FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

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

BRIEF FOR THE SECRETARY OF LABOR

INTRODUCTION

This case involves a question of Mine Safety and Health Administration ("MSHA") jurisdiction at a facility consisting of a sand and gravel pit, an asphalt batch plant, and a concrete batch plant. MSHA issued two citations to Calmat Company of Arizona ("Calmat") after an MSHA inspector observed a man standing on top of the cab of a haul truck, i.e., a dump truck, approximately fourteen feet above the ground, without fall protection. The truck was once used to carry excavated rock to the hopper. It was taken out of service approximately one year before and was in the process of being removed from the facility by a contractor.

Calmat claims that the truck was parked in an area that was surrounded by components of the concrete batch plant, and that

the area was therefore excluded from MSHA jurisdiction under the jurisdictional agreement between MSHA and the Occupational Safety and Health Administration ("OSHA") ("the Interagency Agreement"). The evidence, however, shows that the haul truck had only been used in the excavation process, was never used in the concrete batch plant operations, and, according to Calmat's own Plant Manager, was loaded on a trailer parked in an area that had nothing to do with the concrete batch plant operations.

The judge's decision finding MSHA jurisdiction should be affirmed because the land and the haul truck that was loaded on a trailer parked on the land are included in the definition of a "mine" set forth in Section 3(h)(1) of the Mine Act and were not excluded from MSHA jurisdiction under the Interagency Agreement.

ISSUES

1. Whether the judge correctly concluded that the area in which the haul truck was parked was subject to MSHA jurisdiction because it was "a private way or road appurtenant to a [mine]."

2. Whether the judge correctly concluded that the haul truck was subject to MSHA jurisdiction because it "had been used in the past to haul mine product[.]"

3. Whether the judge correctly concluded that the haul truck and the area in which the haul truck was parked were not excluded from MSHA jurisdiction under the Interagency Agreement because the area in question was not within a specifically

excluded area.

STATUTORY AND REGULATORY FRAMEWORK

A. Statutory Framework

The Federal Mine Safety and Health Act of 1977 ("the Mine Act") was enacted to promote and improve safety and health in the Nation's mines. 30 U.S.C. § 801 et. seq. Under the Mine Act, a "coal or other mine" is defined as:

> (B) private ways and roads appurtenant to [an area of land from which minerals are extracted] ..., and
>
> (C) lands [or] ... equipment ... used in, to be used in, or resulting from, the work of extracting such minerals from their natural deposits ....

30 U.S.C. § 802(h)(1)(B), (C).

In passing the Mine Act in 1977, Congress intended to broaden MSHA's jurisdiction. The Conference Committee indicated that the Act broadly defines "mine" to include "all surface areas from which the mineral is extracted, and all surface facilities used in preparing or processing the minerals, as well as roads ... related to the mining activity." Conf. Rep. No. 95-461, 95th Cong., 1st Sess. 38 (1977), reprinted in Subcommittee of Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977 at 1316 ("Legislative History") (emphasis added). The Senate Committee on Human

Resources stated:

> (I)t 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. 181, 95th Cong., 1st Sess. 14 (1977), reprinted in Legislative History at 602.

B. The Interagency Agreement

In 1979, MSHA and OSHA entered into an interagency agreement. RX-2 (44 Fed. Reg. at 22827). The Interagency Agreement revised a 1975 Memorandum of Understanding between the Mine Enforcement and Safety Administration ("MESA") and OSHA to take into account Congress' directive that the Secretary, in making a determination of what constitutes mineral milling, "give due consideration to the convenience of administration" that would result from assigning to one agency -- MSHA or OSHA -- all safety and health enforcement responsibilities at particular facilities. Ibid. Paragraph A.3. of the Interagency Agreement specifies that in cases involving milling operations, the Secretary will apply the provisions of the Mine Act; paragraph B.6.b. further specifies that OSHA jurisdiction includes "concrete batch plants." RX-2 (44 Fed. Reg. at 22827, 22828). Appendix A provides a general list of milling processes that MSHA has authority to regulate, including

crushing, sizing, and washing, and further provides that OSHA's authority over concrete batch plants begins "after arrival of sand and gravel or aggregate at the plant stockpile." RX-2 (44 Fed. Reg. at 22829, 22830).

