

**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.

HOLCIM (US) INC.,  
Respondent

CIVIL PENALTY PROCEEDING

Docket No. YORK 2021-0023  
A.C. No. 18-00019-527910

Mine: Holcim (US) Inc Hagerstown  
Facility

**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.<sup>1</sup> The Secretary seeks interlocutory review of all five proceedings, pursuant to Commission Procedural Rule 76, 29 C.F.R. § 2700.76.

This docket includes thirteen citations issued pursuant to Section 104(a) of the Mine Act. On August 3, 2021, the Secretary submitted a motion to approve settlement. The motion proposed vacating four citations, while modifying or leaving undisturbed the remaining nine citations and reducing the total penalty from \$28,148.00 to \$17,843.00. *See S. Mot. to Approve Settlement at 2 (Aug. 3, 2021).*

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.*<sup>2</sup> *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

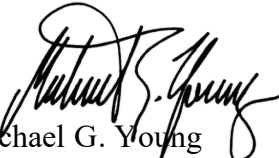
<sup>1</sup> The others are Docket Nos. WEVA 2021-0294, LAKE 2021-0145, SE 2021-0134, and SE 2021-0112, all of which were similarly stayed pending certification. *See Unpublished Order at 1 n.1 (Oct. 19, 2021) (Appendix B).*

<sup>2</sup> “It is undisputed that the Secretary has prosecutorial discretion to vacate a citation. *Secretary of Labor (MSHA) v. RBK Construction, Inc.*, 15 FMSHRC 2099 (October 1993).” *S. Mot. at 3–4.*

the Commission and are subject to my approval. *See* Unpublished Order at 2–3 (Sept. 28, 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. YORK 2021-0023 (Sept. 28, 2021)

Appendix B: Order Staying Proceedings, Docket No. YORK 2021-0023 (Oct. 19, 2021)

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