



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,

Respondent.

OSHRC Docket Nos. 09-2011 &
09-2055

ON BRIEFS:

Ronald Gottlieb, Appellate Attorney; Charles F. James, Counsel for Appellate Litigation; Joseph M. Woodward, Associate Solicitor of Labor for Occupational Safety and Health; M. Patricia Smith, Solicitor of Labor; U.S. Department of Labor, Washington, DC
For the Complainant

Walter G. Breakell, Esq.; Brian J. Barraclough, Esq., Breakell Law Firm, P.C., Albany, NY;
Henry Chajet, Esq.; R. Brian Hendrix, Esq., Jackson Lewis LLP, Reston, VA
For the Respondents

DECISION

Before: ATTWOOD, Chairman; and MACDOUGALL, Commissioner.

BY THE COMMISSION:

Cranesville Aggregate Companies, Inc. owns and operates a sand and gravel mine in Scotia, New York. Several buildings are located on Cranesville's property, including "Building 1" and "Building 2," which are referred to collectively as the "Bag Plant." After receiving a complaint about health and safety hazards in Building 2 at the Bag Plant, the Occupational Safety and Health Administration conducted safety and health inspections at the facility. OSHA

subsequently issued Cranesville three safety citations (Docket No. 09-2011) and three health citations (Docket No. 09-2055).¹ A total penalty of \$508,500 for all six citations was proposed.

Before former Administrative Law Judge Ken S. Welsch, Cranesville asserted that OSHA's authority to regulate conditions at the Bag Plant had been preempted by the Mine Safety and Health Administration pursuant to section 4(b)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 653(b)(1). The judge agreed, finding that the work being done at the Bag Plant rendered it a mine under the Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.*, and he vacated all six citations.

On review, the two Commissioners are divided on the appropriate disposition of the jurisdictional issue in this case. To resolve this impasse, the Commissioners agree to vacate the direction for review, thereby allowing the judge's decision and order to become the final appealable order of the Commission with the precedential value of an unreviewed administrative law judge's decision. *See, e.g., Texaco, Inc.*, 8 BNA OSHC 1758, 1760 (Nos. 77-3040 & 77-3542, 1980); *Rust Eng'r Co.*, 11 BNA OSHC 2203, 2205 (No. 79-2090, 1984); *Safeway, Inc.*, 20 BNA OSHC 1021 (No. 99-316, 2003); *Timken Co.*, 20 BNA OSHC 1070, 1072 (No. 97-0970, 2003). *See also* sections 10(c), 11(a) and (b), and 12(j) of the OSH Act, 29 U.S.C. §§ 659(c), 660(a) and (b), and 661(i). Accordingly, the direction for review is vacated. The separate opinions of each Commission member follow.

SO ORDERED.

/s/ _____
Cynthia L. Attwood
Chairman

/s/ _____
Heather L. MacDougall
Commissioner

Dated: April 22, 2016

¹ In Docket No. 09-2011, the citations allege 17 serious, two willful, and five repeat violations of various general industry standards. In Docket No. 09-2055, the citations allege three serious, six willful, and three repeat violations of general industry standards, including standards relating to personal protective equipment (PPE) and air contaminants. These two matters were consolidated by the judge for disposition purposes with a third matter that is not before us on review. Specifically, Docket No. 10-0447 addressed citations issued at a separate facility owned and operated by Cranesville. However, neither party petitioned for review of this portion of the judge's decision. As a result, by order dated April 26, 2013, the Commission severed Docket No. 10-0447 from this consolidated matter and vacated the direction for review with regard to it.

Separate Opinion of Chairman Attwood

ATTWOOD, Chairman:

The Secretary determined in this case that the Occupational Safety and Health Act applied to conditions at Cranesville’s Bag Plant, which was located at a Cranesville facility at which mining operations also occurred.¹ Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678. Former Administrative Law Judge Ken S. Welsch concluded that the OSH Act was preempted based on his view that mineral milling took place at the Bag Plant and, thus, it was covered by the Mine Act. *See* OSH Act § 4(b)(1), 29 U.S.C. § 653(b)(1) (“Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.”); Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* The Mine Act does not define the term “mineral milling,” but grants the Secretary discretion to determine its meaning. *See* Mine Act § 3(h)(1), 30 U.S.C. § 802(h)(1). Because the Secretary is accorded discretion and I would find his determination here is reasonable, his exercise of that discretion warrants deference. Accordingly, I would find that the cited conditions in the Bag Plant were properly subject to OSHA’s authority, reject Cranesville’s affirmative defense of preemption, and remand this case for further proceedings.

Background

A. Cranesville’s Operations

Cranesville owns a facility in Scotia, New York, that is bisected by a set of railroad tracks. On one side of the tracks is a sand and gravel quarry, and an associated milling facility—referred to as Plant 5—at which mineral material known as “crude” was excavated and then crushed, washed, sized, and separated into sand and two grades of gravel.² These excavation and milling operations were performed outdoors, so the stockpiled sand and gravel products located nearby were exposed to the elements. At the time OSHA inspected the Bag Plant, most of the materials produced at Plant 5 were sold directly to outside buyers or to other offsite Cranesville facilities, or were moved to other stockpiles on the quarry side of the railroad tracks.

¹ Cranesville closed the Bag Plant in the fall of 2010, after this case arose.

² “Crude” is defined in an Interagency Agreement between OSHA and MSHA as “a mixture of minerals in the form in which it occurs in the earth’s crust.” MSHA/OSHA Interagency Agreement, 44 Fed. Reg. 22,827, 22,829, App’x A (Apr. 17, 1979).

On the other side of the tracks was the Bag Plant, which consisted of two buildings, although only activities in one of those buildings, Building 2, are at issue. A small portion of the materials mined and processed at Plant 5 was delivered across the tracks to the Bag Plant as needed. At the Bag Plant, sand, Portland cement, gravel, cement, and other materials were mixed in specified proportions to manufacture several products that were bagged for sale to consumers, such as dry mortar mix, dry concrete mix, and a dry specialty cement product called “surface bond.” Some materials, such as Portland cement, a premium stone product, and sand, were also simply bagged for sale.³ One room in the Bag Plant—known as the maintenance shop—was used to maintain and repair equipment that included mining equipment.⁴

The Bag Plant utilized approximately 3-5% of the materials produced from Plant 5 and, as the judge found, received “most” of the materials it used from outside sources. Upon request from the Bag Plant supervisor, a Plant 5 employee loaded sand or gravel from the outdoor stockpiles at the quarry and delivered specified quantities of those products to outside stockpiles at the Bag Plant, where they continued to be exposed to the elements.⁵ A Bag Plant employee later loaded the gravel and sand into separate plant hoppers as needed.⁶ Other materials that were mixed and/or bagged at the Bag Plant did not originate at Cranesville’s quarry—they came from other Cranesville facilities and other sources unrelated to Cranesville.⁷ All of the sand delivered to the Bag Plant, whether from the quarry and Plant 5 or an outside source, was dried before it

³ The Bag Plant only produced two products on a regular basis: bagged Portland cement and mortar mix. Pure sand was rarely bagged at the Bag Plant.

⁴ Maintenance personnel worked on equipment throughout Cranesville’s operations; they worked specifically on mining equipment at several different locations. When maintenance employees worked on mining equipment at the Bag Plant, their activities were limited to one room in the building that was separate from the bagging operations and from which Bag Plant employees were prohibited entry.

⁵ Any dictionary definitions aside, in evidence is a diagram of the Bag Plant’s Building 2, which identifies the locations of numerous “stock pile[s].”

⁶ Quarry/Plant 5 employees and Bag Plant employees were all employed by Cranesville; however Bag Plant employees did not work at the quarry/Plant 5 and quarry/Plant 5 employees’ contact with the Bag Plant was limited to making deliveries of sand and gravel, and picking up items (such as parts) for delivery to the quarry/Plant 5. A third group of Cranesville employees performed all of the equipment maintenance for the quarry, Plant 5, and the Bag Plant.

⁷ For example, dry Portland cement (an essential ingredient in dry mortar mix) was manufactured elsewhere. And some ingredients used in specialized glues, stone products, and some of the sand used by the Bag Plant came from outside enterprises.

was transferred to a silo and from there, to the mixing and bagging area. The treatment of the sand is a key activity upon which this case turns.

It is undisputed that Cranesville's quarry and Plant 5 must be inspected regularly by MSHA. *See* 30 U.S.C. § 813(a) ("Authorized representatives of the Secretary . . . shall make frequent inspections and investigations in coal or other mines each year . . ."). Indeed, three MSHA inspectors testified that each had conducted such regular inspections of the quarry and Plant 5 as well as surrounding operations on the quarry side of the railroad tracks. All three testified that the supervisor who accompanied them on these inspections told them either that the buildings on the other side of the railroad tracks were not covered by the Mine Act, or that there were no facilities at Cranesville that were subject to the Mine Act other than those on the quarry/Plant 5 side of the railroad tracks. In any event, despite regular MSHA inspections of Cranesville's facility, it is also undisputed that MSHA *never* inspected the Bag Plant.

B. Statutory and Regulatory Background

The determination of whether the activities conducted in the Bag Plant constituted "mineral milling" within the meaning of the Mine Act depends on certain provisions of the OSH Act, the Mine Act (as well as its legislative history), and the 1979 Interagency Agreement between OSHA and MSHA, often referred to as a Memorandum of Understanding (MOU). The OSH Act and the Mine Act both contain provisions relevant to the limits of authority of the two Labor Department agencies. By its terms, the OSH Act "appl[ies] with respect to employment performed in a workplace in a State . . ." OSH Act § 4(a), 29 U.S.C. § 653(a). As noted above, the OSH Act also places limits on that applicability, precluding OSH Act coverage regarding "working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." OSH Act § 4(b)(1), 29 U.S.C. § 653(b)(1).

It is well-settled under long-standing Commission precedent that a section 4(b)(1) claim of preemption is an affirmative defense; the burden of proof therefore is on the employer. *Idaho Travertine Corp.*, 3 BNA OSHC 1535, 1536 (No. 1134, 1975); *Tidewater Pacific Inc.*, 17 BNA OSHC 1920, 1923 (No. 93-2529, 1997), *aff'd in part on other grounds*, 160 F.3d 1239 (9th Cir. 1998). The Commission evaluates an employer's argument that OSHA's authority is preempted under section 4(b)(1) by considering: (1) whether the other federal agency has the statutory authority to regulate the cited working conditions; and (2) if the agency has that authority,

whether the agency has exercised it over the cited conditions by issuing regulations having the force and effect of law. *JTM Indus., Inc.*, 19 BNA OSHC 1697, 1699 (No. 98-0030, 2001). Only the first consideration is at issue in this case.

Under Title I of the Mine Act, MSHA has the authority to regulate working conditions “in coal or other mine[s].” Mine Act § 4, 30 U.S.C. § 803. And the Mine Act specifically defines “coal or other mine” as including, among other things, “lands, . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, . . . *the milling of . . . minerals . . .*” Mine Act § 3(h)(1), 30 U.S.C. § 802(h)(1) (emphasis added). Although “mineral milling” is not defined in the Mine Act, section 3(h)(1) provides specific instructions to the Secretary of Labor that “[i]n making a determination of what constitutes mineral milling for purposes of this Act, the Secretary shall give due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment[.]” *Id.* The Conference Report to Mine Act’s final bill notes that “both the Senate bill and the House amendment authorized the Secretary, in cases of *possible overlapping jurisdiction*[/] between the Mine Safety and Health Administration and OSHA, to assign enforcement responsibilities to a single agency.” S. REP. NO. 95-461, at 38 (1977) (Conf. Rep.) (emphasis added).⁸ Thus, it is clear based on the language of the statute and its legislative history that Congress intended that the Secretary determine whether a particular operation is mineral milling, and contemplated circumstances in which OSHA and MSHA might each have jurisdiction over different operations located at a facility at which mining occurs.

Less than two years after the effective date of the Mine Act, MSHA and OSHA entered into the 1979 MOU to “delineate certain areas of authority, set forth factors regarding determinations relating to convenience of administration, provide a procedure for determining general jurisdictional questions, and provide coordination between MSHA and OSHA in all

⁸ The Senate Committee Report on the proposed Mine Act states that “there may be a need to resolve jurisdictional conflicts, but it is the Committee’s intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that doubts be resolved in favor of inclusion of a facility within the coverage of the Act.” S. REP. NO. 95-181, at 14 (1977). As discussed further below, in this case the Secretary ultimately had no doubts to resolve; he determined that OSHA, not MSHA, had jurisdiction over the Bag Plant. And that determination is supported by the fact that Cranesville neither classified nor treated the Bag Plant employees as covered by the Mine Act.

areas of mutual interest.” 44 Fed. Reg. 22,827 (Apr. 17, 1979). The MOU, unchanged since its inception, is the Secretary’s interpretation of what constitutes mining and mineral milling. It explicitly designates certain operations as being subject to MSHA authority and others as being subject to OSHA authority, and provides a method to determine which agency has authority over heretofore undesignated operations. Appendix A to the MOU defines “milling” and also provides definitions of various processes that inform the Secretary’s determination as to which of the two agencies has regulatory authority over a given operation. 44 Fed. Reg. at 22,829.

C. Procedural History

In response to an employee complaint to OSHA about health and safety hazards at Cranesville’s Bag Plant, OSHA inspected the Bag Plant and ultimately issued Cranesville citations for serious violations of OSHA safety and health standards.⁹ Before the judge, Cranesville challenged OSHA’s authority over the Bag Plant operations on the ground that it was preempted by the Mine Act. Following an evidentiary hearing, the judge vacated the citations on two grounds. First, he concluded that, because “drying” is a process identified as “milling” in the MOU and Cranesville dried all of the sand from the Bag Plant’s outdoor stockpile before either mixing it with other dry ingredients or bagging it, the Bag Plant was a milling operation within the meaning of the Mine Act.¹⁰ Second, the judge concluded that the presence of the maintenance shop in one room of the Bag Plant building where mining and other equipment was repaired was “sufficient to bring the Bag Plant within the purview of the Mine Act.”

On review, the Secretary points to the Mine Act’s explicit delegation of authority to himself to determine which Labor Department agency has inspection authority over the Bag Plant, and contends the judge erred in not according deference to the Secretary’s determination. The Secretary also asserts that pursuant to the definition of “milling” in the MOU, Cranesville’s mining and milling process ceased after the sand and gravel was extracted and milled at Plant 5

⁹ Following receipt of the complaint, an OSHA compliance officer initially went to the wrong Cranesville facility, where the safety director told him that the facility he sought was a mine. The CO reported this conversation to his supervisor, who initially advised him not to inspect. However, it was determined that the Bag Plant was not under MSHA’s jurisdiction and had never been inspected by MSHA. The CO then carried out his inspection of the Bag Plant that led to the OSHA citations.

¹⁰ The judge rejected Cranesville’s additional claim that the Bag Plant engaged in “sizing,” another milling process listed in Appendix A to the MOU. *See* 44 Fed. Reg. at 22,829. I too would find that there is no evidence that sizing occurred in the Bag Plant.

and delivered to the Bag Plant stockpiles. Thus, he argues, the process at the Bag Plant—beginning with the loading of sand and gravel into their respective hoppers and culminating in bagging the consumer product—constituted manufacturing, which falls within OSHA’s authority. In addition, the Secretary argues that the judge erroneously focused on the definition of “drying” in the MOU, and that a reading of the MOU as a whole supports the Secretary’s determination. Cranesville argues that by definition the drying of sand at the Bag Plant is “milling,” and therefore the Bag Plant is subject to the Mine Act. The company also argues that the presence of the maintenance shop in the Bag Plant requires that the entire Bag Plant be considered a mine.