FACTS

Calmat's West Plant facility in Phoenix, Arizona, consists of sand and gravel, asphalt, and concrete ready-mix operations. Stip. 1, 3. The facility includes a pit from which rock and minerals are excavated, a crusher, a wash plant, an overland conveyor, a hot batch plant where asphalt is made, and a concrete batch plant where concrete is made. Tr. 41; Stip. 3; GX-C. The facility also includes a mechanics shop, which services mining equipment, and the miners' break room and tool area. Tr. 63, 67-70; Stip. 10, 11. The concrete batch plant consists of several areas: a processing center, a storage area, and a parking lot for ready-mix trucks. Stip. 4a, 4b, 4c. There are two entrances to the facility, and the facility is surrounded by a fence. Tr. 38, 59-60.

Rock and minerals are excavated from the pit using a front-end loader. Tr. 96; Stip. 16. At the time the citations in this case were issued, the front-end loader was used to place the excavated material into one of two haul trucks owned by Calmat. Tr. 111-13. The haul trucks would drive from the pit and deposit the excavated material into a feed hopper. Stip.

16. The material would then be crushed, screened, washed, and transported by front-end loaders to stockpiles near the pit, where it was sorted according to size. Tr. 96-97, 182. Some of the aggregate was sold directly from the stockpiles near the pit, and some was moved to other stockpiles located closer to the concrete batch plant, along the mine road, to be used to make concrete. Tr. 97-100, 115, 158-62.[1]

The facility includes a thirty-foot-wide private dirt road that has limited public access and is owned and maintained by Calmat. Tr. 37-38, 95, 213-14; Stip. 7. The road begins at one of the facility's two entrances and continues through the facility. Tr. 96-96. There is no indication of the road's boundaries. Tr. 89-90. The road is used by various vehicles, including miners' vehicles traveling to and from work, mine personnel vehicles traveling around the facility, maintenance trucks, Calmat's two haul trucks carrying excavated rock and mineral from the pit to the feed hopper, and vehicles transporting aggregate out of the facility from stockpiles located near the pit or closer to the concrete batch plant. Tr. 51-54, 58-61, 91-92, 95, 127, 145. Concrete and asphalt is also transported out of the facility by trucks traveling on the road. Tr. 180-84, 189-90, 205, 209.

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[1] "Aggregate" is rock that has been crushed and sized. Tr. 91-92.

The two haul trucks owned by Calmat were taken out of service in August 2002. Stip. 14. Both trucks were sold to Pacific Tri-Star, a used equipment dealer, in July 2003. Stip. 17. When the trucks were taken out of service, they were replaced by a conveyor belt system in the excavation area. Tr. 218.

On August 11, 2003, MSHA conducted an inspection of the facility. Tr. 31. MSHA Inspector Enrique Videl observed a man standing on the cab of one of the haul trucks, which had been loaded on a trailer parked on the dirt road approximately four hundred feet from the batch plant, near one of the batch plant stockpiles, and near the mine office. Tr. 87, 89, 103, 115, 119, 145; Stip. 13.[2] The trailer on which the haul truck was loaded was parked on the road in an area that was not a component of the concrete batch plant and had nothing to do with the concrete batch plant. Tr. 178-79, 227. The man was the driver of the trailer, which belonged to an independent contractor who was at the facility to remove the two haul trucks for Pacific Tri-Star. Tr. 110-11, 113, 132-33, 150, 154; Stip. 17. The driver was standing on top of the cab of the haul truck that was loaded onto the trailer, and was approximately fourteen feet above the ground. The driver did not have any fall

[2] The other haul truck was also parked in the area. Tr. 111.

protection and had not received any site-specific hazard training. Tr. 87, 102-03; Stip. 13, 20. The inspector observed the violations from the nearby mine office. Tr. 87, 104, 150-51.

