# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W. Suite 9500
Washington, DC 20001-2021

September 14, 2007

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| CARMEUSE LIME AND STONE, INC., | : | CONTEST PROCEEDINGS |
| Contestant | : | |
| | : | Docket No. KENT 2006-158-RM |
| v. | : | Citation No. 6108736; 01/31/2006 |
| | : | |
| SECRETARY OF LABOR, | : | Docket No. KENT 2006-159-RM |
| MINE SAFETY AND HEALTH | : | Citation No. 6108738; 02/01/2006 |
| ADMINISTRATION (MSHA), | : | |
| Respondent | : | Docket No. KENT 2006-186-RM |
| | : | Order No. 6108751; 02/15/2006 |
| | : | |
| | : | Docket No. KENT 2006-206-RM |
| | : | Citation No. 6108752; 02/15/2006 |
| | : | |
| | : | Docket No. KENT 2006-253-RM |
| | : | Citation No. 6108779; 04/17/2006 |
| | : | |
| | : | Plant Black River Operation |
| | : | Mine ID 15-05484 |
| | : | |
| | : | Docket No. KENT 2006-254-RM |
| | : | Citation No. 6109486; 04/12/2006 |
| | : | |
| | : | Docket No. KENT 2006-255-RM |
| | : | Citation No. 6109487; 04/12/2006 |
| | : | |
| | : | Docket No. KENT 2006-256-RM |
| | : | Citation No. 6109488; 04/12/2006 |
| | : | |
| | : | Underground Black River Operation |
| | : | Mine ID 15-00062 |
| | : | |
| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 2006-318-M |
| Petitioner | : | A. C. No. 15-05484-87032 |
| | : | |
| v. | : | |
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| CARMEUSE LIME & STONE, INC., | : | Docket No. KENT 2006-396-M |
| Respondent | : | A. C. No. 15-05484-89897 |
| | : | |
| | : | Plant Black River Operation |
| | : | |
| | : | Docket No. KENT 2006-397-M |
| | : | A. C. No. 15-00062-89894 |
| | : | |
| | : | Underground Black River Operation |

**DECISION**

Appearances: Joseph B. Luckett, Esq., Office of the Solicitor, U.S. Department of Labor, Nashville, Tennessee, for Petitioner;
R. Henry Moore, Esq., Jackson Kelly, PLLC, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Hodgdon

These consolidated cases are before me on Notices of Contest and Petitions for Assessment of Civil Penalty brought by Carmeuse Lime & Stone, Inc., against the Secretary of Labor, and by the Secretary of Labor, acting through her Mine Safety and Health Administration (MSHA), against Carmeuse Lime & Stone, pursuant to section 105 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815. The company contests the issuance of two orders alleging violations of the Act and six citations alleging violations of the Secretary's mandatory health and safety standards. The petitions allege one violation of the Act and six violations of the Secretary's mandatory health and safety standards and seek penalties of $3,674.00. A trial was held in Covington, Kentucky. For the reasons set forth below, I vacate one order and three citations, modify one order and one citation, affirm two citations and assess penalties of $511.00.

**Settled Matters**

At the beginning of the trial, the parties announced that they had settled one of the orders and four of the citations. (Tr. 9-10.) The Respondent agreed to pay the $291.00 penalty proposed for Citation No. 6108752, in Docket Nos. KENT 2006-206-RM and KENT 2006-318-M, which was issued in connection with "imminent danger" Order No. 6108751, issued under section 107(a) of the Act, 30 U.S.C. § 817(a), and contested in Docket No. KENT 2006-186-RM. (Tr. 9.) Order No. 6108751 will be vacated.[1] Citation No. 6108736, in Docket Nos. KENT 2006-158-RM and KENT 2006-396-M, will be modified by deleting the "significant and substantial" designation and reducing the penalty from $247.00 to $60.00. (Tr. 10.) The

[1] Although it is not clear from the transcript, Counsel for the Secretary has confirmed in a September 12, 2007, letter that vacation of this 107(a) order was part of the settlement.