Discussion

The crushing, washing, and sizing that takes place at Cranesville’s Plant 5 plainly constitutes “milling” within the meaning of the Mine Act. Therefore, the quarry and its associated mill and stockpiles at Plant 5 constitute a “mine” within the meaning of the Mine Act and are subject to that Act. Nonetheless, for the following reasons I would conclude that the Secretary’s determination that the Bag Plant is a manufacturing facility subject to the OSH Act, rather than a mineral mill within the meaning of the Mine Act, is reasonable and entitled to deference.

A. Standard of Review

It is axiomatic that if a statutory provision is unambiguous, its language must be given effect. *Chevron, U.S.A., Inc. v. Nat’l Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). And even if there is ambiguity, “a court may not substitute its own construction of [the] provision for a reasonable interpretation made by the administrator of an agency.” *Id.* at 844. In promulgating the Mine Act, Congress unambiguously delegated to the Secretary responsibility for “making a determination of what constitutes mineral milling” Mine Act, § 3(h)(1), 30 U.S.C. § 802(h)(1). Indeed, as found by the two courts of appeals to address the issue, the language of section 3(h)(1) of the Mine Act “gives the Secretary discretion, within reason, to determine what constitutes mineral milling, and thus indicates that his determination is to be reviewed with deference both by the Commission and the courts.” *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1552 (D.C. Cir. 1984); *see also Kaiser Aluminum and Chem. Co. v. Dep’t of Labor*, 214 F.3d 586, 591 (5th Cir. 2000) (according deference to Secretary of Labor in determining what constitutes “milling” under the Mine Act).

In *Stalite*, the Secretary had determined that the facility at issue engaged in mineral milling and was subject to the Mine Act, and issued citations pursuant to that authority. The Federal Mine Safety and Health Review Commission (FMSHRC) vacated the citations, finding that *Stalite* was subject to the OSH Act.¹¹ In reversing the FMSHRC decision, the D.C. Circuit engaged in a comprehensive analysis of the Secretary’s authority to determine what constitutes mineral milling within the meaning of the Mine Act. The court observed that the distinction between milling, on the one hand, and manufacturing, on the other, is “somewhat elusive, to say the least,” and concluded that “[FMSHRC], so far as we can see, gave the Secretary’s determination no deference, and that was error.” *Id.* at 1551-52. The court noted that “[w]e have before us just the sort of determination the Secretary was empowered by Congress to make[,]” and added that “[i]n this highly technical area deference to the Secretary’s expertise is especially appropriate.” *Id.* at 1552 and n.9. The court also rejected FMSHRC’s refusal to rely on the MOU:

[The MOU], while not dispositive, assist[s] our resolution of the jurisdictional question. Section 3(h) specifically contemplates, and, moreover, depends in part, on “the agencies . . . agree[ing] between themselves as to which agency will inspect a particular business establishment.”

*Id.*¹²

My colleague endorses Cranesville’s argument that the meaning of “milling” as used in the Mine Act is plain, and therefore deference to the Secretary is precluded. But in light of the Act’s explicit delegation of authority to the Secretary to determine the limits of milling, as well as the legislative history noting that the jurisdictional line may not be clear, what is plain is that this argument lacks merit. And instead of determining whether the Secretary’s conclusion that Cranesville did not engage in milling at the Bag Plant within the meaning of the Mine Act is reasonable and thus entitled to deference, the judge applied the wrong standard of review and simply reached his own conclusion. While the judge began his analysis by correctly noting that “[t]he Commission gives considerable weight to a federal agency’s representation as to its authority to regulate cited working conditions,” (citing *JTM Indus.*, 19 BNA OSHC at 1699),

¹¹ FMSHRC is an adjudicatory agency that decides cases arising under the Mine Act. 30 U.S.C. § 823.

¹² Although *Stalite* presented a different factual situation than we have before us—one in which the Secretary’s determination was to *include* an operation within MSHA’s ambit—the principles of deference apply with equal force.

he proceeded to decide the preemption issue without according any apparent weight to the Secretary's representation of OSHA's authority.

Applying the appropriate standard of review to the Secretary's determination, I would conclude that it is reasonable and should be accorded deference. First, the operations of the Bag Plant fit neither the definition of "mill" found in MSHA's standards, nor the definition of "milling" contained in the MOU. MSHA's safety and health standards for metal and nonmetal mines define "mill" as "any ore mill, sampling works, concentrator, and any crushing, grinding, or screening plant used at, and in connection with, an excavation or mine." 30 C.F.R. § 56.2. Although this definition obviously applies to Plant 5 (where Cranesville engaged in crushing, washing, and screening), nothing in the definition bears any resemblance to the processes Cranesville engaged in at the Bag Plant. Additionally, Appendix A of the MOU defines "milling" as "the art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives." 44 Fed. Reg. at 22,829. And it notes that "[t]he essential operation in all such processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated." *Id.*

Cranesville relies on the judge's erroneous finding that "[e]mployees in the Bag Plant were applying heat to *excavated material hauled directly from the mine* in order to dry the material" to argue that the separation of water from sand that occurred in the dryer at the Bag Plant fits within the MOU's definition. (Emphasis added.) Neither the judge's finding nor Cranesville's argument is factually accurate. Indeed, contrary to the judge's finding, the "excavated material"—the crude crust of the earth—was not "hauled directly from the mine" to the Bag Plant. Rather: (1) it was transported from the mine to the milling facilities at Plant 5, where specific milling processes—crushing, washing, and screening—were applied to produce sand and two grades of gravel; (2) these materials were then moved to outdoor stockpiles at Plant 5; (3) most of the output of Plant 5 was then sold in that form, as "primary consumer derivatives," to off-site customers or moved to other stockpiles on the quarry side of the railroad tracks;¹³ (4) as needed, a small portion of the sand and gravel stockpiled at Plant 5 was transported to the Bag Plant's outdoor stockpiles; (5) as needed, the sand and gravel were then loaded into their respective hoppers at the Bag Plant; and (6) the sand was then dried and either

¹³ Cranesville did not dry sand or any of the other products it sold directly from Plant 5 to customers.

stored in a silo for future use or transported to the mixing and bagging areas of the Bag Plant. Thus, “separation of one or more valuable desired constituents [sand and gravel] of the crude from the undesired contaminants with which it is associated” occurred only at Plant 5—not at the Bag Plant. For that reason alone, the Secretary’s determination that Cranesville engaged in manufacturing and not milling at the Bag Plant is reasonable and is entitled to deference.

Furthermore, the drying of sand at the Bag Plant can reasonably be seen as a necessary first step in the Bag Plant’s manufacturing of three products: dry concrete mix, dry mortar mix, and dry surface bonding material. Each of these products was made by mixing dried sand with other dry materials, and they were then bagged at the facility and sold. The Bag Plant also bagged and sold two different grades of Portland cement, which Cranesville acquired from off-site producers. And, occasionally, the plant bagged pure sand. In his deposition, the President of Cranesville Aggregate explained that the material “has to be dry when it’s blended with cement or the chemical reaction will start with the moisture and the bag could harden up.” Moreover, he testified that some materials (such as “play sand”) do not need to be dried, but Cranesville dries them “because [they] handle[] better.” The Secretary’s expert witness confirmed these statements:

Some of the materials that are bagged in these processes include cement. If the materials are moist, when they’re mixed with the cement, they will begin to hydrate the cement which means the cement will start to set up and get hard, and you will have lumps at the least, or you could have the entire bag turn hard and be unusable. So the dryness is important to the bagging process, . . . and also to the handling of it through their system as it’s being conveyed and stored.

And not all of the sand used at the Bag Plant came from Cranesville’s quarry; some of it came from outside sources. Just like the sand delivered from Plant 5, the sand from other sources was stored in a stockpile outside the Bag Plant before it was used. And all the sand that was used at the Bag Plant was dried, irrespective of its source. Thus, sand delivered from off-site locations was treated exactly the same as the sand that came from Cranesville’s mill.

Finally, I would note that the Secretary’s determination that the Bag Plant was subject to OSH Act jurisdiction is consistent with the apparent understanding of Cranesville’s own managers. Prior to OSHA’s inspection, the Bag Plant supervisor was given OSH Act, but not Mine Act, training. And Bag Plant employees were specifically excluded from Mine Act training. Moreover, over the years the quarry/Plant 5 supervisor told at least three MSHA

inspectors that the Bag Plant buildings were not subject to the Mine Act.¹⁴ He testified that he never took the MSHA inspectors to the Bag Plant or introduced them to the Bag Plant supervisor. Indeed, Cranesville's Safety Director, who attended the OSHA opening conference in this case and accompanied both compliance officers on their inspections of the Bag Plant, never asserted that OSHA lacked jurisdiction over the Bag Plant or sought to deny them entry on that ground.

B. The MOU

The judge confined his decision to an analysis of only one portion of Appendix A of the MOU; he failed to consider the MOU as a whole. But the MOU, read in its entirety, supports the conclusion that the Secretary acted reasonably here. Moreover, the judge failed to consider other significant evidence that is relevant to the Secretary's determination.

First, the judge failed to consider part of the MOU in which the Secretary identifies specific processes that are subject to either MSHA or OSHA authority:

Pursuant to the authority in section 3(h)(1) to determine what constitutes mineral milling considering convenience of administration, the following jurisdictional determinations are made:

- a. MSHA jurisdiction includes salt processing facilities on mine property; electrolytic plants where the plants are an integral part of milling operations; stone cutting and stone sawing operations on mine property where such operations do not occur in a stone polishing or finishing plant; and alumina and cement plants.
- b. OSHA jurisdiction includes the following, *whether or not located on mine property*: brick, clay pipe and refractory plants; ceramic plants; fertilizer product operations; concrete batch, asphalt batch, and hot mix plants; smelters and refineries. OSHA jurisdiction also includes salt and cement distribution terminals not located on mine property, and milling operations associated with gypsum board plants not located on mine property.

¹⁴ The judge implicitly credited the MSHA inspectors' testimony that each had conducted regular inspections at the quarry/Plant 5 and that the supervisor told them that the buildings on the other side of the railroad tracks were not covered by the Mine Act. But he rejected the Secretary's argument that Cranesville's actions support the Secretary's determination that the Bag Plant was subject to the OSH Act. The judge correctly observed that "the mine operator is not entitled to set the jurisdictional limits of its property[,] and "MSHA's previous failure to inspect the Bag Plant is not a factor in determining current jurisdiction." However, Cranesville's apparent determination that the Bag Plant was subject to the OSH Act supports the conclusion that it is reasonable for the Secretary to make the same determination. And reasonableness is the standard by which the Secretary's determination is assessed.

MOU paragraph B.6, 44 Fed. Reg. at 22,828 (emphasis added). The evident conclusion to be drawn from this paragraph is that, consistent with the Mine Act, the Secretary determined that OSHA would have jurisdiction over some facilities that are located on mine property. Moreover, with regard to facilities and operations listed in paragraph B.6.b, Appendix A of the MOU plainly describes the point at which MSHA authority ends and OSHA authority begins.¹⁵ Thus, for example, at brick, clay pipe, and refractory plants, OSHA authority “[c]ommences after arrival of raw materials at the plant stockpile.” *Id.* at 22,830. Similarly, at ceramic plants OSHA authority “[c]ommences after arrival of the clay and other additives at the plant stockpile.” *Id.* And OSHA authority at asphalt-mixing plants as well as concrete ready-mix or batch plants “[c]ommences after arrival of sand and gravel or aggregate at the plant stockpile.” *Id.* And the MOU makes clear that all of these types of facilities may be subject to OSHA’s authority even if they are located “on or contiguous to” mine property.¹⁶ The analogy of these operations to the Bag Plant is obvious. In all of them raw materials have been extracted from the earth, have been processed in some way, and then delivered to plants that manufacture a final product. In all of these circumstances, the line between mining and milling, on one hand, and manufacturing, on the other, has been drawn by MSHA and OSHA at the plant’s stockpile, which lends additional credence to the conclusion that the Secretary’s line-drawing in this case is reasonable.

Second, paragraph B.5 of the MOU (neither cited nor discussed by the judge) lists four factors to be considered in drawing the jurisdictional line between milling and manufacturing in circumstances *not* covered by paragraph B.6:

The following factors, among others, *shall be considered* in making determinations of what constitutes mineral milling under section 3(h)(1) and whether a physical establishment is subject to either authority by MSHA or OSHA: the processes conducted at the facility, the relation of all processes at the

¹⁵ Appendix A describes the operations listed in paragraph B.6.b as “types of operations which may be on or contiguous to mining and/or milling operations . . . over which MSHA does not have authority . . . and over which OSHA has full authority” 44 Fed. Reg. at 22,830.

¹⁶ Appendix A also addresses specific types of facilities on mine property in which MSHA and OSHA each have authority over specific operations. For example, regarding gypsum board plants, the Appendix states that “[i]f the plant is located on mine property, [OSHA authority] commences at the point when milling . . . is completed, and the gypsum and other materials are combined to enter the sequential processes necessary to produce gypsum board.” Provisions regarding fertilizer products, custom stone finishing, smelting, electrowinning, and refining similarly demarcate the end of milling (and MSHA’s authority) and the beginning of manufacturing (and OSHA’s authority) in plants located on mine property.

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.

44 Fed. Reg. at 22,828 (emphasis added). Contrary to my colleague's assertion, in his brief, the Secretary has explained why consideration of these factors supports the reasonableness of his determination that the Bag Plant was subject to the OSH Act. The record establishes that all of the processes in the Bag Plant, including the drying of sand, mixing of dry ingredients, and bagging of dry materials, were interrelated and designed to facilitate the production of the final products: bagged dry construction materials. The citations OSHA issued regarding the Bag Plant involve the types of hazards typical of a manufacturing facility: fall hazards, electrical hazards, ladder hazards, personal protective equipment hazards, hazards associated with exposure to respirable dust, and exposure to hazardous substances. Moreover, the Secretary has acted consistently in this regard—his expert witness testified that OSHA had asserted jurisdiction over other, similar, bagging facilities located on mine property.

Third, the judge focused his attention solely on one provision of the MOU's Appendix A, which provides:

Following is a list with general definitions of milling processes for which MSHA has authority to regulate subject to Paragraph B6 of the Agreement. Milling consists of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting.

