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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,
CONTESTANT

v.

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

Contest of Citation

Docket No. WEST 79-72-RM

Citation No. 5658982/28/79

Climax Mine

DECISION

Appearances: Raymond J. Turner, Esq., Rosemary Collyer, Esq.,
Sherman and Howard, Denver, Colorado, for Contestant;
Robert S. Bass, Esq., Robert J. Lesnick, Esq., Office
of the Solicitor, U.S. Department of Labor, Kansas City,
Missouri, for Respondent.

Before: Judge Charles C. Moore, Jr.

Nine cases alleging violations of the same standard (FN.1) were heard pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq., in Golden, Colorado, on January 20, 1981. Eight of the nine cases were dismissed when the Government announced prior to hearing that it had no evidence to present in support of the citations involved. For reasons not entirely clear to me, the Government found it more convenient to have the citations dismissed for failure of prosecution rather than to vacate the citations and move for dismissal of the cases.

For reasons set forth hereinafter, I hold that Citation No. 565898 should not have been issued. Because a reviewing body may disagree with my opinion regarding the initial issuance of the citation, I will also discuss flaws in the testing procedures used to determine the amount of respirable dust.

The citation alleged:

The quartz-bearing dust level around the No. 2 crusher jaw floor operator was 1.02 Mg/m³ on the day shift from 0730

to 1522 on 2/28/79, where the threshold limit value (TLV) was .49 Mg/m³. Feasible engineering or administrative controls were not being used to reduce this amount in order to eliminate the need for respirators. The violation occurred on 2/28/79. This citation is being written on 4/4/79, because of the delay to get the sample analyzed.

The standard in question, 30 C.F.R. 55.5-5, states:

Control of employee exposure to harmful airborne contaminants shall be, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, or by dilution with uncontaminated air. However, where accepted engineering control measures have not been developed or when necessary by the nature of work involved (for example, while establishing controls or occasional entry into hazardous atmospheres to perform maintenance or investigation), employees may work for reasonable periods of time in concentrations of airborne contaminants exceeding permissible levels if they are protected by appropriate respiratory protective equipment * * *.

On March 17, 1981, the Commission received proposed findings of fact and conclusions of law from Climax. The Secretary had earlier announced that it would present no brief or proposed findings, and it has not responded to the materials submitted by Climax. I adopt the following from the proposed findings submitted by Climax.

The parties have stipulated and I find that:

On February 28, 1979, Climax was, in fact, in the process of developing and establishing accepted engineering controls to control exposure to harmful airborne contaminants in the No. 2 Crusher, insofar as feasible, by prevention of contamination, removal by exhaust ventilation, and by dilution with uncontaminated air, to the greatest extent possible under the state of the art.

The time required for Climax to develop and establish accepted engineering controls for the control of employee exposure to harmful airborne contaminants in the No. 2 Crusher has been reasonable and necessary.

The employee sampled by Inspector Jardee on February 28, 1979, which sample gave rise to Citation 565898, was wearing an approved respirator.

On February 28, 1979, the Climax Mine had in effect a proper respiratory protection program.

Under current MSHA policy, whenever an operator, including Climax, demonstrates that it is in the process of developing and implementing accepted engineering controls for the control of employee exposure to harmful airborne contaminants, no citation under 30 C.F.R. 55.5-5 is to be issued, as long as all exposed employees are protected by respirators and a proper respiratory protection program is in effect.

The Secretary offered no evidence regarding the feasibility of preventing airborne contaminants by "accepted engineering control measures" other than the stipulation. Not only was the Government unable to prove a violation, in my opinion it stipulated that there was no violation. These reasons alone provide sufficient grounds for vacating the citation and I hereby find that the citation should not have been issued.

I also find, however, that the procedures used to weigh the dust sample warrant vacation of the citation. The weighing procedure, in its simplest form, consists of allowing a cassette containing a filter to sit undisturbed for 30 days before being initially weighed. This permits outgassing from the plastic cassette which results in the deposit of minute particles on the filter. After 30 days and just before use, the cassette is desiccated (dried), and the filter is removed, deionized, and weighed. It is then replaced in the cassette, sealed, and given to an inspector for testing a mine atmosphere. When the cassette has been used and returned to the laboratory, it is again desiccated; the filter is removed, deionized, and weighed. The difference between the initial weight and the final weight is presumed to be the weight of the dust collected in the mine.

The laboratory technician's record (Deposition Exhibit No. 1) shows that the sample in question (No. 039007) was initially weighed on August 8, 1978, and that the final weighing was on March 6, 1979. (FN.2) Mr. Joseph Gallegos, the laboratory technician, stated that the filter and cassette were in the inspector's possession from August 8, 1978, until March 6, 1979 (p. 59 of deposition). However, Inspector Jardee says that he first got the cassette on February 26, 1979, and states in his citation that although the violation occurred on February 28, 1979, he did not write the citation until April 4, 1979, "because of the delay to get the sample analyzed." But according to the record, the sample was analyzed almost a month earlier on March 6, 1979. The Secretary has made no attempt to establish which of its witnesses was correct nor has it made any admission as to which one was incorrect. This discrepancy alone provides sufficient grounds for vacating the citation. A time lapse of 7 months between the initial weighing of the filter and the final weighing would allow outgassing from the plastic cassette containing the filter to distort and exaggerate the final reading of the weight of the dust on the filter.

