

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

May 14, 1997

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

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v.

Docket No. LAKE 96-137-M

CHRISTMAN QUARRY

BEFORE: Jordan, Chairman; Marks, Riley, and Verheggen, Commissioners

ORDER

BY THE COMMISSION:

Counsel for the Secretary of Labor has filed an unopposed motion to dismiss this proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@). For the reason that follows, we grant the motion.

On March 7, 1996, an inspector from the Department of Labor's Mine Safety and Health Administration (AMSHA@) issued to Christman Quarry (AChristman@) a citation alleging a violation of 30 C.F.R. ' 56.14207. Christman contested the citation and the matter proceeded to hearing before Administrative Law Judge Gary Melick. Judge Melick determined that Christman violated the standard, affirmed the citation, and assessed a \$1 civil penalty. 18 FMSHRC 2151, 2154 (December 1996) (ALJ). The Commission subsequently granted Christman's petition for discretionary review, challenging the judge's decision.

On May 6, 1997, the Commission received the Secretary's Motion to Dismiss Petition for Discretionary Review as Moot. The Secretary stated that, after reviewing the record in this case, the Secretary vacated the underlying citation on May 5, 1997. Mot. at 1. The Secretary attached a copy of the vacated citation to her motion. The Secretary also represented that counsel for Christman has no obligation to the dismissal of this matter. *Id.* at 2.

The Commission has Aresponsibility under the Mine Act . . . to ensure that a contested case is terminated . . . in accordance with the Act.@ *Youghiogeny & Ohio Coal Co.*, 7 FMSHRC 200, 203 (February 1985). A motion by the Secretary to dismiss a review proceeding in which she has vacated an underlying citation will ordinarily be granted if Adequate reason@to do so are present. *See C.W. Mining Co.*, 15 FMSHRC 773, 774 (May 1993). We conclude that adequate reasons exist in this case. The Secretary, as prosecutor charged with enforcing the Mine Act, determined that she should vacate the citation and seek to dismiss this appeal. The operator does not object to the Secretary's motion.

For the foregoing reasons, the Secretary's dismissed motion is granted.¹ Accordingly, the Commission's direction for review is vacated, as is that part of the judge's decision wherein he affirmed the citation, and this civil penalty proceeding is dismissed.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Theodore F. Verheggen, Commissioner

¹ Commissioner Marks voted to deny the motion to dismiss. He concludes that review of the motion and the attached vacation of citation, which is based upon prosecutorial discretion, fails to establish adequate reasons for the requested dismissal. Commissioner Marks notes that in this case the Secretary prevailed in establishing that a violation occurred. Because of the brevity of the motion, it is unclear whether the Commission is to conclude from the motion that the Secretary now believes that no violation occurred, or whether the Secretary is advising the Commission that, notwithstanding the existence of a violation, the Secretary has the authority to abandon her prosecutorial duty. Commissioner Marks submits that, in either case, the Secretary should be required to furnish more support for the motion.