CCASE:
SOL (MSHA) V. ROY GLENN & CLIMAX MOLYBDENUM
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
July 17, 1984
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)

Docket No. WEST 80-158-M

v.

ROY GLENN, Employed by, and
Agent of CLIMAX MOLYBDENUM
COMPANY

DECISION

This is a civil penalty case brought under section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 820(c). 1/ Roy Glenn, a shift boss employed by Climax Molybdenum Company, seeks review of the administrative law judge's finding that he violated section 110(c) of the Mine Act by knowingly authorizing a violation of 30 C.F.R. $ 57.15-5. 4 FMSHRC 13 (January 1982)(ALJ). We granted Glenn's petition for discretionary review and heard oral argument. For the reasons that follow, we reverse the decision of the judge.

At the time of the events at issue, Glenn worked as a shift boss supervising a crew of miners in the Climax mill and crusher where molybdenum ore is processed. Glenn's crew consisted of 10 miners including Chris Martinez, a first class welder, Ron Robinson, a first class mechanic, and John Payne, a mechanic welder. On January 5, 1979, Glenn's

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1/ Section 110(c) provides:

Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in s decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties,

fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

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crew was engaged in welding a new valve onto an oxygen line. Glenn instructed Payne to open and bleed all the existing valves on the line. Martinez and Robinson were to weld the new valve onto the line. To do this it was necessary to work from an adjacent girder which was approximately 20-21 inches wide, 5-1/2 inches thick and 30 feet long with a vertical upright in the middle. After assigning the tasks to the crew, Glenn went to the back of the crusher and began checking each of the existing oxygen valves to be certain they had been opened. After checking the valves, Glenn walked to a place where he could observe the girder.

At the time of assignment, there were two ways for the miners to reach the workplace on the girder. It could be reached by using a 20 foot extension ladder which was approximately 40-50 feet away. (Robinson had used the ladder in the past to reach the end of the girder where the welding operation was to be performed.) Another means of reaching the girder was to ascend a staircase, climb onto the girder and walk across it. Glenn had told his crew to take their safety belts and lines with them, but he gave them no precise instructions regarding how to reach the workplace on the girder. The men were experienced and had worked on girders many times. On this occasion, Martinez and Robinson walked across the girder, with the safety belts and lines unsecured, rather than using the ladder. Upon reaching their workplace on the girder, they secured their safety belts and lines. Glenn did not return from checking the valves and observe them until after they had reached the workplace and tied-off. Despite the fact that Payne had been assigned a task different from the task of Robinson and Martinez, on his own he decided to assist them in their work. Thus, Payne climbed the stairway and began to walk across the girder without his safety line being hooked up. As Payne was walking across the girder, Glenn saw him and waved him down with a flashlight. At this time, an MSHA inspection team arrived. The MSHA inspector thereafter issued a citation alleging a violation of 30 C.F.R. $ 57.15-5 . 2/ The citation - stated:

Three welders were observed working on an oxygen line about 30 feet off the ground. One of them was observed walking a distance of about 30 feet on a steel girder without a safety line hooked up. Roy Glenn, shift boss, was directing the work from below. Crusher Building No. 2.

2/ 30 C.F.R. $ 57.15-5 provides:

Mandatory. Safety belts and lines shall be worn when

men work where there is danger of falling; a second person shall tend the lifeline when bins, tanks, or other dangerous areas are entered.

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The cited condition was abated by removing Robinson and Martinez from the girder with a cherry picker obtained from another department of the mine. 3/ (Apparently Payne had walked back across the girder and down the stairway.) On February 22, 1980, as a result of an MSHA special investigation, the Secretary filed an action against Glenn under section 110(c) of the Mine Act for knowingly authorizing, ordering, or carrying out the cited violation of 30 C.F.R. $ 57.15-5. Glenn contacted the Secretary's action and a hearing was held.