Respondent agreed to pay the $60.00 penalty proposed for Citation No. 6108779, in Docket Nos. KENT 2006-253-RM and KENT 2006-396-M. (Tr. 10.) Finally, the Secretary agreed that Citation No. 6109488 in Docket Nos. KENT 2006-256-RM and KENT 2006-397-M will be vacated. (Tr. 10.) The terms of the agreement will be carried out in the order at the close of this decision.

## Background

Carmeuse Lime & Stone operates the Black River underground limestone mine and plant on the Ohio River, south of Cincinnati, in Pendleton County, Kentucky. Limestone is extracted from the mine, using the room and pillar method, and processed into chemical lime at the plant. It is a large operation, covering about 100 acres. The underground mine has ceilings 25 feet tall and headings 50 feet wide. About 90 miners work in the underground mine and approximately 120 miners work at the plant.

MSHA Inspector Richard L. Jones was inspecting the plant on February 1, 2006, when he observed seven employees of A&T Industrial Services on the site. A&T had been contracted by Carmeuse to do clean-up work at various locations around the plant, using a vacuum truck to do the work. The A&T employees provided Jones with MSHA Forms 5000-23, "Certificate of Training," when he requested them. However, he did not recognize the name of the person who had signed the forms as having given the training or the location where the training had been given. The inspector called the person who had given the training and determined that the training had been given under Part 46 of the regulations, 30 C.F.R. § 46.1 *et seq.*, rather than Part 48, 30 C.F.R. § 48.1 *et seq.*, and that the instructor had not been certified by MSHA.[2] Consequently, he issued an order under section 104(g)(1) of the Act,[3] 30 U.S.C. § 814(g)(1), to A&T. He also issued Citation No. 6108738, under section 104(a), 30 U.S.C. § 814(a), to

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[2] Part 46 governs "Training and Retraining of Miners Engaged in Shell Dredging or Employed at Sand, Gravel, Surface Stone, Surface Clay, Colloidal Phosphate, or Surface Limestone Mines." Part 48, "Training and Retraining of Miners," governs all other miners whether working in underground mines, surface mines, or surface areas of underground mines. It is not disputed that A&T's employees should have been trained under Part 48.

[3] Section 104(g) provides that:

> (1) If, upon any inspection or investigation . . . the Secretary or an authorized representative shall find employed at a coal or other mine a miner who has not received the requisite safety training . . ., the Secretary . . . shall issue an order under this section which declares such miner to be a hazard to himself and to others, and requiring that such miner be immediately withdrawn from the coal or other mine, and be prohibited from entering such mine until an authorized representative of the Secretary determines that such miner has received the training required . . . .

Carmeuse. On March 2, 2006, the citation was modified to a 104(g)(1) order.

The basic facts with regard to the two remaining citations are not in dispute and the parties have stipulated to most of them. At approximately 6:00 a.m. on Monday, April 10, 2006, a crew of 12 Carmeuse hourly employees, a supervisor, Shane Tuel, and an engineer proceeded underground by way of the slope car. They were close to the bottom of the slope when they smelled an odor. They noticed soot in the travelway of the slope. Without investigating further, they decided to leave the mine and reached the surface about 6:10 a.m.

Once on the surface, Tuel contacted Greg Black, the Mine Production Superintendent, at his home. Black in turn contacted Gary Greene, the Mine Maintenance Superintendent, at his home and they agreed to proceed to the mine. They arrived at approximately 7:30 a.m.

At about 8:00 a.m., Black, Danny Willis and Trevor Tallent, all members of the Black River mine rescue team, checked the quality of the air exiting the mine at the slope portal and proceeded underground. They were not wearing mine rescue breathing apparatus. They took air quality readings at the bottom of the slope. They then traveled by tractor to the 7N transformer were they again took air quality readings. The only difference in the three air quality readings was that the reading for CO had increased from 5 parts per million (ppm) at the portal and the foot of the slope to 12 ppm at the transformer. They returned to the surface at approximately 9:00 a.m.