44 Fed. Reg. at 22,829. The only relevant process on that list for purposes of this case is "drying," which is defined as "the process of removing uncombined water from mineral products, ores, or concentrates, for example, by the application of heat, in air-actuated vacuum type filters, or by pressure type equipment." 44 Fed. Reg. at 22,830. The judge applied this definition of drying to the facts as he saw them and found:

The record establishes that d[r]ying occurred in [the Bag Plant]. This milling process is not the primary task in which the Bag Plant employees engaged, but it was a regular and significant part of [the Bag Plant's] weekly schedule of operations. The MOU does not require a certain volume of material to be milled at a facility before it is determined to be under the jurisdiction of MSHA. The

limited drying process that occurred in Building 2 is sufficient to bring the Bag Plant under MSHA's authority.¹⁷

The judge thus reduced his analysis to a simplistic equation—"drying" equals a milling process; therefore the bag plant is a mill—which fails to take into account the whole of the MOU.¹⁸ In addition to the paragraphs already discussed, paragraph B.3 of the MOU provides that "[n]otwithstanding the clarification of authority provided under Appendix A, there will remain areas of uncertainty regarding the application of the Mine Act, especially in operations near the termination of the milling cycle and the beginning of the manufacturing cycle." 44 Fed. Reg. at 22,828. Furthermore, as my colleague acknowledges, paragraph B.4 provides:

Under section 3(h)(1) [of the Mine Act], the scope of the term milling may be expanded to apply to mineral product manufacturing processes where these processes are related, technologically or geographically, to milling. *Or, the term milling may be narrowed to exclude from the scope of the term processes listed in Appendix A where such processes are unrelated, technologically, or geographically, to mineral milling.* Determinations shall be made by agreements between MSHA and OSHA.

Id. (emphasis added). Therefore, even if the term "drying" in Appendix A's general list of milling processes could be considered applicable to the drying that occurred at the Bag Plant, the MOU contemplates that the Secretary may reasonably determine that because the drying process was unrelated, technologically or geographically, to the mineral milling that occurred in Plant 5, it should not be considered "milling" for purposes of determining which agency exercised jurisdiction. Here, the drying process was directly associated with the rest of the manufacturing process and was not "technologically" or "geographically" related to the milling that occurred at

¹⁷ Contrary to the judge's finding, the unrefuted evidence establishes that only one of the six or seven Bag Plant employees operated the dryer, and only for three hours once or twice a week. Thus, assuming that six employees worked in the bag plant for 40 hours a week each, and at most six hours were spent each week drying sand, drying sand comprised less than three percent of the total weekly hours worked by all employees in the Bag Plant. I would not consider this amount of time "significant."

¹⁸ As discussed above, the judge also failed to discuss the applicability of MSHA's definition of "mill," and the MOU's definition of "milling." *See* 30 C.F.R. § 56.2; 44 Fed. Reg. at 22,829.

Plant 5. Thus, this provision in the MOU also supports the reasonableness of the Secretary's decision.¹⁹

C. The Maintenance and Repair Shop

The judge, and my colleague, make much of the fact that one room in Building 2 was used by Cranesville maintenance personnel to maintain and repair mining and Bag Plant equipment which, in their view, leads to the conclusion that MSHA rather than OSHA had jurisdiction over the Bag Plant. As discussed above, however, the MOU makes clear that just because a plant is located on or contiguous to a mining facility, OSHA is not necessarily deprived of authority over non-mining operations at that facility. Here, little is actually known about the maintenance room. It must be emphasized that OSHA did not inspect that room, and Bag Plant employees were prohibited from entering it. Cranesville, which despite my colleague's assertion to the contrary has the burden of proof regarding its section 4(b)(1) affirmative defense, failed to introduce any evidence regarding the amount of space in Building 2 that the maintenance room occupied, as opposed to the space used for the Bag Plant, or to offer any evidence regarding the amount of mine equipment repair work that was done in that room, as opposed to other repair work. I would therefore reject outright Cranesville's argument and the judge's determination that the repair and maintenance of mining equipment in Building 2 renders the entire building a mine within the meaning of the Mine Act

For all these reasons, I would conclude that the Secretary reasonably exercised the express delegation of authority granted to him under the Mine Act to draw the line between Cranesville's mining and milling operations on the one hand, and its manufacturing operations on the other. Accordingly, I would find that Cranesville has not carried its burden to show that

¹⁹ I would also note that under the MOU, questions of jurisdiction are to be resolved by OSHA and MSHA officials at the local and, as needed, national levels, or referred to the Secretary of Labor for decision. MOU paragraph B.8, 44 Fed. Reg. at 22,828. *See City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013) (holding that courts must defer to agency's interpretation of a statutory ambiguity that concerns the scope of the agency's statutory authority). And any post hoc inquiry into the Secretary's internal deliberations leading to his determination of agency authority is the antithesis of his exercise of prosecutorial discretion. *Cf. Cuyahoga Valley Ry. v. United Transp. Union*, 474 U.S. 3, 4-8 (1985) (holding that Secretary's motion to vacate citation on the ground that other federal agency had jurisdiction over cited conditions is unreviewable). Finally, though not relevant to the disposition of this case, should there be any question as to Cranesville's preference for MSHA rather than OSHA jurisdiction here, one need only refer to the \$508,500 proposed OSHA penalty and note that any abatement was obviated by Cranesville's closure of the Bag Plant prior to the hearing.

OSHA's authority is preempted, and I would reverse the judge's decision and remand for further proceedings.

Dated: April 22, 2016

/s/ _____
Cynthia L. Attwood
Chairman

Separate Opinion of Commissioner MacDougall

MACDOUGALL, Commissioner:

This case deals with whether OSHA or MSHA has jurisdiction over Cranesville's worksite, which was inspected by OSHA in response to employee complaints. Following OSHA's inspection, the Secretary issued health and safety citations to Cranesville. Unlike my colleague, I would find that these citations must be vacated because OSHA lacks jurisdiction over the inspected worksite. I would agree with the judge, albeit for slightly different reasons than those set forth in his decision, that the worksite constitutes a mine as defined by the Mine Act, giving MSHA statutory authority over the worksite and cited working conditions; as such, OSHA's authority is preempted by section 4(b)(1) of the OSH Act. Therefore, following the impasse before the Commission and our decision to vacate the direction for review, all citations issued under Docket Nos. 09-2011 and 09-2055 are vacated pursuant to the judge's decision. For the reasons that follow, I would agree that these citations should be vacated.

Factual Background

Cranesville operates a sand and gravel quarry in Scotia, New York. Cranesville mines approximately 1,500 to 2,000 tons of material per day from this quarry. On the same property, Cranesville has several buildings, including a group of buildings referred to as "Plant 5," located next to the quarry, and "Building 1" and "Building 2," which are referred to collectively as the "Bag Plant." The Bag Plant is approximately 600 feet from the quarry and Plant 5. Railroad tracks run across the property, cutting between the quarry and the Bag Plant, and a private road leads from the quarry and crosses over the railroad tracks to the Bag Plant. The quarry, Plant 5, and the Bag Plant, all of which were owned and operated by Cranesville, have the same street address.¹

Following the extraction of mined material from the quarry, Cranesville processes the excavated material by running it through a series of crushers, screens, and wash plants in Plant 5. Each day, employees hauled approximately 60 to 80 tons of excavated material from the quarry and Plant 5 to the Bag Plant, where Cranesville bagged and packaged mineral and construction

¹ Cranesville closed the Bag Plant in 2010. According to the Bag Plant manager, it was shut down because it was too expensive to update. Contrary to my colleague's suggestion, based on this limited evidence, it would be improper for the Commission to ascribe a particular motive to Cranesville's decision in this regard, such as an attempt to avoid OSHA jurisdiction.

materials, such as stone, sand, cement, blacktop, salt, topsoil, and premix aggregates, including concrete mix, mortar mix, “surface bond” and other specialty products. The Bag Plant contained processing equipment, including screens, dryers, elevators, hoppers, and conveyers. Part of the bagging operation involved drying sand and mixing it with cement. During the drying process, the sand was “dumped into a big barrel that has a [furnace] gun on the end of it[,]” which would “spin and fluff[]” the sand to dry it. The Bag Plant also contained a maintenance shop used for repairing mining equipment. This shop performed maintenance work for both Plant 5 and the Bag Plant, but was only one of several locations on the Scotia property where mining equipment was repaired.

The parties agree that the quarry and Plant 5 constitute a mine under the jurisdiction of the Mine Act, and that MSHA has regularly inspected it. Cranesville contends that the work performed at the Bag Plant, which was the subject of OSHA’s inspection, was also under the jurisdiction of MSHA. More specifically, Cranesville contends that in the Bag Plant: (1) it assembled and repaired mining equipment; and (2) it used equipment to dry mined sand to produce a masonry product, which is a milling process. Thus, according to Cranesville, this was work within the jurisdiction of the Mine Act. The Secretary disputes the judge’s finding that the Bag Plant, like the quarry and Plant 5, was also under the jurisdiction of MSHA. The Secretary contends that the fundamental processes Cranesville engaged in at the Bag Plant were bagging and packaging materials, which are not milling processes, noting that most of the material that was mined in Plant 5 was processed and sold without going to the Bag Plant. Thus, according to the Secretary, OSHA’s jurisdiction is not preempted.

Statutory Framework

I. Relevant Provisions of the Mine Act and OSH Act

A. The OSH Act

Section 4(b)(1) of the OSH Act provides:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

29 U.S.C. § 653(b)(1). In determining whether there is preemption under section 4(b)(1), the Commission considers: “(1) whether the other federal agency has the statutory authority to regulate the cited working conditions, and (2) if the agency has that authority, whether the

agency has exercised it over the cited conditions by issuing regulations having the force and effect of law.” *JTM Industr.*, 19 BNA OSHC 1697, 1699 (No. 98-0030, 2001) (citations omitted). In this case, the Secretary concedes MSHA has promulgated regulations that address the hazards at issue in the present case. Thus, as noted by the judge, the only issue before us is whether MSHA has statutory authority to regulate the cited working conditions.

B. The Mine Act

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:

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

30 U.S.C. § 802(h)(1) (emphasis and bolding added).

In passing the Mine Act in 1977, Congress gave MSHA broad jurisdiction and established a “single mine safety and health law, applicable to all mining activity.” S. REP. NO. 95-461, at 37 (1977) (Conf. Rep.). The conference committee indicated that the Mine Act broadly defines “mine” to include not only “areas from which mineral[s] [are] extracted,” but also “all surface facilities used in preparing or processing the minerals” S. REP. NO. 95-461, at 38 (1977) (Conf. Rep.); *see also* S. REP. NO. 95-181, at 14 (1977) (Mine Act jurisdiction reaches “structures . . . which are used or are to be used in . . . the preparation of the extracted minerals . . .”).

The Senate Committee on Human Resources stated:

[It] is the Committee’s intention that what is considered to be a mine and to be regulated under this [Mine] Act be given the broadest possibl[e] interpretation, and it is the intent of this Committee that *doubts be resolved in favor of inclusion of a facility within the coverage of the Act.*

S. REP. NO. 95-181, at 14 (1977) (emphasis added). In sum, Congress intended for the Mine Act's jurisdiction to be broad and jurisdictional questions to be resolved in favor of coverage within the Mine Act.

II. The Interagency Agreement Between MSHA and OSHA

In 1979, MSHA and OSHA entered into an Interagency Agreement addressing the two agencies' mutual jurisdictional boundaries. 44 Fed. Reg. 22,827 (Apr. 17, 1979). This agreement takes into account Congress' directive that the Secretary, in making a determination as to 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. Interagency Agreement at ¶ B.2, 44 Fed. Reg. at 22,828 (citing § 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1)). Paragraph A.3 of the Interagency Agreement specifies that in cases involving milling operations, the Secretary will apply the provisions of the Mine Act. *Id.* at ¶ A.3, 44 Fed. Reg. at 22,827-28.

To further clarify which agency has inspection authority with regard to milling, the Interagency Agreement states that:

[T]he scope of the term milling may be expanded to apply to mineral product manufacturing processes where these processes are related, technologically or geographically, to milling. Or, the term milling may be narrowed to exclude from the scope of the term processes listed in Appendix A where such processes are unrelated, technologically, or geographically, to mineral milling. Determinations shall be made by agreements between MSHA and OSHA.

Id. at ¶ B.4, 44 Fed. Reg. at 22,828.² However, the Interagency Agreement also states that in making such determinations, MSHA and OSHA shall consider the following factors: (1) the

² The Interagency Agreement further states that:

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 cannot 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.

Id. at ¶ B.8, 44 Fed. Reg. at 22,828. It also provides, regarding interagency coordination:

The Office of Legislative and Interagency Affairs in OSHA and the Office of the Assistant Secretary in MSHA shall serve as liaison points to facilitate communication and cooperation between the participating organizations.

processes conducted at the facility; (2) the relation of all processes at the facility to each other; (3) the number of individuals employed in each process; and (4) 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. *Id.* at ¶ B.5, 44 Fed. Reg. at 22,828. In this paragraph of the Interagency Agreement, the Secretary again reiterates that “doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.” *Id.*

Appendix A of the Interagency Agreement provides a list of milling processes that MSHA has authority to regulate, including crushing, sizing, washing, and drying. 44 Fed. Reg. at 22,829-30. Appendix A defines the milling process of “drying” as “the process of removing uncombined water from mineral products, ores, or concentrates, for example, by the application of heat, in air-actuated vacuum type filters, or by pressure type equipment.” *Id.* at 22,830.

Discussion

I. MSHA Has Authority to Regulate Building 2 Where Mining Equipment Was Repaired and Assembled

In addressing the parties’ arguments, the question of whether OSHA or MSHA jurisdiction exists in this case requires the Commission to review the Mine Act and its legislative history, the OSH Act, the Interagency Agreement, and the Secretary’s interpretation of them. I would find that the judge’s conclusion on this issue is consistent with the Mine Act’s plain meaning. When determining the meaning of a statute or standard, the Commission first looks to its text and structure. *Superior Masonry Builders, Inc.*, 20 BNA OSHC 1182, 1184 (No. 96-1042, 2003). If the wording is unambiguous, the plain language of the standard will govern, even if the Secretary posits a different interpretation. *Id.*; *Blount Int’l, Ltd.*, 15 BNA OSHC 1897, 1902 (No. 89-1394, 1992). Both the courts and the Commission have rejected the Secretary’s interpretation when it strains the plain meaning of the statutory or regulatory text. *Worcester Steel Erectors, Inc.*, 16 BNA OSHC 1409, 1418-19 (No. 89-1206, 1993). Here, the plain meaning of the Mine Act compels MSHA coverage of the Bag Plant because the record unequivocally establishes that it is a facility where mining equipment was maintained.

Cranesville’s maintenance crew provided services to the entire contiguous facility located in Scotia. The maintenance crew worked out of a portion of Building 2 in the Bag Plant, which housed the maintenance shop. There, the maintenance crew serviced, repaired, and assembled

Id. at ¶ D.1, 44 Fed. Reg. at 22,828-29.

not only equipment used at the Bag Plant but also mining equipment used at the quarry and Plant 5, including front loaders, conveyors, and crushers. The Secretary does not dispute that this maintenance work was performed in the Bag Plant, but he contends that it was not sufficient to bring the Bag Plant within the scope of MSHA’s authority. I would find, like the judge, that it does.

There is no question that, as the Federal Mine Safety and Health Review Commission (“FMSHRC”) has held, MSHA has authority over facilities where “equipment . . . used in[] the milling of minerals” is maintained. 30 U.S.C. § 802(h)(1). *See Jim Walter Res., Inc.*, 22 FMSHRC 21, 25 (2000) (holding that “the language of the statute is clear” that maintenance of mining equipment is an integral part of the mining process and proper maintenance is the means to achieve a fundamental purpose of the Act—continued operation of safe equipment—and comes within MSHA’s authority); *U.S. Steel Mining Co., Inc.*, 10 FMSHRC 146, 148-149 (1988) (a repair and maintenance shop that served two extraction sites and a cleaning plant, none of which were located on the same property as the maintenance shop, was subject to MSHA authority because it repaired and maintained equipment “used in or to be used in” the employer’s extraction, mining, and coal cleaning activities within the meaning of section 3(h)(1)(c) of the Mine Act). Indeed, the plain language of the Mine Act allows for no other result. *See* 30 U.S.C. § 802(h)(1)(C) (a mine includes “equipment . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form”); *see also Arcadian Corp.*, 17 BNA OSHC 1345, 1347 (No. 93-3270, 1995) (“In a statutory construction case, the beginning point must be the language of the statute”) (citations omitted), *aff’d*, 110 F.3d 1192 (5th Cir. 1997). Cranesville’s maintenance shop repaired and maintained mining equipment, and this work was integral to the work of the quarry and the mining process. As such, I would conclude that the judge correctly found that the maintenance work performed on mining equipment in the Bag Plant brought the Bag Plant under MSHA’s authority.

