FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 27, 2005

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	Docket No. WEST 2004-86-M
ADMINISTRATION (MSHA)	:	
	:	
v.	:	
	:	
CALMAT COMPANY OF ARIZONA	:	

BEFORE: Duffy, Chairman; Jordan, Suboleski, and Young, Commissioners

DECISION

BY: Jordan, Suboleski, and Young, Commissioners

In this civil penalty proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) ("Mine Act"), Administrative Law Judge Gary Melick upheld an order and a citation issued by the Department of Labor's Mine Safety and Health Administration ("MSHA") to Calmat Company of Arizona ("Calmat") alleging that Calmat had violated mandatory training and safety standards. 26 FMSHRC 409 (May 2004) (ALJ). Calmat filed a petition for discretionary review of the judge's decision, which the Commission granted. For the reasons that follow, we affirm the judge's decision.

I.

Factual and Procedural Background

Calmat operates a facility in Phoenix, Arizona, that consists of an aggregate mine, a "ready-mix" concrete batch plant, and an asphalt batch plant. Jt. Stip. 1; Tr. 154, 187. On August 11, 2003, MSHA Inspector Enrique Videl was at the facility to conduct an inspection of the mine and maintenance shop. 26 FMSHRC at 410; Jt. Stip. 13. After a pre-inspection conference at the facility's main office, Inspector Videl walked outside and observed a man who was atop a Caterpillar 773B End Dump Truck ("Cat 773" or "haul truck") that had been loaded onto an over-the-road "LowBoy" tractor-trailer for transport off the property. 26 FMSHRC at 410; Jt. Stips. 13 & 14; Tr. 87, 101-04; Gov't Ex. P-3 (photograph taken by Inspector Videl

showing actual observation). The man was not wearing any fall protection. Jt. Stip. 13; Tr. 87. He was the driver of the LowBoy and an independent contractor hired by Pacific Tri-Star, Inc., a used, heavy-equipment dealer with which Calmat had negotiated the sale of the Cat 773. 26 FMSHRC at 410-11; Jt. Stip. 14; Tr. 113. Inspector Videl thereupon issued Calmat an imminent danger order for failure to provide site-specific training to the driver,[1] along with a citation for failure to provide him with safe access atop the Cat 773.[2] 26 FMSHRC at 410; Gov't Ex. P-5 (copies of order and citations).

At the time of the alleged violations, the LowBoy holding the Cat 773 was parked on a flat, dirt road adjacent to another dirt road in the vicinity of the concrete batch plant. 26 FMSHRC at 411; Jt. Stip. 19; Tr. 88-91. The area was located near a pile of aggregate to be used by the processing center of the concrete batch plant to produce ready-mix, as well as near the ready-mix truck parking lot and slump racks where ready-mix drivers clean their trucks and add water to loads. Jt. Stip. 19. A second LowBoy tractor-trailer holding another Cat 773 was parked nearby. 26 FMSHRC at 410-11; Tr. 151; Gov't Ex. P-3.

Calmat challenged the order and citation solely on the basis that the alleged violations occurred in an area of the facility that Calmat contends is excluded from MSHA's jurisdiction by an Interagency Agreement between MSHA and the Occupational Safety and Health Administration ("OSHA"). 26 FMSHRC at 409. At the hearing, Calmat stated that, absent the existence of the concrete and asphalt batch plants at the facility, there would be no dispute because MSHA would have sole jurisdiction over the facility. Tr. 16-17. Calmat also agreed that, if MSHA's jurisdiction were found to be proper, it would pay the proposed penalties. 26 FMSHRC at 409 n.1.

After examining the Mine Act's definition of "coal or other mine" and accompanying legislative history, the judge held that because "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,'" the area fell within the statutory definition of a mine. 26 FMSHRC at 409-11. The judge further held that "unless specifically excluded by the Interagency Agreement as a concrete batch plant the cited area was within [MSHA's] jurisdiction." *Id*. at 411. The judge went on to find that, being approximately 400 feet away, the site of the alleged violations was a significant distance from the processing center for the concrete batch plant but near an aggregate stockpile used to supply it.

