United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. CRANESVILLE AGGREGATE COMPANIES, INC., d/b/a SCOTIA BAG PLANT; and CRANESVILLE BLOCK COMPANY, INC. Respondents.	OSHRC Docket Nos. 09-2011, 09-2055, 10-0447

APPEARANCES:

Kathryn L. Stewart and Matthew Sullivan, Attorneys; Suzanne Demitrio, Senior Trial Attorney; Patricia M. Rodenhausen, Regional Solicitor; M. Patricia Smith, Solicitor of Labor, U.S. Department of Labor, New York City, NY
For the Complainant

Henry Chajet, Esq. and R. Brian Hendrix, Esq.; Patton Boggs LLP, Washington, DC; and Walter G. Breakell, Esq.; Breakell Law Firm P.C., Albany, NY
For the Respondent

DECISION AND ORDER

Before: ROGERS, Chairman; and ATTWOOD, Commissioner.

BY THE COMMISSION:

Cranesville Aggregate Companies, Inc., d/b/a Scotia Bag Plant ("Cranesville") operates a facility, known as the "Bag Plant," near Albany, New York. The Occupational Safety and Health Administration ("OSHA") commenced an inspection of the Bag Plant in May 2009 and, that November, issued Cranesville multiple serious, willful, and repeat citations under two inspection numbers.[1] During discovery, Cranesville filed motions with the judge seeking to

[1] The cases at issue here are Docket No. 09-2011 and Docket No. 09-2055. The citation issued in the third of these consolidated cases, Docket No. 10-0447, pertains to a different inspection site.

compel the Secretary's production of three internal OSHA memoranda relating to the issuance of these citations, and requesting leave to depose three employees of the Mine Safety and Health Administration ("MSHA"). The Secretary opposed these motions, claiming that the internal memoranda were protected under the deliberative process, work product, and attorney-client privileges, and the MSHA employees' depositions could not be compelled because they are high-ranking government officials who have no personal knowledge of the facts of this case, and their testimony would be either irrelevant or protected by the deliberative process privilege.

Administrative Law Judge G. Marvin Bober[2] granted Cranesville's deposition motion on December 27, 2010, and, on January 10, 2011, denied the Secretary's motion for reconsideration. Also, after ordering the Secretary to submit the unredacted internal OSHA memoranda for an *in camera* review, the judge made *sua sponte* redactions, and disclosed them directly to Cranesville. The Secretary petitioned the Commission for interlocutory review of the judge's three discovery orders under Commission Rule 73(a), 29 C.F.R. § 2200.73(a), renewing the arguments she made before the judge, and contending that the judge's disclosure of the redacted memoranda to Cranesville was in violation of the Commission's procedural rules. The Commission granted the Secretary's petitions on February 1, 2011, and stayed the consolidated cases during the pendency of the interlocutory review. The parties have filed briefs with the Commission in support of their positions on the issues raised by the Secretary's petitions.

For the reasons that follow, we conclude that the internal OSHA memoranda should have been protected from disclosure in their entirety, and that leave to take a deposition should have been granted only as to one of the three MSHA employees. Accordingly, we set aside all three of the judge's orders, lift the stay, and direct the Chief Administrative Law Judge to assign these cases for further proceedings consistent with this opinion.

Internal OSHA memoranda

In his order disclosing the internal OSHA memoranda to Cranesville, the judge explained his rationale for redacting certain portions of these memoranda—designated in the record as Exhibits A, B, and C—but did not fully address all of the Secretary's privilege claims.[3] On

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[2] Judge Bober has since retired from the Commission and is currently serving as a senior judge on a limited appointment.

[3] Cranesville argues that any issues arising from the judge's order are moot based on a promise, set forth in its brief to the Commission, that it will not use the memoranda at trial or in any other

review, the Secretary limits her claims of privilege to Exhibits B and C. In support of her argument that these memoranda are protected from disclosure under the deliberative process, attorney-client, and work product privileges, an attorney from the Solicitor's Office in the Department of Labor has averred that the memoranda: (1) "concern OSHA's health and safety investigations of Respondent's facility"; (2) "detail OSHA's legal and factual analysis of potential citations and make recommendations as to the number, types and gravity of violations proposed"; and (3) "were prepared as part of a process known as 'Joint Review,' whereby OSHA officials and attorneys from the Solicitor's Office collaboratively review, discuss, and, if necessary, modify proposed citations." Although the memoranda "were primarily drafted by OSHA personnel," attorneys "provided extensive input and legal advice to OSHA employees" about them. Also, attorneys "met with OSHA personnel to discuss the proposed citations, penalties, and theories of liability described in these materials," and, on at least two occasions, met with such personnel "to specifically discuss and review the information" in the memoranda. We conclude, based on the following analysis, that Exhibits B and C, in their entirety, are protected from disclosure by the work product privilege.[4]

The work product privilege "protects from disclosure certain materials prepared by attorneys or their agents acting for clients in anticipation of litigation."[5] *St. Lawrence Food*

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way and, "in the interest of judicial economy, Cranesville, its employees and its agents . . . agree to maintain, to the fullest extent of the law, the confidentiality of all unique content contained" in the memoranda. Commission Rule 73(a)(2) permits interlocutory review if the judge's "ruling will result in a disclosure, before the Commission may review the Judge's report, of information that is alleged to be privileged." 29 C.F.R. § 2200.73(a)(2). Despite Cranesville's promise, no order presently requires Cranesville to refrain from using the memoranda, or disclosing their contents to others. Accordingly, unless the Commission sets aside the judge's ruling and issues a ruling of its own, these allegedly privileged documents are discoverable and could also be subject to disclosure requests under the Freedom of Information Act, 5 U.S.C. section 552. We thus reject Cranesville's mootness challenge.

[4] Given this determination, we need not reach the two other privileges asserted by the Secretary.

[5] The work product privilege is codified in Federal Rule of Civil Procedure 26(b)(3), which states as follows:

> Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But . . . those materials may be discovered if . . . they are otherwise discoverable under Rule 26(b)(1); and the party shows that it has

Corp., 21 BNA OSHC 1467, 1470-71, 2004-09 CCH OSHD ¶ 32,801, p. 52,479 (No. 04-1734, 2006) (consolidated). This privilege "applies when the materials in question are shown to be (1) documents or other tangible things, including an attorney's 'mental impressions, conclusions, opinions or legal theories,' (2) prepared in anticipation of litigation or trial, and (3) gathered by or for a party or by or for that party's representative." *Id.* at 1471, 2004-09 CCH OSHD at p. 52,479 (citation omitted). The judge recognized in his order that the Secretary had asserted this privilege, but he did not determine its applicability to the memoranda at issue.