II. MSHA Has Authority to Regulate Bag Plant Where Cranesville Engaged in Milling

I would also agree with the judge that Cranesville was engaged in mineral milling at the Bag Plant, which brought it under MSHA’s authority. On review, Cranesville argues that one of the milling processes listed in the Interagency Agreement—drying—occurred in Building 2 of

the Bag Plant.³ The Secretary, on the other hand, contends that Cranesville’s drying of masonry sand was only incidental to the mineral process—done simply to make it easier to load and move it—and was, therefore, manufacturing, which gives OSHA jurisdiction. The Secretary further challenges the judge’s decision by contending that even if the drying operation constituted milling as defined by the Interagency Agreement, the Secretary reasonably declined to classify it as milling for purposes of MSHA’s jurisdiction because considerations of administrative convenience supported leaving jurisdiction with OSHA. I would agree with the judge that the drying that occurred in Building 2 was milling; as such, MSHA has jurisdiction over not only the quarry and Plant 5 but also the Bag Plant.

As noted above, the Mine Act expressly covers “mineral milling,” but does not define that term. However, in the Interagency Agreement, the Secretary defines “milling” as the “art of treating the crude crust of the earth to produce therefrom the primary consumer derivatives,” which includes several processes including *drying*. Interagency Agreement at App’x. A, 44 Fed. Reg. at 22,829-30. “The essential operation in all such [milling] processes is separation of one or more valuable desired constituents of the crude from the undesired contaminants with which it is associated.” *Id.*, 44 Fed. Reg. at 22,829. The Secretary also defines the milling process of “drying” as “the process of removing uncombined water from mineral products, ores, or concentrates, for example, by the application of heat, in air-actuated vacuum type filters, or by pressure type equipment.” *Id.*, 44 Fed. Reg. at 22,830.

Here, Cranesville—a mine operator—engaged in the excavation of sand and gravel and dried a certain amount of that material at the Bag Plant,⁴ a facility located on the same property as its quarry. Cranesville heated the mined material hauled directly from Plant 5 to remove uncombined water from it; the very definition of “drying” as set out by the Secretary in the Interagency Agreement. Thus, Cranesville treated “the crude crust of the earth to produce therefrom the primary consumer derivatives,” and therefore engaged in “milling” at the Bag

³ Before the judge, Cranesville also contended that it engaged in another milling process in the Bag Plant—sizing. The judge determined that Cranesville was not engaged in sizing, and Cranesville does not challenge this determination upon review.

⁴ No drying of material from Plant 5 was performed prior to its arrival at Building 2.

Plant.⁵ In doing so, Cranesville performed functions usually performed by a mine operator—excavating, milling, and preparing materials for a particular use.

It is true that drying only occurred approximately twice a week at the Bag Plant, but neither the Mine Act nor the Interagency Agreement require drying to be done with any level of frequency at a facility to be considered “milling.”⁶ Exclusivity is not a limitation that Congress included in section 3(h)(1)(C) of the Mine Act. *See Thunder Basin Coal Co. v. FMSHRC*, 56 F.3d 1275, 1280 (10th Cir. 1995) (refusing to “ ‘read a limitation into the [Mine Act] that has no

⁵ In this case, the desired constituents were sand and gravel and the undesired contaminant was water. Water was removed from the crude crust of the earth, and sand and gravel were used to make concrete.

My colleague claims, based on examples provided in the Interagency Agreement, that the jurisdictional line between MSHA and OSHA “is drawn at [Cranesville’s] stockpile.” There is no indication in the record, however, that the mined material transported to the Bag Plant served as a “stockpile,” which is defined as “a reserve supply of something essential accumulated [] for use during a shortage.” WEBSTER’S NEW COLLEGIATE DICTIONARY (1975). While the exhibit mentioned by my colleague identifies three “stockpiles,” the Secretary acknowledged at the hearing that this diagram was admitted into evidence to serve as a general reference for a witness to identify the location of cited violations and not for purposes of any dispositive issue. Merely transporting mined material from one location to another does not make it a “stockpile.” Further, mined material from the quarry and Plant 5 was dried for the first time at the Bag Plant; that it had a temporary resting place during this process does not alter what constitutes mineral milling covered by the Mine Act.

⁶ Nothing in the Interagency Agreement’s definition indicates that the drying must effect a chemical change in the material, as the Secretary now contends on review. As the judge found, employees in the Bag Plant were applying heat to excavated material hauled directly from the quarry in order to dry the material to make it more suitable for its end use. While the Secretary asserts that the judge erred in failing to distinguish between drying performed to render the masonry sand a marketable commodity, which is a milling process, and drying performed as part of manufacturing, which is not a milling process, even the Secretary’s expert acknowledged at trial that the drying done at the Bag Plant made the masonry sand more suitable for its end use:

Some of the materials that are bagged in these processes include cement. If the materials are moist, when they’re mixed with the cement, they will begin to hydrate the cement which means the cement will start to set up and get hard, and you will have clumps at the least, or you could have the entire bag turn hard and be unusable. So the dryness is important to the bagging process.

In weighing all of the evidence, I would find the opinion of Cranesville’s expert—a former Assistant Secretary of Labor for MSHA—to be persuasive; specifically, that the drying that took place at the Bag Plant was integral to the mining process, because without drying, the material was not suitable for its end use, and constituted milling of mined minerals.

basis in statutory language.’ ” (quoting *Utah Power & Light Co. v. Sec’y of Labor*, 897 F.2d 447, 451 (10th Cir. 1990)); *Hercules Inc. v. EPA*, 938 F.2d 276, 280 (D.C. Cir. 1991) (rejecting an interpretation because it “read[] into the statute a drastic limitation that nowhere appear[ed] in the words Congress chose . . .”). As such, like the judge, I would find that the drying process that occurred in the Bag Plant was “milling,” and this activity brought working conditions in the Bag Plant under MSHA’s authority.

III. Deference to the Secretary’s Statutory Interpretation Is Not Warranted

For the reasons discussed above, I would find that the Bag Plant comes within MSHA’s authority because it is a mine, as plainly defined by the Mine Act, where mineral milling took place, as the Secretary himself has defined it in the Interagency Agreement. As such, a deference analysis is not warranted here. If such an analysis was required, however, I would find that the Secretary’s interpretation of the Mine Act in this case is not entitled to deference because it is inconsistent with the statutory interpretation previously set forth in his Interagency Agreement. In addition, the Secretary has failed to follow the Mine Act’s statutory mandate to consider “convenience of administration” in making this interpretation. Under these circumstances, the Secretary’s interpretation is not reasonable; thus, I would not accord it deference.

The Commission’s review of an agency’s interpretation of a statute is governed by the two-part formula announced in *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). In reviewing an administrative interpretation of a statute, the Commission must first ask “whether Congress has directly spoken to the precise question at issue.” *Id.* at 842. If the statute is unambiguous, then the Commission “must give effect to the unambiguously expressed intent of Congress” regardless of the agency’s view. *Id.* at 843. However, if the statute is silent or ambiguous with respect to the specific issue, then the Commission must defer to the agency’s interpretation unless that interpretation is unreasonable. *Id.* at 843–44. However, an interpretation that is inconsistent with the plain meaning of the statute is not entitled to deference.⁷ *Chevron*, 467 U.S. at 843.

⁷ While the Commission gives considerable weight to the agency’s representation as to its authority to regulate cited working conditions, the Commission “independently reviews the statutory and regulatory provisions at issue, as well as the evidence, to determine whether that view is reasonably supported by the record.” *JTM Industr.*, 19 BNA OSHC at 1699. *See also Perez v. Loren Cook Co.*, 803 F.3d 935, 939 (8th Cir. 2015) (agency’s interpretation not entitled

First, I would conclude, like the judge, that the Bag Plant is part of a mine under section 3(h)(1)(C) of the Mine Act. In my view, this reading of the relevant statutory provisions is compelled by the language of the Mine Act and its legislative history, which explicitly contemplates a “need to resolve jurisdictional conflicts” and emphatically states “that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and . . . that doubts be resolved in favor of inclusion of a facility within coverage of the [Mine] Act.”⁸ SEN. REP. NO. 95-181, at 14 (1977). Given that doubts are to be resolved in favor of inclusion of a facility within the coverage of the Mine Act, it is not surprising that multiple courts in several circuits have found a milling facility to be a mine for purposes of the Mine Act. See *In re Kaiser Aluminum & Chem. Co.*, 214 F.3d 586 (5th Cir. 2000) (bauxite processing facility that used chemical process to mill bauxite was a mine under the Mine Act); *Herman v. Associated Elec. Coop, Inc.*, 172 F.3d 1078, 1081 (8th Cir. 1999) (Congress intended “mine” to be given the broadest possible interpretation); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1554 (D.C. Cir. 1984) (slate gravel processing facility that heated, pressed, and sized slate for use in concrete masonry blocks constituted a mine within the meaning of the Mine Act); *Harman Mining Corp. v. FMSHRC*, 671 F.2d 794, 796-97 (4th Cir. 1981) (“broad definition of a ‘mine’ in the Act demonstrates that Congress intended that term to encompass all of the facilities used at a coal preparation plant.”); *Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979) (corporation that separated a burnable coal refuse from dredged sand and gravel

to deference “when the interpretation is plainly erroneous or inconsistent . . . [or] when there is reason to suspect that the agency’s interpretation does not reflect the agency’s fair and considered judgment on the matter in question This may be evidenced by an agency’s current position conflicting with prior interpretations, by an agency’s use of the position as nothing more than a litigating position, or by the use of the interpretation as a post hoc rationalization for prior action.”). The *Chevron* standard also applies to an agency’s interpretation regarding its own statutory authority. See *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863 (2013).

⁸ Like the plain statutory language, the legislative history clearly supports the conclusion that Mine Act jurisdiction exists over Cranesville’s Bag Plant. See *Marshall v. Stoudt’s Ferry Preparation Co.*, 602 F.2d 589, 591-92 (3d Cir. 1979) (the plain language and the legislative history of the Mine Act mandated rejection of a narrow construction of the term “mine”), *cert. denied*, 444 U.S. 1015 (1980).

found to be a mine within the meaning of the Mine Act).⁹ Under this jurisprudence, I would find the Secretary's interpretation here inconsistent with the statutory interpretation set forth in the Interagency Agreement regarding what constitutes mineral milling.

Second, although the Secretary has been given discretion to determine whether mineral milling took place at the Bag Plant, that discretion is not unbridled. In making such a determination, the Mine Act requires the Secretary to give "due consideration to the convenience of administration resulting from the delegation to one Assistant Secretary of all authority with respect to the health and safety of miners employed at one physical establishment." 30 U.S.C. § 802(h)(1). It is not clear whether the Secretary believes he was *required* to consider convenience of administration here,¹⁰ but it appears that he never even gave it lip service until the onset of litigation. While MSHA regularly inspected the quarry, neither MSHA nor OSHA had inspected the Bag Plant prior to OSHA's 2009 inspection.¹¹ In fact, during the one exchange

⁹ Under the OSH Act, an employer may seek review in the court of appeals in the circuit in which the violation occurred, the circuit in which the employer's principal office is located, or the District of Columbia Circuit. 29 U.S.C. § 660(a). The Secretary may seek review in the circuit in which the violation occurred or in which the employer has its principal office. 29 U.S.C. § 660(b). This case arose in New York, which is in the Second Circuit. In general, "[w]here it is highly probable that a Commission decision would be appealed to a particular circuit, the Commission has . . . applied the precedent of that circuit in deciding the case—even though it may differ from the Commission's precedent." *Kerns Bros. Tree Serv.*, 18 BNA OSHC 2064, 2067 (No. 96-1719, 2000) (citation omitted). However, I note that the Court of Appeals for the Second Circuit has not considered the issue of whether an operation constituted mineral milling within the jurisdiction of MSHA.

¹⁰ The Secretary claims in his petition for review that "[w]hile [he] could have considered whether the convenience of administration resulting from coverage of the Bag Plant by a single agency warranted MSHA assuming jurisdiction over the entire facility, he was not required to make such a determination."

¹¹ Any contention that Cranesville's representations as to whether MSHA or OSHA had jurisdiction of the Bag Plant is irrelevant. Employers themselves do not get to determine whether they are covered or exempt from our Nation's employment laws. Similarly, any presumption of jurisdiction by OSHA because MSHA had failed to inspect the Bag Plant is also misplaced. *See Pa. Elec. Co. v. FMSHRC*, 969 F.2d 1501, 1505 (3d Cir. 1992) (rejecting the idea that preemption under section 4(b)(1) of the OSH Act turns on the specifics of an agency's enforcement activities: "The statute does not require us to look beyond the exercise of statutory authority by the agency; no language refers to the *quality* or *consistency* of the agency's exercise of statutory authority.") (emphasis in original); *see also United Energy Servs., Inc. v. MSHA*, 35 F.3d 971, 977 (4th Cir. 1994); *JTM Industr.*, 19 BNA OSHC at 1701-02 ("A lack of enforcement, of course, does not mean that MSHA does not have authority to enforce its

between MSHA and OSHA officials at the regional level prior to OSHA’s inspection, MSHA was mistaken as to which Cranesville location OSHA was inquiring about. The Secretary could not have adequately weighed convenience of administration without information regarding the activities performed within Building 2, particularly when MSHA did not understand which facility they were discussing. The Interagency Agreement describes how the Secretary determines jurisdiction while considering convenience of administration, as required by the Mine Act, in situations where a company’s operations do not fall exclusively within the province of “mineral milling.” Here, the Secretary not only disregarded his own guidance but apparently did not consider administrative convenience at all—at least, not until the onset of litigation. In such situations, courts accord “substantially less deference to post hoc interpretations offered only for purposes of litigation” *Natural Res. Def. Council, Inc. v. FDA*, 760 F.3d 151, 163 (2nd Cir. 2014) (citations omitted); *Perez v. Loren Cook Co.*, 803 F.3d 935, 939 (8th Cir. 2015).

Regardless of whether convenience of administration was considered pre-inspection or post hoc, following the onset of litigation, it is not clear what factors the Secretary considered if he did engage in this exercise;¹² rather, it appears that his assertion that he did the analysis and thereupon concluded that it weighed in favor of OSHA jurisdiction should be enough for the Commission to accept his determination under the guise of deference.¹³ Such broad deference is

regulations. MSHA’s authority, not the vigor of its enforcement, is the subject of our inquiry under section 4(b)(1) of the OSH Act.”) (citations omitted).

¹² The factors contemplated by the Interagency Agreement are: (1) the processes conducted at the facility; (2) the relation of all processes at the facility to each other; (3) the number of individuals employed in each process; and (4) the expertise and enforcement capability of each agency with respect to the safety and health hazard associated with all the processes conducted at the facility. Interagency Agreement at ¶ B.5, 44 Fed. Reg. at 22,828.