Both haul trucks had been driven to the area by one of Calmat's mechanics. Tr. 190. The mechanic had been instructed to get the haul trucks, load them onto the trailer, and make sure that they were tied down. Tr. 133, 202. The mechanic was not in the area when the driver of the trailer climbed on top of the cab of the haul truck. Tr. 143-44. The mechanic had gone into the nearby mine office to find out why the trailer had not arrived and while he was gone the driver of the trailer arrived and got on top of the cab of the haul truck. Tr. 143.

MSHA issued two citations to Calmat alleging significant and substantial violations consisting of failing to provide safe access for the driver who had to climb fourteen feet above the ground to reach the top of the haul truck and failing to provide on-site training to the driver. Tr. 31, 35, 76, 85-86. Both MSHA and Calmat filed motions for summary decision. Calmat did not dispute the occurrence of the violations, the negligence and gravity designations, or the proposed penalty assessment. Tr. 27, 86. Calmat challenged only the existence of MSHA jurisdiction. Ibid.

THE JUDGE'S DECISION

The judge found that MSHA jurisdiction extended over the violations because the dirt roadway, which was the site of the violations, was a "private way or road appurtenant to an area of land from which minerals are extracted" within the definition of a "mine" set forth in Section 3(h)(1) of the Mine Act. 26 FMSHRC at 411. In so finding, the judge noted that Calmat acknowledged at the hearing that the area in question was within MSHA jurisdiction unless it was specifically excluded under the Interagency Agreement. 26 FMSHRC at 410, 411. The judge found that the area was not specifically excluded from MSHA jurisdiction under the Interagency Agreement because the area was not a "concrete batch plant or its stockpiles" within the meaning of the Interagency Agreement. 26 FMSHRC at 411.

ARGUMENT

MSHA JURISDICTION EXTENDED OVER THE LAND IN QUESTION AND THE HAUL TRUCK THAT WAS PARKED ON THE LAND

A. Introduction

Calmat's Petition for Discretionary Review is unclear as to whether Calmat is arguing that MSHA lacks jurisdiction in this case both under the Mine Act itself and under the Interagency Agreement (see Petition at 8-11), or is arguing only that MSHA ceded its statutory jurisdiction to OSHA under the Interagency Agreement (see Petition at 4-8). The Secretary will assume that

Calmat is making both arguments and will address both arguments.[3]

B. Standard of Review

The question of whether MSHA jurisdiction exists in this case requires the Commission to review the Secretary's interpretation both of the Mine Act and of the Interagency Agreement. If the Secretary's interpretation of an unambiguous statutory or regulatory provision is correct, it is to be affirmed without regard to deference; the Secretary's interpretation of an ambiguous statutory or regulatory provision is owed deference and is entitled to affirmance as long as it is reasonable. Nolichuckey Sand Co. Inc., 22 FMSHRC 1057, 1062 (Sept. 2000); Western Fuels-Utah, Inc., 19 FMSHRC 994, 998 (Jun. 1998) (citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842 (1984)).[4]

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[3] Contrary to Calmat's claim, Petition at 9-11, the judge did not need to address Calmat's assertion that the area in question was not a "mine" within the definition in the Mine Act. At the hearing, Calmat's attorney agreed with the judge that, if the concrete and the asphalt batch plants did not exist at the facility, the area in question would be under MSHA jurisdiction. Tr. 16-17. Accordingly, substantial evidence supports the judge's finding that Calmat acknowledged that, absent a specific exclusion, Mine Act jurisdiction extends over the road and the truck that was parked on the road. 26 FMSHRC at 410, 411. Alternatively, we show above that the area in question is clearly a "mine" under Section 3(h)(1) of the Mine Act.

[4] The Secretary maintains that "the rule of deference applies even to an agency's interpretation of its own statutory authority or jurisdiction." Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 381 (1988) (Scalia, J., concurring). In any event, the question of whether deference is

The Secretary's interpretation of her jurisdictional determinations in the Interagency Agreement is also entitled to deference as long as it is reasonable. Watkins Engineers & Constructors, 24 FMSHRC 669, 673 (July 2003) (according deference to the Secretary's determinations as to what constitutes "milling" under Section 3(h)(1) of the Mine Act and the Interagency Agreement). See also Carolina Stalite, 734 F.2d at 1552-54 (holding that the Secretary's determinations regarding what constitutes a "mine" under Section 3(h) of the Mine Act, although jurisdictional, are entitled to deference).