The administrative law judge found that insofar as the actions of Payne were concerned, Glenn had not knowingly authorized, ordered, or carried out a violation of the standard. The Secretary has not challenged this aspect of the judge's decision. As to Robinson and Martinez, the judge found that "there is no evidence to support MSHA's allegation that Glenn himself carried out the violation or directly ordered the two miners to walk across the girder without the benefit of a safety belt." 4 FMSHRC at 20. We agree. We also agree with his further finding that Glenn did not "presume" that the miners would walk across the girder. 4 FMSHRC at 21.

Nevertheless, the judge proceeded to find that Glenn violated section 110(c) of the Act because he "indirectly authorized the violation." Id. We hold that the judge's finding of a violation is incorrect ass a matter of law and, further, that a finding of corporate agent liability cannot be sustained on the facts of this case even when the appropriate legal test is applied.

Regarding the statutory language of section 110(c), we have held previously that the proper legal inquiry for purposes of determining corporate agent liability is whether the corporate agent "knew or had reason to know" of a violative condition. Secretary v. Kenny Richardson, 3 FMSHRC 8, 16 (January 1981), aff'd 689 F.2d 623 (6th Cir. 1982), cert. denied, 77 L.Ed. 2d (1983). There, we stated;

> If a person in a position to protect safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

3/ The abatement notice stated:

> Lift truck was brought in to take the other two welders down in a safe way. The work was completed with the use of the lift truck.

A penalty proceeding brought against the corporate operator for the violation was settled by the parties. FMSHRC Docket No. WEST 79-375-M.

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In Kenny Richardson the underlying violation of a mandatory standard existed at the time that the section 110(c) corporate agent violation occurred (use of unsafe equipment). Here, however, Robinson and Martinez had not yet violated the involved mandatory safety standard by walking the girder at the time of Glenn's alleged violation of section 110(c).

We now apply our holding in Kenny Richardson to those situations where, as here, a violation of a mandatory standard does not exist at the time of the corporate agent's failure to act, but occurs subsequent to that failure. Accordingly, we hold that a corporate agent in a position to protect employee safety and health has acted "knowingly", in violation of section 110(c) when, based upon facts available to him, he either knew or had reason to know that a violative condition or conduct would occur, but he failed to take appropriate preventive steps. To knowingly ignore that work will be performed in violation of an applicable standard would be to reward a see-no-evil approach to mine safety, contrary to the strictures of the Mine Act.

Our decision is supported by the legislative history of the 1969 Coal Act, in which Congress first set forth the basis for establishing personal liability for agents of corporate operators. The House Committee on Education and Labor stated:

> The Committee expended considerable time in discussing the role of an agent of a corporate operator and the extent to which he should be penalized and punished for his violation of the act....
>
> ... The Committee chose to qualify the agent as one who could be penalized and punished for violations, because it did not want to break the chain of responsibility for such violations after penetrating the corporate shield.

H.R. Rep. No. 563, 91st Cong., 2d Sess. 11-12 (1969), reprinted in Legislative History of Federal Coal Mine Health and Safety Act, at 568, 569 (1970).

In passing the 1977 Mine Act, Congress evidenced its concern over the continuing high rates of preventable death and injury. Quoting a study by a Special Mine Safety Board appointed by the Secretary of the Interior, Congress observed:

> On the basis of this analysis, 50.7 percent of the fatal injuries were classified as resulting "from

circumstances over which the workmen had no control, but which were within the scope and range of supervisory responsibility." That is: approximately half of the 270 men killed were victims of inadequate supervision, failure to provide safety devices, ~1587 defective equipment, collapses of roof which supervisors permitted to be unsupported, inadequate ventilation, and other hazardous environmental conditions reasonably within the power of manage ment to prevent. (emphasis added)

H.R. Rep. No. 312, 95th Cong., 1st Sess. 4 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, at 360 (1977).