The mine rescue team consisting of Greg Black, Nick Brewer, Jerry Butler, Danny Willis and Garland Case then organized to go underground. A command base was set up on the surface at 9:15 a.m. The team proceeded underground at 9:20 a.m. wearing mine rescue apparatus.

Alane Preston, the Safety and Loss Prevention Manager, called MSHA to advise them what was occurring at 9:33 a.m. At 10:00 a.m., Don Ratliff, the MSHA Field Office Supervisor, called the mine and issued a verbal 103(k) order requiring the withdrawal of the rescue team from underground.[4] The team exited the mine after issuance of the order.

MSHA Inspector Thomas Galbreath was sent to the mine to investigate the situation, arriving at about 1:00 p.m. There, he met with Inspector Jones, who was already at the mine conducting an inspection, and Carmeuse officials. A mine exploration plan was drawn-up by Carmeuse and the mine rescue team again proceeded underground at 2:40 p.m. At about 3:30 p.m., the team reached the area of the P-19 conveyor where there had been a fire. The belt on the conveyor had burned and several small areas of material were still smoldering and were put out by fire extinguishers.

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[4] Section 103(k), 30 U.S.C. § 813(k), provides, in pertinent part, that: "In the event of any accident occurring in a coal or other mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal or other mine . . . ."

The last crew in the mine prior to April 10, 2006, at 6:00 a.m., was a maintenance crew which left the mine at 4:00 a.m. on Sunday, April 9. They were welding a belt structure and sparks from the welding apparently ignited the belt, although there was no evidence of fire when the maintenance crew left the area.

As a result of this incident, Inspector Galbreath issued Citation Nos. 6109486 and 6109487 to Carmeuse under section 104(a) of the Act. They, along with Citation No. 6108738, were contested at the trial. The citations will be discussed in the order that they were issued.

## Findings of Fact and Conclusions of Law

### Citation No. 6108738

This citation alleges a violation of section 48.25 of the Secretary's regulations, 30 C.F.R. § 48.25, in that:

> Seven untrained contractor employees were allowed to work on this property because the operator did not conduct a complete search to assure the required training had been completed. The operator had no effective system in place to research the validity and completeness of the training that is required before allowing contractor employees to work. These contractor employees had been hired to perform cleanup work in the plant. The contractor employees produced 5000-23 training records, but the person that had conducted the training was not an MSHA certified trainer, and the training plan used was 30 C.F.R. Part 46 type.

(Govt. Ex. 1.) Section 48.25 requires that: "Each new miner shall receive no less than 24 hours of training as prescribed in this section. Except as prescribed in this paragraph, new miners shall receive this training before they are assigned to work duties."

As a threshold matter, the operator argues that the violation was properly issued under section 104(a) of the Act, and should not have been modified to allege a violation under section 104(g). The Commission has held that a 104(g) order must name the miners affected by the order so that it can later be determined whether the named miners had received the proper training to allow them to re-enter the mine and it must be issued "on the spot during or immediately following the inspection and provide for immediate withdrawal of the miners in question." *Twentymile Coal Co.*, 26 FMSHRC 666, 674 (Aug. 2004), *rev'd on other grounds* 411 F.3d 256 (D.C. Cir. 2005). Here the order meets neither of these requirements. Thus, it appears the operator is correct. Apparently recognizing this, the Petitioner stated in her brief that: "The Secretary would not oppose a modification of the violation to a 104(a) citation." (Sec. Br. at 9.) Consequently, I will modify the order back to a 104(a) citation.

It is undisputed that the seven A&T employees had not been trained as required under section 48.25. Nevertheless, the Respondent asserts that it should not be charged with this violation because it had "a more than adequate system in place to assure that its contractors had the MSHA-required training under 30 CFR. Part 48." (Resp. Br. at 6.)