In this case, the judge agreed with the Secretary, and the evidence compels a finding, that the land and the haul truck that was loaded on a trailer parked on the land were within the definition of a "mine" set forth in Section 3(h)(1) of the Mine Act, and were not excluded from MSHA jurisdiction under the Interagency Agreement.

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owed to an agency's determination of the scope of its own jurisdiction is a question the Commission need not reach in this case. All of the Calmat facility is indisputably subject to regulation under either the Mine Act or the Occupational Safety and Health Act, and thus the Secretary in effect is not determining the outer limits of her own authority, but is merely "adjusting the administrative burdens between her various agencies." Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1553 (D.C. Cir. 1984). In addition, the Secretary's interpretation of the statutory provision in question correctly reflects Congress' unambiguously expressed statutory intent.

C. The Secretary's Interpretation That the Land and the Haul Truck That Was Parked on the Land Were Part of a "Mine" Under Section 3(h)(1) of the Mine Act Is Reasonable and Entitled to Deference

Congress used the "sweeping" set of definitions set forth in Section 3(h)(1) of the Mine Act to achieve broad statutory coverage. See Justis Supply & Machine Shop, 22 FMSHRC 1292, 1296 (Nov. 2000); Jim Walter Resources, Inc., 22 FMSHRC 21, 25 (Jan. 2000). See also Carolina Stalite, 734 F.2d at 1554; Harman Mining Co. v. FMSHRC, 671 F.2d 794, 797 (4th Cir. 1981); Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1117-18 (9th Cir. 1981); Marshall v. Stoudt's Ferry Preparation Co., 602 F.2d 589, 592 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980). Under the plain language of Section 3(h)(1)(B) and (C), the area in which the haul truck in this case was parked is either a "road[] ... appurtenant to" an area of land from which minerals are extracted, or is "land ... used in, or to be used in, or resulting from" extracting minerals, and the haul truck that had been used in the extraction process and which was parked on the land was "equipment ... resulting from" the extraction of minerals.

The term "appurtenant," under Section 3(h)(1)(B), commonly means "annexed or belonging legally to some more important thing (a right-of-way to land or buildings)." Webster's Third New International Dictionary (1993) at p. 107. See also Black's Law

Dictionary (8th ed. 2004) (defining "appurtenant" as "annexed to a more important thing"). Under the common definition of the term, the area in question is a road "appurtenant to" land from which minerals are extracted. The area is part of a thirty-foot-wide private dirt road that originates at one of the entrances to the facility and extends through the facility to the excavation pit. The road is owned and maintained by Calmat and has limited public access. The road is used by miners traveling to and from work, mine personnel traveling around the facility, maintenance trucks, contractors and customers transporting aggregate, concrete, and asphalt out of the facility, and was used by the two haul trucks that carried excavated rock from the pit to the feed hopper. Even though parts of the road are located near components of the concrete batch plant -- i.e., near the concrete batch plant stockpile, the ready-mix truck parking lot, and the batch plant processing center -- the area in which the haul truck was parked is, under the common definition of the term, "appurtenant to" land from which minerals are extracted.

Calmat's suggestion, Petition at 9 n.4, that the Secretary did not raise the issue of whether the area in question is a road "appurtenant to" land from which minerals are extracted is misplaced. The judge himself raised the issue in questioning the Secretary's attorney:

Q. THE COURT: -- and if it's traveling -- if it's a haul truck or a truck carrying miners over that same area, it would then be MSHA jurisdiction?

A. MS. COPLICK: Yes, Your Honor. And although that may --

Q. THE COURT: How about the fact -- how about if there are violations on the roadway itself, such as a hazard in the roadway, whose jurisdiction is it then?

