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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

CLIMAX MOLYBDENUM COMPANY, CONTESTANT	CONTEST PROCEEDING
	Docket No. WEST 85-96-RM
v.	Citation No. 2358524; 3/20/85
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), RESPONDENT	Docket No. WEST 85-97-RM Citation No. 2358525; 3/21/85
	Docket No. WEST 85-99-RM Citation No. 2356413; 3/21/85
	Docket No. WEST 85-100-RM Citation No. 2356414; 3/21/85
	Climax Mine
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), PETITIONER	CIVIL PENALTY PROCEEDING Docket No. WEST 85-120-M A.C. No. 05-00354-05510
v.	Climax Mine
CLIMAX MOLYBDENUM COMPANY, RESPONDENT	

DECISION

Appearances: Richard W. Manning, Esq., Climax Molybdenum Company, Greenwich, Connecticut, for Contestant/Respondent; Robert J. Lesnick, Esq., Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Respondent/Petitioner.

Before: Judge Carlson

These consolidated proceedings arose out of inspections conducted by representatives of the Secretary of Labor (hereafter "the Secretary") at the underground molybdenum mine operated by Climax Molybdenum Company (hereafter "Climax") at Climax, Colorado. The inspections took place on March 20 and 21, 1985. The inspectors issued five citations for violations of mandatory safety standards promulgated by the Secretary. Each of these citations was timely contested by Climax. Later, the Secretary proposed penalties for the alleged violations. These proposals appear in

the single civil penalty proceeding docketed as WEST 85Ä120ÄM, which was consolidated for hearing with the individual contest cases.(FOOTNOTE 1)

The consolidated proceedings were tried under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (hereafter "the Act"). Both parties filed post-hearing briefs.

WEST 85Ä96ÄRM, Citation No. 2358524

Inspector Jake DeHerrara issued this citation on March 20, 1985, because openings in a flume board constituted an alleged falling hazard under 30 C.F.R. 57.11Ä12.(FOOTNOTE 2) That standard provides:

> Openings above, below, or near travelways through which persons or materials may fall shall be protected by railings, barriers, or covers. Where it is impractical to install such protective devices, adequate warning signals shall be installed.

The evidence shows that the cited condition existed at or near a switch-point on the railroad which runs through an underground haulage drift. The flume is a shallow ditch-like drain which parallels the track and drains water from the mine. The top of the flume is covered by boards (two adjacent 2 by 12's) to keep debris from entering the flume and clogging it.

The evidence also shows that the haulage drift is approximately 12 feet wide with the track running down the center. The track is 3 feet in width, measured between the rails, which leaves about 4 feet of open drift floor on the side of the tracks opposite the side where the flume is located.

Witnesses for both parties agreed that the miners walking through the haulage drift frequently use the flume boards as a walkway because they generally offer the smoothest surface. On the other hand, miners may also walk on the opposite side of the rails, or between the rails. The drift floor is often wet and muddy, and is, by its nature, rough and uneven.

According to the inspector, the opening was 14 inches long, 14 inches deep, and 10 inches wide. Measurements provided by Climax were not significantly different. This opening lay between the two railroad ties on either side of the metal throw rod which opens and closes the switch. The opening also accommodates the bridle bar mechanism of the switch.

While Climax concedes that the opening existed, it adduced testimony through one of its own safety inspectors, Mr. Kenneth Johnston, that the switch openings were necessary to furnish access to the switches to clean out debris. Storke level railroad switches number about 100, according to Johnston, and only a small number of these are covered. About half, however, do not cross flume boards as does the one cited. Those which are covered, Climax's safety and health manager Dan Larkin testified, are generally on curves or at other points where debris from the loads of passing cars is likely to sift into the openings and interfere with the switches' operation (Tr. 85). Larkin maintained that it was "possible" but not "practical" to cover the part of the switch openings between the tracks because the cover would interfere with operation of the switches (Tr. 51Ä52). He acknowledged, however, that the part of the opening outside the rails (between the throw lever and the nearer track) could be covered (Tr. 68).