Here, the record shows that attorneys from the Solicitor's Office were involved in the review and preparation of these documents and had addressed matters, such as the standards to be cited, the justifications for willful and repeat characterization, and the proposed penalty amounts. Their "mental impressions, conclusions, opinions or legal theories" are reflected in the documents and are thus implicated here. *Id.*, 2004-09 CCH OSHD at p. 52,479. Moreover, at the time the documents were prepared litigation was plainly anticipated, as the documents comprise a draft and revisions setting forth the factual and legal bases for the violation allegations and penalty assessments to be contained in an OSHA citation. And OSHA personnel, along with the attorneys from the Solicitor's Office, would have understood that matters such as the standards cited, justifications for characterization, and the proposed penalty amounts would be central to that litigation. *See id.* at 1471 n.7, 2004-09 CCH OSHD at p. 52,479 n.7 (noting rule of law set forth in *United States v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998), which states that documents are deemed "prepared 'in anticipation of litigation' . . . if 'in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation' "); *EEOC v. Lutheran Social Serv.*, 186 F.3d 959, 968 (D.C. Cir. 1999) (noting that "prospect of litigation" means that "the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable" (internal quotation marks omitted)). Finally, as to satisfaction of the last element, there is no question that OSHA created these memoranda, i.e., that it "gathered" the documents. *St. Lawrence Food Corp.*, 21 BNA OSHC at 1471, 2004-09 CCH OSHD at p. 52,479.

> substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

We also note that opinion work product, such as the recommendations included in the exhibits, "is virtually undiscoverable." *United States v. Deloitte, LLP*, 610 F.3d 129, 135 (D.C. Cir. 2010) (citation omitted); *St. Lawrence Food Corp.*, 21 BNA OSHC at 1471, 2004-09 CCH OSHD at p. 52,479 ("Opinion work product enjoys either absolute or near-absolute immunity and is only discoverable in very rare and extraordinary circumstances, such as where [it] contains evidence of fraud or illegal activities."). And other work product, such as statements of fact, is discoverable, but only if the party seeking the material "shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3) (noting that this exception applies only to material that is otherwise discoverable under Federal Rule of Procedure 26(b)(1)); *Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) ("A party can discover fact work product upon showing a substantial need for the materials and an undue hardship in acquiring the information any other way."). Cranesville has made no attempt here to demonstrate such a need. We thus conclude that the Secretary has established that Exhibits B and C are protected, in their entirety, by the work product privilege.

Under these circumstances, we find that the judge erred in partially disclosing these two memoranda to Cranesville after redacting certain information, *sua sponte*. Commission Rule 52(d)(2) permits a party to "obtain as of right an order sealing from the public those portions of the record containing the allegedly privileged information pending interlocutory or final review of the ruling, or final disposition of the case, by the Commission." 29 C.F.R. § 2200.52(d)(2). Thus, not only are Exhibits B and C fully protected from disclosure, the judge's decision to partially disclose their contents, without providing the Secretary an opportunity to review his redactions and respond accordingly, deprived the Secretary of this right. Indeed, the Secretary was entitled to seek interlocutory review of the judge's order *before* information "alleged to be privileged" was disclosed. 29 C.F.R. § 2200.73(a)(2).

To remedy this situation, we direct the Chief Judge to immediately enter a protective order that (1) requires Cranesville to return all outstanding copies of Exhibits B and C to the Secretary, and (2) prohibits it from using Exhibits B and C in any way, including during the proceedings before the Commission. This order should also seal from the public any copies of Exhibits B and C presently in the record. 29 C.F.R. § 2200.52(d)(2).

Leave to depose MSHA employees

Cranesville sought leave under Commission Rule 56(a) to depose three MSHA employees—James Petrie, Donald Foster, and James Hull—on issues pertaining to Cranesville's defense that MSHA, rather than OSHA, had jurisdiction over the cited facility. 29 C.F.R. § 2200.56(a) ("Depositions of . . . witnesses shall be allowed only by agreement of all the parties, or on order of the Commission or Judge following the filing of a motion of a party stating good and just reasons."). Petrie was an MSHA district manager at the time OSHA inspected Cranesville's facility in 2009 and is presently a senior health specialist in MSHA's Office of Standards. Foster was an MSHA assistant district manager at the time of the 2009 inspections and is presently a district manager. And Hull has been an MSHA supervisory inspector at all relevant times. According to Cranesville, the topics to be addressed with these prospective deponents are (1) "the historic application" of the memorandum of understanding ("MOU")[6] between OSHA and MSHA on jurisdictional issues; (2) the MOU's application to, and the "historical jurisdictional treatment" of, Cranesville's property, which includes the cited facility; and (3) "the facts and circumstances surrounding the sudden assertion of jurisdiction by OSHA over [Cranesville's] property."

In her opposition to Cranesville's motion, the Secretary relied on *Simplex Time Recorder Co.* ("*Simplex*") *v. Secretary of Labor*, 766 F.2d 575 (D.C. Cir. 1985), to claim that all three MSHA employees qualify as high-ranking government officials. Without addressing the Secretary's claim, the judge granted Cranesville's motion and denied the Secretary's motion for reconsideration. We conclude that, under *Simplex*, the judge erred in granting Cranesville leave to depose two of the three MSHA employees, Petrie and Foster. Thus, we find that the MSHA district manager position—held by Petrie at the time of OSHA's inspections and currently held by Foster—is that of a high-ranking government official who, under the circumstances of this case, cannot be compelled to provide deposition testimony.