A. MS. COPLICK: Well, in that case, Your Honor, I think that the definition of a mine, which includes all roads pertinent to a [sic] -- would make it MSHA jurisdiction. If it was a travelway absolutely completely within a batch -- for example, the processing plant. Say, as a matter of simple reality, the MSHA inspectors don't go in there. They would have no reason to --

Q. THE COURT: Well, it's not a question of whether they go or not. It's a question of whose jurisdiction is it.

A. MS. COPLICK: Yes, Your Honor.

Q. THE COURT: So you're saying a roadway, even one used by the front-end loader between the stockpiles and the batch plant, may be MSHA jurisdiction if it's also used by -- by vehicles used in mining activity? I mean, actual excavation for removal of minerals, or the travel of the haul trucks, or the travel of miners?

A. MS. COPLICK: Absolutely, Your Honor.

Q. THE COURT: So it's a dual use road? If it's used at all by any mining equipment, it would be under MSHA jurisdiction?

A. MS. COPLICK: Yes, Your Honor. And certainly that is the -- the interagency agreement itself provides for that.

Q. THE COURT: Okay. I just wanted to know what your position was. Go ahead.

Tr. 176-177. Self-evidently, the issue was one on which the judge "was afforded an opportunity to pass." 30 U.S.C. § 813(d)(2)(A)(iii).

Calmat's assertion, Petition at 9, that the judge's finding that the area in question is a "road appurtenant to a mine" is flawed because the judge stated that the violations took place on a flat area located "adjacent to the dirt roadway" is also unpersuasive. The judge's finding that the area in which the violations were cited is a private road or way, 26 FMSHRC at 411, is supported by MSHA Inspector Videl's testimony that the haul truck was loaded on a trailer parked on the road itself and not, as Calmat claims, Petition at 9, 11, adjacent to the road. Inspector Videl testified:

Q. THE COURT: Okay. Well, what is actually at position "H"?

A. THE WITNESS: "H" is just a piece of land.

Q. THE COURT: Well, is it flat? Is it hilly?

A. THE WITNESS: It's flat.

Q. THE COURT: Is there any way to distinguish that from the adjacent road?

A. THE WITNESS: No, sir.

Q. THE COURT: What is it used for, to your knowledge?

A. THE WITNESS: "H"?

Q. THE COURT: Yes.

A. THE WITNESS: As a roadway.

Q. THE COURT: All right. Go ahead.

* * *

Q. THE COURT: Is there any indication of where the roadway's boundary is?

A. THE WITNESS: No, sir.

Q. THE COURT: All right.

Tr. 89-90. Inspector Videl's testimony that the area in question is part of the road itself is not disputed. Accordingly, the judge's finding should be affirmed. Harlan Cumberland Coal Co., 20 FMSHRC 1275, 1288 (Dec. 1998) (undisputed testimony supported the judge's finding).

This case is distinguishable from Bush & Burchett v. Secretary of Labor, 117 F.3d 932 (6th Cir. 1997), on which Calmat relies in support of its claim, Petition at 9-11, that the road is not "appurtenant to" land from which minerals are extracted. In this case, the road is a private dirt road owned and maintained by Calmat. In Bush & Burchett, the Court found

that a bridge and a road approaching the bridge, both of which were public in nature and were to become part of the state highway system on completion, were not a road "appurtenant to" land from which minerals were extracted because, if they were, Mine Act jurisdiction "could conceivably extend to unfathomable lengths" and include "any road." 117 F.3d at 937. The road in this case does not extend beyond Calmat's fenced facility; it originates at one of the entrances to the facility, extends through the facility to the pit area, and is used in connection with the mining and milling activities occurring at the facility. Mine Act jurisdiction in this case could hardly be clearer, and the contrast between this case and Bush & Burchett could hardly be sharper.

Even if the Commission agrees with Calmat -- and, for the reasons stated above, it should not -- that the area in question is not a road "appurtenant to" land from which minerals are extracted, it should affirm the judge's decision on the ground that the area is included in the statutory definition of a "mine" because it is land "used in, or to be used in, or resulting from" the work of extracting minerals under Section 3(h)(1)(C) of the Mine Act.[5]

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[5] Although a prevailing party cannot appeal a favorable judgment, it "may offer in support of [the] judgment any argument that is supported by the record, whether it was ignored by the court below or flatly rejected." 9 Moore's Federal

