephones and that in each instance the telephone line "came out of the phone and went right up and into a bundle of powerlines, and went down

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the drift" (Tr. 218). He further testified that the telephone lines in question had jackets (Tr. 257), and that the citation addresses the outer jackets of telephone lines touching the outer jackets of power cables (Tr. 223).

At various times between August 25, 1978, and February 2, 1979, Federal mine inspectors James D. Enderby and David Park issued subsequent action notices extending the time periods for abatement. The citations were terminated in April of 1979 by Federal mine inspector Elmer E. Nichols.

The parties stipulated that molybdenum ore is mined underground at the Climax Mine by the block caving method. A cave is created above the production areas by drilling and blasting. After the rock is fractured by blasting, creating the cave, the force of gravity causes the rock to continue to break. The rock then falls from the cave into raises (fingers) that run at a 45-degree angle into a slusher drift. Each slusher drift (also called a dash) has six finger raises. The fractured rock falls through the raise into the slusher drift. Each slusher drift has a 150-horsepower electrical motor which powers a dipper that is pulled back and forth in the slusher dash. The dipper pulls the rock towards a draw hole which is 3.9 feet wide and 8 feet long. The rock falls through the draw hole into ore trains that are sitting on tracks in a haulage drift which is located approximately 10 feet below the floor of the slusher drift. The haulage drift is perpendicular to the slusher drift.

The parties further stipulated that the instant cases involve only power cables in drifts of the mine which have track for the haulage of ore, or other materials, by rail. The Climax Mine has approximately 24 miles of haulage drifts, and these drifts contain an estimated 367,000 feet of cable of the types in issue here. The types of cables involved in these proceedings are listed on Joint Exhibit 6. There are approximately 24 miles of air lines and 24 miles of waterlines in these drifts.

All of the power cables involved in the instant cases carry voltages having low potential, as that term is defined by 30 C.F.R. 57.2, i.e., 650 volts or less. None of these cables carry in excess of 440 volts. Additionally, the cables never carry voltages greater than the manufacturer's insulation rating.

As a general rule, air lines and waterlines are on one side of the drift and power cables are on the other side of the drift. However, the power cables may, from time to time, be on the same side of the drift as an air line or a waterline for a variety of reasons. These reasons include the following: First, it is sometimes necessary to move air or waterlines or power cables from one side of the drift to the other in order to transmit air, water, or electricity to a particular location. Second, at intersections of drifts, air lines, waterlines, or power cables will frequently cross. Third, the distribution of power within production areas leads to numerous crossovers which are unavoidable. Power for slusher operations is distributed via cable referenced in Joint Exhibit 6. The main distribution cable

is the 500 M.C.M.

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cable. 2/0 feeder cables are spliced into that 500 M.C.M. cable to run power into a switch vault. Switch vaults are 70 feet apart in production areas on alternate sides of the haulage drift. There are approximately 300 switch vaults in the mine. Approximately 150 are in production areas. At any given time, approximately 50 more switch vaults are active in supplying power to fans or other electrical equipment. Power is distributed from the switch vault to the motors in two slusher dashes. Slusher motors are also on alternating sides of the haulage drift, thus requiring at least one additional crossover of power cable and also frequently requiring that the power cable run parallel to the air and waterlines for several feet.

In addition to the foregoing, the parties stipulated that when the respective citations were issued, Inspector Atwood observed various places on the 600 Level and the Storke Level at the Climax Mine in which the outer jacket of an insulated and jacketed power cable was touching an air line, waterline or telephone line, and that the power conductors in these cables were carrying voltages ranging from 110 volts to 440 volts. Furthermore, the parties stipulated that the cables were in satisfactory condition.

Mandatory safety standard 30 C.F.R. 57.12-82 provides as follows: "Powerlines shall be well separated or insulated from waterlines, telephone lines, and air lines." The regulation applies "only to the underground operations of underground mines." 30 C.F.R. 57.1. The principal area of disagreement between the parties centers around the appropriate definition of the term "powerlines" and the determination as to what constitutes suitable insulation at the points where powerlines achieve contact with waterlines, air lines, and telephone lines.

