No. 16-2055

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SECRETARY OF LABOR,

Petitioner,

v.

CRANESVILLE AGGREGATE COMPANIES, INC., DBA SCOTIA BAG PLANT,

Respondent.

On Petition for Review of a Final Order of the
Occupational Safety and Health Review Commission
(Administrative Law Judge Ken S. Welsch)

PAGE PROOF BRIEF FOR THE SECRETARY OF LABOR

M. PATRICIA SMITH
Solicitor Labor

ANN S. ROSENTHAL
Associate Solicitor of Labor for
Occupational Safety and Health

CHARLES F. JAMES
Counsel for Appellate Litigation

RONALD J. GOTTLIEB
Senior Trial Attorney
U.S. Department of Labor
Washington, DC 20210
(202) 693-5494

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STATEMENT REGARDING ORAL ARGUMENT

This appeal raises an important issue regarding the allocation of authority between the Mine Safety and Health Administration and the Occupational Safety and Health Administration over structures engaged both in mining and non-mining activities. The Secretary of Labor believes that oral argument would assist the Court in the disposition of this case.

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JURISDICTIONAL STATEMENT

The Occupational Safety and Health Review Commission (Commission) had jurisdiction over this matter under section 10(c) of the Occupational Safety and Health Act (OSH) Act, 29 U.S.C. § 659(c). This Court has jurisdiction under section 11(b) of the OSH Act, 29 U.S.C. § 660(b), because the Secretary of Labor (Secretary) filed a petition for review on June 17, 2016, within sixty days of the Commission's final order of April 22, 2016. The appeal is from a final order that disposes of all parties' claims.

STATEMENT OF ISSUE

Whether the Commission erred in rejecting the Secretary's interpretation that Cranesville's Bag Plant was not a mine under section 802(h)(1) of the Mine Act where the operations performed there were primarily related to the manufacture of finished products.

STATEMENT OF THE CASE

A. Nature of Case and Course of Proceedings

This is an enforcement action under the OSH Act. Decision and Order (ALJ Dec.) 1-3. Following an inspection, the Occupational Safety and Health Administration (OSHA) issued Cranesville six citations alleging numerous violations of various occupational safety and health standards. ALJ Dec. 2. Cranesville contested the citations, and the Commission adjudicated the contest. ALJ Dec. 2.

Administrative Law Judge (ALJ) Ken S. Welsch vacated the citations on the ground that the Mine Safety and Health Administration (MSHA) had authority over the cited working conditions and therefore preempted OSHA's authority to enforce OSH Act requirements for those conditions. ALJ Dec. 6-13, 27. The Commission granted the Secretary's petition for discretionary review. Commission Decision (Comm'n Dec.) 2. Following briefing, the Commission issued a decision vacating the direction for review to allow the ALJ's decision to become the Commission's final order because the two Commissioners could not agree on

whether the Mine Act or the OSH Act applied to the cited conditions. Comm'n Dec. 1-2.

The Commission's decision is reported at 2016 O.S.H. Dec. (CCH) ¶ 33513 and 2016 WL 1734938. The ALJ's decision is reported at 2013 WL 11305551 and at 24 O.S.H. Cas. (BNA) 1115, 2013 O.S.H. Dec. (CCH) ¶ 33293, 2013 WL 1883840.

B. Statement of Facts

1. Statutory and Regulatory Background

a. *The OSH Act and Mine Act*

Congress enacted the OSH Act "to assure so far as possible" safe working conditions for "every working man and woman in the Nation." 29 U.S.C. § 651(b). The Secretary enforces the OSH Act by inspecting worksites and issuing citations when he determines that an employer has violated a requirement of the OSH Act.[1] *Id.* §§ 654, 657-658. An employer may challenge a citation by filing a notice of contest seeking review by the Commission, an

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[1] The Secretary has delegated most of his authority under the OSH Act to the Assistant Secretary for Occupational Safety and Health, who heads OSHA. Secretary's Order 1-2012 (Jan. 18, 2012), 77 Fed. Reg. 3912. This brief uses the terms "Secretary" and "OSHA" interchangeably.

adjudicative agency independent of the United States Department of Labor. *Id.* §§ 651(b)(3), 659(a), 661.

When Congress passed the OSH Act, certain federal agencies had authority to regulate occupational safety and health of employees in particular fields. To avoid duplication of effort, section 4(b)(1) of the OSH Act provides that "[n]othing in this [chapter] 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). Under this provision, the OSH Act does not apply if (1) another federal agency has statutory authority to regulate the cited working conditions, and (2) that other agency has exercised that authority by issuing applicable regulations. *See Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 241-45 (2002); *Donovan v. Red Star Marine Servs., Inc.*, 739 F.2d 774, 777-80 (2d Cir. 1984).

