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SOL (MSHA) V. RBK CONSTRUCTION, INC.  
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October 25, 1993

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	Docket Nos. WEST 93-154-M
	:	WEST 93-155-M
RBK CONSTRUCTION, INC.	:	WEST 93-156-M

DIRECTION FOR REVIEW  
DECISION

This civil proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1988) ("Mine Act" or "Act"). On August 11, 1993, Commission Administrative Law Judge Gary Melick issued a certification for review of interlocutory ruling pursuant to Commission Rule 76(a)(1)(i), 58 Fed. Reg. 12158, 12172 (March 3, 1993), to be codified at 29 C.F.R. 2700.76(a)(1)(i)(1993). The judge, on his own motion, certified that his July 13, 1993, ruling "denying the Secretary's attempted vacation of citations issued under section 104(a) of the [Mine Act, 30 U.S.C. 814(a)] . . . involves a controlling question of law and that immediate review will materially advance the final disposition of the proceedings." Certification, August 11, 1993.

We grant interlocutory review and suspend briefing. For the reasons set forth below, we vacate the judge's order of July 13, 1993, and grant the parties' motions to dismiss these proceedings.

This civil penalty proceeding consists of eight section 104(a) citations issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to RBK Construction, Inc., on October 8, 1992. The citations allege safety, training, and notification violations, as well as a citation for failing to file a legal identity form. In issuing these citations, the Secretary maintained that respondent was the operator of a mine. In its answer, on February 4, 1993, respondent asserted that it was engaged in a "cut-and-fill operation for the Colorado Department of Transportation," not a mining operation, and that, therefore, MSHA was without jurisdiction. Respondent's letter of February 4, 1993.

Subsequently, the Secretary filed a letter with the judge on July 9, 1993, stating that the Secretary had vacated all the citations. The Secretary explained that, upon review of the matter, he had determined that respondent's operation was primarily related to the public "highway cut" and any mineral being processed was only incidental to that work. The Secretary cited and attached MSHA I Program Policy Manual, Sec. 4, 3 (July 1, 1988), referencing the Interagency Agreement between MSHA and the Occupational Safety and Health Administration ("OSHA"). The agreement states:

MSHA does not have jurisdiction where a mineral is extracted incidental to the primary purpose of the activity. Under this circumstance, a mineral may be processed and disposed of, and MSHA will not have jurisdiction since the company is not functioning for the purpose of producing a mineral.

Operations not functioning for the purpose of producing a mineral include, but are not limited to, the following:

. . . .

2. Public road and highway cuts . . . .

Secretary's letter of July 9, 1993, Attachment 1. The judge construed this letter to be a motion by the Secretary to dismiss.

Additionally, the record contains a note to the file by the judge regarding teleconferences on July 12, 1993, between the judge and representatives of the parties. The judge advised the parties that, in his preliminary judgment, respondent's operation was a mine and, therefore, he could not approve the Secretary's attempted vacation of the citations. The judge noted his reliance upon the inspector's statement that respondent operated a screening plant wherein cut rock was sized and then used as fill for road construction.

On July 13, 1993, respondent advised the judge that it no longer sought to contest the citations and that it would not attend the scheduled hearing. That same day the judge issued his order denying the motions to dismiss. Subsequently, the Secretary advised the judge that he too saw no basis for a hearing, since the citations had been vacated.

In response to a briefing order issued July 23, 1993, the Secretary explained his position to the judge that vacation of the citations was a proper exercise of statutory authority under sections 104 and 107 of the Act, 30 U.S.C. 814, 817, and that such action was not inconsistent with section 110(k), 30 U.S.C. 820(k). 1/ The Secretary asserted that, since the citations were vacated, "there simply is no penalty to be considered and there is nothing further for the Commission to decide." Secretary's letter of August 6, 1993.

The judge, on his own motion, then certified his order for interlocutory review. The judge stated that the Secretary had failed to provide adequate reasons for the "attempt to vacate"; had failed to enable the Commission to conduct an evidentiary hearing regarding the purported reasons for vacation; and had failed to secure the Commission's approval in accordance with section 110(k) of the Act and *Youghioghney and Ohio Coal Co.*, 7 FMSHRC 200 (February 1985). Certification, August 11, 1993.

On August 24, 1993, the Secretary filed his opposition to interlocutory review. The Secretary asserted that he has exclusive enforcement authority pursuant to sections 104 and 107 of the Mine Act and that he is authorized to vacate citations and orders. Asserting that *Cuyahoga Valley Ry. Co. v. United Transp. Union*, 474 U.S. 3 (1985) is virtually identical to the present case, the Secretary contends that his determinations to vacate citations and orders are not reviewable by the Commission. The Secretary states that his decision not to assert jurisdiction in the instant case is fully consistent with the

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1/ Section 110(k) 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. No penalty assessment which has become a final order of the Commission shall be compromised,

mitigated, or settled except with approval of the court."

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Interagency Agreement between MSHA and OSHA. Finally, the Secretary argues that section 110(k) applies only to settlements of penalties, not to vacations of citations or orders. The Secretary states that the Mine Act contains no provision for Commission approval of his decisions to vacate enforcement actions.

In *Youghiogeny and Ohio*, cited by the judge, the Commission concluded that "adequate reasons" were required to support a dismissal of a proceeding. 7 FMSHRC at 203. Subsequently, the Supreme Court ruled in *Cuyahoga Valley Ry.* that the Secretary of Labor has unreviewable discretion to withdraw a citation charging an employer with a violation of the Occupational Safety and Health Act, and that the Occupational Safety and Health Review Commission does not have the authority to overturn the Secretary's decision not to issue or to withdraw a citation. 474 U.S. at 7-8. Based on that decision, we overrule *Youghiogeny and Ohio*. We agree with the Secretary that he has the authority to vacate the citations in issue, and, therefore, we grant the motions to dismiss. 2/

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Arlene Holen, Chairman

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Richard V. Backley, Commissioner

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Joyce A. Doyle, Commissioner

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L. Clair Nelson, Commissioner

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2/ Parties may, in the future, file stipulations of dismissal, signed by all parties to a proceeding, in order to effect voluntary dismissal. Cf. generally Fed. R. Civ. P. 41 (a)(1)(ii). Upon the parties' filing of the appropriate stipulation, the presiding Commission judge shall enter an order dismissing the proceeding.