FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

601 New Jersey Avenue, NW, Suite 9500 Washington, D.C. 20001-2021 Telephone: (202) 577-6809 Fax: (202) 434-9949 September 3, 2010

HILDA L. SOLIS, : CIVIL PENALTY PROCEEDING

Secretary of Labor,

United States Department of Labor, : Docket No. SE 2009-991-M

Petitioner : A.C. No. 01-00043-197458

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LEHIGH CEMENT COMPANY, INC., : Mine: Leeds Plant

Respondent :

ORDER DISMISSING PROCEEDING

Before: Judge William B. Moran

v.

This case is before the Court upon a petition for assessment of a civil penalty under section 105(d) of the Federal Mine Safety and Health Act of 1977. The parties have filed a Joint Motion to dismiss petition for assessment of civil penalty. In total the originally assessed amount for the two citations was \$13,200.00, each being assessed \$6,600.00. The joint motion describes the "proposed settlement motion" for the citations as "vacated." The joint motion is a peculiar submission in that it recites the penalty criteria, such as history of previous violations, size of the operator's business, and the operator's good faith abatement to "achieve rapid compliance after notification of the alleged violation." It is only when the negligence and gravity are brought up among the penalty criteria that the Secretary advises that "[b]ased upon a review of the evidence and in its prosecutorial discretion, Petitioner agrees to vacate [the two citations]. The Joint Motion concludes that "approval of this settlement is in the public interest and will further the intent and purpose of the [Mine Act]."

Normally, a settlement motion arises in the context of the parties' negotiation of the particular citations listed, and more often than not, at least some of the citations are settled for an amount which is less than the penalty sums originally proposed. Where all of the citations in a given docket are vacated, as in this instance, the description of the result as a "settlement motion" seems inapt. Here, the Joint Motion seeks dismissal of the petition for the assessment of civil penalty. The question is whether a motion seeking a judge's approval to dismiss a matter should be denominated as a "settlement."

This matter, despite ticking off the penalty criteria, is simply a motion to dismiss the citations listed in the docket and to end the civil penalty proceeding. In *RBK Construction, Inc.*,

15 FMSHRC 2099 (Oct. 1993) the Commission, looking to the U.S. Supreme Court's decision in *Cuyahoga Valley Ry. Co. v. United Transportation Union*, 474 U.S. 3 (1985), held that the Secretary has the authority to vacate citations and that such actions are not reviewable.

In *Cuyahoga* the Supreme Court noted the distinct roles of the Commission and Secretary of Labor as adjudicator and prosecutor, respectively, and that Congress did not intend a commingling of those roles.¹ *See, also Rockville Crushed Stone, Inc.* 1994 WL 700964, December 1994 (Judge Merlin²), noting *RBK's* holding that the "vacation of citations and orders are within the Secretary's unreviewable prosecutorial discretion." *cf. PC Sand & Gravel*, 32 FMSHRC 235, 2010 WL 1145201, February 2010, (Chief Judge Lesnick) in which that judge distinguished the Secretary's effort to vacate citations "in the context of a motion to approve a settlement agreement."

As at least the title, if not the substance, of the Joint Motion is to dismiss the petition for the assessment of the civil penalty in this docket, and as such action does not require Commission approval, the proceeding has become moot and therefore this matter is **DISMISSED**, with prejudice.

William B. Moran Administrative Law Judge

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¹While *Cuyahoga* dealt with the authority of the Occupational Safety and Health Review Commission, there is no basis to distinguish the Mine Safety and Health Review Commission's authority and the Commission recognized that fact in *RBK Construction*.

²Judge Merlin was the Chief Administrative Law Judge at that time. He has since retired.