In addition, the haul truck that had been used in the extraction process and that was loaded on a trailer parked on the land was "equipment ... resulting from" the work of extracting minerals under the plain language of Section 3(h)(1)(C). "Result" means "to ... arise as a consequence, effect, or conclusion." Webster's Third New International Dictionary (1993) at p. 1937. Moreover, the term "resulting from" refers to past use. Cf. Lancashire Coal Co. v. Secretary of Labor, 968 F.2d 388, 394 (3d Cir. 1992) (noting that the past, present, and future tenses are covered under the phrase "the work of extracting minerals" and that Congress must have intended the words "resulting from" to refer to "former use"). Inspector Videl's testimony, Tr. 111-13 that the haul truck had been used in the extraction process, i.e., to carry excavated rock to the hopper, is consistent with the ordinary definition of "resulting" and is undisputed. See Harlan Cumberland, 20

Practice § 204.11(3) at 44-45. The Supreme Court approved the foregoing principle in United States v. American Railway Express Co., 265 U.S. 425, 435 (1924). Accord Dandridge v. Williams, 397 U.S. 471, 475-476 n.6 (1970); In re: Columbia Gas System, Inc. v. United States, 50 F.3d 233, 237 n.6 (3d Cir. 1995); EF Operating Corp. v. American Buildings, 993 F.2d 1046, 1048 (3d Cir. 1993), cert. denied, 510 U.S. 868 (1993). It is under this principle that the Secretary asserts that, although the judge correctly concluded that MSHA had jurisdiction because the area in question is a road "appurtenant to" an area of land from which minerals are extracted, the judge's finding of jurisdiction is also supported by evidence establishing that the truck was parked on "land" "used in, to be used in, or resulting from" the excavation of minerals at Calmat's facility.

FMSHRC at 1288 (undisputed testimony supported the judge's finding).

Contrary to Calmat's assertion, Petition at 7-8, the Secretary's assertion of Mine Act jurisdiction in this case is completely consistent with the Lancashire case. In Lancashire, the Court held that the Mine Act did not give MSHA jurisdiction over a silo at an abandoned coal preparation plant because the clause in Section 3(h)(1)(C) that refers to "the work of preparing coal or other minerals" does not include the phrase "resulting from." 968 F.2d at 390-93. The Court noted that Section 3(h)(1)(C) refers to three different mining activities (extracting minerals; milling minerals; and preparing coal or other minerals) and that while the definition of a coal or other mine includes structures "resulting from" the extraction of minerals, the quoted language is not used in the statutory language extending coverage to structures "used in or to be used in" mineral milling or the preparation of coal or other minerals. 968 F. 2d at 390. In this case, the Secretary is not arguing that MSHA had jurisdiction under the clause that refers to "the work of preparing coal or other minerals"; she is arguing that MSHA had jurisdiction under the clause that refers to "the work of extracting ... minerals[.]" The clause that refers to "the work of extracting ... minerals" does include the phrase "resulting from" -- a phrase that, as the Court in

Lancashire emphasized, encompasses things that "were once used" in the work referred to "but are no longer being so used ...." 968 F.2d at 393.

Calmat is similarly mistaken in asserting, Petition at 8-9, that MSHA did not have jurisdiction in this case because the sand and stone carried by the haul truck was "finished product."[6] In all of the cases cited by Calmat, the courts held that MSHA did not have jurisdiction under the clause in Section 3(h)(1)(C) that refers to "the work of preparing coal or other minerals" because the material in question was "finished product." In this case, the Secretary is not arguing that MSHA had jurisdiction under the clause that refers to "the work of preparing coal or other minerals"; she is arguing that MSHA had jurisdiction under the clause that refers to "the work of extracting ... minerals[.]"

In any event, Calmat's assertion has no connection with the facts of this case. There is no evidence that any work of preparing or milling the material that the haul truck was used to transport had been finished, or even started. See Section 3(i) of the Mine Act (defining "the work of preparing the coal"); 44 Fed. Reg. at 22829-30 (defining "milling"). The only

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[6] Plant manager Buckner testified that "finished product" means rock that has "been sized to whatever sizes were called for and it's in the stockpile and it's ready to be shipped out." Tr. 183.

thing that had been done to the material was that it had been excavated from the pit and carried in the haul truck to the feed hopper. Preparation work did not even start until after the material was deposited into the feed hopper.