¹³ The Secretary contends that he considered convenience of administration, but claims that the list of factors in the Interagency Agreement is non-exhaustive and cites to additional factors not included in the Interagency Agreement. Specifically, the Secretary cites Cranesville’s treatment of the Bag Plant workers as employees rather than miners, and prior determinations by the Secretary that other facilities which were similar to the Bag Plant, including one which was nearly identical to it, were not covered by the Mine Act. However, it is a bedrock rule that an agency can never “rewrite clear statutory terms to suit its own sense of how the statute should operate.” *Utility Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014). Thus, I would find that the Secretary’s construction of the Interagency Agreement is an attempt to extend the reach of the Mine Act beyond the plain meaning of the statute’s and Interagency Agreement’s language, and is therefore unreasonable. See *Arcadian Corp.*, 17 BNA OSHC at 1350-51 (holding that adequacy of notice to regulated parties bears on the reasonableness of the

simply not warranted. *See Morton v. Ruiz*, 415 U.S. 199, 237 (1974) (in order for an agency interpretation of statute to be granted deference, it must be consistent with the congressional purpose); *see also Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166 (2012) (deference to an agency’s interpretation of its own ambiguous regulation is unwarranted when there is reason to suspect that the agency’s interpretation does not reflect the agency’s fair and considered judgment on the matter in question). Moreover, in reviewing the steps contemplated by the Interagency Agreement when a question of jurisdiction between MSHA and OSHA arises, it appears that these steps were not taken here.¹⁴ The Secretary presented no evidence that the issue was “transmitted to the respective National Offices . . . to resolve the matter,” nor did OSHA utilize the “Office of Legislative and Interagency Affairs . . . to facilitate communication and cooperation” with MSHA. *See Interagency Agreement* at ¶¶ B.8, D.1, 44 Fed. Reg. at 22,828-29. Indeed, had the Secretary truly considered convenience of administration, it seems probable that he would have resolved jurisdiction in favor of MSHA since that agency regularly conducted inspections of the Scotia operations, including the quarry and Building 5; thus, it would be the most “administratively convenient” to delegate MSHA authority over the Bag Plant.¹⁵

Finally, looking at these circumstances through the lens of convenience of administration, I fail to see, and the Secretary has failed to illuminate, how it is more convenient to require separate MSHA and OSHA inspections of the same property here, owned and operated by a

Secretary’s interpretation of a standard). Such a construction is not a matter of “prosecutorial discretion,” as my colleague contends, and therefore her reliance upon *Cuyahoga Valley Ry. United Transp. Union*, 474 U.S. 3 (1981), is misplaced. *See id.* at 7 (holding that the Commission cannot review the Secretary’s decision to withdraw a citation, over the objection of an intervening union, because “[s]uch a procedure would . . . allow the Commission to make both prosecutorial decisions and to serve as the adjudicator of the dispute, a commingling of roles that Congress did not intend.”).

¹⁴ While my colleague is correct that the Interagency Agreement allows for the Secretary to make determinations for “milling [to] be narrowed to exclude from the scope of the term processes . . . where such processes are unrelated, technologically or geographically, to mineral milling,” no such determination occurred here (and certainly not prior to the issuance of the citation); nor can the Secretary ignore the plain meaning of the Mine Act.

¹⁵ Under section 103(a) of the Mine Act, MSHA inspectors are required to regularly inspect mines to ensure compliance with the Mine Act and MSHA standards. 30 U.S.C. § 813(a).

single employer.¹⁶ I am left with the conclusion that all of this is the result of the Secretary having given little consideration to the issue of jurisdiction until after the employer contested the OSHA citations and asserted its jurisdictional defense.¹⁷ As such, I return to the guidepost, oft-cited here in my separate opinion, that both the Mine Act and the Interagency Agreement reiterate that coverage of the Mine Act is to be construed broadly and that “doubts be resolved in favor of inclusion of a facility within the coverage of the Mine Act.” Interagency Agreement at ¶ B.5, 44 Fed. Reg. at 22,828. For these reasons, I would find that the Secretary has not shown that his interpretation regarding jurisdiction is reasonable, and therefore, I would not give it deference.

¹⁶ Because of this incongruity, the case before us has the Secretary arguing for OSHA jurisdiction, while the employer is arguing for MSHA jurisdiction. It is more common for the employer to argue for OSHA jurisdiction instead of MSHA, because MSHA is generally regarded as having more stringent oversight requirements. *See, e.g., Shamokin Filler Co. v. FMSHRC*, 772 F.3d 330, 332 n.1 and at 333 (3rd Cir. 2014) (noting that Congress gave the Secretary more rigorous enforcement mechanisms under the Mine Act than the OSH Act), *cert. denied*, 135 S. Ct. 1549 (2015). While my colleague identifies fall hazards, ladder hazards, personal protective equipment hazards, hazards associated with exposure to respirable dust, and exposure to hazardous substances as those alleged to have been present at the inspected workplace and as “the types of hazards typical of a manufacturing facility,” manufacturing facilities certainly do not have a monopoly on these hazards, and they may also exist at a mining facility. Indeed, MSHA has promulgated regulations covering these hazards, satisfying the second prong of the preemption test—a point which the parties do not dispute.

¹⁷ While not dispositive, I would find that the Secretary had the burden to establish OSHA jurisdiction once Cranesville challenged it. When jurisdiction is challenged by a litigant, the ultimate burden of proof rests upon the one who asserts it rather than the one who challenges it. *See, e.g., Thomson v. Gaskill*, 315 U.S. 442, 446 (1942); *Moms Against Mercury v. FDA*, 483 F.3d 824, 828 (D.C. Cir. 2007); *Moser v. Pollin*, 294 F.3d 335, 339 (2d Cir. 2002); *EEOC v. St. Francis Xavier Parochial Sch.*, 117 F.3d 621 (D.C. Cir. 1997). Here, Cranesville raised lack of jurisdiction under section 4(b)(1) of the OSH Act on the ground that jurisdiction rests with another federal agency—MSHA. This made it the Secretary’s burden to prove that OSHA, not MSHA, has jurisdiction. This rule is compliant with the language in section 4(b)(1), which recognized the primacy of existing laws in providing that the OSH Act does not apply where “other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.” 29 U.S.C. § 653(b)(1). Indeed, it is a duty of a court to independently examine the jurisdictional underpinnings of an action, regardless of whether a jurisdictional question is raised by the parties. *See United States v. Hays*, 515 U.S. 737, 742 (1995); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588 (1939), *superseded by statute*, 28 U.S.C. § 1367, *as recognized in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

Like the judge, I would find that the Bag Plant is a mine within the scope of MSHA's statutory authority. As such, I would find that MSHA has authority to regulate the working conditions in the Bag Plant, and that it has exercised its authority by issuing regulations that apply to the cited conditions. Therefore, I would conclude that OSHA's authority is preempted by section 4(b)(1) of the OSH Act and would agree with the judge's decision to vacate the citations.

Dated: April 22, 2016

/s/ _____
Heather L. MacDougall
Commissioner

United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1924 Building - Room 2R90, 100 Alabama Street, SW
Atlanta, Georgia 30303-3104

Secretary of Labor,

Complainant,

v.

Cranesville Aggregate Companies, Inc., d/b/a
Scotia Bag Plant; and Cranenville Block Co.,

Respondent.

OSHRC Docket Nos.

09-2011, 09-2055 & 10-0447

Appearances:

Suzanne L. Demitrio, Esquire, Matthew M. Sullivan, Esquire, and Kathryn L. Stewart, Esquire
U. S. Department of Labor, Office of the Solicitor
New York, New York
For Complainant

Walter G. Breakell, Esquire and Brian Barraclough, Esquire
Breakell Law Firm, P.C.
Albany, New York

and

Henry Chajet, Esquire and Brian Hendrix, Esquire
Patton Boggs, LLP
Washington, D.C.
For Respondent

Before: Administrative Law Judge Ken S. Welsch

DECISION AND ORDER

Cranesville Aggregate Companies (Aggregate) owns and operates a worksite located at 427 Sacandaga Road in Scotia, New York. Cranenville Block Company Inc. (Block) owns and operates a worksite located at 637 East Chester Street in Kingston, New York. In May of 2009, the Occupational Safety and Health Administration (OSHA) began safety and health inspections at the Scotia worksite in response to an employee complaint. In September of 2009, OSHA conducted a safety inspection at the Kingston worksite, also in response to an employee complaint. Aggregate and Block are both owned by members of the Tesiero family.

As a result of the OSHA inspections, on November 10, 2009, the Secretary issued safety citations (Docket No. 09-2011)¹ and health citations (Docket No. 09-2055)² to Aggregate. The Secretary proposed penalties in the amount of \$221,000.00 for the safety citations and of \$287,500.00 for the health citations. The Secretary issued safety citations (Docket No. 10-0447)³ to Block on February 11, 2010. She proposed penalties totaling \$27,500.00 for the safety citations.

Aggregate and Block timely contested the citations. The cases were consolidated and assigned for mandatory settlement proceedings. The parties were unable to come to a settlement agreement. The cases subsequently were reassigned to Judge Bober, who scheduled the hearing to begin on February 1, 2011. During discovery, respondent filed motions seeking to compel the Secretary's production of three internal OSHA memoranda and requested leave to depose three employees of the Mine Safety and Health Administration (MSHA). The Secretary opposed these motions on the grounds that the memoranda were privileged and the deponents did not possess facts relevant to the cases. Judge Bober granted the deposition motion on December 27, 2010, and denied the Secretary's motion for reconsideration on January 10, 2011.

On January 4, 2011, the Secretary petitioned the Commission for interlocutory review of Judge Bober's discovery orders. The Commission granted the Secretary's petition on February 1, 2011, and stayed the consolidated cases during the pendency of the interlocutory review. On July 13, 2011, the Commission issued its decision, setting aside Judge Bober's discovery orders, lifting the stay, and directing the Chief Judge to assign the cases for further proceedings. The Chief Judge assigned the cases to the instant court on July 19, 2011.

The parties entered into a pre-hearing stipulation regarding certain serious and other-than-serious violations alleged in the citations for Docket Nos. 09-2011 and 09-2055 (Exh. ALJ-

¹ Under Docket No. 09-2011, the Secretary issued three citations: Citation No. 1 (Serious violations alleged in Items 1 through 16); Citation No. 2 (Willful violations alleged in Items 1 and 2); and Citation No. 3 (Repeat violations alleged in Items 1 through 5).

² Under Docket No. 09-2055, the Secretary issued three citations: Citation No. 1 (Serious violations alleged in Items 1 through 4); Citation No. 2 (Willful violations alleged in Items 1 through 4); and Citation No. 3 (Repeat violations alleged in Items 1 and 2).

³ Under Docket No. 10-0447, the Secretary issued one citation, for repeat violations alleged in Items 1, 2a, and 2b.

1).⁴ The parties also stipulated to the amendment of Item 4 of Citation No. 3 of Docket No. 09-2011, to accurately reflect the date of the alleged violation (Exh. ALJ-2).

The court held a nine-day hearing from November 30, 2011, to December 2, 2011; from December 5, 2011, to December 7, 2011; and from January 4, 2012, to January 6, 2012, in Albany, New York. The parties filed post-hearing briefs on August 10, 2012, and reply briefs on October 19, 2012.

Aggregate argues that its Scotia worksite falls under the jurisdiction of MSHA, which preempts the jurisdiction of OSHA. Therefore, the company argues, the court must vacate the citations addressing the Scotia worksite.

Block contends the Secretary failed to establish violations of the three standards for which it was cited at its Kingston worksite. The company also argues that, should the court find any violations exist, the violations should not be classified as repeat. Block contends it is not the employer at the previously cited facility that is the basis for the repeat classification.

For the reasons discussed below, the court finds that OSHA's jurisdiction over Aggregate's Scotia worksite is preempted by MSHA under § 4(b)(1) of the Occupational Safety and Health Act of 1970 (Act). Therefore, all citations issued under Docket Nos. 09-2011 and 09-2055 are vacated. Under Docket No. 10-0447, the court vacates Item 1 of the Citation. The court affirms Items 2a and 2b of the Citation as repeat violations, and assesses a grouped penalty of \$5,000.00.

Docket Nos. 09-2011 and 09-2055

Background

Aggregate owns and operates a sand and gravel mine⁵ located at 427 Sacandaga Road, Scotia, New York. Several buildings are on the property, including a group of buildings referred to as "Plant 5," located next to the quarry, and Building 1 and Building 2, which are referred to collectively as the "Bag Plant" (Exh. C-3). Building 1 and Building 2 are approximately 600 feet

⁴ The stipulations are effective only in the event that the court finds OSHA has jurisdiction over Aggregate's worksite. If no OSHA jurisdiction is found, all items of the citation will be vacated (Tr. 5).

⁵ The gravel and sand mine located at the Scotia site was variously referred to as the "mine," the "pit," and the "quarry" throughout the hearing. All terms refer to one area from which sand and gravel are excavated on Aggregate's property.

from the quarry and Plant 5. Railroad tracks run across the property between the quarry/Plant 5 area and the Bag Plant (Tr. 955, 1808-1809). A private road leads directly from the quarry to the Bag Plant (crossing over the railroad tracks) (Tr. 955). The quarry, Plant 5, and the Bag Plant are all located on one parcel of real property, owned by Aggregate, with the street address of 427 Sacandaga Road (Tr. 1637-1648).

Aggregate mines sand and gravel from the quarry near the Plant 5 area. Aggregate mines approximately 1,500 to 2,000 tons of material a day. Aggregate processes the excavated material by running it through a series of crushers, screens, and wash plants in the Plant 5 buildings. The screens in the wash plant separate the mined material into four different sized products (one sand and three stone). Aggregate places each product in its own stockpile. Aggregate then either loads the products into trucks to be sold or moves them to another stockpile for storage (Tr. 928-929, 1062-1063, 1093-1094, 1097-1099).

MSHA classifies Aggregate's quarry as an "intermittent mine," which it inspects annually (MSHA inspects active mines twice a year) (Tr. 1068, 1139). There is no record of MSHA inspecting the Bag Plant across the railroad tracks from Plant 5 (Tr. 1069-1070). The Secretary does not dispute that Aggregate's quarry and the Plant 5 area constitute a mine that is under the jurisdiction of MSHA. The Secretary contends, however, that OSHA has jurisdiction over the Bag Plant.

The Bag Plant buildings housed equipment, including screens, dryers, elevators, hoppers, and conveyors, as well as equipment for bagging the finished product (Tr. 879, 883).⁶ Building 1 contained equipment and a silo for storage (Tr. 882-883). Building 2 contained a maintenance shop used for repairing mining equipment and was where the bagging operation was performed (Tr. 721, 1678-1679). Loaders hauled approximately 60 to 80 tons of excavated material per day from the Plant 5 quarry to the Building 2 for bagging (Tr. 713, 1647, 1687). Bag Plant employees bagged and packaged mineral and construction materials, including stone, sand, cement, Portland cement, blacktop, salt, and premix aggregates such as concrete mix, mortar mix, and mix, specialty products, high bond, and surface bond. Most of these materials originated outside of Aggregate's quarry (Tr. 928-929).

⁶ Aggregate closed the Bag Plant in September or October of 2010 (Tr. 922).

