

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

601 New Jersey Avenue, N.W., Suite 9500

Washington, D.C. 20001

May 21, 2004

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 2004-86-M
Petitioner	:	A. C. No. 02-02166-11087
v.	:	
	:	
CALMAT COMPANY OF ARIZONA,	:	
Respondent	:	West Plant

DECISION

Appearances: Jan M. Coplick, Esq., Office of the Solicitor, U.S. Department of Labor, San Francisco, California, on behalf the Petitioner; Rochelle R. Dunham, Esq., O’Melveney & Myers, LLP, Los Angeles, California, on behalf of the Respondent.

Before: Judge Melick

This case is before me upon a Petition for Civil Penalty filed by the Secretary of Labor, pursuant to Section 105(d) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1994), *et seq.*, the “Mine Act,” charging the Calmat Company of Arizona (Calmat) in two citations with violations of mandatory standards and proposing civil penalties of \$2,975.00, for the alleged violations. The pivotal issue before me is whether the Department of Labor’s Mine Safety and Health Administration had jurisdiction under the Mine Act to issue the citations at bar.¹ Calmat maintains that the citations were issued in an area of its facility that was explicitly excluded from such jurisdiction by the interagency agreement between the Department of Labor’s Occupational Safety and Health Administration (OSHA) and the Department’s Mine Safety and Health Administration (MSHA), *i.e.*, the “Interagency Agreement.”

The starting point for an analysis of Mine Act jurisdiction is the definition of the term “coal or other mine,” in Section 3(h)(1). A coal or other mine is there defined, in relevant part, as “(A) an area of land from which minerals are extracted . . . , (B) private ways and roads appurtenant to such area, and (C) lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in . . . the work of extracting minerals from their natural deposits, . . . or used in . . . the milling of such minerals . . .” 30 U.S.C. § 802(h)(1). The Senate Committee that drafted this definition stated its intention that “what is considered to be a mine

¹ Calmat has agreed to pay the penalties proposed by the Secretary should jurisdiction be found under the Mine Act.

and to be regulated under this Act be given the broadest possible interpretation, and . . . that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” S. Rep. No. 181, 95th Cong., 1st Sess. 14 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 9th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 602 (1978)(“Legis. Hist”); *See also* *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984).

The Secretary argues that the cited conditions fall within Mine Act jurisdiction because they involved a haul truck that had been “used in” extracting minerals from their natural deposits and that the violations took place on “private ways and roads appurtenant to such area.” Indeed, Respondent acknowledges that the citations would have been within the Secretary’s jurisdiction under the Mine Act, but for its claimed exemption under the Interagency Agreement for concrete batch plants (Tr. 14-15).

There is no dispute that the Interagency Agreement, executed pursuant to the authority of Section 3(h)(1) of the Mine Act, places concrete batch plants under OSHA’s exclusive jurisdiction whether or not they would otherwise be considered to be part of a “mine.” The agreement provides that OSHA’s authority over concrete ready-mix and batch plants, “commences after [the] arrival of sand and gravel or aggregate at the plant stockpile.” The precise question to be resolved in this case then, is whether the violations were cited within or outside of the concrete ready-mix batch plant at the Calmat facility on August 11, 2003.

The Calmat facilities are clearly depicted in the to-scale photographic map in evidence as Exhibit R-1. A not-to-scale reduced copy of that map was admitted as Exhibit P-1 and is attached hereto as an appendix. The perimeter of the facility is defined with a fence. There are two gated entrances through which a variety of vehicles must pass to enter or exit. Mine Act jurisdiction in the areas within the facility involving the extraction of sand and stone (area E-3 on Exhibit R-1) and the processing and storage of such material in designated areas (E-2 and E-3 on Exhibit R-1) is undisputed. It is also undisputed that certain areas are excluded from Mine Act jurisdiction by the Interagency Agreement. The Secretary acknowledges that these excluded areas include the concrete batch plant (area “B” on Exhibit R-1) and the specific aggregate stockpiles associated with the concrete batch plant (areas P ½ , P 3/8, P 1 ½ , PL and PS on Exhibit R-1) (Tr. 148).²

The subject citations were issued on August 11, 2003, for the alleged failure to provide safe access for a truck driver who had climbed to a position 14 feet above ground on top of a haul truck and the alleged failure to provide specific on-site training for that driver. The driver was standing on a Caterpillar Model 773 haul truck positioned on a lowboy trailer. (See Exhibit P-3). A second Caterpillar haul truck was also parked nearby. These haul trucks had been used

² It is undisputed however that the stockpile identified as “K” on Exhibits R-1 and P-1 is depicted as larger and closer to the location of the cited violations (position “H”) than was extant at the time of those alleged violations.

in the past to haul mine product (sand and rock) within the facility but had not been recently used. The trucks in fact had recently been sold and were being loaded onto the lowboy for removal from the facility. They had been driven to this site by a Calmat mechanic who was also supervising their removal. Shortly before the time the citation was issued the tires had been removed from one truck by a tire contractor to facilitate its transport on the lowboy. The second truck was about to be likewise handled.

The alleged violations took place on a flat area (identified on Exhibits R-1 and P-1 as “H”) used to park the cited vehicles and located adjacent to the dirt roadway (identified by yellow marker on Exhibits R-1 and P-1) leading from the 51st street entrance in the facility. This roadway was also used by various vehicles including those miners (as defined in the Mine Act) coming to and leaving work, trucks carrying mine personnel and trucks used to maintain equipment under admitted Mine Act jurisdiction. In addition, haul trucks for outside contractors travel this roadway carrying sand and stone from the area within admitted Mine Act jurisdiction.

Within this framework of evidence it is clear that the area in which the violations were cited was a private way or road appurtenant to “an area of land from which minerals are extracted.” Therefore, unless specifically excluded by the Interagency Agreement as a concrete batch plant the cited area was within Mine Act jurisdiction. Indeed, as previously noted, Calmat acknowledged this at hearing. (Tr. 14-15).

The site of the alleged violations was a significant distance (about 400 feet) from the concrete batch plant but was also located near an aggregate stockpile (Area “K” on Exhibit R-1) used to supply the concrete batch plant - - a stockpile which the Secretary acknowledges was outside Mine Act jurisdiction. However, since the area of Calmat property on which the lowboy and haul trucks were parked and where the violations were cited was not within that specific excluded area, of the mine, *i.e.*, the concrete batch plant or its stockpiles, the cited area was within Mine Act jurisdiction. Accordingly the citations herein were properly issued. I further find that the Secretary’s proposed penalties, which Calmat has agreed to pay should Mine Act jurisdiction be found, are appropriate considering the criteria under Section 110(i) of the Act.

ORDER

Citation Nos. 6293819 and 6293820 are hereby affirmed and the Calmat Company of Arizona is hereby ordered to pay civil penalties of \$1,750.00 and \$1,225.00 respectively for the violations charged therein within 40 days of the date of this decision.

Gary Melick
Administrative Law Judge
(202) 434-9977

(Distribution by Certified Mail)

Jan M. Coplick, Esq., Office of the Solicitor, U.S. Dept. of Labor, 71 Stevenson St., Suite 1110,
San Francisco, CA 94105

Rochelle R. Dunham, Esq., Scott H. Dunham, Esq., O'Melveny & Myers, LLP, 400 South Hope
St., Los Angeles, CA 90071

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Exhibit R-1 - photographic map