Like the plain statutory language, the legislative history clearly supports the conclusion that Mine Act jurisdiction existed in this case. See Natural Resources Defense Council, Inc. v. Daley, 209 F.3d 747, 752 (D.C. Cir. 2000) (both statutory language and legislative history are part of a plain meaning analysis); Western Fuels-Utah, Inc., 19 FMSHRC 994, 998 (June 1997) (same). In passing the Mine Act in 1977, Congress intended to broaden MSHA's jurisdiction. See Conf. Rep. at 38, reprinted in Legislative History at 1316 (emphasis added), and S. Rep. at 14, reprinted in Legislative History at 602. Both the statutory language and the legislative history noted above at pp. 3-4, supra, plainly support the Secretary's position that Mine Act jurisdiction existed in this case. See, e.g., Stoudt's Ferry, 602 F.2d at 592 (the plain language and the legislative history of the Mine Act mandated rejection of a narrow construction of the term "mine").

If, however, the Review Commission finds that the meaning of the Mine Act is ambiguous, the Secretary's interpretation is entitled to deference because it is consistent with the language and the purpose of the Act. See Joy Technologies, Inc. v.

Secretary of Labor, 99 F.3d 991, 997 (10th Cir. 1996) (Secretary's interpretation of the term "independent contractor" was reasonable and entitled to deference because it was consistent with the language and purpose of the Mine Act); Rock of Ages Corp., 20 FMSHRC 106, 117 (Feb. 1998) (interpretation of MSHA blasting regulation found to be consistent with the language, history, and purpose of the regulation), aff'd in pertinent part, 170 F.3d 148 (2d Cir. 1999).

D. NEITHER THE LAND NOR THE HAUL TRUCK THAT WAS PARKED ON THE LAND WAS EXCLUDED FROM MSHA JURISDICTION UNDER THE INTERAGENCY AGREEMENT

The Interagency Agreement identifies specific operations that would otherwise be subject to MSHA jurisdiction but that, to enhance convenience of administration, are to be treated as subject to OSHA jurisdiction. 44 Fed. Reg. at 22827-28. The agreement states that "OSHA jurisdiction includes ... concrete batch, asphalt batch, and hot mix plants." 44 Fed. Reg. at 22828. In addition, with respect to concrete ready-mix or batch plants, Appendix A of the agreement states that OSHA jurisdiction "[c]ommences after arrival of sand and gravel or aggregate at the plant stockpile." 44 Fed. Reg. at 22830. The Agreement says nothing about roads, land, or equipment that is "near to" or "adjacent to" a concrete batch plant or the concrete batch plant stockpile.

Because Congress instructed that the Mine Act "be given the

broadest possibl[e] interpretation," S. Rep. at 14, reprinted in Legislative History at 602, the Interagency Agreement's exclusions from MSHA jurisdiction should be narrowly construed. Chao v. Double JJ Resort Ranch, 375 F.3d 393, 396 (6th Cir. 2004) ("exemptions from the [Fair Labor Standards] Act are to be narrowly construed against the party asserting them and their application limited to those establishments plainly and unmistakably within their terms and spirit") (internal quotation and citation omitted)). Similarly, because the Agreement identifies a number of specific exclusions from MSHA jurisdiction, the Agreement should not be construed as intending any additional exclusions absent a clear affirmative indication of such an intent. See NextWave Personal Communications, Inc. v. FCC, 254 F.3d 130, 152-53 (D.C. Cir. 2001) (applying the principle of "expressio unius est exclusio alterius" to statutory exemptions), aff'd, 537 U.S. 293 (2003); United States v. Rappi, 175 F.3d 742, 751-52 (9th Cir.) (same effect), cert. denied, 528 U.S. 912 (1999). Under these principles, the Agreement cannot be construed as excluding from MSHA jurisdiction either the land or the haul truck that was loaded on a trailer parked on the land. Accordingly, the Secretary's position in this case reflects the plain meaning of the Agreement.

