

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

1730 K STREET N.W., 6TH FLOOR

WASHINGTON, D.C. 20006

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
v.	:	
	:	
BRENT ROBERTS,	:	Docket Nos. KENT 91-896-R
PAUL COTTON,	:	KENT 91-897-R
STEVE LITTLE,	:	KENT 91-898-R
BENNY JOHNSON,	:	KENT 91-934-R - 91-955-R
SYDNEY POE,	:	KENT 91-992-R
ROBERT BENNET,	:	LAKE 91-478-R
JAMES JACK,	:	LAKE 91-503-R - 91-529-R
JOHN S. BIBY,	:	LAKE 91-530-R - 91-605-R
LARRY FLYNN,	:	SE 91-538-R
KIMMIE NOAH,	:	SE 91-544-R - 91-655-R
SHARELL CLARK,	:	WEVA 91-1331-R
JAMES F. MATICS,	:	WEVA 91-1332-R
ROBERT E. PERSINGER,	:	WEVA 91-1333-R
EVERETTE E. BALLARD,	:	WEVA 91-1385-R
DANIEL SERGE,	:	WEVA 91-1386-R
	:	WEVA 91-1494-R - 91-1509-
R	:	
SANDRA EASTHAM,	:	WEVA 91-1414-R - 91-1435-
R	:	
KEVIN TUSTIN,	:	WEVA 91-1436-R - 91-1493-
R	:	
STEVEN PERKINS,	:	WEVA 91-1510-R - 91-1524-
R JIMMY HAYWORTH,	:	WEVA 91-1525-R
DONALD CASE, and	:	WEVA 91-1614-R
REGGIE PHILYAW	:	WEVA 91-1926-R

BEFORE: Riley, Verheggen, and Beatty, Commissioners<sup>1</sup>

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<sup>1</sup> Chairman Jordan has recused herself in this matter and took no part in the consideration of this order. Pursuant to section 113(c) of the Mine Act, 30 U.S.C. ' 823(c), this panel of three Commissioners has been designated to exercise the powers of the Commission.

ORDER

BY THE COMMISSION:

In these contest proceedings arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@), the Secretary of Labor has filed with the Commission a motion to consolidate and dismiss her appeals. The petitioners have not filed an opposition to the motion. For the reasons that follow, we grant the motion, vacate the directions for review, and dismiss these proceedings.

I.

Factual and Procedural Background

On April 18, 1991, the Secretary, through the Department of Labor's Mine Safety and Health Administration (AMSHA@), proposed to revoke certifications that had been conferred, pursuant to 30 C.F.R. Parts 70, 71, and 90, upon certain persons to collect respirable dust samples and to maintain and calibrate respirable dust sampling devices.<sup>2</sup> The proposed revocations arose from citations that were issued, pursuant to 30 U.S.C. ' 814(a), to various mine operators on April 4, 1991, alleging that the weight of respirable dust cassettes submitted to fulfill sampling requirements had been intentionally altered by removing dust from the cassette filters. On May 15, 1991, notices of contest were filed with the Commission, resulting in these contest proceedings.

On May 24, 1991, the Secretary filed a motion to dismiss these proceedings, asserting that the Commission lacked jurisdiction to review the matter. On September 4, 1991, following argument on the motion, Chief Administrative Law Judge Paul Merlin issued a decision dismissing the case of *Brent Roberts* on the ground that the Commission lacked jurisdiction to review the matter. 13 FMSHRC 1377 (Sept. 1991) (ALJ). He concluded that, under the Mine Act and its legislative history, the Commission is not empowered to legislate a system of administrative

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<sup>2</sup> The Mine Act requires that mine operators maintain an average concentration of respirable dust in the mines below prescribed limits. 30 U.S.C. ' 842(b); 30 C.F.R. ' ' 70.100, 71.100, 90.100. Operators must take accurate dust samples and submit them to the Secretary for analysis. 30 U.S.C. ' 842(a); 30 C.F.R. ' ' 70.201-70.210, 71.201-71.210, 90.201-90.210. Respirable dust sampling can only be done by a person who has been certified by the Secretary to take dust samples. 30 C.F.R. ' ' 70.2(c), 70.202-70.203, 71.2(c), 71.202-71.203, 90.2, 90.202-90.203.

review for cases involving decertification of persons who are not mine operators, miners, or representatives of miners. *Id.* at 1383. The judge subsequently issued separate decisions dismissing each of the remaining cases based on his *Roberts* decision, which he found dispositive of the matter. *See id.* at 1385-1416 (decisions dismissing remaining cases).