In *Simplex,* the D.C. Circuit determined that the Solicitor of Labor, the Secretary's chief of staff, an OSHA regional administrator, and an OSHA area director were all "top executive

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[6] This MOU, effective on March 29, 1979, "delineate[s] certain areas of authority, set[s] forth factors regarding determinations relating to convenience of administration, provide[s] a procedure for determining general jurisdictional questions, and provide[s] for coordination between MSHA and OSHA in all areas of mutual interest."

department officials" who "should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions." 766 F.2d at 586. As evidenced by the MOU between OSHA and MSHA, which permits certain jurisdictional issues to be resolved by the OSHA regional administrator and the MSHA district manager,[7] these two positions are of approximately equivalent ranking within OSHA and MSHA, sister agencies within the Department of Labor. We thus find that an MSHA district manager, like the OSHA regional administrator in *Simplex*, is the type of official who, "absent extraordinary circumstances," may not be required to testify about his or her "reasons for taking official actions." *Id.*

The protection afforded to high-ranking government officials has been applied to current holders of high-ranking positions and, in some instances, to individuals who formerly held these positions. *See United States v. Sensient Colors, Inc.*, 649 F. Supp. 2d 309, 316-18 (D.N.J. 2009); *United States v. Wal-Mart Stores, Inc.*, No. CIV.A. PJM-01-1521, 2002 WL 562301, at **2-4 (D. Md. Mar. 29, 2002). The rationale for providing such protection is based, in part, "on the notion that '[h]igh ranking government officials have greater duties and time constraints than other witnesses' and that, without appropriate limitations, such officials will spend an inordinate amount of time tending to pending litigation." *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007) (citation omitted). This purpose supports extending high-ranking status to Foster in his current capacity as MSHA district manager but not necessarily to Petrie, who is currently employed as an MSHA senior health specialist, a position that is not akin to those the court found to be high ranking in *Simplex*. Nonetheless, we find that Petrie's role while serving as MSHA's district manager at the time of the 2009 inspections is entitled to protection, and this protection survives Petrie's change in position. As the Supreme Court noted in *United States v. Morgan*, 313 U.S. 409, 422 (1941), it is "not the function of the court to probe the mental processes of the Secretary"; "[j]ust as a judge cannot be subjected to such scrutiny, so the

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[7] Paragraph B.8 of the MOU states as follows:

> When any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA Regional Administrator . . . shall attempt to resolve it at the local level in accordance with this Memorandum and existing law and policy. Jurisdictional questions that can not be decided at the local level shall be promptly transmitted to the respective National Offices which will attempt to resolve the matter. If unresolved, the matter shall be referred to the Secretary of Labor for decision.

integrity of the administrative process must be equally respected." Moreover, courts have held in some cases that subjecting the decision-making processes of former high-ranking government officials "to judicial scrutiny and the possibility of continued participation in lawsuits years after leaving public office would serve as a significant deterrent to qualified candidates for public service." *Wal-Mart Stores, Inc.*, No. CIV.A. PJM-01-1521, 2002 WL 562301, at *3; *accord Sensient Colors, Inc.*, 649 F. Supp. 2d at 316. Based on these considerations, we find that both Foster and Petrie are entitled to be treated as high-ranking government officials for purposes of assessing whether Cranesville should be permitted to take their depositions.

The protection, however, is not absolute since "[d]epositions of high ranking officials may be permitted where the official has first-hand knowledge related to the claim being litigated." *Bogan*, 489 F.3d at 423. But "even in such cases, discovery is permitted only where it is shown that other persons cannot provide the necessary information." *Id.* Here, both Foster and Petrie averred in their declarations that they (1) had "no first-hand knowledge of any facts of this case or the underlying investigation that led to the citation[s] in this case"; (2) "neither compiled nor gathered any factual information relating to the citation[s]," and did not recall ever visiting the cited facility or the nearby quarry that, on previous occasions, had been inspected by MSHA; and (3) had no involvement, either directly or as a consultant, in "OSHA's decision to inspect" the cited facility. In certain circumstances, a party may be permitted to test through deposition the veracity of averments made in a sworn statement. *See Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 145 F.R.D. 92, 97 (S.D. Iowa 1992) (concluding that party, through deposition, is "entitled to 'test' " company president's "professed lack of knowledge," as averred in affidavit, regarding matter relevant to cause of action). But here, there is no indication that, before subpoenaing Foster and Petrie, Cranesville attempted to "pursue other sources to obtain" the first-hand knowledge that it believes Foster and Petrie may be able to provide. *Bogan*, 489 F.3d at 424 (concluding that need to depose high-ranking official—mayor of Boston—was not established "because [those seeking the deposition] did not pursue other sources to obtain relevant information before turning to the Mayor"). Accordingly, given the status of Foster and Petrie as high-ranking government officials, their sworn statements denying any knowledge of the relevant facts, and Cranesville's failure to demonstrate that the "first-hand knowledge" it seeks from them could not be obtained through other means, we conclude that the judge erred in granting Cranesville leave to depose Foster and Petrie.

However, MSHA Supervisory Inspector Hull, who manages a staff of eleven employees, is not a high-ranking government official under the court's rationale in *Simplex*. The lowest ranking official in *Simplex* to be granted this status was the OSHA area director—a position that is not comparable to an MSHA supervisory inspector—and we find that other applicable precedent does not support extending the protection to a supervisory employee in Hull's position. *Simplex*, 766 F.2d at 586; *see, e.g.*, *In re United States*, 624 F.3d 1368, 1369 (11th Cir. 2010) (Administrator of EPA); *Bogan*, 489 F.3d at 423-24 (mayor of Boston); *In re FDIC*, 58 F.3d 1055, 1060 (5th Cir. 1995) (FDIC Directors); *In re United States*, 985 F.2d 510, 512 (11th Cir.) (FDA Commissioner), *cert. denied*, 510 U.S. 989 (1993); *U.S. Bd. of Parole v. Merhige*, 487 F.2d 25, 29 (4th Cir. 1973) (United States Parole Board members), *cert. denied*, 417 U.S. 918 (1974). We thus conclude that the judge properly granted Cranesville leave to depose Hull on matters relevant to its jurisdictional defense.[8]

ORDER

We set aside all three discovery orders, lift the stay of these consolidated cases, and direct the Chief Judge to assign these cases for further proceedings consistent with this opinion. With respect to the internal OSHA memoranda, we direct the Chief Judge to immediately issue an order that (1) requires Cranesville to return to the Secretary the copies of Exhibits B and C that Judge Bober disclosed with his previous order, and all other outstanding copies of these memoranda; (2) prohibits Cranesville from using Exhibits B and C in any way, including during the proceedings before the Commission; and (3) seals from the public copies of Exhibits B and C presently in the record. With respect to the depositions of the MSHA employees, we direct that an order be issued quashing Cranesville's subpoenas of MSHA District Manager Foster and

[8] We recognize that the Secretary has challenged, before both the judge and the Commission, the relevancy of the information sought by Cranesville in these depositions and raised an issue as to whether such information would be privileged. The Secretary may raise any such objections during Hull's deposition, and instruct him not to answer a question if she believes that the response would result in the disclosure of privileged information. 29 C.F.R. § 2200.56(a) (stating that depositions "shall be taken in accordance with the Federal Rules of Civil Procedure," particularly Rule 30); Fed. R. Civ. P. 30(c)(2) (stating that "[a] person may instruct a deponent not to answer . . . when necessary to preserve a privilege"). Thereafter, the parties may resolve any issues concerning allegedly privileged information by following the procedure specified in Commission Rule 52(d). 29 C.F.R. § 2200.52(d)(2).

former MSHA District Manager Petrie, but granting Cranesville leave to take the deposition of MSHA Supervisory Inspector Hull.