Consistent with this expressed legislative intent, the Commission held in Kenny Richardson that a supervisor's blind acquiescence in unsafe working conditions would not be tolerated. Onsite supervisors were put on notice by our decision that they could not close their eyes to violations, and then assert lack of responsibility for those violations because of self-induced ignorance. Our decision here today is buttressed by the same concerns and principles.

Under Kenny Richardson, the question is whether, given the facts found in this case, Glenn either "knew or had reason to know" that Robinson and Martinez would, in fact, walk the girder instead of climbing the ladder and thereby violate the standard.

We answer this question in the negative. The judge specifically found, and we agree, that there is no evidence that Glenn "carried out the violation or directly ordered the miners to walk across the girder without the benefit of a safety belt." 4 FMSHRC at 20. Nor does the record establish that Glenn indirectly authorized the violation. Glenn instructed Robinson and Martinez to take their safety belts and lines with them in working on the oxygen line. 4 FMSHRC at 17; Tr. 241. Glenn did not observe either man actually cross the girder. 4 FMSHRC at 20; Tr. 289. Glenn did not presume that Robinson and Martinez would use the girder. 4 FMSHRC at 21. Glenn relied on Robinson and Martinez to complete their assigned task safely; both were experienced and highly skilled miners who had worked on a girder many times prior to the incident in question. 4 FMSHRC at 20; Tr. 263, 269, 270-71. Robinson had used the ladder on occasion to get up to the girder. 4 FMSHRC at 17. When Robinson and Martinez crossed the girder, Glenn was busy ensuring their safety otherwise by checking to insure the oxygen line valves were shut off; Glenn did not want the crew to cut into a pressurized oxygen line. 4 FMSHRC at 16; Tr. at 116, 272-73. 4/

The findings of fact by the judge as to what Glenn had "reason to

know" when he assigned Robinson and Martinez the task of welding the oxygen line do not support a legal conclusion that a violation of section 110(c) occurred. The judge found only that Glenn had "reason

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4/ In 21 years of Glenn's employment by Climax, neither he nor any member of any crew that he had supervised had ever lost time from work as a result of an accident. Tr. 283, 285.

to know" that the two miners "might" use the girder without the use of safety belts and that, therefore, he had "reason to know" of a "possible violative condition because the men "might or "could" walk across the girder and forego use of the ladder. 4 FMSHRC at 20. As a practical matter, supervisors will always have "reason to know" that miners might" perform tasks in an unsafe manner. This degree of knowledge, accurately phrased by the judge in the subjunctive mood, is too contingent and hypothetical to be legally sufficient under our test enunciated above that a supervisor can be held personally responsible under section 110(c) "when, based upon the facts available to him, he either knew or had reason to know that a violative condition or conduct could occur, but he failed to take appropriate preventive steps." Moreover, for the reasons above, we reject the judge's legal conclusion that Glenn violated section 110(c) by not instructing the miners to use the ladder "because walking across the girder was at least as likely a means of getting to the oxygen line." 4 FMSHRC at 21.

Before personal liability under section 110(c) can be imposed on an operator's agent for "knowingly" authorizing, ordering, or carrying out a violation, the Secretary's proof must rise above mere assertion that, at the time of assignment, an assigned task could have been performed by the miners in an unsafe as well as a safe manner. Adoption of this rationale could mean that, in every instance in which a miner engages in violative conduct, an operator's agent could be held personally liable under section 110(c) for failing to anticipate the miner's unsafe actions and not giving specific instructions to such miner, at the time of assignment, to avoid all of the hazardous approaches to a task that could be followed. We cannot accept as probative evidence to fill this void in the record, the assertion made by counsel for the Secretary at oral argument that "any reasonable man should have known at that time that given the situation, .. [the miners] clearly would take the opposite course to get there. Oral Arg. Tr. 36. 5/

In sum, although we agree with the judge's statement that agents of corporate operators have a duty to prevent violations that they have reason to know will occur, we hold that in this case Glenn, based upon the facts available to him at the time of the work assignment, did not

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5/ Although the Secretary argued in his brief that it is "obvious that walking on girders without a safety belt is a common practice at Climax," he disavowed that position at oral argument and agreed that there is no record evidence of such a practice. Oral Arg. Tr. at 46.