Climax argues that the term "powerline" should be defined as a "conducting material capable of carrying electrical power;" i.e., that the definition of powerline should be limited to the copper conductors contained within a power cable, and exclude the insulation, jacket and filler. Climax further argues that when this definition is applied, one can then consult both the American Society for Testing and Materials (ASTM) standards for the manufacture of power cable and accepted principles of electrical engineering to determine whether the insulation is sufficient. In Climax's view, unless such definition is adopted, no objective basis exists for determining what constitutes suitable insulation. Additionally, Climax maintains that its interpretation is consistent with the electrical standards in 30 C.F.R. 57.12. (Climax's Posthearing Brief, pp. 8-15, 20).

MSHA categorically rejects Climax's contentions and argues that "powerline" includes not only the metal that actually conducts the flow of power from one point to another, but also the component parts that make up the line from one point to another, i.e., the insulation, jacket and filler. (MSHA's Posthearing Brief, p. 3). For the reasons set forth below, I conclude that the term "powerline," as used in 30 C.F.R. 57.12-82, encompasses not only

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the conductor, but also all constituent parts of the cable that make up the line from one point to another, e.g., the insulation, jacket and filler. (FOOTNOTE 3)

Neither Climax's nor MSHA's witnesses were able to point to a learned treatise in the field of electrical matters containing a definition of the term "powerline," and none of the exhibits suggest an express definition for the term. Accordingly, on the basis of the record developed in these cases, it must be concluded that the term "powerline," as used in the general electrical field, is not susceptible to a precise definition of the type that would be of meaningful assistance in deciding the issues presented in the instant cases. It is therefore necessary to consider all electrical standards and definitions contained in Part 57 of Title 30 of the Code of Federal Regulations in order to determine the meaning of the term "powerline" as used in the context of standards designed to secure a safe work place for miners working in the underground areas of metal and nonmetallic mines.

A full review of the electrical standards and definitions set forth in Part 57 of Title 30 of the Code of Federal Regulations convinces me that Climax's definition of the term "powerline" is inaccurate when viewed in the context of mine safety as relates to electrical applications located in the underground areas of underground metal and nonmetallic mines. The electrical terms appearing most frequently in 30 C.F.R. 57.12, insofar as material to the instant cases, are "cables," "trailing cables," "power cables," "conductors," "power conductors," "bare power conductors," "electrical conductors," "power wires," "signal wire," "bare signal wires," "trolley feeder wires," "trolley wires," "powerlines" and "bare powerlines." Of these, only the term "conductor" is expressly defined within Part 57 of Title 30. Climax's proffered definition of "powerline" is identical in all material respects to the definition of "conductor" set forth at 30 C.F.R. 57.2, which provides as follows: "'conductor' means a material, usually in the form of a wire, cable, or bus bar, capable of carrying an electric current." It can therefore be deduced that if the drafters of the subject regulation had intended it to require only "conducting material capable of carrying electrical power" to be "well separated or insulated from waterlines, telephone lines, and air lines," then they would have used the term "conductors" in lieu of the term "powerlines." Substantial guidance is also provided by a comparison of mandatory safety standards 30 C.F.R. 57.12-66 and 30 C.F.R. 57.12-82. The former

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regulation, applicable "only to the surface operations of underground mines," 30 C.F.R. 57.1, makes express reference to "bare powerlines" (emphasis added). The latter regulation, applicable only to the underground operations of underground mines, refers to "powerlines" and does not contain the modifying adjective "bare." In view of the foregoing, it is apparent that the drafters of Part 57 of Title 30 intended that the term "powerline," in the context of 30 C.F.R. 57.12-82, envisioned a line that already included a conductor or conductors with the insulation and jacket as manufactured, such as exists in Exhibit 0-4. Accordingly, I conclude that the term "powerline," as used in 30 C.F.R. 57.12-82, encompasses not only the metal that actually conducts the flow of electricity from one point to another, but also all component parts that make up the line from one point to another. The electrical cables at issue in Citation Nos. 331733 and 331744 were "powerlines" within the meaning of the cited regulation. Furthermore, the terms "trolley wires" and "bare power conductor," as treated in 30 C.F.R. 57.12-80, bolster the proposition that the term "powerlines" in the context of 30 C.F.R. 57.12-82 envisioned something more than bare power conductors.

The second area of controversy concerns the determination as to what constitutes insulation in compliance with the regulation.