SO ORDERED.

____/s/_____
Thomasina V. Rogers
Chairman

____/s/_____
Cynthia L. Attwood
Commissioner

Dated: July 13, 2011

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
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SECRETARY OF LABOR, Complainant, v. CRANESVILLE AGGREGATE COMPANY, d/b/a SCOTIA BAG PLANT (09-2011 and 09-2055) and CRANESVILLE BLOCK COMPANY (10-0447) Respondents.	OSHRC Docket Nos 09-2011, 09-2055 and 10-0447

ORDER MOTION TO TAKE DEPOSITIONS

On December 8, 2010, the Respondents' filed their Motion For Leave To Take the Depositions of Donald J. Foster, [District Manager for the Metal and Nonmetal Mine Safety and Health Northeast District], James R. Pertie, [former [District Manager for the Metal and Nonmetal Mine Safety and Health Northeast District], and James S. Hull, [supervisor for the Metal and Nonmetal Mine Safety and Health field office located in Albany, New York], ("Motion"). In support of its motion the Respondents assert that (1) "Cransville Aggregate has maintained that its worksite is part of its mine located [in] Scotia, New York", (2) "the worksite falls under the jurisdiction of The Mine Safety and Health Administration (MSHA)," (3) [t]he property has been inspected by MSHA each year for the last twenty-six (26) yeas (sic) and until the inspection resulting in the current contest, had not been the subject of an inspection by OSHA" (4) "the sudden and surprising assertion of jurisdiction over the property by OSHA appears to explicitly contradict the [Interagency Agreement Between [MSHA, US DOL] and OSHA USDOL] memorandum (sic) of Understanding, [MOU], on jurisdictional issues between MSHA and OSHA entered into on March 29, 1979 and which explicitly states that a

presumption exists that activities on a mining property, including sand, gravel and cement, shall be subject to MSHA jurisdiction and that jurisdictional questions were to be resolved by the MSHA District Manager," (5) the consented depositions of Messrs. Foster, Perie and Hull were scheduled for December 14, 2010, (6) "[on] December 2, 2010, the Secretary indicated [without explanation] that [Messrs.] Foster, Perie and Hull will not be produced to be deposed,"(7) "[it had] been learned threough discovery that OSHA personnel initially hesitated in asserting jurisdiction over Respondent's property until after contacting MSHA personnel," (8) "many of the documents have been redacted it is important that [Respondents] have the ability to examine all of the that may have participated in the decision by MSHA to suddenly relinquish jurisdiction over the property to OSHA, and (9) it is believed that [Messrs. Foster, Perie and Hull] were involved in the determination whether MSHA had jurisdiction over the worksite."

In its reply, the Secretary asserts that (1) the "Respondent may not depose high ranking officials who lack personal knowledge of the case,"and (2) the "Respondent seeks only irrelevant and privileged information from the MSHA officials'"

DISCUSSION AND CONCLUSION

Rule 56 of the Commission's Rules of Procedure, 29 CFR 2200.56 provides depositions of parties, intervenors or witnesses by agreement or shall only be allowed by a Judge's order after a filing of a motion by a party and a finding of "good and just reasons."

In this case, the facts as set forth by the Respondents are basically unchallenged by the Secretary. The affidavits of Messrs. Foster, Perie and Hull are factually similar. Each affidavit stated that "I have no first-hand knowledge of any facts of this case or the underlying investigation that led to the citation in this case. I neither complied nor gathered any factual information relating to the citation."; "I was not involved in OSHA's decision to inspect the Cransville bag plant." Each affidavit, however, is silent in respect to Paragraph B. Clarification of Authority, sentence 8.of the MOU. Paragraph B, sentence provides, "as pertinent, [w]hen any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA Regional Administrator *** shall attempt to resolve it ***."

"Cransville Aggregate has maintained that its worksite is part of its mine located [in] Scotia, New York." As such jurisdiction resides with MSHA which has inspected the worksite for the last twenty-six years (26) "until the inspection resulting in the current contest" (09-2011 and 09-2055, inspection dates May 11, 2009 - August 28, 2009 and 10-0447, inspection dates September 4, 2009 - December 21, 2009) when OSHA inspected the worksites. As there was a change of jurisdiction, between the last

MSHA inspection and the first OSHA inspection, Paragraph B. sentence 8.of the MOU should have been the basis for such operational change in jurisdiction between the agencies.

The Secretary objects to the Respondent deposing all three of the named MSHA employees. As each "lack[s] personal knowledge of the case,"and the "Respondent seeks only irrelevant and privileged information from the MSHA officials." The Respondent is not concerned with Messrs. Foster, Perie and Hull personal knowledge of the cases, but whether any one or in combination they were involved in any oral or written discussions or communications with OSHA regarding the operational change which formed the basis the OSHA inspections in 2009. The information regarding the operational change which formed the basis for the OSHA inspections in 2009 is not privileged as the matter does not involve policy matter but a practical one,

ORDER

IT IS ORDERED THAT the Respondents' Motion For Leave To Take the Depositions of Donald J. Foster, James R. Pertie, and James S. Hull is GRANTED.

IT IS FURTHER ORDERED THAT the Respondents shall take the depositions of Donald J. Foster, James R. Pertie, and James S. Hull after providing ten (10) days written notice to the Secretary unless waived by the parties as provided by Rule 56(c) of the Commission's Rules of Procedure, 29 CFR 2200.56(c).

/s/

Dated: December 27, 2010
Washington, D.C.