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[1] The order alleges a violation of 30 C.F.R. § 46.11(b)(4). Section 46.11 states, in pertinent part, that "(b) You must provide site-specific hazard awareness training, as appropriate, to any person who is not a miner as defined by § 46.2 of this part but is present at a mine site, including: . . . (4) Customers, including commercial over-the-road truck drivers . . . ."

[2] The citation alleges a violation of 30 C.F.R. § 56.11001, which requires that "[s]afe means of access shall be provided and maintained to all working places."

Id.[3] However, the judge concluded that since the site was not within the area of the mine that the Interagency Agreement intended to exclude from the Mine Act's coverage – i.e., the concrete batch plant or its stockpiles – the site was within MSHA's jurisdiction. *Id.* Accordingly, the judge affirmed the order and citation and assessed civil penalties totaling $2,975.00, the amount proposed by the Secretary for the two violations. *Id*.

II.

Disposition

On appeal, Calmat continues to base its challenge to MSHA's jurisdiction on its claim that the conduct for which Calmat was cited "occurred at a location squarely within the concrete batch plant and, therefore, beyond MSHA's jurisdiction under the Interagency Agreement." C. Amended Br. at 2.[4] Calmat contends that the judge failed to address the issue of which area of the facility constitutes the concrete batch plant exempt from MSHA's jurisdiction under the Interagency Agreement. C. Amended Br. at 4-6. Calmat maintains that the site of the alleged violations was completely surrounded by components of the concrete batch plant and that activities that took place on the road adjacent to the area cannot be attributed to the entire facility. C. Reply Br. at 5-7. Calmat argues that the judge further erred in finding that the site of the alleged violations was a private way or road appurtenant to a mine and that past use of the haul trucks in mining operations provided a sufficient basis for MSHA's exercise of jurisdiction in this case. C. Amended Br. at 7-8, 9-11; C. Reply Br. at 3-4, 9-12. Finally, Calmat asserts that it did not receive notice that the functional and operational areas of its concrete batch plant are regulated by MSHA. C. Amended Br. at 12; C. Reply Br. at 12-15.

The Secretary responds that the judge correctly concluded that the site of the alleged violations was subject to MSHA's jurisdiction because the area is adjacent to a road that originates at one of the entrances to the facility and extends through the facility to the excavation pit. S. Br. at 9-17. She asserts that the judge also correctly concluded the haul truck, atop which the man was standing, had been used in the past to haul mine product and that use provides an additional basis for MSHA's jurisdiction in this case. *Id.* at 17-22. The Secretary argues that the judge correctly determined that neither the haul truck nor the area in which it was parked is

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[3] *See* 26 FMSHRC at 410 (judge's reference to area "B"); Tr. 114-15 (inspector's testimony that haul trucks were approximately 400 feet from the processing center for the concrete batch plant at area "B").

[4] Calmat designated its petition for discretionary review and accompanying memorandum of points and authorities as its opening brief. Letter dated July 26, 2004. On September 14, 2004, the Commission received Calmat's notice of errata and amended memorandum of points and authorities, which deleted five lines of text and added four lines of text. While this filing occurred after the Secretary filed her brief, she neither objected nor responded.

excluded from MSHA's jurisdiction because neither was within an area specifically excluded by the Interagency Agreement. *Id.* at 22-26. The Secretary contends that, pursuant to the language and purpose of the Mine Act and the Interagency Agreement, Calmat had fair notice that the haul truck and the area in which it was parked are subject to MSHA's jurisdiction. *Id.* at 26 n.8.

Section 4 of the Mine Act provides in part that "[e]ach coal or other mine . . . shall be subject to the provisions of this Act." 30 U.S.C. § 803. "Coal or other mine" is defined in section 3(h)(1) of the Act as:

> (A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment.