Both MSHA and Climax agree that the purpose of 30 C.F.R. 57.12-82 is to prevent a waterline, telephone line or air line from becoming energized (Climax's Posthearing Brief, p. 19; MSHA's Posthearing Brief, p. 4). Climax argues that compliance with the standard is achieved if the manufacturer applied insulation on the powerline is sufficient to achieve the standard's objective. Accordingly, Climax argues that the cables at issue (Joint Exh. 6) provide the requisite protection by their design (Climax's Posthearing Brief).

MSHA argues that, in the context of mining, avoidable hazards and risks are required to be eliminated to the greatest extent possible, and that this objective is attained when the powerlines are well separated from the waterlines, telephone lines and air lines, or when insulation, in addition to that which is placed on the powerline by the manufacturer, is used at the points of contact. In MSHA's view, Climax's proffered interpretation is both shortsighted and naive because it incorrectly assumes that powerlines used in the underground areas of metal and nonmetallic mines will never sustain damage. According to MSHA, Climax's approach allows avoidable hazardous conditions to remain in the miner's work environment, and places excessive faith in the initial construction and manufacturer's testing of every inch, foot and mile of powerline used in the Climax Mine. MSHA points to the Nelson/Shepich Memorandum of February 21, 1975 (Joint Exh. 18) as a detailed statement of its interpretation of the requirements of the regulation, and argues that the interpretation set forth in the memorandum should be accorded deference, citing *Bell v. Brown*, 557 F.2d 849, 855 (D.C. Cir. 1977); *Perine v. William Norton & Company, Inc.*, 509 F.2d 114, 120 (2d Cir. 1974); S. Rep. No. 95-181, 95th Cong., 1st

Sess. (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT of 1977 at 637 (1978) (MSHA's Posthearing Brief, pp. 2-7).

It is unnecessary to rely upon the Nelson/Shepich Memorandum of February 21, 1975 (Joint Exh. 18) for the proposition that mandatory safety standard 30 C.F.R. 57.12-82 requires the use of additional insulation at

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the points where powerlines contact waterlines, telephone lines and air lines. The regulation, when interpreted in accordance with the principles of statutory construction, requires the use of additional insulation.

As a general proposition, the rules of statutory construction can be employed in the interpretation of administrative regulations. See C. D. Sands, 1A Sutherland Statutory Construction, 31.06, p. 362 (1972). According to 2 Am. Jur.2d, Administrative Law, 307 (1962), "rules made in the exercise of a power delegated by statute should be construed together with the statute to make, if possible, an effectual piece of legislation in harmony with common sense and sound reason." Remedial legislation directed toward securing safe work places must be interpreted in light of the express Congressional purpose of providing a safe work environment, and the regulations promulgated pursuant to such legislation must be construed to effectuate Congress' goal of accident prevention. *Brennen v. Occupational Safety and Health Review Commission*, 491 F.2d 1340 (2d Cir. 1974).

Mandatory safety standard 30 C.F.R. 57.12-82 uses the terms "powerlines" and "insulated." As noted previously in this decision, it is apparent that the drafters of Part 57 of Title 30 intended that the term "powerline," in the context of 30 C.F.R. 57.12-82, envisioned a line that already included a conductor or conductors with the insulation and jacket as manufactured, such as exists in Exhibit 0-4. Accordingly, the use of the term "insulated" in 30 C.F.R. 57.12-82 would be a redundancy if it did not require the use of additional insulation. It is a time-honored rule of statutory construction that effect must be given, if possible, to every word, clause and sentence contained in a statute. "A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error." C. D. Sands, 2A Sutherland Statutory Construction, 46.06, p. 63 (1973). However, it is equally "clear that if the literal import of the text of an act is not consistent with the legislative meaning or intent, or such interpretation leads to absurd results, the words of the statute will be modified by the intention of the legislature." C. D. Sands, 2A Sutherland Statutory Construction, 46.07, p. 65 (1973).

The foregoing interpretation of 30 C.F.R. 57.12-82 as requiring additional insulation where powerlines achieve contact with waterlines, telephone lines and air lines, gives effect to both words contained in the regulation, preserves the intent of the drafters, and harmonizes with Congress' goal of accident prevention. It cannot be said that the drafters were unaware of the significance attached to the use of the term "insulated," because such term is defined by 30 C.F.R. 57.2 as follows:

"Insulated" means separated from other conducting surfaces by a dielectric substance permanently offering

a high resistance to the passage of current and to disruptive discharge through the substance. When any substance is said to

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be insulated, it is understood to be insulated in a manner suitable for the conditions to which it is subjected. Otherwise, it is, within the purpose of this definition, uninsulated. Insulating covering is one means for making the conductor insulated.