Gary Pelech, a Carmeuse maintenance planner, met with Todd Tallon, A&T President, on November 16, 2005, to discuss the work to be done and advised him that the workers had to be trained under Part 48. (Tr. 47-48.) In addition, Pelech gave Tallon a written document setting out the work to be done and that the workers be Part 48 trained. (Resp. Ex. 12.) On January 11, 2006, Pelech provided site-specific training to six of the A&T employees and required them to show him their MSHA 5000-23 forms showing their previous training. (Tr. 49-52.) The seventh employee was trained in the same manner on February 1, 2006. (Tr. 53.) When the seven employees signed in at the mine on February 1, they signified by a check mark on the sign-in sheet that they had been site-specific trained and MSHA Part 48 trained. (Resp. Ex. 13.)

It appears that Carmeuse had taken reasonable steps to insure that A&T's employees were properly trained. However, the fact remains that they were not. The Act imposes strict liability on mine operators for violations regardless of fault, even if the violation was committed by an independent contractor, such as A&T. *Intern. Union, United Mine Workers v. FMSHRC*, 840 F.2d 77, 83-84 (D.C. Cir. 1988); *Extra Energy, Inc.*, 20 FMSHRC 1, 5-6 (Jan. 1997); *Bulk Transportation Services, Inc.*, 13 FMSHRC 1354, 1359 (Sept. 1991). Moreover, it is within the Secretary's discretion whether or not to cite the independent contractor, the operator, or both for the violation. *Secretary of Labor v. Twentymile Coal Co.*, 456 F.3d 151 (D.C. Cir. 2006.) Finally, operators have the overall compliance responsibility for insuring that independent contractors comply with the standards and regulations applicable to the work being performed by them in the operator's mine. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986); *Mingo Logan Coal Co.*, 19 FMSHRC 246, 250 (Feb. 1997). Accordingly, I conclude that the Respondent violated the regulation as alleged.

*Significant and Substantial*

The inspector found this violation to be "significant and substantial." A "significant and substantial" (S&S) violation is described in section 104(d)(1) of the Act, 30 U.S.C. § 814(d)(1), as a violation "of any mandatory health or safety standard . . . of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981)

I find that the "significant and substantial" designation is not applicable to this violation. As section 104(d)(1) plainly states, only violations of a "mandatory health or safety standard" can be S&S. Section 3(l) of the Act, 30 U.S.C. § 802(l), defines "mandatory health or safety

standard" as "the interim mandatory health or safety standards established by titles II or III of the Act, and the standards promulgated pursuant to title I of this Act." Training and retraining of miners is not included in either title II or III of the Act, nor is it included in the Secretary's mandatory health and safety standards promulgated pursuant to title I of the Act.

The mandatory health and safety standards are set out in Parts 56, 57, 58, 62, 70, 71, 72, 75, 77 and 90 of the regulations and are clearly identified as such.[5] In contrast, section 48.21, 30 C.F.R. § 48.21, states: "The provisions of this subpart B set forth the mandatory requirements for submitting and obtaining approval of programs for training and retraining miners working at surface mines and surface areas of underground mines."

The U.S. Court of Appeals for the District of Columbia Circuit has held that the Act "does not authorize the FMSHA to designate as 'significant and substantial' a violation of a regulation such as 50.11(b) that is not a mandatory health or safety standard." *Cyprus Emerald Resources v. FMSHRC*, 195 F.3d 42, 45 (D.C. Cir. 1999). Section 48.25 is a regulation such as section 50.11(b), 30 C.F.R. § 50.11(b), that is not a mandatory health or safety standard. Accordingly, I conclude that the violation was not "significant and substantial" and will modify the citation.