The undisputed evidence showed that a second and somewhat smaller opening existed in the flume boards near the opening for the throw rod. This opening was also about 14 inches long and its width varied between 7 and 4 inches. It, too, was 14 inches deep. Here it appeared that the flume board had simply been broken (Tr. 36). The relative location of the two openings is shown plainly in the photograph received as government exhibit 1 and the sketch received as Climax's exhibit 2.

The inspector believed that the openings in the boards presented a clear falling hazard to miners walking the flume boards. He testified that a walker's foot could easily enter the opening causing a broken or sprained leg or foot (Tr. 18, 26). He emphasized that the haulageway was not lighted except by the miners' cap lights. The uneven illumination source increased the danger, he believed. That the haulageway was not otherwise lighted is not disputed.

Climax disagrees with the entire thrust of the inspector's presentation insofar as the hazard was concerned. Mr. Johnston expressed great doubt that any part of a miner's body would actually drop through one of the openings causing an injury. (FOOTNOTE 3)

He admitted such an accident was "possible" (Tr. 71Ä72), but deemed it highly unlikely. He stressed that the opening at the switch itself was at least partly blocked by the throw rod itself, which would support a part of the foot if a miner should step into the opening. The opening on one side of the rod was 1 1/2 inches, and on the other was 8 inches, he testified.

Johnston also suggested that the inspector's focus on flume-board openings was unrealistic since the haulageway floor was inherently uneven, and obstacles were common. He mentioned standing water in depressions, rocks, and openings between the railroad ties. The Secretary has not denied that these features were present. In framing its legal argument on this matter, Climax states in its post-hearing brief:

> In determining whether a particular opening constitutes a violation of 57.11Ä12, it is crucial to consider the location of the opening. An opening of 8 by 14 inches in the floor of a 5Äfoot wide elevated walkway may constitute a violation, while another opening of the same dimensions at a different location would not. (Climax's brief at 4.)

Further, Climax contends that the openings were not a citable hazard because in its safety meetings the company routinely warned miners to exercise care in walking the drift, particularly around switches (Tr. 40Ä42). Referring to the miners, Mr. Johnston stated: "They're told to be very observant and keep your [sic] eyes open where you're going" (Tr. 41).

Finally, Climax contends that its history of falling accidents in haulage drifts showed that the openings were not a hazard. In this regard, Dan Larkin, the company's manager of safety and health, testified that approximately 20 to 25 percent of all accidents at the mine since 1979 had been slip-and-fall incidents. In the same period, however, only about 5 percent of these occurred in haulage drifts. None involved falls through openings around track switches (Tr. 87Ä88).

I must conclude that the preponderant evidence establishes a minor violation of the cited standard. Climax's argument that the hazard presented by the openings in the flume boards constitutes no greater danger than the uneven floor of the drift generally, or the danger of walking the railroad ties - conditions which the inspector doubtless saw but did not cite - deserves some consideration. It would be naive, certainly, to expect a drift of the sort we deal with here to be as smooth and obstacle-free as an office-building corridor. The chief difficulty with Climax's position is that the flume boards presented themselves as an inviting walkway. The evidence convinces me that, overall, they offered the smoothest walking surface in the drift. That miners often choose to walk on them with the operator's approval is not disputed. I find that because of the openings, however, the boards held out a deceptive sense of safety to walkers who

chose that route, a sense not provided by the drift floor or the railroad ties which tended to be uniformly uneven. Moreover, the 14Äinch drops at the flume-board openings are not inherent in the design and purpose of either the flume or the track switches; they may be remedied. Climax acknowledges that some of the switch openings were covered at the time of citation. This greatly weakens its argument that use of covers was "impractical." Rather, it appears that it was practical to cover the openings where accumulation of debris was a problem, and impractical to do so where it was not. The question appears more one of mere convenience than practicality.

It must also be noted that the smaller opening complained of in the citation had nothing to do with a switch. Instead, the boards had apparently simply been broken off and not repaired or replaced. Where flume boards are offered as a travelway, it is incumbent on the mine operator to keep them in decent repair.