It is significant to note that "[w]hen any substance is said to be insulated, it is understood to be insulated in a manner suitable for the conditions to which it is subjected." Climax's position in this case fails to take this requirement into account.

Climax's principal argument asserts that the electrical cables used as powerlines in the underground areas of the Climax Mine accord the requisite protection that the regulation seeks to secure by virtue of their very design. The testimony of Dr. Fred Leffler, Associate Professor of Electrical Engineering at the Colorado School of Mines, supports Climax's contention that the cables, manufactured in accordance with the ASTM standards, are substantially oversized in terms of their dielectric properties.

According to Dr. Leffler, the dielectric strength of ethylene-propylene rubber (EPR) is approximately 350 volts per mil, i.e., approximately 350 volts per 1/1000 of an inch (Tr. 363, 396). EPR is the type of insulation used on much of the cable at issue in the instant cases. These 600-volt rated, EPR-insulated cables have an insulation thickness ranging from 30 to 60 mils, depending on the size of the conductors (Exh. 0-7, Table 1D). The size of the conductors in the cables at issue ranges from 16 Awg to 500 mcm (Joint Exh. 6). Accordingly, these cables have insulation around the conductors with a dielectric strength rating, depending on the size of the conductors, of 10,500 volts (Awg sizes 14 to 9), 15,750 volts (Awg sizes 8 to 2), 19,250 volts (Awg sizes 1 to 4/0), and 22,750 volts (225-500 mcm). (See, Exh. 0-7, table 1D, and Tr. 361-364.)

Styrene butadiene rubber (SBR), the other type of insulation used on the power cables at issue in these proceedings, has a dielectric strength rating of approximately 250 volts per mil (Tr. 357-358). Accordingly, the 600-volt rated, SBR-insulated cables have insulation around the conductors with a dielectric strength rating, depending upon the size of the conductors, of 7,500 volts (Awg sizes 18-16), 11,250 volts (Awg sizes 14-9), 15,000 volts (Awg sizes 8-2), 20,000 volts (Awg sizes 1 to 4/0), and 23,750 volts (225 to 500 mcm). (See, Exh. 0-7, table 1A, and Tr. 357-361.)

The neoprene rubber used as a jacket is not taken into account when determining the insulation rating. The jacket serves to protect the insulation from outside forces such as oils, acids, alkalies, water or moisture, flame and abrasion (Tr. 48, 67-68, 365). However, both Dr. Leffler and Lawrence P. Filek, an MSHA electrical engineer, agreed that the jacket has an insulating capability (Tr. 49, 367). According to Dr. Leffler, neoprene and lead-cured neoprene have a dielectric strength of

approximately 300 volts per mil (Tr. 367). Cable specifications set forth by Climax's cable supplier, Anixter Brother's Inc., indicate that the jacket on a three-conductor,

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16-Awg cable, which appears to be the smallest cable listed on Joint Exhibit 6, is 4/64's of an inch (Exh. 0-5); i.e., 62.5 mils. Accordingly, the jacket on what appears to be the smallest cable would provide an extra 18,750 volts of dielectric substance on that cable.

The fact that the cables possess these qualities is not dispositive. It must be borne in mind that the powerline applications addressed by 30 C.F.R. 57.12-82 are located in the underground areas of metal and nonmetallic mines, an extremely harsh environment. The cables can sustain physical damage from a variety of sources such as fly rock and concussion from blasting, rubbing by haulage equipment, and dragging over sharp rock or metal edges (Tr. 71, 73-74, 198-200, 215, 295, 329). According to Mr. Filek, if wires or small metal objects, propelled by a blast concussion, penetrated both the jacket and insulation, a waterline or air line could become energized in the absence of added insulation if the cable was within sufficient proximity to the waterline or air line. This could occur even though the cable did not contact the pipe at the point of penetration. Electricity can conduct along the surface of a contaminated cable to the point of contact (Tr. 75-76). Furthermore, it should be borne in mind that Inspector Atwood worked as a miner at the Climax Mine from 1956 to 1972 (Tr. 195-196). His testimony is deemed particularly probative as relates to both the conditions existing in the mine and the frequency of employee contact with the waterlines and air lines. His testimony reveals that the mine is wet and that individuals walking through underground areas are walking in mud and water most of the time. It is extremely wet when the snow melts in spring. In fact, the mine resembles an underground lake in areas at that time of the year (Tr. 211). The inspector further testified that it is normal for miners to achieve physical contact with the waterlines and air lines during their normal working day. Physical contact can occur while hooking up air and water hoses, while climbing ladders or while stepping into the dashes (Tr. 214).