Citation No. 6109486

This citation alleges a violation of section 50.10, 30 C.F.R. § 50.10, because:

> The mine operator did not immediately contact MSHA when evidence of a mine fire was discovered and the mine was evacuated. The supervisor and the day shift maintenance crew traveled down the slope at approximately 0600 on 4/10/2006. The supervisor immediately evacuated the crew from the mine, upon evidence of a fire, at approximately 50 foot from the bottom of the slope. MSHA was not notified until a phone call was made to Don Ratliff, Field Office Supervisor, in Lexington, Ky. at 0933. The mine had been evacuated at approximately 0615.

[5] 30 C.F.R. § 56.1 ("This part 56 sets forth mandatory safety and health standards for each surface metal or nonmetal mine . . . ."); 30 C.F.R. § 57.1; 30 C.F.R. § 58.1 ("The health standards in this part apply to all metal and nonmetal mines."); 30 C.F.R. § 62.100 ("This part sets forth mandatory health standards for each surface and underground metal, nonmetal, and coal mine . . . ."); 30 C.F.R. § 70.1; 30 C.F.R. § 71.1; 30 C.F.R. § 72.1 ("The health standards in this part apply to all coal mines."); 30 C.F.R. § 75.1 ("This part 75 sets forth safety standards compliance with which is mandatory in each underground coal mine . . . ."); 30 C.F.R. § 77.1; 30 C.F.R. § 90.1 ("This Part 90 is promulgated pursuant to section 101 of the Act . . . ."). Where the introductory language of a Part is not set out, it is essentially the same as the language in the Part preceding it.

(Govt. Ex. 10.) Section 50.10 requires, in pertinent part, that: "If an accident occurs, an operator shall immediately contact the MSHA District Office having jurisdiction over the mine. . . . The operator shall contact MSHA as described at once without delay and within 15 minutes." For the purposes of this violation, section 50.2(h)(6), 30 C.F.R. § 50.2(h)(6), defines "accident" as: "An unplanned mine fire not extinguished within 30 minutes of discovery."

At approximately 6:00 a.m. on Monday, April 10, 2006, Shane Tuel and his crew went underground in the slope car. (Jt. Ex. 1, Stip. 30.) They were close to the bottom of the slope when they smelled an odor and noticed soot in the travelway of the slope. (Jt. Ex. 1, Stip. 31.) As a result, they went back out of the mine.

Inspector Thomas Galbreath testified that he issued Citation No. 6109486 because:

> [T]he evidence of a fire was discovered at approximately 6 a.m. by [the] maintenance crew going in, and at that time the maintenance supervisor evacuated the mine, and at that time there was evidence of fire, unplanned fire, and it became reportable. And it was not reported in the proper length of time. If he had got to the surface at 6:15 – an unplanned fire, you would have 30 minutes to extinguish it. If he had that time to extinguish it, it would have been 6:30 which, 15 minutes to report it, which would have been 6:45, and our Lexington field office was not called with the information until approximately 9:33.

(Tr. 110-11.)

The evidence in this case does not support a violation of section 50.10. The regulation requires that a fire be discovered, not be extinguished within 30 minutes and MSHA not be notified of the fire within 15 minutes of it not being extinguished. None of these occurred. A fire was not discovered at the time the inspector concluded that it had been. The operator was investigating the cause of the odor and soot, when MSHA ordered that the mine be evacuated. And when the fire was finally discovered, it was extinguished within 30 minutes.

The term "mine fire" is not defined in the regulations. "Fire" is defined as "the phenomenon of combustion as manifested in light, flame, and heat and in heating, destroying and altering effects." *Webster's Third New International Dictionary (Unabridged)* 854 (2002 ed.). It has been defined in another case involving this regulation as "a rapid, persistent chemical change that releases heat and light and is accompanied by flame, especially the exothermic oxidation of a combustible substance. *American Heritage Dictionary of the English Language*, 62 (4th ed. 2006)." *Phelps Dodge Tyrone, Inc.*, 29 FMSHRC ____, slip op. at 6, No. CENT 2006-212-RM (July 25, 2007) (ALJ). "Mine," of course, is defined in section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), and for the purposes of this decision is not in issue.

