

CCASE:

CLIMAX MOLYBDENUM V. MSHA

DDATE:

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TTEXT:

FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION  
WASHINGTON, D.C.

September 21, 1979

CLIMAX MOLYBDENUM COMPANY Docket No, DENV 79-3-M  
a division of AMAX INC. Docket No. DENV 79-4-M

Docket No. DENV 79-5-M

Docket No. DENV 79-6-M

v.

Docket No. DENV 79-7-M

Docket No. DENV 79-8-M

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

Docket No. DENV 79-9-M

Docket No. DENV 79-10-M

Docket No. DENV 79-11-M

Docket No. DENV 79-12-M

Docket No. DENV 79-13-M

#### DECISION

These proceedings arose from applications filed by Climax Molybdenum Company (Climax) for review of citations issued for alleged violations of 30 CFR 57.5-5, pertaining to dust exposure.

On November 9, 1978, the administrative law judge issued an order to Climax to provide information and clarification" concerning its applications for review. Climax was ordered to: (1) provide legible copies of the citations; (2) advise the judge whether the citations had been abated; and (3) inform the judge whether it was seeking relief by way of a review on the merits of abated citations. The order specified no date for reply.

On January 10, 1979, the judge dismissed the applications for review for Climax's failure to comply with his November 9th order. As of that date, 62 days after the judge issued his order, Climax had not responded in any manner to the judge. On January 11, 1979, before learning of the judge's dismissal, Climax complied with the judge's order. In addition, Climax also filed a motion and brief requesting the judge to rule on the question of "immediate' review of unabated citations or to certify the issue for interlocutory review to the Commission. On February 21, the Commission granted Climax's petition for discretionary review of the judge's order of dismissal. On review, Climax argues that the judge's dismissal of its applications for review was an abuse of discretion. Climax emphasizes the absence in the order of a time limit for response, that it did comply with the order (albeit one day after the judge's dismissal order), that its time for response was reasonable in light of the

complex brief it also filed on the issue of immediate review, that dismissing the cases was a disproportionate reaction to the facts, and that the judge elevated the need for a prompt determination of the issues over the need for a just determination.

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We are not impressed with Climax's assertions that its delay in response was, in part, necessitated by its efforts to brief the jurisdictional questions presented by its applications. The judge's order requested information and clarification; it did not request nor require an extensive brief.

However, an order which lacks a date for response gives no guidance to its recipients for the timing of their compliance and it thereby promotes controversies such as the one before us. Because the lack of a date certain for compliance may have significantly contributed to Climax's lack of prompt response to the judge's order, we find that the dismissal of these applications for review in this instance was an unduly harsh sanction and therefore an abuse of the judge's discretion. 1/ Accordingly, the decision of the judge is reversed and the cases are remanded for further proceedings consistent with this decision.

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1/ At the time in question, the Commission's interim procedural rules did not require the judge to issue a show cause order prior to dismissing a case seeking review of a citation or withdrawal order for failure to comply with a prehearing order of the judge. The Commission's permanent procedural rules do provide for a Prior show cause proceeding. See 44 Fed. Reg. 38,232 (1979) (to be codified in 29 CFR. §2700.63). Thus, in future cases, an opportunity for presentation and consideration of misunderstandings such as this one is available.