In May 2009, compliance safety and health officer (CSHO) Edwin Rodriguez received a telephone complaint regarding health and safety hazards in Building 2 of the Bag Plant at the Scotia worksite. His supervisor assigned Rodriguez to investigate the complaint (Exh. C-1; Tr. 43).

Initially Rodriguez went to the worksite for Electric City, another company owned by the Tesiero family, where Electric City's safety director (who was also the safety director for Aggregate, as well as Block) informed him that Aggregate's facility was "down the road" (Tr. 51). The safety director told Rodriguez that Aggregate's site was "on a quarry" and was "part of MSHA" (Tr. 182). Rodriguez called his supervisor and relayed the safety director's information to her. Rodriguez's supervisor told him, "That's MSHA's jurisdiction," and instructed him to return to OSHA's office (Tr. 182).

Subsequently, OSHA reversed its decision and instructed Rodriguez to proceed with the inspection of Aggregate's Bag Plant. On May 12, 2009, Rodriguez arrived at Aggregate's site and conducted an inspection of Building 2, limited to the complaint items. Aggregate's safety director and its plant manager accompanied Rodriguez during his walkaround (Tr. 55, 183, 238). Based upon his inspection, Rodriguez recommended the Secretary issue citations for safety violations (his recommendation was the basis for the citations issued under Docket No. 09-2011). Rodriguez also requested OSHA send out an industrial hygienist to inspect Building 2, due to the amount of dust he observed (Tr. 64).

On May 19, 2009, Rodriguez returned with industrial hygienist (IH) Jason Martin to conduct the health inspection. Martin conducted a walkaround inspection of Building 2, accompanied by Rodriguez, the safety director, and the plant manager (Tr. 406-407). On June 3, 2009, Martin returned to Building 2 to conduct air sampling of employees during the bagging operation (Tr. 410-411). Martin visited Aggregate's site a third time, on June 17, 2009, to observe Aggregate's surface bonding process (Tr. 488-489). Based on Martin's inspection of Building 2, the Secretary issued the citations for health violations under Docket No. 09-2055.

Each party presented an expert witness at the hearing. The Secretary relied on L. Harvey Kirk, a Senior Mine Safety and Health Specialist in MSHA's Office of Metal and Non-Metal Safety. The court qualified him as an expert in mining and milling processes (Tr. 1452). Mr. Kirk never visited the Bag Plant, but formed his opinions of its processes by viewing aerial

photographs of the site, diagrams of Building 1 and Building 2, photographs of equipment, and reviewing depositions taken during discovery (Tr. 1410). Mr. Kirk produced a report based on his findings (Exh. C-76). Mr. Kirk concluded that the Bag Plant was not a mine within the meaning of the Mine Act.

Aggregate presented David D. Lauriski, president of Safety Solutions International, a safety and health management company that caters to clients in the mining industry. Mr. Lauriski is a former Assistant Secretary of Labor for MSHA (Exh. R-33; Tr. 1720). The court qualified him as an expert in mining and milling processes (Tr. 1742). Mr. Lauriski visited the Bag Plant twice, on December 1, 2010, and again on January 5, 2011⁷. The Bag Plant was shut down on both occasions. Mr. Lauriski concluded the Bag Plant was a mine within the meaning of the Mine Act.

Aggregate ceased operating the Bag Plant following the OSHA inspection, citing budget considerations (Tr. 922).

Preemption Under § 4(b)(1)

Aggregate contends the citations issued under Docket Nos. 09-2011 and 09-2055 must be vacated because OSHA lacks jurisdiction over its worksite. Aggregate argues that the quarry on its site constitutes a mine, giving MSHA statutory authority over the entire site.

Section 4(b)(1) of the Act, 29 U.S.C § 653(b)(1), provides:

Nothing in this Act shall apply to working conditions of employees with respect to which other Federal agencies . . . exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health.

In determining whether OSHA's authority is preempted under § 4(b)(1), the Commission evaluates "(1) whether the other federal agency has the statutory authority to regulate the cited working conditions, and (2) if the agency has that authority, whether the agency has exercised it

⁷ After Mr. Lauriski completed his testimony at the hearing, the Secretary took issue with his second visit, which occurred during the hearing, the day before Mr. Lauriski testified. Mr. Lauriski did not inform the Secretary he was making the visit, nor afford her counsel with the opportunity of accompanying him. In her brief, the Secretary moves to strike all of Mr. Lauriski's testimony relating to the second visit. The motion is denied, but it is noted that the court does not rely on Mr. Lauriski's testimony regarding his second visit to the Bag Plant for any findings of fact in this decision.

over the cited conditions by issuing regulations having the force and effect of law.” *JTM Industries*, 19 BNA OSHC 1697, 1699 (No. 98-0030, 2001).

The second prong of the Commission’s evaluation (whether MSHA has exercised its authority over the cited working conditions by issuing applicable regulations) is not at issue here—the Secretary concedes MSHA has issued the requisite regulations.⁸ Therefore, the only factor under consideration is whether MSHA has the statutory authority to regulate Building 2 at Aggregate’s worksite.

“The Commission gives considerable weight to a federal agency’s representation as to its authority to regulate cited working conditions.” *Id.* Under the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. § 803, MSHA has jurisdiction to regulate the working conditions at a worksite where employees are extracting minerals, milling minerals, or preparing coal or other minerals. Section 3(h)(1) of the Mine Act, 30 U.S.C § 802(h)(1), defines “coal or other mine” as:

(A) an area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits in nonliquid form, or if in liquid form, with workers underground, used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities.

The inclusion of “structures, facilities, equipment, machines, [and] tools” in section (C) of the definition signals the intention of Congress that the Mine Act be interpreted broadly:

[T]here may be a need to resolve jurisdictional conflicts, but it is the Committee’s intention that what is considered to be a mine and to be regulated under this Act be given the broadest possible interpretation, and it is the intent of this Committee that doubts be resolved in favor of the inclusion of a facility within coverage of the Act.

⁸ “The Secretary acknowledges that MSHA has issued regulations that, for the majority of the citation items, are at least somewhat analogous to the OSHA regulations at issue. However, since Respondent cannot show that MSHA has authority to regulate the Scotia Bag Plant, this prong is not relevant to the jurisdictional determination.” (Secretary’s brief, p. 39, footnote 3). During cross-examination, MSHA inspector James Logan testified that MSHA and OSHA had overlapping standards addressing the cited conditions (Tr. 1143-1146).

S. Rep. No. 181, 95th Cong, 1st Sess. 14 (1977).

Shortly after the Mine Act took effect, OSHA and MSHA entered into an interagency agreement. The agencies published a “memorandum of understanding” (MOU), the purpose of which was “to delineate certain areas of authority” and “provide a procedure for determining general jurisdictional questions” (Exh. C-77, p. 1). The MOU explicitly assigns to MSHA jurisdiction over milling processes.

Milling consist of one or more of the following processes: crushing, grinding, pulverizing, sizing, concentrating, washing, drying, roasting, pelletizing, sintering, evaporating, calcining, kiln treatment, sawing and cutting stone, heat expansion, retorting (mercury), leaching, and briquetting.

(Exh. C-77, p. 4).

Aggregate contends two of the listed milling processes, sizing and drying, occurred in Building 2. The Secretary argues the fundamental processes in which employees engaged in Building 2 were bagging and packaging materials, which are not milling processes: “[M]ost of the material that was mined in Plant 5 was processed and sold without going to the Bag Plant. The material that did go to the Bag Plant was crushed, washed, and screened *at the mine*, not at the Bag Plant.” (Secretary’s brief, p. 46, emphasis in original).

Sizing

The MOU defines sizing as “the process of separating particles of mixed sizes into groups of particles of all the same size, or into groups in which particles range between maximum and minimum sizes” (Exh. C-77, pp. 4-5). Various Aggregate management personnel testified generally that the company engages in sizing in the Bag Plant. The testimony of the employees who actually worked in the Bag Plant was more specific, however, and raised doubts regarding Building 2’s sizing operation.

The Bag Plant manager testified Aggregate used screens, or “shakers,” to sift the material into different sizes (Tr. 1026-1027). Building 2 employees processed the excavated sand intended for the surface bonding operation by passing it through one screen to remove oversized particles. The oversized particles were not further used, but were discarded (Tr. 1007, 1047). A former Aggregate employee likewise testified he observed excavated material in Building 2 being sifted through a grate to separate large rocks from the sand mix. The large rocks were taken off the grate and tossed out into the yard outside Building 2 (Tr.689-690).

The Secretary argues this activity was not sizing within the meaning of the MOU, but was instead “scalping,” which is the process of removing unwanted material. The court agrees with the Secretary. The MOU requires the sizing process to separate particles into groups of “all the same size.” Here the Bag Plant employees only divided the material into two groups—the sand, which was further processed and sold, and all the oversized particles. The oversized particles did not “range between minimum and maximum sizes.” There was no maximum limit imposed. The oversized particles were also not grouped for processing. They were treated as waste and discarded.

The definition of sizing in the MOU provides specific guidelines for the process. Based on the evidence presented here, Aggregate’s process did not meet the terms of the definition. It is determined that Aggregate was not engaged in sizing in Building 2.

Drying

The MOU defines drying as “the process of removing uncombined water from mineral products, ores, or concentrates, for example, by the application of heat, in air-acutated vacuum type filters or by pressure type equipment” (Exh. C-77, p. 5). Building 2 operations included drying a certain amount of material excavated from the quarry to produce a masonry sand mix, that would then be bagged (Tr. 1652-1653). Excavated material would be “dumped into a big barrel that has a [furnace] gun on the end of it” that would “spin and fluff” the sand to dry it (Tr. 1654-1655). Aggregate used the dryer room twice a week on average (Tr. 935). Employees could not bag sand with moisture in it because it would compromise the quality of the product (Tr. 1678).

The Secretary argues the “limited drying” that occurred in Building 2 was not drying as contemplated by the MOU:

[It] was done simply to dry out the moisture in the materials which have been sitting outside; it did not chemically alter the materials. . . . Materials were sent through the dryer to separate them because the material was wet or frozen from being outside, not from being mined; the material did not stay dry between mining and bagging.

(Secretary’s brief, pp. 21-22).

Nothing in the MOU's definition of drying indicates that the drying must effect a chemical change in the material. Employees in the Bag Plant were applying heat to excavated material hauled directly from the mine in order to dry the material. No previous drying occurred in the Plant 5 area.

The Secretary's expert, Mr. Kirk, distinguished between drying as a milling activity and "incidental drying." In his view, the drying that took place in Building 2 was not integral to processing the sand as a finished product. Mr. Kirk regarded the drying in Building 2 as incidental to the milling process, done simply to make it easier to move and load the sand:

Dried material flows better through chutes. It doesn't get carried over on conveyors and then spill off at the return rollers. The materials that are dry don't cling together, the larger particles with the small particles. They segregate better. If you're working in cold climates like this, and you put wet material into a silo, and the temperature drops like we might find outside today, you will get a block of solid material when the temperature drops.

(Tr. 1482).

In support of her position that merely drying some excavated material does not qualify as drying within the meaning of the MOU, the Secretary cites a seminal MSHA case, *Oliver M. Elam*, 4 FMSHRC 5 (1982). Elam operated a commercial dock on the Ohio River from which coal and other material were loaded onto barges. Elam had a crusher on site that it used occasionally to break up large pieces of coal to make them easier to load. MSHA asserted jurisdiction over the company because it engaged in crushing coal, a milling activity. The company disputed MSHA's jurisdiction.

MSHA's Review Commission sided with Elam, finding MSHA did not have authority over the company's worksite. In so doing, the Commission articulated its test for whether a given process is appropriately classified as a milling operation:

[I]nherent in the determination of whether the operation properly is classified as "mining" is an inquiry not only into whether the operation performs one or more of the listed work activities, but also into the nature of the operation performing such activities.

Id. at 7.

MSHA's Review Commission held that Elam's work in crushing the coal was done in order to make it easier to load, rather than to make it more suitable for its end use:

[W]ork of preparing coal connotes a process, usually performed by the mine operator engaged in the excavation of the coal or by custom preparation facilities undertaken to make coal suitable for a particular use or to meet market specifications.

Id. at 8.

Here, Aggregate, the mine operator, engaged in the excavation of the sand and gravel and dried the material at the Bag Plant, its own facility, to make it more suitable for use by the end user. Mr. Kirk acknowledged the drying done by Aggregate not only made the material easier to handle for storing and loading, it made it more suitable for its end use:

Also, if you're packaging the materials, customers prefer to have dry material come out of their bags Some of the materials that are bagged in these processes include cement. If the materials are moist, when they're mixed with the cement, they will begin to hydrate the cement which means the cement will start to set up and get hard, and you will have clumps at the least, or *you could have the entire bag turn hard and be unusable*. So the dryness is important to the bagging process, to the bagging process and also to the handling of it through their system as its being conveyed and stored.

(Tr. 1483; emphasis added).

Here, the Secretary's expert himself concedes that the drying process done in the Bag Plant renders the material more suitable for its end use. Indeed, failing to dry the material could result in an unusable product.

The record establishes that drying occurred in Building 2. This milling process is not the primary task in which the Bag Plant employees engaged, but it was a regular and significant part of Building 2's weekly schedule of operations. The MOU does not require a certain volume of material to be milled at a facility before it is determined to be under the jurisdiction of MSHA. The limited drying process that occurred in Building 2 is sufficient to bring the Bag Plant under MSHA's authority.

Maintenance Shop

Furthermore, it is undisputed that Aggregate employees repaired mining equipment in one of the rooms of Building 2. Aggregate's maintenance supervisor had his own crew, whom he assigned from the maintenance shop in Building 2. In the maintenance shop the maintenance

crew repaired crusher parts and bucket loaders that were damaged in the quarry (Tr. 1025-1026). The maintenance crew worked in all areas of Aggregate's property, including the sand and gravel mine (Tr. 968). The maintenance supervisor met with his crew at the maintenance shop and from there assigned tasks throughout Aggregate's property, including the gravel and sand mine (Tr. 713, 721, 889, 968). CSHO Rodriguez conceded that Aggregate's maintenance crew worked in both areas of the property: "[T]hey would do maintenance on this side, on the bagging facility, but they also worked on the quarry side" (Tr. 74). This alone is sufficient to bring the Bag Plant within the purview of the Mine Act.

MSHA's Lack of Enforcement

The Secretary argues that, despite annual inspections of the quarry and Plant 5 area, MSHA had never conducted an inspection of the Bag Plant. MSHA Inspector Lynn Allen testified that when he asked the Plant 5 manager about the Bag Plant on the other side of the railroad tracks, the manager told him the property across the railroad tracks was not under MSHA (Exh. C-69, pp.18-19). MSHA Inspector Matthew Mattison testified that when he inquired about the facility on the other side of the tracks, the Plant 5 manager informed him the facility was a bagging plant that was not under MSHA's jurisdiction (Tr. 1064, 11076, 1085-1086). MSHA Inspector James Logan stated that when he had finished inspecting the quarry and the Plant 5 area during his inspection, he asked the Plant 5 manager if there were any other parts of the mine property that needed to be inspected. The Plant 5 manager told him no (Tr. 1110, 1123).

The Secretary's contends that Aggregate has, through the years, told the various MSHA inspectors who have asked about the Bag Plant that it is not under MSHA's jurisdiction. Therefore, she argues, Aggregate should be held to this position and not be permitted to assert now that the Bag Plant is, in fact, under MSHA's authority.