G. Marvin Bober
Administrative Law Judge[1]

[1]The Subpoenas are being sent overnight under separate cover

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SECRETARY OF LABOR, Complainant, CRANESVILLE AGGREGATE COMPANY, d/b/a SCOTIA BAG PLANT 09-2011 [safety] and 09-2055 (health) and CRANESVILLE BLOCK COMPANY (10-0447) Respondents.	OSHRC Docket Nos. 09-2011, 09-2055 and 10-0447

ORDER ON MOTION FOR PRODUCTION OF (a) UNREDACTED DOCUMENTS AND (b) SECRETARY'S OPPOSITION TO RESPONDENTS' MOTION FOR PRODUCTION OF UNREDACTED DOCUMENTS

FACTS:

On December 8, 2010, the Respondents filed their Motion For Production Of Unredacted Documents, ("Motion"). The Respondents assert that (1) as part of the Secretary's document production pursuant to 29 CFR 2200.52 and [Federal Rule of Civil Procedure, FRCP] 26 an undated twenty (20) page completely redacted (black out) Memorandum ["Exhibit A" Bates # CAH-014 -CAH-033]; and two (2) fully redacted [Memoranda] dated August 28, 2009 consisting of nine (9) pages, ["Exhibit B"-Bates # CAS -029-037], and seven (7) pages, ["Exhibit C"- Bates # CAS 040-046][1], [respectively] were produced; (2) "Respondents contacted the Secretary's counsel for the breadth of the redaction, including the date and the scope of privilege being asserted ***," (3) "the Secretary's counsel advised that the entire

[1]The Memoranda are being referred to as Exhibit A, Exhibit B and Exhibit C.

contents of [Exhibit A, Exhibit B and Exhibit C] [were] privileged as noted as it contained information related to the 'deliberative process' and attorney client privilege of the agency," (4) "[i]t is impossible to review the redacted document (sic) to ascertain whether the asserted privileges properly apply in whole or in part," (5) "[the Secretary's counsel] did not make application for a Protective Order nor did she submit any affidavit or other information which supported her claim of privilege or seek an in camera review of the document by the Court as outlined in 29 CFR 2200.52(d)(1),"[t]he Secretary has produced the documents pursuant to FRCP 26 which represents her acknowledgment that the document(s), in [their unredacted forms], likely contained information which were reasonably calculated to lead to discovery of admissible evidence but for the asserted privilege, and (6) the Respondents seek an Order compelling production of [Exhibit A, Exhibit B and Exhibit C] in unredacted form [for an] in camera review*** to determine whether the asserted privilege is properly being applied to the full scope of each of the documents or whether some protected form of document may be allowed."

On December 22, 2010, the Complainants' counsel filed its Memorandum of Law in Opposition To Respondent's (sic) Motion For Production Of Unredacted Documents, ("Reply"). In her Reply, the Complainants' counsel asserts that (1) "the deliberative privilege protects memoranda that, as here, memorialize the agency's internal discussions about proposed citations under consideration by OSHA," (2) "[t]hese memoranda reflect precisely the kinds of internal deliberations that are protected from discovery in order to promote candid and effective decision-making," and (3) "***,these materials - drafted in consultation with counsel and in anticipation of imminent litigation - are shielded from disclosure under attorney-client and work product privileges."

Supporting its Reply were three affidavits.:The Affidavit of David Michaels. Assistant Secretary for OSHA, United States Department of Labor; The Affidavit of Matthew Sullivan, Trial Attorney, United States Department of Labor, Attorney for Complainant; The Affidavit of Daniel Hennefeld, Trial Attorney, United States Department of Labor, Attorney for Complainant.

Pursuant to this Court's Order dated December 22, 2010, the Secretary submitted in unredacted form Exhibit A, Exhibit B and Exhibit C to the undersigned on December 22, 2010 for an *in camera*

inspection. After an *in camera inspection,* the Court has concluded that as Exhibit C is a shorter draft version and in large measure a duplicate of Exhibit B, Exhibit C need not be

provided to the Respondent.

Deliberative Process Privilege:

The Freedom Of Information Act of 1966, 5 U.S.C. 552 *et.seq,*, ("FOIA'), was enacted "to pierce the veil of administrative secrecy and to open agency action to the light of public scrutiny." "[T]he FOIA] reflects a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language". *Dep't of Air Force v. Rose,* 96 S.Ct. 1592, 1599 (1976), ("*Rose*"). FOIA permits an agency to withhold a document only if it comes within one of nine specific exemptions, 5 U.S.C. 5529(b), which are to be construed narrowly in respecting the Act's presumption favoring disclosure. *Id.* The agency bears the burden of showing that a claimed exemption such as "inter-agency or intra- agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," section 552(b) (5), (hereinafter "*Exemption 5*" or "p*re-decisional privilege")*. applies *N.L.R.B. v. Sears, Roebuck & Co.,* 95 S.Ct. 1504 (1975) ("*Sears*").

Under the p*re-decisional privilege,* a governmental agency may properly withhold a document requested by a litigant during discovery. A document is p*re-decisional privilege* if it was prepared to assist an agency decision-maker make a decision. It protects against pre-mature disclosure of policies, advisory opinions or recommendations which follow full and frank discussion(s) between participants of ideas, issues and policies. *Renegotiation Bd. V. Grumman Aircraft Eng'Corp.*, 95 S Ct. 1491, 1500 (1975), (*"Grumman")*. It is *deliberative* if it is actually related to the process by which policies are developed The theory behind this privilege is that such exchanges would be inhibited if participants expected their remarks to be disseminated publically. The design of the p*re-decisional privilege* is to encourage a full and frank discussion between participants of ideas and policies. *Sears 95 S Ct..* at.1516-1517.

Simultaneously, courts have held that *the pre-decisional privilege* is limited, and it would not include purely factual document(s) *Environmental Protection Agency v. Mink.*, 93 S. Ct.827, 836, 838 (1973), ("*Mink*"). This is true even if the document(s) was used in the establishment of policy. *McClelland v. Andrus*, 606 F.2d 1278,1289 (D.C. Cir. 1979) The *pre-decisional privilege* does not protect factual findings and conclusions as opposed to the formulation of a new policy, or to documents that were written after an agency adopts a policy, as such any after adopted policy can not be pre-decisional. *Sears* 95 S.Ct.1516-1517 & n. 19. Thus, document(s) concerning the explanation, interpretation, or application of an existing policy) or to documents that were written after an agency adopts a policy can not be

pre-decisional. *Id.*

The claim of the p*re-decisional privilege* must be invoked by the agency head or his/her delegated subordinate with significant authority after the agency head issues guidelines for invoking the privilege and identifies the delegated officials. The claim of privilege must specifically describe the information that is purported privileged. A minimal and uninformative explanation of the document(s)is not sufficient. *Mobil Oil Corp. v. Department of Energy,* 102 F.R.D. 1, 6 (N.D.N.Y. 1983), ("*Mobil Oil Corp.*").