30 U.S.C. § 802(h)(1). Pursuant to subsection (C)'s language requiring that the Secretary, in making a determination of what constitutes mineral milling for purposes of the Mine Act, give due consideration to the convenience of delegating to one Assistant Secretary the authority over the health and safety of miners employed at one physical establishment, MSHA and OSHA entered into an Interagency Agreement.[5] 44 Fed. Reg. 22,827 (Apr. 17, 1979), *amended by* 48 Fed. Reg. 7,521 (Feb. 22, 1983).

Under the Interagency Agreement, some operations which could be considered "mineral milling" are regulated by MSHA while others are regulated by OSHA. Paragraph B.6.b., which delegates to OSHA jurisdiction over, among other things, concrete and asphalt batch plants, including those located on mine property, is relevant to the Calmat facility in this case. 44 Fed. Reg. at 22,828. Also, Appendix A of the Interagency Agreement provides that, with regard to concrete ready-mix or batch plants, OSHA's jurisdiction commences upon arrival of sand and gravel or aggregate at the plant stockpile. *Id.* at 22,830.

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[5] Under section 4 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. (2000) ("OSH Act"), OSHA has jurisdiction to regulate the working conditions of only those employees whose occupational health and safety is not regulated by other federal agencies or by state agencies pursuant to the OSH Act. 29 U.S.C. § 653(b)(1).

A. Whether the Secretary Properly Exercised MSHA's Jurisdiction

In determining whether the Secretary has adhered to the Interagency Agreement in exercising MSHA's jurisdiction in this case,[6] the agreement as well as common sense dictates that we examine both the location where the cited conduct occurred and the nature of the conduct itself. The terms of the Interagency Agreement are clear that both work locations and work functions are important in determining the respective jurisdiction of the two agencies.[7] Moreover, focusing only on the location of the work, as Calmat urges (*see* C. Amended Br. at 6, 11; C. Reply. Br. at 5), would permit an operator at a facility, where there is both OSHA and MSHA-regulated work, to escape enforcement of one agency's regulations by moving the work to an area of the facility considered to be geographically outside that agency's jurisdiction. While there is no allegation that such conduct occurred here, we must be mindful of the potential for abuse in other cases.[8]

In reviewing the judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. *See* 30 U.S.C. § 823(d)(2)(A)(ii)(I). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC

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[6] Given Calmat's position that, absent a finding the cited conduct occurred within the concrete batch plant area of its facility, MSHA's jurisdiction would be appropriate, we do not address the basis for MSHA's jurisdiction under section 3(h)(1).

[7] As previously noted, Paragraph B.6.b. of the Interagency Agreement assigns concrete batch plants, i.e., locations, to OSHA's jurisdiction, but Appendix A specifies that OSHA's regulatory authority does not begin until after arrival of product at the stockpile. 44 Fed. Reg. at 22,828, 22,830. Another example of how the Interagency Agreement relies upon both location and function appears in Paragraph B.4. which provides that the term "milling" may be expanded to include processes that are related, technologically or geographically, or narrowed to exclude processes that are unrelated, technologically or geographically. *Id*. at 22,828. In addition, Paragraph B.5. then lists several factors to be considered in determining what constitutes milling and whether a physical establishment is subject to authority by MSHA or OSHA, including the processes conducted at the facility. *Id.*

[8] Our approach here is consistent with previous cases involving jurisdictional questions governed by the Interagency Agreement, where the Commission has examined various work sites as well as the functions performed and the processes conducted to determine MSHA's jurisdiction under the Mine Act. *E.g., Watkins Engineers & Constructors*, 24 FMSHRC 669, 672-76 (July 2002); *Drillex, Inc.*, 16 FMSHRC 2391, 2394-96 (Dec. 1994); *W. J. Bokus Indus., Inc.*, 16 FMSHRC 704, 705-08 (Apr. 1994); *see also Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1551-55 (D.C. Cir. 1984) (considering physical proximity and operational integration to determine that slate gravel processing facility constituted a mine within Mine Act).

2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). We also keep in mind the words of the Senate Committee responsible for drafting the Mine Act:

> The Committee notes that there may be a need to resolve jurisdictional conflicts, but it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.

S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978).