The Secretary's argument is rejected. It should be obvious that the mine operator is not entitled to set the jurisdictional limits of its property. The MSHA inspectors relied on the assurances of Aggregate's plant manager, an interested party likely not inclined to invite further inspection of his worksite, to tell them where they should inspect. They were not required do so. As MSHA inspector Logan acknowledged, MSHA has "warrantless right of entry" (Tr. 1108).

See § 103(a), 30 U.S.C. § 813(a); *Donovan v. Dewey*, 452 U.S. 594 (1981). It was within their authority to inspect the Bag Plant (with or without the plant manager’s consent).

MSHA inspector James Logan conceded that it is not up to the employer to define the limits of MSHA’s authority: “Jurisdiction is dependent upon what the process is being conducted there” (Tr. 1137). Jurisdiction is determined by the specific conditions of the worksite—not the opinion of a plant manager or any other employee.

MSHA’s previous failure to inspect the Bag Plant is not a factor in determining current jurisdiction. The courts have rejected the argument that failure to exercise statutory authority negates preemption:

United Energy’s argument assumes that the enforcement history of the agency is relevant in determining whether MSHA has preempted OSHA’s jurisdiction. It is not. Under section 4(b)(1), MSHA may preempt OSHA’s regulatory authority by “exercising statutory authority to prescribe . . . regulations affecting” the area at issue. The plain language of that section indicates that this is all that MSHA must do to preempt this regulatory field.

United Energy Services, Inc. v. MSHA, 35 F.3d 971, 977 (4th Cir. 1994).

The Commission is similarly emphatic that MSHA’s failure to inspect a site over which it has authority is not relevant to the issue of preemption: “A lack of enforcement, of course, does not mean that MSHA does not have *authority* to enforce its regulations. MSHA’s authority, not the vigor of its enforcement, is the subject of our inquiry under section 4(b)(1) of the OSH Act.” *JTM Industries*, 19 BNA OSHC at 1701-1702.

The record establishes Aggregate was engaged in drying excavated material in Building 2 and that its maintenance crew repaired mining equipment in the maintenance shop located there. Keeping in mind that it is the intent of Congress that “doubts be resolved in favor of the inclusion of a facility within coverage of the [Mine] Act,” the court determines the Bag Plant was a mine within the scope of MSHA’s regulatory authority. Because MSHA has statutory authority to regulate the working conditions in the Bag Plant, the court concludes MSHA preempts OSHA’s authority under § 4(b)(1) of the Act. Accordingly, all items of the citations issued under Docket Nos. 09-2011 and 09-2055 are vacated.⁹

⁹ At the hearing on January 4, 2012, the court granted, over the Secretary’s objection, Aggregate’s motion to amend its answer to assert the defense of lack of informed consent (Tr. 1386). The basis for this defense is Aggregate’s (continued on next page)

Docket No. 10-0447: The Kingston Worksite

Background

On September 4, 2009, CSHO Rodriguez and IH Martin arrived at Block's worksite, a ready mix facility, in Kingston, New York, in response to an employee complaint. The OSHA representatives met with Block's plant manager and its safety director (who is also Aggregate's safety director), who accompanied them on a walkaround inspection (Tr. 164, 541-548). Based upon the inspection conducted by CSHO Rodriguez and IH Martin, the Secretary issued a citation alleging three repeat violations of OSHA standards to Block on February 11, 2010.

The Citation

The Secretary has the burden of establishing the employer violated the cited standard. To prove a violation of an OSHA standard, the Secretary must show by a preponderance of the evidence that (1) the cited standard applies; (2) the employer failed to comply with the terms of the cited standard; (3) employees had access to the violative condition; and (4) the cited employer either knew or could have known with the exercise of reasonable diligence of the violative condition.

JPC Group Inc., 22 BNA OSHC 1859, 1861 (No. 05-1907, 2009).

Item 1: Alleged Repeat Violation of 29 C.F.R. § 1910.132(a)

Item 1 of the Citation alleges:

Protected equipment . . . [was] not provided, used, and maintained . . . wherever it was necessary by reasons of hazards of processes of environment [or] chemical hazards . . . encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation, or physical contact:

- (a) On or about 09/04/2009, in the yard washing area, for employees that work with TKO-S which contains ingredients such as, but not limited to, hydrochloric acid. The employer did not enforce the use of personal protective equipment such as, but not limited to, safety glasses and gloves.

Section 1926.1910.132(a) provides:

Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and

contention that IH Martin made misleading statements to Aggregate's plant manager and its safety director when interviewing them during OSHA's inspection. Having determined that the Mine Act preempts OSHA's jurisdiction over the Scotia site, the court finds the informed consent issue is moot, as are all other issues raised by the parties with respect to the Scotia worksite inspections.

reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, radiological hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

As they conducted the walkaround inspection, CSHO Rodriguez and IH Martin observed an employee washing a ready mix truck in the facility's yard (Exh. C-55; Tr. 164, 551). The employee was wearing "normal clothing" and was not wearing face protection or gloves (Tr. 165). The employee had transferred a solution from a 55-gallon drum to a 5-gallon bucket. IH Martin later determined the solution was "a TKO solution that's an acid wash to wash the ready mix trucks" (Exh. C-54; Tr. 549). The plant manager acknowledged that the employee should have been using face and hand protection. He informed the OSHA representatives that Block provides personal protective equipment (PPE) to its employees (Tr. 551).

Applicability of the Standard

Block does not dispute the applicability of § 1910.132(a) to the cited condition. The standard requires employees to wear PPE when exposed to chemical hazards. It is undisputed the TKO solution contained hydrochloric acid, a corrosive chemical. Section 1910.132(a) applies.

Failure to Comply with the Terms of the Standard

Block's safety director testified that the TKO solution Block uses comes in a 55-gallon drum, and has a concentration of 22% hydrochloric acid (Tr. 1219). Upon receipt of the drum, Block employees transfer half of the solution to another 55-gallon drum and add water to the two half-full drums, resulting in two drums containing a solution with a concentration of 11% hydrochloric acid (Tr. 1284-1285).

During the inspection, Block provided a material safety data sheet (MSDS) to OSHA for the TKO solution. That MSDS was for a product called TKO-S (Exh. C-54; Tr. 549-550). Dr. Kathleen Fagan is a Board-certified physician who specializes in occupational medicine. She holds a master's degree in Public Health and has thirty years of experience in her field (Tr. 748-749). The court qualified her as an expert in occupational medicine and health hazards, including the potential health effects of exposure to chemical contact hazards (Tr. 769, 778-779). Dr. Fagan called Commercial Maintenance Supply, Inc., the manufacturer of the TKO solution, to obtain a copy of the MSDS more legible than the one supplied by Block. The manufacturer

informed her that the product it supplies to Block is actually TKO-PLUS3 (Exh. C-61; Tr. 803-804, 839). The MSDS for TKO-S states that its concentration of hydrochloric acid is less than 11%, but the raw material contains a maximum of 36.5%. The MSDS for TKO-PLUS3 states that the concentration of hydrochloric acid is less than 70%, but the raw material contains a maximum of 36.5% (Exhs. C-54, C-61; Tr. 805).

Hydrochloric acid is a hazardous substance that “can cause serious burns upon contact with the skin,” “can cause burns to the eyes,” and “be irritating when inhaled” (Tr. 803-804, 807-808). NIOSH recommends the use of PPE for workers exposed to hydrochloric acid, including gloves and splash goggles (Tr. 808). A solution containing between 3% and 10% hydrochloric acid “becomes irritating to the skin, and above that depending on the length of time of the exposure, you will begin to see burns” (Tr. 807).

Block argues the Secretary did not establish the actual concentration of the solution the employee was using at the time he was observed washing his truck. The company speculates the employee may have further diluted the solution with water in the 5-gallon bucket. IH Martin did not take a sample of the solution and have it analyzed in a lab (Tr. 635). Dr. Fagan stated if the solution was diluted to below 3%, it would be unlikely to cause harm to an exposed employee (Tr. 834-835). Block contends that without an analysis, the Secretary cannot prove the exposure levels of the TKO solution presented a significant risk to the employee.

Block’s argument is rejected. There is no persuasive evidence the employee further diluted the solution once he transferred it to the bucket. The employee involved did not testify. Block’s safety director stated that drivers at another Cranesville plant told her they add additional water to the solution before using it to wash their trucks, but she had no personal knowledge that Block’s drivers followed this practice (Tr. 1287-1288). Block cites IH Martin’s affirmative answers at the hearing to the questions, “[D]id you consider that water was added to that solution to conduct the washing?” and “And, do you have evidence that water was added?” as evidence the employee further diluted the solution (Tr. 635). The court regards his affirmative answers as ambiguous as to whether IH Martin was referring to the initial dilution that occurred upon arrival of the product at the plant (when it was diluted by half), or to a later dilution made by the employee. Block itself requires its employees to wear PPE when using the TKO solution (Exh. R-24).

The Secretary has established that the employee violated the terms of § 1910.132(a) by failing to wear PPE while washing his truck with the TKO solution containing a concentration of at least 3% hydrochloric acid, a hazardous chemical.

Employee Access to Violative Condition

Block's employee had access to the violative condition. CSHO Rodriguez and IH Martin, as well as the Block's plant manager and its safety director, observed the employee in the act of using the TKO solution without wearing the required PPE (Exh. C-55).

Employer Knowledge

The Secretary contends Block had constructive knowledge of the violation because the employee was working in plain view in the yard of the Kingston facility. Block argues the plant manager, whose office did not afford a view of the yard, had no actual or constructive knowledge of the employee's violative conduct.

Block has a written safety program which includes a PPE policy requiring employees to wear PPE when potentially exposed to hazardous substances (Exh. C-73). Block also prepared a Job Safety Analysis for the Kingston facility that identified hazards and prescribed corrective or preventive actions (Exh. R-20). Block trains new hires in the PPE policy and retrains existing employees on an annual basis (Tr. 1298). Block provides its employees with all required PPE (Tr. 638). The employee observed washing his truck acknowledged that he had received PPE training and that his PPE was in his truck (Tr. 1363).

The only two supervisory employees in attendance at the facility that the record mentions are the plant manager and the safety director, whom the plant manager called to the facility when the OSHA personnel arrived. Prior to the discovery of the employee washing his truck, the plant manager had attended an opening conference with CSHO Rodriguez and IH Martin, had called the safety director, and had waited with the OSHA representatives for her arrival. The plant manager then accompanied the OSHA representatives on the walkaround inspection.

There is no indication in the record how long the employee had been engaged in washing his truck when he was discovered. It is possible he did not begin the violative activity until after the OSHA personnel arrived. The plant manager's attention was entirely taken up with the opening conference and OSHA inspection once CSHO Rodriguez and IH Martin arrived. The court concludes the plant manager's failure to discover the employee's violative conduct was not

due to the lack of reasonable diligence. The employee was engaged in a transitory activity that violated written safety procedures in which he had been trained.

The Secretary has failed to establish Block had either actual or constructive knowledge of the violative conduct. Item 1 of the Citation is vacated.

Items 2a and 2b: Alleged Repeat Violations of 29 C.F.R. §§ 1910.1200(f)(5)(i) and (ii)

Items 2a and 2b of the Citation each allege:

On or about 09/04/2009, in the yard washing area, a 5 gallon container of TKO-Acid solution was not labeled with its contents.

Sections 1910.1200(f)(5)(i) and (ii) provide in pertinent part:

[T]he employer shall ensure that each container of hazardous chemicals in the workplace is labeled, tagged or marked with the following information:

- (i) Identity of the hazardous chemical(s) contained therein; and
- (ii) Appropriate hazard warnings, or alternatively, words, pictures, symbols, or combination thereof, which provide at least general information regarding the hazards of the chemicals, and which, in conjunction with the other information immediately available to employees under the hazard communication program, will provide employees with the specific information regarding the physical and health hazards of the hazardous chemical.

Items 2a and 2b refer to the 5-gallon bucket containing the TKO solution cited in Item 1 of the Citation. Nothing on the exterior of the bucket identified the contents in the bucket or warned of the potential hazards posed by contact with the contents (Tr. 561). Block's employees routinely transferred the solution from the 55-gallon drum (which was labeled) into the 5-gallon bucket when they used the solution for cleaning. They "placed the larger container of solution into the smaller one so that they could use a brush to brush the truck off" (Tr. 561).

Applicability of the Standard

The cited standard applies to the cited conditions. Section 1910.1200(b)(2) of the Hazard Communication Standard (HCS) states that the HCS "applies to any chemical which is known to be present in the workplace in such a manner that employees may be exposed under normal conditions of use or in a foreseeable emergency." Section 1910.1200(b)(1) requires "all employers to provide information to their employees about the hazardous chemicals to which they are exposed." The TKO solution at issue contains hydrochloric acid, a hazardous chemical.

Failure to Comply with the Terms of the Standard

Block stored the 55-gallon labeled drum and the 5-gallon unlabeled bucket outside its building at the worksite (Exhs. C-56 through C-59; Tr. 559-561). Block contends it is exempt from the labeling requirement under § 1910.1200(f)(8) of the HCS. That exemption provides in pertinent part:

The employer is not required to label portable containers into which hazardous chemicals are transferred from labeled containers, and which are intended only for the immediate use of the employee who performs the transfer.

As the party claiming the exemption, Block has the burden of proving it meets the requirements of § 1910.1200(f)(8). IH Martin acknowledged that the employee at issue transferred the TKO solution to the bucket for the immediate use of washing his truck (Tr. 637). It is undisputed, however, that the employee left the unlabeled bucket containing the TKO solution sitting out after finishing with it (Exhs. C-56 through 59; Tr. 556, 562).

Sections 1910.1200(f)(5)(i) and (ii) are designed to provide employees with information regarding the hazardous chemicals to which they may be exposed in the workplace. After the employee who originally used the solution in the bucket left the area, another employee could have come into contact with the contents of the unlabeled bucket. The absence of labeling could delay appropriate treatment of any injuries sustained by contact with the corrosive chemical. Block has failed to establish its employee transferred the contents of the labeled drum to the bucket only for immediate use, under § 1910.1200(f)(8).

Block's failure to comply with the terms of §§ 1910.1200(f)(5)(i) and (ii) is established.

Employee Access to Violative Condition

Block stored the unlabeled bucket in an outside area, accessible to all employees working at the facility. Block had provided nine employees with face shields, which it designated as being "strictly for truck wash, TKO" (Exh. R-24; Tr. 1278). The day of the inspection, the employee who had used the bucket to wash his truck left the unlabeled container sitting out, still full of the TKO solution (Tr. 556, 559, 562). Block's employees had access to the violative condition.

Employer Knowledge

Block had actual knowledge its employees transferred the TKO solution to an unlabeled bucket. It was Block's practice to store the unlabeled bucket in plain view next to the TKO drum for use by its employees (Tr. 556, 562). The safety director testified she was aware Block had difficulty keeping the bucket labeled because the labels would get wet and smear or peel off. She had experimented with laminating the labels and attaching them to the buckets with zip ties, but those regularly ripped off (Tr. 1265-1266).¹⁰

Block did not establish the employee violated a company rule when he left the bucket of TKO solution sitting out. Block does not assert the employee engaged in unpreventable misconduct, an affirmative defense. The Secretary has established Block committed a violation of §§ 1910.1200(f)(i) and (ii).