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know, or have reason to know, that Robinson and Martinez would violate the standard. Accordingly, the judge's decision is reversed, the penalty assessment is vacated and this proceeding is dismissed. 6/

Rosemary M. Collyer, Chairman

L. Clair Nelson, Commissioner

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6/ In light of this disposition we need not reach the other issues raised by the parties.

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Commissioner Jestrab dissenting:

I respectfully dissent. The statute provides in part:

> Whenever a corporate operator violates a mandatory ... safety standard ... any ... agent of such corporation who knowingly authorized ... such violation ... shall be subject to the same civil penalties.... 30 U.S.C. $ 820(c).

Here the experienced Administrative Law Judge weighed the evidence presented and found that the agent, Roy Glenn, knowingly authorized a violation of the standard cited and he held the agent liable. I most respectfully submit to my esteemed colleagues that there is substantial evidence to support the finding.

The work to be performed was a welding job on a girder over 20 feet above the floor. Tr. 22, 263. There were two ways to reach the work-place. Tr. 237. One way was to use a staircase and then walk across the girder, which had no siderails or lines to which one could tie off a safety belt. Tr. 24, 237. The other way was by use of a nearby ladder. Tr. 237, 289. The former route was selected by the workmen and thus neither workman could use his safety belt. Tr. 230, 231. The inspector cited the employer for a violation of 30 C.F.R. $ 57.15-5, which provides:

> Mandatory. Safety belts and lines shall be worn when there is a danger of falling....

MSHA also cited the agent, Glenn, under 30 U.S.C. $ 820(c) above. The question here is whether the agent, Roy Glenn, knowingly authorized the violation by the employer. Glenn knew of the two alternatives for reaching the site when he assigned the workman to the welding task. Tr. 289. Glenn claimed he did not know how the workmen intended to get to the workplace. See e.g., Tr. 269, 292. Indeed, he suggested that it was of no concern to him how they

proceeded to the worksite. Id. But the statute imposes upon him as an agent the duty not to authorize a violation of the standard. He is charged with knowing that which was clearly before him. His omission to eliminate the route across the girder which violated the standard, or to bring it into compliance with handrails or lines, was a knowing authorization implied in fact for the workmen and hence the corporate operator to violate the standard. There was no showing at the hearing by the agent, Glenn, that he had any expectation that the ladder would be used or if used that it would have complied with applicable safety regulations.

I would affirm the order.

Frank F. Jestrab, Commmissioner

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Commissioner Lawson dissenting:

Despite the rhetorical flourishes and obligatory obeisance to precedent and legislative history, today the Commission majority vitiates the principles established by Kenny Richardson. My colleagues err in concluding that the findings of the judge below are legally insufficient to support a finding of corporate agent liability under section 110(c) of the Mine Act. The Mine Act places primary responsibility for maintaining safe and healthful working conditions in our nation's mines on mine operators and their corporate agents. Sections 2(e) and 110(c). In Kenny Richardson the Commission held that a supervisor, as an agent of management, is in a position to protect the safety and health of individual miners and has a statutory duty to take affirmative action to prevent violative conduct or conditions. By their decision in this case, my colleagues have permitted corporate agents to abdicate that responsibility and permit individual miners the choice of performing their work in an unsafe manner, regardless of the hazard to them and their fellow miners. This result is inconsistent with the Mine Act's preventive goals and enforcement scheme. If through adequate supervision a violation can be prevented, it is contrary to the purpose of the Act to permit this shift of statutory responsibility.