The judge concluded that the area in which the cited conduct occurred was not within the area of the facility over which OSHA, according to the Interagency Agreement, had jurisdiction (i.e., the concrete batch plant or its stockpiles) but, rather, a flat area adjacent to a dirt roadway that ran through the facility from one of the entrances. 26 FMSHRC at 411. With regard to exactly where the Cat 773 was located, Joint Stipulation 19 states "the Cat 773 was located *on* a roadway" (emphasis added). Inspector Videl testified the area where the haul trucks were parked was a flat, dirt roadway, and he also estimated the area was merely 10 to 15 feet from another roadway used in entering and exiting the facility by himself and many others, such as Calmat's miners, other employees, and contractors, including aggregate truck drivers and mine maintenance contractors. Tr. 88-95, 124-25; *see* 26 FMSHRC at 411 (noting alleged violations occurred adjacent to the roadway used by various vehicles, including those of miners coming to and leaving work, trucks carrying mine personnel, and trucks used to maintain mine equipment).

Despite Joint Stipulation 19, Calmat argues the cited conduct took place on "raw land" near a road, not "on" a road. *See* C. Amended Br. at 9, 11; C. Reply Br. at 5, 9. Calmat can go no further, however, conceding the site at issue "was not necessarily a functional 'component' of the concrete batch plant." C. Reply Br. at 5. Nevertheless, it urges that we overturn the judge's factual finding because the cited conduct occurred in an area that was completely surrounded by components of the batch plant. C. Amended Br. at 6, 11.

We do not entirely agree with Calmat's description of the area. As the judge found, the processing center for the concrete batch plant was 400 feet away from where the cited conduct took place. 26 FMSHRC at 411; *see* n.4, *supra*.[9] While the concrete batch plant stockpiles were

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[9] While Calmat is correct that the judge erroneously referred to the "processing center of the concrete batch plant" as the "concrete batch plant," we believe the judge's error is harmless. *See* 26 FMSHRC at 410 & 411; C. Amended Br. at 4-6. The judge clearly states his understanding of the several areas excluded from MSHA's jurisdiction by the Interagency Agreement as follows: "It is . . . 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

considerably closer, also nearby was a maintenance shop at which mechanical work was performed on the haul trucks. Jt. Stip. 10. MSHA inspected the shop, and employees, including miners, checked in and attended safety meetings at the shop. Jt. Stips. 10 & 11; Tr. 75. Significantly, there was no fence or other clear demarcation line between the areas of the mine and those of the concrete batch plant.

In addition, Stephen Buckner, Calmat's plant manager, testified that the area at issue was not part of the concrete batch plant. Tr. 177-79. He further admitted that his choice of that area for loading the haul trucks onto the LowBoys had nothing to do with the concrete batch plant. Tr. 227. The site was selected because the LowBoy tractor-trailers onto which the haul trucks were being loaded are very long trucks and it was the "best," "safest," and "emptiest" place that was near to a road. Tr. 226-27.

Thus, the site of the alleged violations is a part of the facility that was not solely devoted to either MSHA-regulated aspects or OSHA-regulated aspects of the work performed there, and the site was near to both mining-related areas as well as the concrete batch plant. Consequently, an examination of the functions being performed that gave rise to the order and citation are appropriate.

It is clear that the cited conduct of the independent contractor had nothing to do with Calmat's concrete batch plant operations but, rather, occurred in connection with Calmat's mining operations. The Joint Stipulations indicate that the haul trucks had been used in functions at Calmat's facility that are indisputably subject to the Mine Act (i.e., prior to the arrival of product at the stockpile when, pursuant to Appendix A of the Interagency Agreement, OSHA's jurisdiction commences). Joint Stipulations 14 through 16 state, in part:

> 14. . . . The Cat 773 was a 50 Ton End Dump Truck which Respondent *had used in its mining operations*. In August 2002, however, the Cat 773 was relegated to Respondent's bone yard because it was inoperable for mining purposes – it had a cracked frame. . . . .
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> 15. During its active use by Respondent prior to August 2002, the Cat 773 was driven only by Respondent's *miner* employees, i.e., those who had received new miner or refresher miner training under the [Mine] Act.
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> 16. The Cat 773 was used primarily, if not exclusively, as a *hauler*. A loader would excavate rocks and minerals from the pit and place the material inside the Cat 773. Then, the Cat 773 would *haul the material to the feed hopper*.