We now turn directly to the question of whether either of the two openings was large enough to represent a realistic possibility that a miner's foot could fall through, thus violating the standard. I must agree with Climax that the chances of this happening are not great. I further agree that even if a miner's foot did encounter one of the openings, the openings were narrow enough that the foot might not fall through. On the other hand, Climax acknowledges that it is possible that a foot could drop into the openings and that injury could ensue. From simply looking at the openings as depicted in the photographs and sketches in evidence, I must conclude that there is a realistic possibility that a foot, or a part of one, could drop through. That is sufficient to establish violation.

Climax's argument concerning safety education and the miners' familiarity with switch openings and other walking hazards in the drift does not constitute a defense. Where a standard prescribes certain protective measures to eliminate hazards, a cautious state of mind cannot be substituted for those measures.

The operator's favorable injury record of falling incidents in the haulage drifts is commendable, but again is no defense. It bears instead upon the severity of the violation.

The Secretary's citation classifies the violation as "significant and substantial" under section 104(d) of the Act. In Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), the Commission defined such a violation as where " . . . there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Although I am satisfied by the evidence that the falling hazard contributed to by the openings creates a reasonable likelihood of injury, I am

not satisfied that the likely injury would be of a reasonably serious nature. On the contrary, I must agree with Climax's position that where injuries did occur they would be non-serious, in the nature of scrapes, bruises or minor sprains rather than the broken bones, or severe sprains envisioned by the inspector. The violation cannot, therefore, qualify as significant and substantial.

The Secretary proposes a penalty sum of $91.00 for this citation. The parties have stipulated, however, that should the violation be found non-significant and substantial, the appropriate penalty would be $20.00.

The record contains evidentiary facts or stipulations regarding the six elements to be considered under section 110(i) of the Act in assessing penalties. These need not be detailed here. It is enough to say that nothing in the record shows the stipulated amount is inappropriate. A civil penalty of $20.00 will therefore be assessed.

WEST 85Ä97ÄRM, Citation No. 2358525

This citation nearly duplicates that discussed immediately above. Inspector Jake DeHerrera issued it on March 21, 1985, for another opening in haulage drift flume boards. This, too, was an alleged violation of 30 C.F.R. 57.11Ä12.

The evidence shows that this opening measured 14 inches deep by 31 inches long and up to 5 inches wide. The only significant difference between the circumstances here and those in the previous citation may be summarized as follows: the opening is not at or near a railway switch; the opening had a cover, but it had been dislodged and was leaning against the rib, rather than being in place; the longest dimension of the opening ran the length of the flume boards, rather than across them; and the foot traffic could be expected to be less, consisting primarily of six electricians headquartered in a nearby shop area.

In terms of the existence of a violation, none of these differences would alter the result reached for the earlier citation. The defenses are essentially the same (except for those relating exclusively to switch openings), and are insufficient for the reasons discussed in connection with that citation.

If anything, the circumstances here are slightly more favorable to the Secretary. This is so because the opening had previously been covered.

Nevertheless, this violation does not rise to the "significant and substantial" level. The credible evidence shows that while injuries are reasonably likely to occur, they are not reasonably likely to be serious. I agree with Climax that slight bruises, mild sprains, etc., would be the common result of accidents involving this small opening.

The penalty for this violation will be assessed at $20.00. This is in conformance with the parties' stipulation regarding non-significant and substantial violations.

WEST 85Ä99ÄRM, Citation No. 2356413

On March 21, 1985, Inspector Elmer Nichols, acting on behalf of the Secretary, issued a citation charging that Climax was in violation of the mandatory safety standard published at 30 C.F.R. 57.3Ä22.(FOOTNOTE 4) That standard 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 the 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.

