

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

February 19, 2002

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
	:	
	:	
v.	:	Docket Nos. WEST 2000-35-RM
	:	WEST 2000-36-RM
	:	WEST 2000-180-M
UNITED METRO MATERIALS	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman, and Beatty, Commissioner

The Secretary of Labor has filed a motion to vacate the direction for review in which United Metro Materials joins. The Secretary states that she has vacated the citations in the above-captioned proceeding and that she will not enforce the citations. In light of the representations made in the joint motion, the Commission grants the motion and vacates the direction for review.

Theodore F. Verheggen, Chairman

Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, concurring:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) (“Mine Act”). In August 1999, a laborer working at a plant operated by United Metro was fatally injured after he was caught in a conveyor belt roller while attempting to clear it with a hoe. 23 FMSHRC 1085, 1086. (Sept. 2001) (ALJ). After investigating the accident, MSHA cited the operator for violations of several regulations. One citation charged the operator with a failure to adequately guard the return roller, in violation of 30 C.F.R. § 56.14107(a). The second citation alleged a failure to shut off the conveyor prior to cleaning the rollers, as required by 30 C.F.R. § 56.14202. *Id.* at 1086; Narrative Findings for a Special Assessment. Fourteen months later the Secretary proposed a penalty of \$40,000 for the first citation and \$35,000 for the second. 23 FMSHRC at 1086-1087. The operator contested these citations and the proposed penalties.

In an order dated September 28, 2001, Judge Cetti dismissed the proceedings. 23 FMSHRC at 1089. Relying on section 105(a) of the Act,¹ the judge concluded that the Secretary had failed to notify the operator of the civil penalty proposed within a reasonable time after the termination of the investigation that resulted in the issuance of the citations. *Id.* By order dated October 26, 2001, the Commission, on its own motion, directed review of the judge’s decision. The Secretary has notified the Commission that the citations under review were vacated on November 8, 2001 and she now moves the Commission to dismiss these proceedings as moot. Sec’y Notice of Vacating of Citations and Motion to Vacate the Direction for Review at 1-2. United Metro Materials joins in this motion. United Metro Letter of November 14, 2001.

The Commission initially ordered review of this matter because the judge’s decision raised significant legal and policy issues. Although the Secretary’s actions raised eyebrows, I nevertheless conclude that this proceeding must now be dismissed as moot.

¹ Section 105(a) provides:

If, after an inspection or investigation, the Secretary issues a citation or order under section 104, he shall, within a reasonable time after the termination of such inspection or investigation, notify the operator by certified mail of the civil penalty proposed to be assessed under section 110(a) for the violation cited and that the operator has 30 days within which to notify the Secretary that he wishes to contest the citation or proposed assessment of penalty.

30 U.S.C. § 815(a).

The Supreme Court in *Cuyahoga Valley Railway Co. v. United Transportation Union*, 474 U.S. 3, 7-8 (1985) (per curiam) held that the Secretary's decision to withdraw a citation against an employer under the Occupational Safety and Health Act was not reviewable by the Occupational Safety and Health Review Commission. The Court pointed out that allowing the Commission to overturn the Secretary's decision to withdraw a citation would amount to allowing the Commission "to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend." 474 U.S. at 7. Following *Cuyahoga*, this Commission in *RBK Construction Inc.*, 15 FMSHRC 2099, 2101 (Oct. 1993), concluded that it lacked the authority to overturn a Secretarial decision to withdraw or vacate a citation.

Accordingly, in light of the Secretary's vacation of the citations at issue, I join the majority in vacating our direction for review and dismissing these proceedings.

Mary Lu Jordan, Commissioner

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