

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 1400
WASHINGTON, DC 20004-1710
TELEPHONE: 202 434-9987 / FAX 202 434-9949

November 19, 2021

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

v.

GREENBRIER MINERALS, LLC,
Respondent

CIVIL PENALTY PROCEEDING

Docket No. WEVA 2021-0294
A.C. No. 46-09563-532369

Mine: Eagle No. 1 Mine

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,² pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76.

I agree with the Secretary that this interlocutory ruling involves a controlling question of law, and that immediate review will materially advance the final disposition of this proceeding and the other four similar cases. I certify for review this question: Whether the Secretary has unreviewable discretion to vacate a contested citation without the Commission’s approval.

This docket includes six citations issued pursuant to Section 104(a) of the Mine Act. On August 5, 2021, the Secretary submitted a motion to approve settlement. The motion proposed vacating two citations, leaving the remaining four citations undisturbed and reducing the total penalty from \$1,960.00 to \$1,213.00. *See* S. Mot. to Approve Settlement at 2 (Aug. 5, 2021). In support of these modifications, the Secretary offered only the following:

¹ The others are Docket Nos. YORK 2021-0023, LAKE 2021-0145, 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 *See* Unpublished Order at 1 n.1 (Oct. 19, 2021) (“Stay Order”).

² I deferred to the Secretary which case to submit for interlocutory review. *See* Stay Order at 2 n.2. I suggested that it was not necessary to certify all five cases. The Secretary has elected to petition for review of all of them. The other four will be certified in separate orders. I infer from his choice that there may be distinctions in one or more of the other cases that the Secretary wishes to bring to the attention of the Commission.

The Secretary has determined that this violation should be vacated in an exercise of his prosecutorial discretion recognized by the Commission in *RBK Construction, Inc.*, 15 FMSHRC 2099 (October 1993).

Id. at 3.³

I denied approval of the settlement—specifying that the asserted unreviewable discretion is contrary to the Mine Act’s requirement that the Commission approve all settlements, as these vacatur were proposed within a motion to approve settlement. *See* Unpublished Order at 1 (Sept. 30, 2021) (“Order”).⁴ The Order, however, provided possible resolution—either a certification or a detailed explanation—rather than Commission review. *See id.* at 3.⁵

In a phone conference on October 14, 2021, regarding a similarly situated docket—YORK 2021-0023—the Solicitor maintained her reliance on the Secretary’s asserted authority to vacate citations without the approval of a Commission Judge, even when done as part of a settlement proposal.⁶ Parties agreed that interlocutory review was an appropriate means of resolution, and the undersigned agreed to grant certification. *See* Stay Order at 2.

Section 110(k) of the Mine Act provides, “No proposed penalty which has been contested before the Commission under section 105(a) shall be compromised, mitigated, or settled except with the approval of the Commission.” 30 U.S.C. § 820(k). The standard for Commission evaluation is whether the proposed settlement is “fair, reasonable, appropriate under the facts, and protects the public interest.” *Am. Coal Co.*, 40 FMSHRC 983, 987 (Aug. 2018).

To effectively apply this standard, Commission Judges must have “sufficient information” upon which to base this evaluation. *Id.* (quoting *Black Beauty Coal Co.*, 34 FMSHRC 1856, 1862 (Aug. 2012)); *see also* 29 C.F.R. § 2700.31(g) (“Any order by the Judge approving a settlement shall set forth the reasons for approval and shall be supported by the record.”).

The Secretary here has chosen not to provide information supporting the vacatur of contested citations within a motion to approve settlement, instead invoking unreviewable

³ This identical language, provided as the only explanation for vacatur, was used for both citations in paragraphs 6(A) and 6(B) to “assist the Commission in evaluating whether the proposed penalty reductions are fair, reasonable, adequate under the facts, and in the public interest.” S. Mot. at 2–3.

⁴ The Order, and the Stay Order, are attached as Appendices “A” and “B” and incorporated in this order by reference.

⁵ The same offer was provided before the Secretary’s request that the undersigned reduce the denial to a formal order. *See* E-mail from Kirsten Brown, Attorney Advisor to Administrative Law Judge Michael G. Young, to MSHA Conference and Litigation Representative Donald R. Hayhurst, Jr. (Aug. 26, 2021, 7:29 PM EDT).

⁶ The Solicitor asserted the authority for all associated dockets, including this one. *See supra* note 1.

discretion to vacate citations under *RBK Construction, Inc.* See 15 FMSHRC 2099, 2101 (Oct. 1993) (“*RBK*”). In the Order, I held that *RBK* does not control the resolution of this issue. I found that *RBK*’s reasoning and provenance distinguish that case from the case at bar.

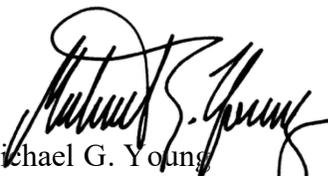
First, *RBK* recognizes that Section 110(k) of the Mine Act “only applies to settlements of penalties, not to vacations of citations and orders.” *Id.* Here, the Secretary vacated citations within a motion to approve settlement, leaving others undisturbed. See Order at 1, 3 (noting the suggestion of a *quid pro quo*—vacating relatively large penalties in return for agreement to pay those remaining).

Second, the Supreme Court decision upon which *RBK* is grounded reinforces the requirement for Commission review by contrast to the Occupational Safety and Health Act (“OSHA”). See *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3, 6–7 (1985) (holding that the Secretary had unlimited discretion to vacate citations under OSHA and requiring no settlement approval by OSHRC). In direct contrast to OSHA, the Mine Act expressly requires Commission approval for settlement of contested citations. See Order at 2 (describing OSHA language granting sole discretion to the Secretary where the Mine Act does not, rendering the *Cuyahoga Valley Railway Co.* decision irrelevant to FMSHRC settlements).

Because the Secretary declined an offer to certify or explain his decision to vacate the settlement as either independent of the disposition of the other citations or as a justifiable compromise, I have considered his vacatur as part of a settlement, rendering *RBK* inapplicable.⁷ I also acknowledge the Secretary’s prosecutorial discretion in two prior instances—the authorized representative’s decision to cite the violation, and the Secretary’s decision to petition for penalty. Each citation in this docket has now, therefore, been contested before the Commission and requires approval for settlement. See Order at 2–3.

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.

This interlocutory ruling is hereby **CERTIFIED**.


Michael G. Young
Administrative Law Judge

⁷ I recognize that the Secretary may have decided to challenge my decision on principle, even if he had sought to vacate the penalty on independent grounds. Nothing in this order prejudices the Secretary’s ability to certify that he decided to vacate penalties in any of the affected dockets for reasons independent of the settlement, should the Commission affirm my order.

Distribution (by email):

Alexandra J. Gilewicz, Office of the Solicitor, U.S. Dep't of Labor,
gilewicz.alexandra.j@dol.gov

Emily Toler Scott, Office of the Solicitor, U.S. Dep't of Labor, scott.emily.t@dol.gov

Lorna M. Waddell, Counsel for Respondent, Dinsmore & Shohl LLP, lorna.waddell@dinsmore.com

Attachments:

Appendix A: Order Denying Motion to Approve Settlement, Docket No. WEVA 2021-0294
(Sept. 30, 2021)

Appendix B: Order Staying Proceedings, Docket No. WEVA 2021-0294 (Oct. 19, 2021)