The legislative history reflects, as the majority acknowledges, that Congress was particularly concerned over the high number of mining injuries and fatalities that resulted from inadequate supervision and hazardous workplace "conditions reasonably within the power of management to prevent" (emphasis added). H. R. Rep. No. 312, 95th Cong., 2d Sess. 4 (1977), reprinted in Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Cong., 2d Sess. 357, 360 (1978). The key is prevention--management's duty to stop violations before they occur. This requires the exercise of forethought by those responsible for maintaining safety in the mines, and is a duty that is essential to achieve the statutory purpose.

The majority in this case fails to erect any affirmative standard or framework against which one is to measure, not whether or not the admittedly violative conduct might, or could occur, but indeed whether it "would." Determining whether a violation "would" occur in the absence of supervisory action is an exercise more suited to retrospective application than to prospective intervention. If intervention is not demanded of an agent when unsafe conduct is "at least as likely" as safe conduct, but is to be required only when a violation is imminent, or has already occurred the Act's protections would indeed be hollow. Under the majority's rationale, if the facts in this case had revealed that the miners were proceeding into an area of unsupported roof, although an alternate route was available, no supervisory duty to intervene would arise other than a last minute tackle by their supervisor, until they had actually entered the hazardous area. One searches the statute and legislative history in vain for support for such a standard.

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The judge below found that Glenn had "sufficient information to give him reason to know of a possible violative condition." 4 FMSHRC 13, 20. He concluded that Glenn had a duty to instruct the miners he had ordered to go up on this girder to use the ladder, finding that walking across the girder was at least as likely a means of getting to the oxygen lines as using the ladder." 4 FMSHRC at 21. Substantial evidence, including Glenn's own uncontroverted testimony, supports the judge's finding.

Glenn was aware of the construction of the girder, knew that there were no handrails thereon, nor cable for attachment of safety lines (Tr. 286-7). 1/ The ladder, presented as the alternative means of access, 2/ was located 40 to 50 feet distant from the job site, "up on another deck" (Tr. 286). Glenn was not only unaware of whether the ladder had been used previously to reach the girder (Tr. 286), but testified that he "did not think" about how the miners would reach the girder. According to Glenn, the miners "had two choices: they could have walked across or they could have got the ladder" (Tr. 289). He did not even believe that walking this girder, situated twenty feet above a concrete floor, presented a safety or falling hazard, despite the prohibition of the standard, of which Glenn was aware (Tr. 295). It is also undisputed that all three miners under Glenn's supervision had not used the ladder--nor safety belts or lines--but had traversed this girder without protection on the day in question. Slip op. at 2. There is no dispute as to the propriety of Payne's attempting to assist his fellow miners in the performance of the task at hand. In fact, the miners were waiting on the girder for Payne to tell them when the oxygen line had been bled and welding could begin (Tr. 130, 133). Work on this girder had been undertaken twice prior to the date

of this violation, and Glenn did not know how the miners gained access to their work station on those occasions (Tr. 251, 271, 286, 293.) Finally, and perhaps of greatest significance, if Glenn had seen miner Robinson walking across the girder, he probably would not have stopped him, "because I have seen him walk other things" (Tr. 297).

1/ It is true, as the majority states, that Glenn told his crew to take their safety belts and lines with them. However, it is also true, as Glenn acknowledged, that there was nothing to attach them to until the crew reached the assigned work area on the girder, 28 to 30 feet from the staircase.

2/ The very existence of a ladder at this mine capable of providing access to the girder is questionable. The ladder itself was, according to Glenn, "used for ventilation purposes," not for this girder. (Tr. 269.) It is most unlikely that a 20-foot extension ladder, which simple observation would reveal to have a maximum siderail extension of 17 feet, would reach a 5-1/2 inch thick girder that is 20 feet 2 inches above the floor, even if (1) the ladder was positioned vertically rather than at the necessary angle for stability, and (2) there was something to lean it against other than the vertical support beam located 14 feet away from the work station involved in this case. See 30 C.F.R. $$ 57.11-4. It is significant that after arrival of the inspection party, rather than using this ladder to remove Robinson and Martinez from the girder, Glenn had a cable strung along the girder, upon instruction from his superior, and then personally went and obtained a cherry picker to bring the two miners down. (Tr. 280-82, 287.)