If the Commission finds that the meaning of the Interagency

Agreement is ambiguous, the Secretary's interpretation is entitled to deference because it is consistent with the language and the purpose of the Agreement. One of the stated purposes of the Agreement is to "set forth factors regarding determinations relating to convenience of administration." 44 Fed. Reg. at 22827. The Agreement states that among the factors to be considered in making jurisdictional determinations are

> the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with all the processes conducted at the facility. The consideration of these factors will reflect Congress' intention that doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.

44 Fed. Reg. at 22828 (emphasis added). Thus, the Agreement contemplates a process-oriented analysis of jurisdictional questions.

A process-oriented analysis supports a finding of MSHA jurisdiction in this case. As to the haul truck itself, the evidence shows that the truck was used only to carry excavated material to the feed hopper and played no part in the ensuing process in which the material was processed, transported by front-end loaders, stockpiled, and, finally, used to make concrete. As to the area in which the truck that was loaded on

a trailer was parked, Plant Manager Buckner himself testified that the area was not a component of the concrete batch plant and that the use of the area had nothing to do with the concrete batch plant operations. Tr. 178-79, 227.

Calmat makes much of the fact, Petition at 2, 4-5, that Plant Manager Buckner circled the area in question to designate it as one of the components of the concrete batch plant and that the circled area was included in a larger circled area which, according to Calmat's counsel, Tr. 156-57, represented all of the components that are necessary for the operation of the concrete batch plant. Although the larger circle initially included the area in question, Calmat fails to mention the fact that Buckner subsequently testified, Tr. 178-79, that the area in question should not be part of the larger circled area because the area was not part of the concrete batch plant.[7] Moreover, Buckner testified, and there is no dispute, that the shop where mining equipment is serviced and all employees check-in, and the surrounding area of the shop, both of which are located within the large circled area, are under MSHA jurisdiction. Tr. 185, 223-25. The legal determination with respect to what parts of Calmat's operations were excluded from

[7] Buckner subsequently drew a black square around the previously circled area to indicate that the area in which the haul truck was parked was not part of the concrete batch plant. Tr. 178-79.

MSHA jurisdiction was for the judge to make, and the determination the judge made was correct. Although cases such as this involve drawing fine lines, the line must be drawn somewhere -- and the judge drew the line precisely where the Interagency Agreement draws the line.[8]

[8] Calmat cursorily suggests, Petition at 2, 12, that the Secretary's position in this case implicates the due process rights of mine operators. Assuming that this suggestion amounts to a fair notice argument, the argument is meritless. As demonstrated above, the language and the purpose of the Mine Act and the Interagency Agreement gave Calmat fair notice that the haul truck and the area in which the haul truck was parked were included in the Act's definition of a "mine" and were not excluded from MSHA jurisdiction under the Agreement. See Rock of Ages Corp. v. Secretary of Labor, 170 F.3d 148, 156 (2d Cir. 1999) (fair notice was provided by the plain meaning of the standard and the objectives of the Mine Act); Freeman United Coal Mining Co. v, FMSHRC, 108 F.3d 358, 362 (D.C. Cir. 1997) (fair notice was provided by the plain language of the standard). Calmat's "disagreement with the clear import" of the Act and the Agreement does not reflect, in the Act or the Agreement as they have been applied, "vagueness of constitutional dimension." United States v. Thomas, 864 F.2d 188, 199-200 (D.C. Cir. 1988).

CONCLUSION

For all of the reasons discussed above, the Commission should affirm the judge's decision.

Respectfully submitted,

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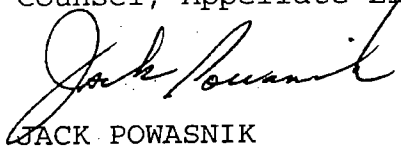

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CERTIFICATE OF SERVICE

I certify that a copy of the Secretary's brief was mailed on August 25, 2004, to:

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August 25, 2004

Richard L. Baker
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Federal Mine Safety and Health Review Commission
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Washington, D.C. 20001-2021

Re: Secretary of Labor v. Calmat Company of Arizona,
FMSHRC Docket No. WEST 2004-86-M

Dear Richard Baker:

I am enclosing the original and seven copies of the Secretary's brief in the above case.

Very truly yours,

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