Significantly, neither definition of "fire" includes an "odor" or "soot." Clearly, Tuel did not "discover" a "fire," with light, flame and heat, before he decided to return to the surface with his crew. While his actions were certainly prudent, all that his information provided the operator was that there might be a problem in the mine that needed to be investigated. Among the possibilities that the company management considered before going back into the mine were that a piece of diesel equipment may have been left on in the mine, as had happened previously, or there was some sort of fire. (Tr. 187.)

The Commission has held with regard to this regulation that:

> Although the regulation requires operators to report immediately certain "accidents" as defined in section 50.2(h), it must contemplate that operators first determine whether particular events constitute reportable "accidents" within that definition. Section 50.10 therefore necessarily accords operators a reasonable opportunity for investigation into an event prior to reporting to MSHA. Such internal investigation, however, must be carried out by operators in good faith without delay and in light of the regulation's command of prompt, vigorous action. The immediateness of an operator's notification under section 50.10 must be evaluated on a case-by-case basis, taking into account the nature of the accident and all relevant variables affecting reaction and reporting.

*Consolidation Coal Co.*, 11 FMSHRC 1935, 1938 (Oct. 1989).

The citation in this case was issued during a period when an emergency temporary standard (ETS) had been issued by the Secretary. 71 Fed. Reg. 12252 (March 9, 2006). Among the changes made was the addition of a definition of "immediately" to section 50.10 as being "at once without delay and within 15 minutes." *Id.* at 12269. In the preamble to the regulation, MSHA essentially adopted the Commission's holding above, when it stated:

> The ETS does not change the basic interpretation of § 50.10. By the terms of the provision, an operator is required to notify MSHA only after determining whether an "accident" as defined in existing paragraph 50.2(h) has occurred. This affords operators a reasonable opportunity to investigate an event prior to notifying MSHA. That is, mine operators may make reasonable investigative efforts to expeditiously reach a determination.

*Id.* at 12260.

In conformance with these guidelines, Black, Willis and Tallent went into the mine to

investigate the situation. Prior to entering the mine they checked the air coming from the slope portal; nothing indicated that a fire was occurring. (Jt. Ex. 1, Stip. 35.) When they reached the shop to see if any of the diesel equipment was running, the air quality readings were normal. (Jt. Ex. 1, Stip. 36, Tr. 196.) Not finding any equipment running, they continued on. When they reached the 7 North transformer they got a CO reading of 12 ppm. (Jt. Ex. Stip. 36.) They were not sure what this meant, so they headed to the fresh air side of the mine. (Tr. 198.) At that point, Black decided that since a mine rescue team exercise had already been planned for that day, it would be good training to complete the search of the mine as a mine rescue team training exercise and they returned to the surface. (Tr. 199.)

The five man mine rescue team entered the mine at 9:20 a.m., wearing mine rescue apparatus. (Jt Ex. 1, Stip. 39.) Meanwhile, "to be cautious," Alane Preston called the MSHA District Office at 9:33 a.m. and spoke to Don Ratliff, telling him that they " were being conservative about it," that they "had not found a fire or anything," but "had some kind of soot in the air" and "were investigating" it. (Jt. Ex. 1, Stip. 41, Tr. 250-51.) Shortly thereafter, Ratliff called back and issued a "K" order, ordering the mine to be evacuated.

Under the guidance of MSHA Inspectors Galbreath and Jones, the mine was explored in the afternoon in accordance with a plan required by MSHA. At about 3:30 p.m., the team reached the P-19 conveyor where it was apparent that the 120 foot conveyor belt had burned. There were three areas of smoldering material which were immediately extinguished with fire extinguishers. It was believed that the belt was ignited by slag from cutting and welding operations in the area that ended about 3:00 a.m. on Sunday morning. (Tr. 212.)