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stockpiles associated with the concrete batch plant (areas P ½, P 3/8, P 1 ½, PL and PS on Exhibit R-1)." 26 FMSHRC at 410. Moreover, in his ultimate finding describing the area excluded from MSHA's jurisdiction, the judge refers to both the concrete batch plant and its stockpiles. *Id.* at 411.

Jt. Stips. 14-16 (emphases added). *See Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1296 (Nov. 2000) (holding dragline assembly site was a mine and dragline was equipment used in mining subject to Mine Act).

Calmat argues that the prior sale of the haul trucks removes them from MSHA's jurisdiction (C. Reply Br. at 14), but we cannot agree. As the facts underlying the order and citation show, the haul trucks remained at Calmat's facility pursuant to its interest and under its control. Witnesses, including Calmat's plant manager, testified that a mine mechanic drove the haul trucks from the bone yard to the subject area and was responsible for overseeing the job of preparing and loading them onto the LowBoy tractor-trailers. Tr. 136-41, 190-95, 202-04. Moreover, Calmat does not explain how the sale transferred jurisdiction over the work performed on the haul trucks to OSHA, when the haul trucks remained unrelated to Calmat's OSHA-regulated operations.

In summary, considering both the locational and functional aspects of this case, the site where the haul trucks were parked was not clearly part of the batch plant that was excluded from MSHA's jurisdiction by the Interagency Agreement, and the haul trucks themselves were clearly related to mining operations and within MSHA's jurisdiction. Because the alleged violations involve an independent contractor performing work on mining equipment under the direction of a mine employee in a dual-use area, and in light of Congress' clear intention that jurisdictional doubts be resolved in favor of coverage by the Mine Act, we believe the alleged violations properly fall under MSHA's jurisdiction. Accordingly, we conclude that substantial evidence supports the judge's conclusion that the Secretary correctly applied the Interagency Agreement in exercising MSHA's jurisdiction in this case.

B. Whether Calmat Had Notice of MSHA's Jurisdiction

Courts have found adequate notice where "a regulated party acting in good faith would be able to identify, with 'ascertainable certainty,' the standards with which the agency expects the parties to conform" by "reviewing the regulations and other public statements issued by the agency." *General Elec. Co. v. EPA*, 53 F.3d 1324, 1329 (D.C. Cir. 1995) (citing *Diamond Roofing Co. v. OSHRC*, 528 F.2d 645, 649 (5th Cir. 1976)). In this case, we conclude that adequate notice was provided Calmat by the language and legislative history of the Mine Act as supplemented by the Interagency Agreement, which carves out of MSHA's jurisdiction concrete batch plant operations. Where, as here, neither the geographic site of the alleged violations nor the haul trucks involved in the alleged violations were exclusively related to the concrete batch plant, it follows that Calmat should have known the site and haul trucks would be subject to MSHA's jurisdiction.

III.

Conclusion

For the foregoing reasons, we affirm the judge's decision.

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Mary Lu Jordan, Commissioner

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Stanley C. Suboleski, Commissioner

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Michael G. Young, Commissioner

Chairman Duffy, concurring:

I join with my colleagues in affirming the decision below; the substantial evidence rule compels that result. This case raises important questions regarding the effectiveness and predictability of enforcement under the Mine Act, however, that warrant a separate opinion.

In my view, the area where the violation occurred, referred to as area "H" in the exhibits, is more logically associated with that part of the property designated as being under OSHA's jurisdiction. By location, it is certainly more proximate to the OSHA side of the property than it is to the MSHA side of the property. It is directly adjacent to a material stockpile that feeds the concrete batch plant, and, according to the Interagency Agreement between MSHA and OSHA, OSHA's jurisdiction over concrete batch plants "commences after arrival of sand and gravel or aggregate at the plant stockpile." Interagency Agreement at Appendix A, 44 Fed. Reg. at 22,830. In addition, area "H" is located near the ready-mix truck parking lot and slump racks where ready-mix truck drivers clean their trucks and add water to loads. Jt. Stip. 19; Tr. 157-88.