Attorney Client Privilege:

An attorney who seeks to invoke the privilege on behalf of a client must fulfill four requirements:

1. The person asserting the privilege must be or be sought a a client,
2. The person to whom the communication was made (a) is a member of a bar of a court, or his subordinate, and (b) is acting as a lawyer in connection with this communication,
3. The communication relates to a fact of which the attorney was informed, (a) by his client, (b) without the presence of strangers, (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
4. The privilege has been (a) claimed and (b) not waived by the client.

United States v United Shoe Machinery Corp., 89 F. Supp. 357, 358-359 (D. Mass. 1950), *cert. denied*, 83 S.Ct. 505 (1963).

DISCUSSION AND CONCLUSION

Deliberative Process Privilege:

Turning to the facts in this matter, the Complainant has formally asserted the *deliberative process privilege* and has provided a support affidavit by an appropriate official. The Secretary of Labor's designee, Assistant Secretary of Labor for OSHA David Michaels. 71 Fed Reg 67024 and 67025, (November 17, 2006) personally reviewed Exhibits A, B, and C. He determined that a formal assertion of the *pre-decisional privilege* was appropriate and

identified the precise information for which the privilege was asserted.[2] The Court finds Mr. Michaels to be an appropriate "head of agenc[y] within the Department [of Labor]" entitled to assert the deliberative process privilege before the Court.

Based upon the Court's *in camera* inspection, this Court finds that Mr. Michaels' assertion that the redacted material contained in Exhibits A is shielded from disclosure by the *pre-decisional privilege* is misplaced **except as set out below** for the following reasons. First, Exhibit A, despite the Complainant's claim of *pre-decisional privilege* because it is in draft form is hollow, Exhibit A is nothing more than a compliance officer's, ("CO"), fact gathering responsibility of following the OSHA' s Field Operations Manual, ("FOM").Once fact finding was completed by the CO, the CO prepared a report with detailed, factual information to establish each specific element of each violation (Chapters 5 and 6 of the FOM).Exhibit A is post-decisional as it analyzes and follows a predetermined format decisional process set forth in the FOM. Furthermore, Exhibit A is purely factual and therefore, not privileged.

Certain sentences, remain redacted after an *in camera* inspection by the Court of Exhibit A pages 3, 4, 5, 6, 7, 8, 9 15, 17, 18, 19 (CAH016-022, 028, 030-032), Exhibit B page 3, 4, 5, 6 (CAS031-034) and Exhibit C page 4(CAS043). These identified pages come within the purview of the **Informant's Privilege.** The *Informant's Privilege* "is the well-established right of the government to withhold from disclosure the identity of persons who furnishi information of violations of the law to officers charged with enforcement of tha law.." *Roviaro v. United States,* 77 S. Ct. 623, 626-628 (1957), (*Roviaro"). Quality Stamping Products Co.,* 7 BNA OSHC 1285 (No. 78-235, 1979). As the privilege applies to Commission proceedings, the Commission has held that the *Informant's Privilege* is applicable to "any person furnishing information to government officials concerning violations of the Act *** regardless of the informant's employment relationship to the cited employer." *Stephenson Enterprises, Inc.,* 2 BNA OSHC 1080 (No. 5873, 1974). "The justification for the privilege is the public interest in the free flow of information to the government concerning violations of law and the protection of informants from retaliation." *Roviaro 77 S. Ct. at 627* The scope of the privilege is limited by its purpose. - protecting the anonymity of the informer. Thus, if disclosure would not reveal the identify of the informer than there is no privilege. Another limitation on the privilege

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[2] Specifically, Mr. Michaels asserted that the information in the redacted portions at issue "would reveal the internal deliberations of OSHA prior to the decision to issue a citation to Respondent, including: the pre-decision intra-agency deliberations of OSHA; recommendations, opinions and advice on legal or policy matters; and written summaries of factual evidence that reflect a deliberative process." Michaels Affidavits, dated March 8, 2010.

"arises from the fundamental right of fairness. Where the disclosure of an informer's , or the contentents of his communication, is relevant and helpful to the defense ***, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action.", *Roviaro* 77 S. Ct. at 628 and *Donald Braasch Construction Inc.,* 17 BNA OSHC 2082, 2083-2084 (No. 94-2615, 1997).

Attorney Client Privilege:

Certain sentences were redacted after an *in camera* inspection by the Court of Exhibit A, page 9 (CAH022), Exhibit B, page 6 (CAS034) as a portion of each came within the purview of the *Attorney Client Privilege*.

ORDER

IT IS ORDERED THAT the Motion For Production Of Unredacted Documents is GRANTED, in part, and DENIED, in part. (See Exhibit A, Exhibit B and Exhibit C attached)

/s/

Dated: January 5, 2011
Washington, D.C.

G. Marvin Bober
Administrative Law Judge

[Exhibits A, B, and C have been removed pending interlocutory review.]

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

CRANESVILLE AGGREGATE COMPANY, d/b/a SCOTIA BAG PLANT 09-2011 [safety] and 09-2055 (health) and CRANESVILLE BLOCK COMPANY (10-0447)

Respondents.

OSHRC Docket Nos .09-2011, 09-2055 and 10-0447

ORDER ON MOTION STRIKE RESPONDENT'S SEVENTH DEFENSE

On December 13, 2010, the Secretary filed her Motion To Strike the Respondents' Seventh Defense, ("Motion"), as asserted in its Answers filed in OSHRC Docket Nos. 09-2011 and 09-2055. The Secretary asserts in her Motion that (1) "OSHA's jurisdiction over the Scotia plant is not preempted by MSHA", (2) "the Scotia plant is not a 'mine' subject to MSHA jurisdiction," (3) "OSHA has properly asserted jurisdiction over the Scotia Bag Plant."

The Respondents' Seventh Defense states:

> The Occupational Health and Safety Act ["The Act'] is not applicable to Cranesville. Cranesville is a 'mine operator' under the Federal Mine Safety and Health Act, ['FMSHA"]. Cranesville is not an 'employer' under [The Act]. Complainant issued the citations at issue in the above-captioned proceeding

> for alleged conditions and practices at a "mine," as that term is defined by the [FMSHA]. As such, Complainant has no jurisdiction over Cranesville's mine and Complainant lacks the requisite statutory authority under ["The Act'] to cite or otherwise take any enforcement action against Cranesville."