Clearly, there was no evidence of a mine fire when Tuel left the mine. Black and his men were properly investigating the cause of the soot and odor when they left the mine to bring in the mine rescue team. The mine rescue team was properly investigating the situation when they were ordered to leave the mine. Nor does it appear that the company was not expeditiously trying to discover what the cause of the soot and odor were. Further, the air readings that they were taking did not indicate that anything serious was occurring. Lastly, when the cause of the soot and odor was finally discovered, what little fire there was, was putout in significantly fewer than 30 minutes. Accordingly, I conclude that the Respondent did not violate section 50.10 and the citation will be vacated.

Citation No. 6109487

This citation alleges a violation of section 57.4362, 30 C.F.R. § 57.4362, in that:

> Following evacuation of the mine at approximately 0615 on 04/10/2006, because of a fire emergency, three mine rescue members entered the mine at approximately 0800 to explore the mine. These miners were not wearing any form of mine rescue apparatus and were in advance of the fresh air base. This mine has

> three means of exhaust and only one exhaust (mine portal) was tested for atmospheric conditions. They were underground until approximately 0900. Mine rescue members were exposed to the possibility of toxic gases by not knowing the conditions underground. This hazard could cause a fatal accident. This mine has a fully equipped mine rescue team that is trained in all aspects of mine exploration.

(Govt. Ex. 11.) Section 57.4362 provides that: "Following evacuation of a mine in a fire emergency, only persons wearing and trained in the use of mine rescue apparatus shall participate in rescue and firefighting operations in advance of the fresh air base."

The Secretary has failed to establish this violation. While there may have been an evacuation of the mine, it did not occur in a "fire emergency," no persons were participating "in rescue and firefighting operations," and no one was "in advance of the fresh air base."

"Fire emergency" is not defined in the regulations. However, it stands to reason that for there to be a fire emergency, there must be a fire. As has already been seen in the discussion of the previous citation, when Black and the others entered the mine at 8:00 a.m., there was no fire. Indeed, fire was only one of several possibilities that they considered, when they entered the mine to investigate the cause of the soot and odor.

Further, in the preamble to this regulation, MSHA stated that: "[O]nce a fire emergency *has been declared* and a fresh-air base *has been established*, mine rescue apparatus must be worn as a protection against smoke, fumes, and toxic products of fire." 50 Fed. Reg. 4,022, 4,028 (1985) (emphasis added). As the Commission has observed, the preamble and the regulation envision a formal procedure of declaring a fire emergency and establishing a fresh air base. *Gouverneur Talc Co.*, 20 FMSHRC 129, 135 (Feb. 1998). Here, no fire emergency had been declared.

Next, it is plain from the facts of this case that the three men were not participating in rescue and firefighting operations when they went into the mine to investigate the situation.

Finally, no fresh air base had been established, so no miner could have been in advance of it. The Secretary grounds its claim that a fresh air base had been established on the conclusion of Inspector Galbreath that the fresh air base was located "at the hoist house." (Tr. 121.) Galbreath offered no other evidence as to how he concluded that a fresh air base was ever established, let alone that one was set-up prior to the three men entering the mine at 8:00 a.m. On the other hand, Sammy Linville, a Carmeuse kiln operator and rescue team member, testified, as a witness for the Secretary, that "when the three guys came out and we was in a room, we said that the hoist house would be considered the fresh air base," which indicates that if one were established, it was not until after the three men came out of the mine. (Tr. 160.) Black testified that a fresh air base was not "established any time on April 10." (Tr. 217.) That Black was correct is

supported by the fact that the parties stipulated that a "command base" was set up on the surface at 9:15 a.m. (Jt. Ex. 1, Stip. 40.)

Certainly, a fresh air base, as commonly understood, was not established. A "fresh air base" is defined as: "An underground station, located in the intake airway, that is used by rescue teams during underground fires and rescue operations. The base should be as close to the fire as safety will permit, adequately ventilated, and in constant touch with the surface by telephone." Am. Geological Institute, *Dictionary of Mining, Mineral, and Related Terms*, 223 (2d ed. 1997). As Commissioner Jordan pointed out in her concurring opinion in *Gouverneur Talc*, "[a]ccording to this definition, therefore, the regulation contemplates the formal establishment of a properly ventilated underground area to demarcate the boundary beyond which apparatus must be used." 20 FMSHRC at 137 (footnote omitted). Obviously, nothing like that was established here.