The alleged violation took place in one of the fingers rising from a slusher drift. (See joint exhibits 4 and 5.) The finger was not in use at the time. A concrete safety plug had been in place at the upper end. On the day prior to the inspection, miners had set and shot one round of explosives in the plug, bringing part of it down. Their purpose was to remove the plug in order to bring the finger back into production. Miners were continuing the removal work when the inspector arrived at about 10:00 a.m. on the morning of his inspection. These background facts were not in dispute.

According to Inspector Nichols, when he and Inspector DeHerrera arrived at the base of the finger, a miner, Kelly Kramp, had just descended a set of ladders after having drilled the face of the finger preparatory to setting a second round of charges.

At about that time a "handful" of small bits of rock dribbled down from somewhere, convincing him that the finger was beginning to "work." He then noticed a piece of concrete in the face which appeared to him "quite loose." He described it as about the size of a basketball, and estimated its weight at between 50 to 60 pounds.

He viewed the concrete (referred to most often in all the testimony as "the rock") from the third step of the bottom ladder in a set of two six-foot stepladders. This put him about seven or eight feet from the face. The rock was to the left of the top step of the upper ladder. The only illumination present was his cap lamp.

He was immediately concerned that the rock could come down. DeHerrera and he left very briefly and went to a nearby lunch-room where he wrote out the citation for violation of 30 C.F.R. 57.3Ä22. He advised that Kramp and the other miner in the crew, Nick Doran, should not go back up to load holes until the offending piece of cement was barred down.

The inspector explained that because of the location of the loose cement he was not concerned that it would fall directly on the miner or the ladder. Rather, he testified, it would likely fall on the 4 by 4 wooden brace upon which the upper ladder rested. This, in turn, would cause the miner and his equipment to fall to the concrete base of the finger.

Inspector Nichols maintained that when he returned from the slusher drift (or dash) at about 10:10 a.m. the piece of concrete had been brought down. He made it clear that the single piece of concrete (a part of the plug which did not come down in the original blasting of the plug) was the only part of the face which he deemed a hazard.

Mr. Kelly Kramp was called as a witness by both the Secretary and Climax. His assessment of the stability of the piece of concrete differed markedly from the inspector's. Kramp testified that when he reached the finger on the morning in question he first checked for misfires from the previous round. He then barred down until he was certain any loose material had been removed. Then, he testified, he proceeded to drill for the second round. Kramp agreed that the inspectors appeared just after he had completed the drilling. He denied that he had seen any materials fall while the inspector was there, but conceded that the "handful" could have fallen and escaped his notice. He did acknowledge that some dribbling of "fines" or "sands" had occurred earlier when he was drilling. This he insisted, was common when drilling a safety plug after a first round had been fired. In this case he suggested it was caused by movement in the finger attributable to a combination of drill water, drill vibration, and drill air. He believed that most of it was small bits of muck loosened by the first blast which had come to rest on a narrow bench he had created just below the face to facilitate preparation for the setting of the first charge.

All in all, Kramp was certain that although dribbling of materials could sometimes presage a major movement in muck or ore in a finger, what he saw on March 21 was not of that sort. Rather, it was no more than what was to be anticipated from a stable face during removal of a safety plug (Tr. 291Ä292).

Mr. Kramp maintained that his later effort to dislodge the piece of cement confirmed his view. He testified that it took five minutes of vigorous barring and prying by his partner and him to loosen it. They were forced to get in behind it to destabilize it. Some of the difficulty stemmed from the fact that the piece of concrete was partly supported by the concrete forming the walls or ribs of the finger itself.

Mr. Ken Johnston, the Climax safety inspector who accompanied the federal inspectors, testified briefly for the operator. He agreed with Kramp's assessment. He could see nothing indicating that the piece of concrete was loose or unstable. He also asserted that the few "pebbles" coming down seemed "inconsequential."

The Secretary presented no evidence tending to show that Climax failed to bar down at the beginning of the shift. The inspector did suggest at one point that there had been a failure to examine and test "frequently thereafter." There is no evidence, however, to support that assertion. Similarly, Inspector Nichols acknowledged that there was no question of supervisory dereliction in performing daily visits. Thus, the only relevant part of the standard is that which declares:

> Loose ground shall be taken down or adequately supported before any work is done.