Additionally, it is significant to note that both Mr. Williams and Mr. Pupera testified that they would prefer added insulation at the point of contact prior to touching the water or air lines, provided the jacket and insulation had been penetrated (Tr. 315-316, 329-330).

It cannot be said that drafters of Part 57 of Title 30, in formulating their definition of "insulated," were unaware of either the harsh environment in the underground areas of metal and nonmetallic mines or the dielectric properties of jackets and insulation used on cables approved for use in mines. A substance is "insulated" when it is "insulated in a manner suitable for the conditions to which it is subjected," a requirement directly related to the mining environment. The fact that "[i]nsulating covering is one means for making the conductor insulated" shows that the drafters did not intend to rely solely upon the cable as manufactured in all cases.

These considerations, when applied to 30 C.F.R. 57.12-82,

point to an interpretation requiring the use of insulation in addition to that which is on the powerline. Given the harsh environment existing in the underground areas of metal and nonmetallic mines, it would be unreasonable to rely solely

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upon the manufacturer-applied insulation to achieve the regulation's stated goal. In this environment, a mine operator cannot be 100 percent certain that every inch of powerline will retain its dielectric integrity throughout each hour and minute of the day. The added insulation may not be foolproof, but its use promotes the regulation's objective and thereby contributes to securing a safe work place for miners. "Should a conflict develop between a statutory interpretation that would promote safety and an interpretation that would serve another purpose at a possible compromise of safety, the first should be preferred." District 6, UMWA v. Department of Interior Board of Mine Operations Appeals, 562 F.2d 1260 (D.C. Cir. 1972). Accordingly, I conclude that 30 C.F.R. 57.12-82 requires the use of additional insulation where powerlines contact waterlines, telephone lines and air lines.

The final question presented as relates to Citation Nos. 331733 and 331744 concerns the type of additional insulation necessary to comply with the regulation. It is unnecessary to explore this issue in order to determine whether the cited practices constituted violations of 30 C.F.R. 57.12-82 because the mine operator in this instance had no additional insulation at the points of contact with the air lines and waterlines. The absence of any additional insulation established violations of the regulation. However, the evidence does disclose the type of additional insulation necessary, at a minimum, to comply with the requirement, as set forth in the following paragraphs.

One of MSHA's interpretations is set forth in the last paragraph of the Nelson/Shepich Memorandum of February 21, 1975 (Joint Exh. 18), as follows: "Additional insulation means that insulation in addition to the jacketing shall have a dielectric strength at least equal to the maximum applied voltage on the conductor." This interpretation is entitled to weight. As noted by the Commission in *The Helen Mining Company*, 1 FMSHRC 1796, 1801, 1979 OSHD par. 24,045 (1979):

In accordance with this expression of congressional intent, we will accord special weight to the Secretary's view of the 1977 [Mine] Act and the standards and regulations he adopts under them. His views will not be treated like those of any other party, but will be treated with extra attention and respect * * *. [T]his weight may vary with the question before the Commission, especially where the Secretary has gained some special practical knowledge or experience through his inspection, investigation, prosecution, or standards-making activities * * *.

The record offers no clear indication as to how the drafter of the memorandum reached the conclusions that the additional insulation "shall have a dielectric strength at least equal to the maximum applied voltage on the conductor." However, the record clearly shows that the wording in that paragraph of the memorandum does not set forth a logical interpretation as to the amount of additional insulation needed, as demonstrated by the

testimony of two of MSHA's witnesses, Mr. Lawrence T. Filek and Mr. William S. Vilcheck.

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Mr. Filek received a Bachelor of Science degree from the University of Illinois in 1951, and thereafter practiced his profession in both Government and the private sector. At the time of the hearing, he was in his fifth year of employment at MSHA's Denver Technical Support Center in Lakewood, Colorado. During cross-examination, he testified as follows:

Q. Now, would it be a fair summary of this memorandum to say that what the Shepich-Nelson memorandum requires is that there be some insulation in addition to the jacketing on the power line?