Nevertheless, Calmat's principal witness testified that area "H" is not part of the concrete batch plant. Tr. 177-79. Conceding that the area in question is not part of the concrete batch plant constitutes a fatal admission against interest that supports the judge's conclusion that the area in question was subject to MSHA's jurisdiction, if only by default. That may be sufficient for the resolution of this case, but it offers little by way of guidance with respect to other properties that may be subject to the dual jurisdiction of OSHA and MSHA.

Paragraph B.2. of the Interagency Agreement restates the Secretary's statutory authority under 30 U.S.C. § 802(d) to delegate to one agency or the other the authority for all workplace safety and health enforcement at dual jurisdiction sites in the interest of administrative convenience. That was the circumstance in *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984), where all safety and health enforcement authority had been delegated to MSHA prior to commencement of the enforcement action giving rise to the litigation. Had the Secretary exercised her discretion here as she did in *Carolina Stalite*, particularly in light of the lack of clear lines of demarcation between the mining and mineral processing functions at the Calmat property (e.g., the shared use of the maintenance shop), there would have been no jurisdictional question to decide in this case.

The Secretary chose not to take that course of action, insisting that the area in question is inarguably within the regulatory purview of MSHA. That professed certainty is belied by the MSHA inspector's testimony that on his initial visits to the mine, he had to be directed by the operator's representative to those areas considered to be MSHA-regulated areas. Tr. 46, 64. Moreover, the inspector testified that prior to his observation of the violation, he had not intended to inspect the area in question as part of his regular inspection. Tr. 88. This was so despite the Act's command that mines be inspected in their entirety. 30 U.S.C. § 813(a). In

short, had the inspector not seen the violative condition occurring within area "H," MSHA's jurisdiction over the area would not have been invoked.[1]

In sum, if not for Calmat's fatal admission, I would hold that the area in question, by geographical location, was more logically aligned with the concrete batch plant and more appropriately within OSHA's jurisdiction. Granting that to be the case, the violative conduct would not have gone unsanctioned. Paragraph C.3. of the Interagency Agreement provides that when MSHA becomes aware of unsafe or unhealthful conditions in an area for which OSHA has enforcement authority, MSHA shall forward that information to OSHA, and under Paragraph C.4., OSHA shall notify MSHA of the ultimate disposition of the matter. 44 Fed. Reg. at 22,828. The inspector, therefore, after having been assured that the contractor's employee was no longer in danger, could have referred the matter to OSHA.[2]

This case illustrates the need to establish definitive jurisdictional authority for workplace safety and health at dual use properties by assigning exclusive responsibility to either MSHA or OSHA, or by clearly delineating beforehand those areas subject to enforcement by the respective agencies. In any event, the allocation of enforcement authority should not be left to the ad hoc approach adopted here.

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Michael F. Duffy, Chairman

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[1] My colleagues conclude that MSHA's jurisdiction is supported by the fact that the contractor's employee was standing on equipment associated with mineral extraction, not concrete batch plant processing. Slip op. at 7-8. I do not believe that is dispositive. The contractor's employee could have been standing on a stack of giant widgets, and the hazard would have been the same. Moreover, section 3(h) of the Mine Act refers to mining equipment "used in, or to be used in . . . the work of extracting . . . minerals from their natural deposits . . . ." The equipment here had been junked and sold, and was no longer used in the extraction process. 26 FMSHRC at 410-11.

[2] Notwithstanding his contention that the conduct he observed constituted an imminent danger under the Act, the inspector paused to take a photograph of the violative scene. Tr. 101-02. It would seem to me that a shouted "Get the hell down from there!" might have been a more appropriate and practical response. In any event, by the time the inspector arrived at the LowBoy, the contractor's employee had already returned safely to the ground. Tr. 87-88.

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