The Respondents in its Motion For Leave To Take Deposition of Donald J. Foster, James R. Pertie and James S. Hull assert that OSHA lacks of jurisdiction in this matter: (1) "Cransville Aggregate has maintained that its worksite is part of its mine located [in] Scotia, New York", (2) "the worksite falls under the jurisdiction of The Mine Safety and Health Administration (MSHA)," (3) [t]he property has been inspected by MSHA each year for the last twenty-six (26) yeas (sic) and until the inspection resulting in the current contest, had not been the subject of an inspection by OSHA."

DISCUSSION AND CONCLUSION

Essentially the parties are diametrically opposed on the issues of the definition of mine, mining, or mining operations and whether MSHA or OSHA has jurisdiction over the Respondents' worksite. As resolution of these issues are, in part, factual, live testimony of witnesses who will be subject to both direct examination and cross-examination will be required. Thus, live witness testimony will be crucial to the resolution of the above identified issues.

ORDER

IT IS ORDERED THAT the Secretary's Motion To Strike the Respondents' Seventh Defense is DENIED without prejudice.

/s/

Dated: January10, 2011
Washington, D.C.

G. Marvin Bober
Administrative Law Judge

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket Nos. 09-2011, 09-2055 and 10-047

CRANESVILLE AGGREGATE COMPANY, d/b/a SCOTIA BAG PLANT 09-2011 (safety) and 09-2055 (health) and CRANESVILLE BLOCK COMPANY (10-0447)

Respondents.

ORDER ON MOTION FOR RECONSIDERATION

On December 8, 2010, the Respondents' filed their Motion For Leave To Take the Depositions of Donald J. Foster, [District Manager for the Metal and Nonmetal Mine Safety and Health Northeast District], James R. Pertie, [former [District Manager for the Metal and Nonmetal Mine Safety and Health Northeast District], and James S. Hull, [supervisor for the Metal and Nonmetal Mine Safety and Health field office located in Albany, New York], ("Motion"). In support of its motion the Respondents assert that (1) "Cransville Aggregate has maintained that its worksite is part of its mine located [in] Scotia, New York", (2) "the worksite falls under the jurisdiction of The Mine Safety and Health Administration (MSHA)," (3) [t]he property has been inspected by MSHA each year for the last twenty-six (26) yeas (sic) and until the inspection resulting in the current contest, had not been the subject of an inspection by OSHA" (4) "the sudden and surprising assertion of jurisdiction over the

property by OSHA appears to explicitly contradict the [Interagency Agreement Between [MSHA, US DOL] and OSHA USDOL] memorandum (sic) of Understanding, [MOU], on jurisdictional issues between MSHA and OSHA entered into on March 29, 1979 and which explicitly states that a presumption exists that activities on a mining property, including sand, gravel and cement, shall be subject to MSHA jurisdiction and that jurisdictional questions were to be resolved by the MSHA District Manager," (5) the consented depositions of Messrs. Foster, Perie and Hull were scheduled for December 14, 2010, (6) "[on] December 2, 2010, the Secretary indicated [without explanation] that [Messrs.] Foster, Perie and Hull will not be produced to be deposed,"(7) "[it had] been learned through discovery that OSHA personnel initially hesitated in asserting jurisdiction over Respondent's property until after contacting MSHA personnel," (8) "many of the documents have been redacted it is important that [Respondents] have the ability to examine all of the that may have participated in the decision by MSHA to suddenly relinquish jurisdiction over the property to OSHA, and (9) it is believed that [Messrs. Foster, Perie and Hull] were involved in the determination whether MSHA had jurisdiction over the worksite."

On December 27, 2010, the undersigned issued his Order, ("ORDER"), granting the Respondents' Motion For Leave To Take the Depositions.

On December 30, 2010, the Secretary filed her Motion For Reconsideration, ("MFR"), and asserts that "the facts developed [after the initial pleadings were filed] in the depositions already taken make it clear that Respondent has no legitimate need for the additional depositions it seeks."

DISCUSSION AND CONCLUSION1

The MFR contains (1) the Declaration of Suzanne Demitrio, Senior Trial Attorney U. S. DOL, ("Dec. Demitrio p."), (2) affidavits of Messrs. Foster dated December 21, 2010, Hull dated December 20, 2010 and Perie dated December 18, 2010 are factually similar to their Affidavits submitted with the Reply. Each affidavit stated that "I have no first-hand knowledge of any facts of this case or the underlying investigation that led to the citation in this case. I neither complied nor gathered any factual information relating to the citation."; "I was not involved in OSHA's decision to inspect the Cransville bag plant." Each affidavit, however, is silent in respect to Paragraph B. Clarification of Authority, sentence 8.of the MOU. Paragraph B, sentence provides, "as pertinent, [w]hen any question of jurisdiction between MSHA and OSHA arises, the appropriate MSHA District Manager and OSHA

1 For purposes of identification, Respondents Scotia New York facility that produces bags, and distributes ready-mix concrete products will be called "Scotia-Bag Plant." The Respondents' sand and gravel quarry will be called "The Quarry."

Regional Administrator *** shall attempt to resolve it ***," (3) snipits (pages 1, 75-79) from the Deposition of James Logan, 2, (3) snipits (pages 137-140) from the Deposition of Kimberly Mosher3, (Dep. p.) (4) snipits (pages 1, 37-58) from the Deposition of Edwin Rodriguez, an OSHA Compliance Officer and Safety Narrative pages Bates numbers CAS 079-084), Dep. p.) and (5) the Declaration of Robert Kulick, Regional Administrator, Region 2, OSHA, ("Dec. Kulick").

In Dec. Demitrio at page 2, counsel stated that the OSHA inspections in these proceedings occurred at the Scotia-Bag Plant and that across the railroad tracks from the Scotia-Bag Plant "sits a sand and gravel quarry, also owned by Respondent. While MSHA has previously inspected Respondent's quarry, Respondent has adduced no evidence that MSHA ever conducted inspection activities at the [Scotia-Bag Plant].

In Dep. of Mr. Logan pp.75- 77, he stated that (1) there was a telephone call from OSHA inquiring if MSHA inspected "the bag facility," (2) from conversations within his office inspections of the bag plant "was OSHA jurisdiction," and (3) "Scotia" and "Plant 5" are synonymous with his MSHA Office.

In Dep Ms. Mosher at p 139. she stated that she did not know if "building 2" was regulated was regulated by MSHA. As building 2 has not been identified, this Court does not know if building 2 is the Scotia-Bag Plant, The Quarry or another building or why MSHA or OSHA asserted jurisdiction over this building.