A. Yes.

Q. And that that amount of insulation be, looking to the last sentence, at least equal to the maximum voltage applied on the conductor?

A. What is implied there is that the dielectric strength of the insulation should be at least equal to the insulation -- the dielectric strength of the conductor, and not the applied voltage.

Q. Well, let me rephrase the question. I think what the memorandum requires is that the additional insulation beyond the outer jacketing have a dielectric strength at least equal to the maximum voltage which would be applied to the power conductor; isn't that correct?

A. I don't think so.

Q. Oh? Well, could you restate for me then what you do believe it says?

A. Well, I could restate for you what I believe it should say.

Q. Well, I'm interested in what it says, Mr. Filek, not what you wish it said.

A. Okay. This memorandum equates -- this memorandum equates dielectric strength, which is usually measured in volts per thickness of insulation to voltage, and the units do not -- do not correspond; therefore, it cannot be an equality.

(Tr. 113-114).

Mr. Vilcheck received a Bachelor of Science degree in electrical engineering and a Master of Science degree in electrical engineering in 1973 and 1975, respectively. Both degrees were received from West Virginia

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University. He received an emphasis on power systems during his studies for his Master's of Science Degree, and, at the time of the hearing, was in his second year of employment at MSHA's Pittsburgh Technical Support Center. Mr. Vilcheck testified as follows during cross-examination:

Q. Does Joint Exhibit 18 say you should double it? What does that Joint Exhibit 18 say should be doubled? That is, is it the voltage applied to the conductor, or is it the manufacturer's rating on the insulation?

A. Okay. Exhibit 18 to me says that -- it says, "Insulation in addition to the jacketing shall have a dielectric strength at least equal to the maximum voltage on the conductor."

Larry says we are kind of comparing apples to oranges. I think it results from a nontechnical person writing this memorandum. Okay?

You know, we can argue what his intent was or how we interpret it to be, but actually what he has verbatim I don't think makes a whole lot of sense. Okay? We know that he's trying to put additional insulation on the conductor, and I think what he means is at least equal to that of the insulation on the conductor, but I --

Q. But that's not what it says.

A. What it says may be -- I'm not sure what it says is what his intent was either. Okay?

(Tr. 170).

The testimony of Mr. Filek reveals that the additional insulation will meet the requirements of 30 C.F.R. 57.12-82 if it possesses the following traits: A piece of permanently fastened, nonabsorbent insulator should be placed between the cable and the waterline, telephone line, or air line (Tr. 107). The added insulation should have a dielectric rating at least equal to the dielectric rating of the cable when it was new (Tr. 110).

This is not to say, of course, that other methods of insulation cannot be employed. The only conclusion that can be drawn from the record is that added insulation with the foregoing characteristics is, at a minimum, sufficient to comply with 30 C.F.R. 57.12-82.

In view of the foregoing, and particularly because in these instances no additional insulation whatsoever was applied, it is found that the practices set forth in Citation Nos. 331733 and 331744 were violations of 30 C.F.R. 57.12-82. The applications for review will be denied in Docket Nos. DENV 78-553-M and DENV 78-554-M, and a civil penalty will be assessed for these violations in Docket No. WEST 79-340-M.

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As noted previously in this decision, Citation No. 331747 alleges a violation of mandatory safety standard 30 C.F.R. 57.12-10 in that several telephone lines were observed hanging with and touching energized powerlines. The cited mandatory safety standard provides as follows: "Telephone and low-potential signal wire shall be protected, by isolation or suitable insulation, or both, from contacting energized power conductors or any other power source."

The inspector's testimony reveals that the citation charges a violation of that portion of the regulation requiring telephone and low-potential signal wire to be protected, by isolation and/or suitable insulation, from contacting energized power conductors (see, e.g., Tr. 219, 251, 258). The phrase "or any other power source," as used in the regulation, refers to electrical switchboxes and items of a similar nature, but does not refer to a line (Tr. 258).

As noted previously in this decision, the inspector testified that the telephone lines in question had jackets, and that the citation addresses the outer jackets of telephone lines touching the outer jackets of power cables. It is therefore clear that the telephone lines were not in contact with "power conductors" in view of the definition of "conductor" set forth at 30 C.F.R. 57.2.

