FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES 601 New Jersey Avenue, N.W., Suite 9500 Washington, DC 20001

September 13, 2010

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING

MINE SAFETY AND HEALTH

ADMINISTRATION, (MSHA), : Docket No. KENT 2009-949-M

Petitioner : A.C. No. 15-07101-179364

V.

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CARMEUSE LIME & STONE, : Maysville Mine

Respondent :

ORDER GRANTING THE SECRETARY'S MOTION FOR WITHDRAWL OF THE MOTION TO DISMISS

This captioned proceeding is before me upon a petition for assessment of civil penalty filed pursuant to section 105(d) of the Federal Mine Safety and Health Act of 1977 (the Act) filed against Carmeuse Lime & Stone (Carmeuse). 30 U.S.C. § 815(d). The petition seeks to impose a civil penalty of \$138.00 in satisfaction of Citation No. 6510263. This citation alleges a violation of mandatory safety standard in 30 C.F.R. § 57.15005 that requires safety belts to be worn where there is a danger of falling. Specifically, the citation states, in pertinent part, "[a] vendor/subcontractor employee from Excel Air & Oil Equipment, Inc., [Excel] was observed standing atop the Mobiltrans HD 30 bulk oil tank while not using suitable fall protection. He was installing a flow meter in one of the delivery lines"

On May 7, 2010, the Secretary filed a motion to dismiss this case, based on the erroneous belief that the case should be dismissed because Excel was a contractor. On May 13, 2010, the Secretary filed a motion to withdraw her original motion to dismiss because she now believes that Excel is a vendor. On May 25, 2010, Carmeuse filed a motion in opposition to the Secretary's motion to withdraw her motion to dismiss admitting that Excel is a contractor. Section 3(d) of the Mine Act provides that a mine operator includes any independent contractor performing services at a mine. 30 U.S.C. § 802(d).

Whether Excel is a vendor or a contract is a distinction without a difference. Excel is an independent contractor (mine operator) as contemplated by section 3(d) by virtue of the performance of its services at the mine.

The Court of Appeals for the D.C. Circuit held that the Secretary's decision to cite the owner-operator of a mine and/or its independent contractor, is an exercise of her prosecutorial discretion that is unreviewable. *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006). Consequently, the Secretary may cite Carmeuse for alleged safety violations of its independent contractor Excel. Accordingly, **IT IS ORDERED** that the Secretary's motion to withdraw its motion to dismiss **IS GRANTED**.

Jerold Feldman Administrative Law Judge

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