

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 19, 2021

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

v.

RIVER CITY STONE-DIV/MATHY
CONSTRUCTION CO,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. LAKE 2021-0145
A.C. No. 47-03196-534597

Mine: Plant #53

ORDER CERTIFYING CASE FOR INTERLOCUTORY REVIEW

Before: Judge Young

This case is before me on a Petition for the Assessment of Civil Penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(d). I denied a motion to approve settlement of this docket, and four similarly situated proceedings.¹ The Secretary seeks interlocutory review of all five proceedings, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76.

This docket includes two citations issued pursuant to Section 104(a) of the Mine Act. On October 6, 2021, the Secretary submitted a motion to dismiss civil penalty proceeding. The motion proposed vacating one citation, while leaving the other undisturbed and reducing the total penalty from \$250.00 to \$125.00. *See S. Mot. to Dismiss Civ. Penalty Proc. at 1 (Oct. 6, 2021)*. Because the motion appears to vacate one contested citation in return for agreement to pay the other, I treat it as a motion to approve settlement.

The question certified for review and my position have been clearly expressed in the Order Certifying Case for Interlocutory Review for Docket No. WEVA 2021-0294 (Appendix C). As in each associated docket, the Secretary chose not to provide information supporting the vacatur of the contested citations or certify that vacatur was not contingent upon resolution of the remaining citations. Instead, he invoked unreviewable discretion under *RBK Construction, Inc.*²

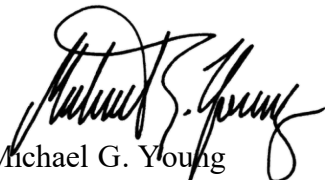
¹ The others are Docket Nos. WEVA 2021-0294, YORK 2021-0023, SE 2021-0134, and SE 2021-0112, all of which were similarly stayed pending certification. *See Unpublished Order at 1 n.1 (Oct. 19, 2021) (Appendix B)*.

² “In an exercise of his prosecutorial discretion as previously recognized by the Federal Mine Safety and Health Review Commission in *RBK Construction*, 15 FMSHRC 2099 (October

See 15 FMSHRC 2099, 2101 (Oct. 1993) (“*RBK*”). I found that *RBK* does not control the resolution of this issue, and that the citations proposed to be vacated have been contested before the Commission and are subject to my approval. See Unpublished Order at 3 (Oct. 8, 2021) (Appendix A).

Under Commission Procedural Rule 76, 29 C.F.R. § 2700.76, I certify that this interlocutory ruling involves a controlling question of law—whether the Secretary has unreviewable discretion to vacate a contested citation without the Commission’s approval—and that immediate review will materially advance the final disposition of the proceeding.

For the reasons stated herein, and in my order certifying interlocutory review in WEVA 2021-0294, this interlocutory ruling is hereby **CERTIFIED**.



Michael G. Young
Administrative Law Judge

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Attachments:

Appendix A: Order Denying Motion to Approve Settlement, Docket No. LAKE 2021-0145 (Oct. 8, 2021)

Appendix B: Order Staying Proceedings, Docket No. LAKE 2021-0145 (Oct. 19, 2021)

Appendix C: Order Certifying Case for Interlocutory Review, Docket No. WEVA 2021-0294 (November 19, 2021)

1993), the Secretary has decided to vacate Section 104(a) Citation 9482296.” S. Mot. at 1.