Accordingly, the application for review will be granted in Docket No. DENV 78-555-M, and the proposal for a penalty in Docket No. WEST 79-340-M will be dismissed as relates to Citation No. 331747.

2. Evaluation of Civil Penalty Assessment Criteria

The parties stipulated that the primary purpose of this litigation is to permit Climax and MSHA to resolve a conflict between them regarding the interpretation of the regulations at issue. The parties further stipulated that if violations are found to have occurred, then the civil penalties assessed by the Office of Assessments would be appropriate. The relevant proposed assessments are identified as follows:

Citation No.	Date	\$30 C.F.R. Standard	Assessment
331733	7/27/78	57.12-82	72
	7/27/78	57.12-82	78
Total:			\$150

The record fully supports the assessment of civil penalties in the amounts proposed by the Office of Assessments. The absence of operator negligence is deemed of particular significance to this determination.

The record reveals that Climax is a large operator, producing approximately 50,000 tons of ore per day; that Climax

has no history of previous violations for which assessments have been paid during the period of time

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prior to July 27, 1978 (Tr. 22-23); and that Climax demonstrated good faith in attempting rapid abatement (Tr. 21-22, 202-203, 213). No evidence was presented establishing that the assessment of civil penalties will affect Climax's ability to remain in business, and, accordingly, it is found that the assessment of civil penalties for Citation Nos. 331733 and 331744 will not affect Climax's ability to remain in business. Hall Coal Company, 1 IBMA 175, 79 I.D. 688, 1971-1973 OSHD par. 15,380 (1972).

The air lines and waterlines in the Climax Mine are grounded to the rails of the haulage tracks at 500-foot intervals (Tr. 320), and are supported at 6- to 10-foot intervals on supports attached to rock bolts driven into the rock (Tr. 339). The rock at the Climax Mine makes a very good grounding medium (Tr. 339). Furthermore, the cables at issue in these proceedings were in satisfactory condition. Based upon these considerations, the design characteristics of the cables at issue in these proceedings and the voltages applied to the cables, Climax could have had some foundation for concluding that additional insulation was not necessary at the points where powerlines contacted waterlines, telephone lines and air lines because it could have concluded in good faith, although erroneously, that the objective of the regulation had been met. Accordingly, it is found that Climax did not demonstrate negligence in connection with the practices described in the citations.

The best available evidence indicates that no injuries have been sustained at the Climax Mine as a result of powerlines energizing waterlines, telephone lines or air lines (Tr. 297-298). In fact, Mr. Pupera, the electrical superintendent, had never heard of the AC system energizing a waterline or an air line at the Climax Mine, although he had heard of it occurring from other causes. He related approximately two or three occurrences over an 8-year period in which the trolley wire was knocked down and achieved contact with a pipe. In view of these considerations, the characteristics of the jacketed and insulated cables at issue in these proceedings, and the specific electrical applications encompassed by the citations, it is found that the occurrence of the event against which the standard is directed was improbable. However, if the event did occur, then all miners achieving proper conductive contact with the waterlines or air lines would be exposed to serious or fatal injury (see, e.g., Tr. 213). Accordingly, it is found that the violations were moderately serious.

In view of the foregoing, Climax will be assessed civil penalties as set forth above.

VI. Petitioner's Motion in Docket No. WEST 79-340-M to Withdraw the Proposal for a Penalty as Relates to Certain Citations

MSHA filed a written motion during the hearing on March 11, 1980, to withdraw the proposal for a penalty as relates to six citations. The motion states, in part, as follows:

1. From August 7, 1978, to December 27, 1978, the following citations were issued to respondent:

- (a) No. 333300 for an alleged violation of 30 C.F.R. 57.12-10;
- (b) No. 333331 for an alleged violation of 30 C.F.R. 57.12-1;
- (c) No. 333242 for an alleged violation of 30 C.F.R. 57.12-25;
- (d) No. 333246 for an alleged violation of 30 C.F.R. 57.12-13;
- (e) No. 333335 for an alleged violation of 30 C.F.R. 57.12-13;
- (f) No. 333336 for an alleged violation of 30 C.F.R. 57.12-13.