The parties' versions of the facts are not greatly divergent. The question of violation actually turns on the validity of their witnesses' opinions. Whose judgment, Inspector Nichols's or Mr. Kramp's, is entitled to acceptance? One claims the cement appeared loose; the other insisted it was not. That determination is difficult because both men are highly experienced hardrock miners, well-qualified to make such judgments.

Having weighed the matter, I conclude that the Secretary has failed to carry his ultimate burden of proof. I reach this conclusion for several reasons. Although Inspector Nichols had great familiarity with work in raises, he had no prior specific experience with the reopening of fingers which had been safety-plugged for repair. Kramp, by contrast, had 10 years of experience working in fingers, five of which involved removing safety plugs. Beyond that, the inspector reached his judgment after seeing the allegedly loose piece of concrete briefly and from a distance. Kramp not only looked at it at close range, but ultimately barred it down. Finally, the fact that it took two miners, Kramp and Doran, at least five minutes to bar down the relatively small piece of cement tends to show that it was stable. None of this would be persuasive, of course, if the truth of Kramp's testimony were somehow suspect. In this regard, I note that at the time of the hearing Kramp had not been employed by Climax for five months. If he had any reason to

slant his testimony in favor of the operator, it was not apparent on the record. I accept Mr. Kramp's view that the cement was stable. The citation will be vacated.

WEST 85Ä100ÄRM, Citation No. 2356414

This citation concerns the ladder arrangement used by Mr. Kramp to reach the concrete plug in the finger discussed in the previous citation. Inspector Nichols observed that miners had used two six-foot folding stepladders. These ladders remained in the closed or folded position. Mr. Kramp had leaned them against the concrete side of the finger, which rose from the floor at a 45Ädegree angle. The feet of the rear legs of the lower ladder rested on the floor. The feet of the upper ladder were spaced 46 inches above the top step of the lower ladder. They rested on a 4 by 4 inch wooden brace. Neither ladder was fastened to the finger by any means. (See sketch, government exhibit 8.)

Inspector Nichols believed this arrangement violated the standard published at 30 C.F.R. 57.11Ä1.(FOOTNOTE 5) That standard provides:

> Safe means of access shall be provided and maintained to all working places.

In his testimony, Nichols expressed a number of concerns about the safety of the ladders. Chief among these were the following: that the ladders were designed to be self-standing, not to be leaned; that unsecured, the ladders were unstable and, under loading, could slip to one side or the other, causing a climbing miner to fall; that the top step of the lower ladder was cracked; and that the 46Äinch gap between ladders, where no steps were provided, created a separate and significant hazard.

He also maintained that the necessity for Mr. Kramp to carry a 125Äpound drill up the ladder increased the overall hazards. The proper practice, the inspector claimed, was to use a single "miner's ladder" to reach the workplace. He contended that the folded stepladder, resting on its back legs alone, was inherently less stable than the miner's ladder. This was so, he testified, because the steps at 12Äinch intervals between the heavy side rails of the single ladder lent those rails more rigidity than the slender back legs of the stepladder. Only the front legs of the stepladder were meant to bear the weight of a climber, while the back legs were designed merely to support the ladder itself.

The witnesses for Climax disagreed with nearly all of the inspector's contentions. Mr. Kramp, who was using the ladders, believed they were safer than a miner's ladder. He pointed out that they were wider at the base than a miner's ladder and should therefore be steadier. He also testified that the steps on the ladders used were wider and angled differently from those on miners' ladders. This, he said, gave the stepladders a superior footing when the ladder had to be leaned at a 45Ädegree angle, and allowed the climber more toe space because of the offset provided by the rear legs. He further insisted that the top step was sound when he ascended the ladder; it cracked, he said, when he dropped the drill leg on it as he started to descend.

The Climax safety manager, Mr. Larkin, testified that he could see no problem with the ladder arrangement.