Repeat Classification

The Secretary classified Items 2a and 2b as repeat violations of the Act. The Citation states:

Cranesville Block was previously cited for a violation of this Occupational Safety and Health Standard 1910.1200(f)(5)(i) which was contained in OSHA inspection number 311974992, Citation Number 01, Item Number 8a, issued on 01/05/2009, with respect to a workplace located at Big Boom Road, Glens Falls, New York 12801.

Cranesville Block was previously cited for a violation of this Occupational Safety and Health Standard 1910.1200(f)(5)(ii) which was contained in OSHA inspection number 311974992, Citation Number 01, Item Number 8b, issued on 01/05/2009, with respect to a workplace located at Big Boom Road, Glens Falls, New York 12801.

In order to establish a repeat violation, the Secretary must prove that at the time of the alleged repeat violation, a Commission final order exists against the same employer for a substantially similar violation. *Potlatch Corp.*, 7 BNA OSHC 1061, 1063 (No. 16183, 1979). The Secretary issued a citation to "Cranesville Block Co. Inc." for violations at a Glens Falls

¹⁰ Block's safety director testified Block had adopted a method of using color-coded buckets to identify their contents. Signs posted on the walls of the facility would enable employees to match the color of the buckets to their contents. Buckets intended for the transfer of the TKO solution were supposed to be red (Tr. 1265-1266). Upon being shown the photographs of the white bucket at issue during cross-examination, the safety director acknowledged the color-coding system had gone into effect after the September 2009 OSHA inspection that resulted in the instant Citation (Tr. 1320-1321).

facility on January 5, 2009. The Commission entered a final order for that citation on February 23, 2009, but the name of the company was changed to “Glens Falls Ready Mix, Inc.” (Exh. C-67).¹¹ Items 8a and 8b of the citation in that case allege violations of §§ 1910.1200(f)(5)(i) and (ii) for failing to label a 55-gallon drum of plasticizer containing a diluted solution of formaldehyde. Block does not dispute that a final order exists in the Glens Falls case or that the cited violations were substantially similar to the ones cited in Items 2a and 2b of the instant case. Block contends, however, that it is “a separate and distinct corporate entity, and does not own the facility located at Big Boom Road, Glens Falls, New York, which is owned by Glens Falls Ready Mix, Inc.” (Block’s brief, p. 89).

Single Employer

Where the Secretary alleges a single employer relationship, she bears the burden of proving its existence. *Loretto-Oswego Residential Health Care Facility*, 23 BNA OSHC 1356, 1358, n. 4 (No. 99-0958, 2011), *aff’d* 692 F.3d 65 (2d Cir. 2012).

Under Commission precedent, separate entities have been regarded as a single employer when three elements are present: (1) a common worksite; (2) interrelated and integrated operations; and (3) a common president, management, supervisor or ownership.

Altor, Inc., 23 BNA OSHC 1458, 1463 (No. 99-0958, 2011), *aff’d* 23 BNA OSHC 2073 (3d Cir. 2012).¹²

¹¹ For clarity, the court will at times use the full names of the various Cranesville companies rather than the shortened versions (e.g., “Aggregate” and “Block”) that have been used throughout the decision.

¹² Subsequent to the hearing in this case and the filing by the parties of their post-hearing briefs, the Second and Third Circuits issued decisions in *Loretto* and *Altor*, respectively. The courts provide strong support for the application of the four-prong test for single employer adopted by the National Labor Relations Board (NLRB) rather than the Commission’s three-prong test. The NLRB test dispenses with the element of a common worksite and instead considers (1) interrelated operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership. The Third Circuit applied the NLRB’s test in upholding the Commission’s finding of a single employer in *Altor*. The Second Circuit upheld the Commission’s determination in *Loretto* that a group of affiliated nursing homes did not constitute a single employer. While stopping short of applying the NLRB’s test (for procedural reasons), the Second Circuit states that the Secretary’s interpretation of the Act “will receive our deference even in the face of contrary Commission interpretations.” 692 F.3d at 75.

In her reply brief, the Secretary urges the court to ignore Commission precedent and apply the four-prong NLRB test in the present case. The court declines to do so. The Commission issued *Loretto* and *Altor*, as well as *Southern Scrap Metals Co., Inc.*, 23 BNA OSHC 1596 (No. 94-3393, 2011) (reiterating three-prong test for single employer as Commission precedent), in 2011. The court will follow current Commission precedent in deciding this issue.

Cranesville Block Co., Inc., owns 20 to 30 facilities engaged in operations including concrete block manufacturing, concrete ready mix manufacturing, concrete precast, gravel pits, and sand pits. Cranesville Aggregate Companies, Inc., mines and processes aggregates and operates facilities at approximately ten sites. Cranesville Management Company is a management company for all the Cranesville companies. It provides management services for the following Cranesville companies: Cranesville Block Co. Inc., Cranesville Aggregate Companies, Inc., Fulmont Ready-Mix Company, Inc., Glens Falls Ready Mix, Inc., and John Tesiero, LLC. Cranesville Block Company wholly owns Cranesville Management Co. (Exh. C-85; pp. 16, 18-20, 27, 30, 32).¹³ The issue is whether the necessary elements exist to classify Cranesville Block Co. Inc., and Glens Falls Ready Mix, Inc., as a single employer.

(1) Common Worksite

It is apparent that Cranesville Block Co. Inc., and Glens Falls Ready Mix, Inc., do not physically share a common geographic worksite where their employees engage in ready mix operations; Block's facility is in Kingston, New York, while Glens Falls's facility is in Glens Falls, New York. The companies do, however, share a common worksite for their principal executive offices. Cranesville Block Co. Inc., Cranesville Aggregate Companies, Inc., Cranesville Management Company, Glens Falls Ready Mix, Inc., and Fulmont Ready-Mix Company all use the same address as their mailing address and as their principal executive offices: 1250 Riverfront Center, Amsterdam, New York, 12010 (Exhs. C-82, C-85, pp. 16, 29). The five companies share a suite in the building (Exh. C-85, p. 107). The companies also share administrative personnel who work at the common corporate worksite at Riverfront Center (Exh. C-84; Exh. C-85, pp.105-106).

Block also maintains a physical presence at Glens Falls facility. Exhibit C-9 is a copy of a photograph showing a billboard displayed at the top of a building at the Glens Falls facility. The billboard reads:

Cranesville Block Co.
Glens Falls Ready Mix
For Concrete Call
(518) 793-1695

¹³ Exhibit C-85 is a copy of Joseph Tesiero's deposition in this case, taken on October 13 and 14, 2011. Mr. Tesiero did not testify at the hearing.

Block's "CBC" company logo appears between the two corporate names. Mr. Tesiero testified the purpose of the sign was to promote customer "brand recognition" with Block (Exh. C-85, p. 288). The telephone number connects to a dispatcher at the common corporate offices at Riverfront Center, who takes orders on behalf of all the companies located there (Exh. C-85, p. 288).

(2) Interrelated and Integrated Operations

From May 1, 2008, to November 10, 2009, Block, Aggregate, Glens Falls, and Fulmont Ready-Mix Company, Inc., employed some of the same employees, including those who worked in administration, billing, purchasing, human resources, and safety. These shared employees were employed by Cranesville Management Company and their salaries were funded by each of the Cranesville companies on a pro-rata basis, based on the percentage of income generated by each company. Employees were paid using one centralized payroll system (Exhs. C-84, C-85, pp. 108-109, 111, 114, 118, 125, 133-134, 273).

Management employees from the four companies were also employed by Cranesville Management Company and their salaries were funded and allocated between each of the Cranesville companies, based on the percentage of time spent doing work on behalf of each company (Exh. C-85, pp. 217-219; Tr. 1170). All four companies shared the same computer network and software, expense coding system, website, and domain name for employee email addresses (Exh. C-85, pp. 145, 152, 154, 212). The homepage of the companies' website reads, "The Home of the Cranesville Companies in Amsterdam, NY 12010" (Exh. C-70).

The companies collectively provided benefits to their employees. They shared a common pension plan and health insurance plan (Exh. C-85, pp. 128-129, 136-141). The companies also shared a consolidated joint application for extensions of credit, by which a purchaser of any Cranesville product could submit an application to Block to use credit at any of the Cranesville companies (Exh. C-85, pp. 223-226).

The Cranesville companies' banking transactions were also shared. Joseph Tesiero, his father John A. Tesiero, Jr., his mother Elizabeth Tesiero, and his brother John A. Tesiero III, all of whom held officer positions in at least one of the companies, each had signatory authority over the bank accounts of all four companies, as well as Cranesville Management Company (Exh. C-85, pp. 260-261). The Cranesville companies draw funds from numerous accounts. In

some circumstances different Cranesville companies issued checks from the same account with the same routing number (Exh. C-85, pp. 78-83). The four companies received accounting services in accordance with a single agreement with an outside accounting firm (Exh. C-85, pp. 252-253). Block and Aggregate filed a consolidated federal tax return, as did Glens Falls and Fulmont Ready-Mix, Inc. (Exh. C-85, pp. 253-254).

When a purchase is beneficial to all the companies managed by Cranesville Management Company, one company pays the expense out of a general fund. The expense is then allocated to each of the companies on a pro-rata basis, based on the percentage of income generated by each company. The Cranesville companies keep a running tally of which company has paid for each purchase, as well as the company's pro-rata share of the expense for each purchase. The companies transfer money at the end of the year to balance out a company's account with the records of expenses paid (Exh. C-85; pp. 77-72).

(3) *Common President, Management, Supervisor or Ownership*

Joseph Tesiero's sister is Carol T. Whelly, who is married to William A. Whelly, Jr. Joseph Tesiero's other sister, Elizabeth Gaines, is married to William Gaines (Exh. C-85, pp. 17, 42, 44-45). From 2007 to 2009, the officers of Cranesville Block Co. Inc. were: John A. Tesiero, Jr., president; John A. Tesiero III, vice-president; William A. Whelly, Jr., assistant vice-president; Steven M. Dowgielewicz¹⁴, assistant vice-president; Carol T. Whelly, secretary; and Elizabeth Tesiero, treasurer (Exh. C-83).

Block owns all the shares of Aggregate. From 2007 to 2009, the officers of Aggregate were: Joseph Tesiero, president; William A. Whelly, Jr., vice-president; Carol T. Whelly, secretary; and John A. Tesiero III, treasurer (Exh. C-83).

From 2007 to 2009, the officers of Fulmont Ready-Mix Company, Inc., were: Elizabeth Tesiero, president; John A. Tesiero III, vice-president; Carol T. Whelly, secretary; Carol T. Whelly, treasurer; and William A. Whelly, assistant treasurer (Exh. C-83).

Fulmont Ready-Mix Company, Inc., owns all the shares of Glens Falls Ready Mix, Inc. From 2007 to 2009, the officers of Glens Falls were identical to the officers of Fulmont:

¹⁴ Mr. Dowgielewicz is the only officer in the four companies who is not, as far as the court knows, related by blood or marriage to the Tesiero family.

Elizabeth Tesiero, president; John A. Tesiero III, vice-president; Carol T. Whelly, secretary; Carol T. Whelly, treasurer; and William A. Whelly, assistant treasurer (Exh. C-83).

The four companies share the same safety director (Exh. C-84).¹⁵ If OSHA showed up at any of the four Cranesville companies, the policy was to call the safety director. She would either go to the site herself or contact the regional coordinator to go to the site (Exh. C-85; pp. 284-285). The four companies implemented the same safety and health programs. Newly hired employees for all of the companies were trained at the Riverfront Center, home of the common corporate worksite. Safety training was provided at the same time to employees of different Cranesville companies (Exh. C-85, pp. 231-233, 269-271).

Analysis

Based upon the three factors considered under the Commission's single employer test (common worksite; interrelation and integration of operations; and common president, management, supervisor, or ownership), the court determines Cranesville Block Co. Inc., and Glens Falls Ready Mix, Inc., are a single employer. The record leaves no doubt that their operations are extensively intertwined, that management and supervisory personnel overlap, and that six members of the Tesiero family hold nineteen officers' positions in four companies.

The weakest factor is the element of a common worksite. Block and Glens Falls do not share a geographic location where they perform ready mix operation. They do, however, share a corporate office space, from which their safety policies, payroll, benefits, administrative services, and budget emanate.

Having considered the three factors in totality, the court concludes that Block and Glens Falls are a single employer. Block is, therefore, subject to a repeat violation of §§ 1910.1200(f)(f)(i) and (ii). As noted, a final order existed against Glens Falls for substantially the same violation at the time of the instant inspection (Exh. C-67). Items 2a and 2b of the Citation are properly classified as repeat.

Penalty Determination

The Commission is the final arbiter of penalties in all contested cases. "In assessing penalties, § 17(j) of the OSH Act, 29 U.S.C. § 666(j), requires the Commission to give due

¹⁵ The safety director testified she was actually the safety director for approximately thirty Cranesville companies overall (Tr. 1197).

consideration to the gravity of the violation and the employer's size, history of violations, and good faith." *Burkes Mechanical Inc.*, 21 BNA OSHC 2136, 2142 (No. 04-0475, 2007). Gravity is a principal factor in a penalty determination and is based on the number of employees exposed, duration of exposure, likelihood of injury, and precautions taken against injury." *Siemens Energy and Automation, Inc.*, 20 BNA OSHC 2196, 2201 (No. 00-1052, 2005).

The Cranesville companies employed approximately 300 employees at the time of the OSHA inspection (Tr. 1326, 1332). As established by the repeat violation, OSHA had previously cited Block for violating § 1910.1200(f), among other violations. There is no evidence that Block demonstrated anything less than good faith with respect to the Kingston inspection.

The Secretary asserts Block's violation of §§ 1910.1200(f)(i) and (ii) is of "medium severity" and "lesser probability." The rationale listed for this assessment is, "Hazard of chemical burns to skin and eye, hazard existed intermittently" (Secretary's brief, p. 158). The Secretary proposed a grouped penalty of \$10,000.00 for Items 2a and 2b, based on the amount she would have proposed if the violation were serious and not repeat, multiplied by five (Tr. 1332).

The record establishes Block had at least nine employees who had access to the unlabeled bucket containing the TKO solution. The gravity of the violation is mitigated by the PPE training the employees received. The violation was apparently of short duration, since the OSHA representatives had observed the employee using the unlabeled bucket of TKO solution during their walkaround. The bucket was observed sitting unused during the same inspection.

Having considered the relevant factors, the court determines that a penalty of \$5,000.00 is appropriate.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The foregoing decision constitutes the findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

ORDER

Based upon the foregoing decision, it is hereby ORDERED that:

1. All items in Citation Nos. 1, 2, and 3, issued under Docket No. 09-2011, are vacated and no penalties are assessed;
2. All items in Citation Nos. 1, 2, and 3, issued under Docket No. 09-2055, are vacated and no penalties are assessed;
3. Item 1 of Citation No. 1 (alleging a repeat violation of § 1910.132(a)), issued under Docket No. 10-0447, is vacated and no penalty is assessed; and
4. Items 2a and 2b of Citation No. 1 (alleging repeat violations of §§ 1910.1200(f)(i) and (ii)), issued under Docket No. 10-0447, are affirmed and a grouped penalty of \$5,000.00 is assessed.

SO ORDERED.

Date: March 12, 2013
Atlanta

/s/
KEN S. WELSCH
Judge