In conclusion, at least three of the four elements of this regulation were not proven by the Secretary. Accordingly, I conclude that the company did not violate section 57.4362 and will vacate the citation.

## Civil Penalty Assessment

The Secretary has proposed a penalty of $1,769.00 for Citation No. 6108738. However, it is the judge's independent responsibility to determine the appropriate amount of penalty in accordance with the six penalty criteria set out in section 110(i) of the Act, 30 U.S.C. § 820(i). *Sellersburg Stone Co. v. FMSHRC*, 736 F.2d 1147, 1151 (7th Cir. 1984); *Wallace Brothers, Inc.*, 18 FMSHRC 481, 483-84 (Apr. 1996).

In connection with the penalty criteria, the parties have stipulated that Black River Plant employed approximately 120 people who worked 247,291 hours in 2005. (Jt. Ex. 1, Stips. 3 and 4.) From this, I find that the operator is a medium to large size business. The parties also stipulated that the penalties will not affect Carmeuse's ability to remain in business, and I so find. (Jt. Ex. 1, Stip. 14.) From the Assessed History Violation Report and the allied papers, I find that the operator has a slightly lower than average history of previous violations. (Govt. Ex. 14.) I further find from the citation that the company demonstrated good faith in abating the violation.

With regard to gravity, I agree with the inspector that the failure to insure that contract employees are properly trained could have serious consequences. However, in this case it did not because the employees had received site specific training, had received Part 46 training and were not working in or around Carmeuse employees, but were cleaning up lime dust around the plant area. Therefore, I find that the violation was not very serious.

Finally, I do not agree with the inspector that the operator was moderately negligent in connection with this violation. The company had made reasonable, although not exhaustive, efforts to insure that the A&T employees were properly trained. Consequently, I find the operator's level of negligence for this violation was low and will modify the citation accordingly.

Taking all of these factors into consideration, I conclude that a penalty of $100.00 is appropriate for Citation No. 6108738. I further find that the penalties agreed to for the settled citations are appropriate under the penalty criteria.

## Order

In view of the above, Citation No. 6108736, in Docket Nos. KENT 2006-158-RM and KENT 2006-396-M, is **MODIFIED**, as agreed by the parties, by deleting the "significant and substantial" designation and is **AFFIRMED AS MODIFIED**; Order No. 6108738, in Docket Nos. KENT 2006-159-RM and KENT 2006-396-M, is **MODIFIED** from a 104(g) order to a 104(a) citation and by deleting the "significant and substantial" designation and is **AFFIRMED AS MODIFIED**; Order No. 6108751, in Docket No. KENT 2006-186-RM, is **VACATED**, as agreed by the parties; Citation No. 6108752, in Docket Nos. KENT 2006-206-RM and KENT 2006-318-M, is **AFFIRMED**, as agreed by the parties; Citation No. 6108779, in Docket Nos. KENT 2006-253-RM and KENT 2006-396-M, is **AFFIRMED**, as agreed by the parties; Citation No. 6109486, in Docket Nos. KENT 2006-254-RM and KENT 2006-397-M, is **VACATED**; Citation No. 6109487, in Docket Nos. KENT 2006-255-RM and KENT 2006-397-M, is **VACATED**; and Citation No. 6109488, in Docket Nos. KENT 2006-256-RM and KENT 2006-397-M, is **VACATED**, as agreed by the parties.

Carmeuse Lime and Stone, Inc., is **ORDERED TO PAY** a civil penalty of **$511.00** within 30 days of the date of this order.

T. Todd Hodgdon
Administrative Law Judge

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