On October 3, 1991, counsel in the *Roberts* case filed with the Commission a petition for discretionary review. Subsequently, in all except one of the remaining cases, counsel filed petitions for discretionary review that adopted and incorporated by reference the *Roberts* petition.<sup>3</sup> On October 15, 1991, the Commission directed the proceedings for review. Shortly thereafter, the petitioners filed motions requesting that further proceedings be stayed until resolution of the proceedings against mine operators alleging alteration of respirable dust samples in *In re: Contests of Respirable Dust Sample Alteration Citations*, Master Docket No. 91-1 (*ADust Cases*), then pending before Administrative Law Judge James A. Broderick. On November 7, 1991, the Commission stayed the proceedings. On April 20, 1994, Judge Broderick issued a final decision dismissing the *Dust Cases* on the ground that the Secretary had failed to prove that the weight of respirable dust cassettes had been intentionally altered. 16 FMSHRC 857 (Apr. 1994) (ALJ). Subsequently, the Secretary filed a petition for discretionary review of the judge's decision, which was granted by the Commission. On November 29, 1995, the Commission affirmed the judge's *Dust Cases* decision. 17 FMSHRC 1819 (Nov. 1995). The Secretary subsequently appealed to the United States Court of Appeals for the District of Columbia Circuit. On August 21, 1998, that court issued its decision in the *Dust Cases*, affirming the Commission. *Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

## II.

### Disposition

The Secretary represents that, on September 10, 1998, MSHA mailed a notice to all persons previously notified of the proposed revocation of certifications that the agency was withdrawing the proposed revocations. Mot. at 5. She requests that, because the proceedings all involve similar issues, the Commission consolidate the proceedings. *Id.* at 5-6. In addition, she requests that, because MSHA has withdrawn its proposed revocations, the Commission dismiss the proceedings on the ground that they are moot. *Id.* at 6-7. The petitioners do not oppose the motion.

We hereby lift the stay in these proceedings. We agree with the Secretary that these proceedings may be properly consolidated under Commission Procedural Rule 12, 29 C.F.R.

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<sup>3</sup> The Commission's Docket Office has no record of receiving a petition for discretionary review in the case of *Patrick Henry Fluty*, 13 FMSHRC 1401 (Sept. 1991) (ALJ) (Docket Nos. WEVA 91-1193-R through WEVA 91-1218-R).

' 2700.12,<sup>4</sup> and accordingly order consolidation. We further agree with the Secretary that these proceedings no longer present a justiciable controversy. A case is moot when the issues presented no longer exist or the parties no longer have a legally cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Here, the Secretary represents that MSHA has withdrawn its proposed revocations, which was the underlying controversy in these proceedings. Therefore, we find that there is no longer a live controversy between the Secretary and the petitioners as to the actions out of which the petitions for discretionary review arose. Thus, we conclude that these proceedings are moot and that dismissal is appropriate. *See Mid-Continent Resources, Inc.*, 12 FMSHRC 949, 955-56 (May 1990) (affirming judge's dismissal of case when Secretary had vacated underlying citation and withdrawal order making case moot).

Upon consideration of the motion, we grant it. Accordingly, the Commission's directions for review in these matters are vacated and these proceedings are dismissed.

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

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<sup>4</sup> Rule 12 provides:

The Commission and its Judges may at any time, upon their own motion or a party's motion, order the consolidation of proceedings that involve similar issues.