2. On July 25, 1979, the Federal Mine Safety and Health Administration, Office of Assessments, assessed proposed penalties for each of the alleged violations set forth in the aforesaid citations, in the following amounts:

Citation No.	Assessed Proposed Penalty
333300	\$255.00
333331	\$325.00
333242	\$ 56.00
333246	\$325.00
333335	\$325.00
333336	\$325.00

3. There is insufficient evidence to establish a violation of the aforesaid mandatory standards as the only witness who can testify to the conditions of the alleged violations is permanently unavailable to testify at the hearing.

In view of the representations set forth above, an order will be entered granting MSHA's motion.

VII. Conclusions of Law

1. Climax Molybdenum Company and its Climax Mine have been subject to the provisions of the 1977 Mine Act at all times relevant to these proceedings.

2. Under the 1977 Mine Act, the Administrative Law Judge has jurisdiction over the subject matter of, and the parties to, these proceedings.

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3. Federal mine inspector James Atwood was a duly authorized representative of the Secretary of Labor at all times relevant to the issuance of Citation Nos. 331733, 331744 and 331747.

4. The practices set forth in Citation Nos. 331733, and 331744 were in violation of mandatory safety standard 30 C.F.R. 57.12-82.

5. The practice described in Citation No. 331747 was not a violation of mandatory safety standard 30 C.F.R. 57.12-10.

6. All of the conclusions of law set forth previously in this decision are reaffirmed and incorporated herein.

VIII. Proposed Findings of Fact and Conclusions of Law

All briefs filed in these proceedings, insofar as they can be considered to have contained proposed findings and conclusions, have been considered fully, and except to the extent that such findings and conclusions have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or because they are immaterial to the decision in these cases.

ORDER

IT IS ORDERED that the February 25, 1980, determination in Docket No. WEST 79-340-M granting MSHA's motion to withdraw the proposal for a penalty as relates to Citation Nos. 333241, 333339 and 333340 be, and hereby is AFFIRMED.

IT IS FURTHER ORDERED that MSHA's March 11, 1980, motion to withdraw the proposal for a penalty in Docket No. WEST 79-340-M as relates to Citation Nos. 333300, 333331, 333242, 333246, 333335 and 333336 be, and hereby is GRANTED.

IT IS FURTHER ORDERED that the applications for review in Docket Nos. DENV 78-553-M and DENV 78-554-M be, and hereby are, DENIED, and that such application for review proceedings be, and hereby are, DISMISSED.

IT IS FURTHER ORDERED that the application for review in Docket No. DENV 78-555-M be, and hereby is, GRANTED, and that Citation No. 331747 be, and hereby is VACATED. The proposal for a penalty in Docket No. WEST 79-340-M is herewith DISMISSED as relates to such Citation.

IT IS FURTHER ORDERED that Climax be, and hereby is, ASSESSED civil penalties in the amount of \$150, as set forth in Part V(B)(2), supra, and that Climax pay such civil penalties within 30 days of the date of this decision.

John F. Cook
Administrative Law Judge

~FOOTNOTE_ONE

1 Citation No. 331733, July 27, 1978, 30 C.F.R. 57.12-82 states the following: "Powerlines and pipelines were in contact on the 600 level in various places. These were energized powerlines of various voltages from 110 V up." Citation No. 331744, July 27, 1978, 30 C.F.R. 57.12-82 states the following:

"Powerlines and pipelines were in contact on the Storke level in various places. These were energized powerlines of various voltages from 110V on up."

~FOOTNOTE_TWO

2 Citation No. 331747, July 28, 1978, 30 C.F.R. 57.12-10 states the following: "Several phone lines on the 600 level were observed hanging with and touching energized powerlines. This condition exists in all of the areas of the 600 level. A total of 10 phones were checked and the lines were all in contact with the powerlines."

~FOOTNOTE_THREE

3 Climax maintains that MSHA stipulated to this definition of a powerline and that MSHA should not be permitted to depart from the definition as stipulated (Climax's Posthearing Brief, pp 14-15). The stipulation in question states as follows: "A powerline is a conducting material capable of carrying electrical power. A communication line (because of the low current flow) is not powerline." Having considered both the comments of counsel for MSHA (Tr. 117-118, 122-123) and the precise wording of the stipulation, I conclude that the sole purpose of this stipulation was to set forth a distinction as to the different functions performed by powerlines and communication lines. Accordingly, the conclusion reached in this decision as relates to the definition of "powerline" does not do violence to the stipulation.