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The judge below phrased Glenn's responsibility in terms of "indirect authorization." Read in context, this does not appear to differ from constructive "knowledge or reason to know," under the Kenny Richardson test, that these miners would utilize the girder to reach their work site. Indeed, it would appear that Glenn had actual knowledge of at least Robinson's earlier noncompliance with the safety standard, and had through inaction condoned such in the past. (Tr. 297.) Failing to correct an unsafe practice which is known is indistinguishable from authorizing that practice to continue. Here, there was a "high probability of the existence of the fact in question," U.S. v. Jewell, 532 F.2d 697, 700, (9th Cir.), cert. denied. 426 U.S. 9-1 (1967): walking the girder without utilizing safety belts. Knowledge by Glenn of the violation of this standard by a member of his crew is thus properly imputable to him. The facts in this case do not present the situation, so alarming to the majority, in which a supervisor fails to anticipate "all of the hazardous approaches to a task that could be followed." (slip op.

at 6). It is thus unnecessary to determine the outer limits of an agent's liability under some factual construct not presented by this record. The judge's finding that use of the girder to gain access to the work area was at least as likely as use of the--it would appear inadequate--ladder, is no more than a restatement of Glenn's own view of the alternatives presented. Glenn, as the judge found, did not consider it to be unsafe for Robinson and Martinez to walk across the girder without safety belts, preferring to rely on their opinion of the hazard involved, rather than insisting that there be compliance with the regulation. (Tr. 295, 4 FMSHRC at 20). This is, simply put, not only to ignore, but to condone, unsafe and violative work practices by knowingly allowing the individual miners that option. The test under Kenny Richardson is whether Glenn had information that would lead a person exercising reasonable care, who is responsible for the proper performance by miners of their assigned duties and is in a position to forestall safety and health hazards, to be aware of the existence of a violative condition, and whether he failed to act on the basis of that information. 3 FMSHRC at 16. It is abundantly clear from this record that Glenn should have known with the exercise of reasonable, even minimal, diligence of the hazardous conduct involved in this case, as the judge below found. See Austin Building Co., v. OSHRC, 647 F.2d 1063, 1067-68 (lOth Cir. 1981). To ignore work performed or to be performed, or not to think about how that work is to be done (Tr. 289), in violation of an admittedly applicable standard, is to reward the type of see-no-evil approach to mine safety that the majority claims to disavow. The judge's finding that Glenn had sufficient information to give him reason to know of the existence of a violative condition and a duty to act on the basis of that information is the relevant determination under Richardson, and is supported by substantial evidence. 3/

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3/ To the extent that any doubt may have existed as to the degree of Glenn's negligence and responsibility, the response of the judge below, which was to reduce the proposed penalty from $500.00 to $40.00, would appear to be both equitable and eminently reasonably. 4 FMSHRC at 21, 22.

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For the reasons set forth, I would affirm the decision and order of the judge. 4/

I therefore join with Commissioner Jestrab and dissent.

A. E. Lawson, Commissioner

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4/ The judge's rulings on the constitutional and procedural issues raised below and renewed before the Commission are correct, for the reasons given.

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Distribution
W. Michael Hackett, Esq.
1310 South Denver
Tulsa, Oklahoma 74119
Michael McCord, Esq.
Anna L. Wolgast, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203
Edward H. Sherman, Esq.
Sherman & Sherman, P.C.
Suite 475, Capital Life Center
16th at Grant Street
Denver, Colorado 80203
Richard W. Manning, Esq.
Climax Molybdenum Company
1707 Cole Boulevard
Golden, Colorado 80401
Administrative Law Judge John Morris
Federal Mine Safety & Health Review Commission
333 West Colfax Ave., Suite 400
Denver, Colorado 80204