Counsel for Climax points out that since the standard prescribes no specific measures to achieve "safe access," safe compliance must be gauged by whether the access used by the company would inspire corrective action in a " . . . reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry . . . . " Alabama ByÄProducts Corporation, 4 FMSHRC 2128, 2129 (December, 1982).

The test is the correct one. I must conclude, however, that a reasonably prudent person confronted with the ladder arrangement used by Climax would judge it unsafe. I do not reach this conclusion based upon the inspector's concerns about the inherent design differences between folding stepladders and miners' ladders. The inspector's testimony in that regard was weakened by his admission that had the safety of the lower ladder been the only issue, he would have found it satisfactory except for the broken top step. (Tr. 307Ä308, 321, 324.)

The hazard revealed by the evidence was the use of the two ladders with a 46Äinch gap between the two. Mr. Kramp maintained that he could easily and safely climb the lower ladder with a 125Äpound jackleg drill over his shoulder, sling the drill off his shoulder and onto the 4 by 4 brace supporting the second ladder, and then somehow pull himself up onto the brace where he would stand to drill. This testimony is simply not credible. One way or another, he had to climb the last 46 inches of a 45Ädegree concrete wall without steps and without ladder rails to grasp to balance himself. The manuever would be hazardous without a heavy drill being carried. With the drill, it was even more dangerous. Because of the gap between the upper and lower ladders, the standard was clearly violated.

Further, I conclude that the violation was "significant and substantial," as alleged. Had a miner, particularly one burdened with a 125Äpound drill, fallen while ascending or descending the makeshift ladder arrangement, the possibility of a reasonably serious injury was all too apparent. The reasonable possibility of such an injury's occurring is likewise manifest.

The parties have stipulated that for those violations which are found to exist, and which are also found to be "significant and substantial," the civil penalties proposed by the Secretary are appropriate and should be imposed. The stipulation appears reasonable. Consequently, a civil penalty of $98.00 will be assessed.

CONCLUSIONS OF LAW

Based upon the entire record herein, and in accordance with the determinations of fact contained in the narrative portions of this decision, the following conclusions of law are made:

(1) The Commission has jurisdiction to decide this consolidated matter.

(2) Climax violated the mandatory safety standard published at 30 C.F.R. 57.11Ä12 as alleged in citation number 2358524.

(3) The violation was not "significant and substantial" within the meaning of the Act.

(4) The reasonable and appropriate penalty for the violation is $20.00.

(5) Climax violated the mandatory safety standard published at 30 C.F.R. 57.11Ä12 as alleged in citation number 2358525.

(6) The violation was not "significant and substantial" within the meaning of the Act.

(7) The reasonable and appropriate penalty for the violation is $20.00.

(8) Climax did not violate the mandatory safety standard published at 30 C.F.R. 57.3Ä22 as alleged in citation number 2356413.

(9) Climax violated the mandatory safety standard published at 30 C.F.R. 57.11Ä1 as alleged in citation number 2356414.

(10) The violation was "significant and substantial" within the meaning of the Act.

(11) The reasonable and appropriate penalty for the violation is $98.00.

ORDER

Accordingly, citations numbered 2358524 and 2358525 are ORDERED affirmed as non-significant and substantial; citation number 2356413 is ORDERED vacated; citation number 2356414 is ORDERED affirmed as significant and substantial; and Climax is ORDERED to pay total civil penalties of $138.00 to the Secretary within 30 days of the date of this decision.

John A. Carlson
Administrative Law Judge

1 Originally, Docket No. WEST 85Ä98ÄRM was included in the consolidation. That contest was withdrawn by Climax at the hearing, however, and was severed for disposition by separate order issued on January 21, 1986.

2 The standard is now re-codified as 30 C.F.R. 57.11012.

3 The standard does appear to be aimed at hazards where a worker may fall through (or partly through) a hole. It does not, that is to say, encompass mere tripping over objects or at uneven spots.

4 Now published, without change, as 30 C.F.R. 57.3022.

5 Now re-codified as 30 C.F.R. 57.11001.