In Dep. Mr. Rodriguez , an OSHA Compliance Officer, ("CO"), and attached Safety Narrative (Bates No. CAS 080) it was clear that there was confusion between MSHA and OSHA whether as to which agency had jurisdiction to conduct an inspection.

On the other hand, the Respondents have maintained that its worksite is part of its mine located [in] Scotia, New York." As such jurisdiction resides with MSHA which has inspected the worksite for the last twenty-six years (26) "until the inspection resulting in the current contest" (09-2011 and 09-2055, inspection dates May 11, 2009 - August 28, 2009 and 10-0447, inspection dates September 4, 2009 - December 21, 2009) when OSHA inspected the worksites. As there was a change of jurisdiction, between the last MSHA inspection and the first OSHA inspection, Paragraph B. sentence 8.of the MOU should have been the basis for such operational change in jurisdiction between the agencies.

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2 James Logan's position title is not contained in his snipit. Dec. Demitrio p.2 identified Mr. Logan as an "MSHA inspector."

3 Kimberly Mosher's position title is not contained in her snipit. Dec. Demitrio p 3 identified Ms. Mosher as "Cranesville's Safety Director."

It is the opinion that due to the confusion as to which agency had jurisdiction to conduct the inspections of Respondents' facilities, and the fact the Respondent seek information Messrs. Foster, Perie and Hull as to whether any one or in combination they were involved in any oral or written discussions or communications with OSHA regarding the operational change which formed the basis the OSHA inspections in 2009. The information regarding the operational change which discussed in the Motion For Reconsideration which formed the basis for the OSHA inspections in these proceedings..

ORDER

IT IS ORDERED THAT the Respondents' Motion For Reconsideration is DENIED.

IT IS FURTHER ORDERED THAT the Respondents shall take the depositions of Donald J. Foster, James S. Hull , and James R. Pertie after providing ten (10) days written notice to the Secretary unless waived by the parties as provided by Rule 56©) of the Commission's Rules of Procedure, 29 CFR 2200.56c).

IT IS FURTHER ORDERED IN PREPARATION FOR TRIAL COUNSEL FOR THE PARTIES SHALL PROVIDE ACOLOR CODED DIAGRAM (using bright colors) identifying (a) the facility(s) MSHA inspected for 24 years as asserted by the Respondents, (b) the facility(s) inspected by OSHA which formed the basis for the citations issued in these cases and consistent terms such as contained in footnote, and in the Depositions such as Plant 5, building 1, building 2, Electric City, S-1 etc.

IT IS FURTHER ORDERED that multiple copies shall be provided to each witness as necessary, the court reporter, and the Court. Colored marking pencils in colors different than used to construct the diagram which will be used by each witness

/s/

dated: January 10, 2011

Washington, D.C.

Marvin Bober
Administrative Law Judge

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR, Complainant, v. CRANESVILLE AGGREGATE COMPANY, d/b/a SCOTIA BAG PLANT 09-2011 [safety] and 09-2055 (health) and CRANESVILLE BLOCK COMPANY (10-0447) Respondents.	OSHRC Docket No.09-2011, 09-2055 and 10-0447

ORDER ON MOTION TO QUASH THE SUBPOENAS AND STAY THE ORDER GRANTING DEPOSITIONS OF DONALD J. FOSTER, JAMES R. PETRIE, AND JAMES S. HULL

On January 5, 2011, the Secretary filed her Motion To Quash The Subpoenas And Stay The Order Granting Depositions of Donald J. Foster, James R. Petrie, and James S. Hull, ("Motion").

The Motion is denied based upon the rationale discussed in the EXHIBIT A.

ORDER

IT IS ORDERED THAT the Motion To Quash The Subpoenas And Stay The Order Granting Depositions of Donald J. Foster, James R. Petrie, and James S. Hull is DENIED.

/s/

Dated: January 10, 2011
Washington, D.C.

G. Marvin Bober
Administrative Law Judge

EXHIBIT A

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR,

Complainant,

v.

OSHRC Docket Nos. 09-2011, 09-2055 and 10-047

CRANESVILLE AGGREGATE COMPANY, d/b/a SCOTIA BAG PLANT 09-2011 (safety) and 09-2055 (health) and CRANESVILLE BLOCK COMPANY (10-0447)

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property by OSHA appears to explicitly contradict the [Interagency Agreement Between [MSHA, US DOL] and OSHA USDOL] memorandum (sic) of Understanding, [MOU], on jurisdictional issues between MSHA and OSHA entered into on March 29, 1979 and which explicitly states that a presumption exists that activities on a mining property, including sand, gravel and cement, shall be subject to MSHA jurisdiction and that jurisdictional questions were to be resolved by the MSHA District Manager," (5) the consented depositions of Messrs. Foster, Perie and Hull were scheduled for December 14, 2010, (6) "[on] December 2, 2010, the Secretary indicated [without explanation] that [Messrs.] Foster, Perie and Hull will not be produced to be deposed,"(7) "[it had] been learned through discovery that OSHA personnel initially hesitated in asserting jurisdiction over Respondent's property until after contacting MSHA personnel," (8) "many of the documents have been redacted it is important that [Respondents] have the ability to examine all of the that may have participated in the decision by MSHA to suddenly relinquish jurisdiction over the property to OSHA, and (9) it is believed that [Messrs. Foster, Perie and Hull] were involved in the determination whether MSHA had jurisdiction over the worksite."

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DISCUSSION AND CONCLUSION1

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ORDER

IT IS ORDERED THAT the Respondents' Motion For Reconsideration is DENIED.

IT IS FURTHER ORDERED THAT the Respondents shall take the depositions of Donald J. Foster, James S. Hull , and James R. Pertie after providing ten (10) days written notice to the Secretary unless waived by the parties as provided by Rule 56©) of the Commission's Rules of Procedure, 29 CFR 2200.56c).

IT IS FURTHER ORDERED IN PREPARATION FOR TRIAL COUNSEL FOR THE PARTIES SHALL PROVIDE ACOLOR CODED DIAGRAM (using bright colors) identifying (a) the facility(s) MSHA inspected for 24 years as asserted by the Respondents, (b) the facility(s) inspected by OSHA which formed the basis for the citations issued in these cases and consistent terms such as contained in footnote, and in the Depositions such as Plant 5, building 1, building 2, Electric City, S-1 etc.

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dated: January 10, 2011

Washington, D.C.

Marvin Bober
Administrative Law Judge