DOCKET NUMBERS 09-2011 AND 09-2055 ARE NOT FINAL ORDERS OF THE REVIEW COMMISSION AS THEY ARE PENDING COMMISSION REVIEW.

DOCKET NUMBER 10-0447 HAS BEEN SEVERED FROM DOCKET NOS. 09-2011 AND 09-2055. PLEASE SEE THE COMMISSION ORDER DATED APRIL 26, 2013, AT THE COMMISSION DECISION SECTION OF THE WEBSITE.

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 Cranesville 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
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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. Cranesville 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,

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[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.

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).[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

[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).

Aggregate owns and operates a sand and gravel mine[5] 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 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

[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.

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

(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).

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, 2011[7]. 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

[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.

> 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 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.

[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).

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.

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 dying 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]

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.

[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 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.

> 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 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-galllon 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]

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[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. Dowgielewicz[14], 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.

/s/

Date: March 12, 2013
Atlanta

KEN S. WELSCH
Judge