The Secretary also enforces, though the Mine Safety and Health Administration (MSHA), the Federal Mine Safety and

Health Act of 1977 (Mine Act), 30 U.S.C. §§ 801-962.[2] Under the Mine Act, the Secretary has authority over mines, which the Act defines as property used in "extracting . . . minerals from their natural deposits" or in "the milling of such minerals."[3] 30 U.S.C. § 802(h)(1).

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[2] Prior to 1977, and at the time the OSH Act was enacted, the Department of Interior was responsible for regulating occupational safety and health in mines. *See* 30 U.S.C. § 961 (transferring all but one function of the Department of Interior to the Secretary and Federal Mine Safety and Health Review Commission).

[3] In full, the Mine Act defines "coal or other mine" to mean:

> (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 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, of if in liquid form, with workers underground, or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals, and includes custom coal preparation facilities. In making a determination of what constitutes mineral milling for the purposes of this chapter, the Secretary shall give due consideration to the convenience of administration resulting from the

The Mine Act does not define "milling," but provides that in determining "what constitutes mineral milling for purposes of" the Mine 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). MSHA's regulations define "mill" as "includ[ing] 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, 57.2 (definition sections of MSHA's safety and health standards for surface and underground mines).

> 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).

b. *The Memorandum of Understanding (MOU)*

In 1979, to provide guidance on how the Secretary would determine the respective authority of MSHA and OSHA, MSHA and OSHA entered an agreement known as the MOU. *Interagency Agreement Between the Mine Safety and Health Administration U.S. Department of Labor and the Occupational Safety and Health Administration U.S. Department of Labor* (Mar. 29, 1979), *published at* 44 Fed. Reg. 22827 (Apr. 17, 1979), *amended*, 48 Fed Reg. 7521 (Feb. 22, 1983), *and reproduced in* Complainant's Exhibit (Ex. C-) 77. 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." The appendix also contains a list of processes that that MSHA may consider milling. One of these is "drying.", *i.e.*, "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." MOU Appendix A.

The MOU states that despite the clarification of authority provided in 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." MOU ¶ B.3. It also states that "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." MOU ¶ B.4.

Pursuant to the Secretary's authority to "determine what constitutes mineral milling considering convenience of administration," Paragraph B.6 of the MOU lists certain types of facilities that are categorically covered by each agency.[4] For

[4] Paragraph B.6a notes that MSHA has authority over "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." Paragraph B.6b notes that OSHA has authority over "brick, clay pipe and refractory plants; ceramic plants; fertilizer product operations; concrete batch, asphalt batch, and hot mix plants; [and] smelters and refineries." OSHA has authority over these operations "whether or not [they are] located on mine property." For facilities such as asphalt-mixing plants,

facilities OSHA covers even though the facility is on mine property, OSHA's authority commences when the materials from the mine, such as sand, arrive at the plant "stockpile" or when milling is completed. MOU B.6b, Appendix. For facilities not covered by paragraph B.6, paragraph B.5 includes a non-exhaustive list of factors the agencies would consider to determine what "constitutes mineral milling" and whether a physical establishment is covered by MSHA or OSHA: "the processes conducted at the facility, the relation of all processes at the facility to each other, the number of individuals employed in each process, and the expertise and enforcement capability of each agency with

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brick plants, concrete ready-mix plants, batch plants, and ceramic plants, OSHA's authority commences after the sand or other materials arrive "at the plant stockpile." MOU Appendix. OSHA also has authority over "salt and cement distribution terminals not located on mine property, and milling operations associated with gypsum board plants not located on mine property." MOU ¶ B.6b. For gypsum board plants on mine property, fertilizer products, custom stone finishing, smelting, electrowinning, and refining, OSHA's authority commences when milling is completed, meaning that OSHA has authority over the subsequent processes even if they occur in the same physical facility at which the milling occurs. MOU Appendix.

respect to the safety and health hazards associated with all the processes conducted at the facility." MOU ¶ B.5.

When coverage questions arise, MSHA and OSHA first attempt to resolve it at the local level, and then refer the question to the national office when they cannot resolve the question. MOU ¶ B.8. If the national MSHA and OSHA offices cannot resolve the question, the matter is referred to the Secretary of Labor. MOU ¶ B.8

2. Cranesville and its Activities in Scotia, New York

Cranesville is owned by Cranesville Block Co., Inc. (Cranesville Block). Ex. C-85 at 37. Cranesville Block operates approximately thirty facilities, which include approximately twenty-three concrete block manufacturing, ready-mix manufacturing, and concrete precast facilities along with seven gravel and sand pits.[5] ALJ Dec. 22; Tr. 1197-98; Ex. C-85 at 27. Cranesville produces aggregates from the gravel and sand pits and sells the aggregates to Cranesville Block and third parties.

[5] Cranesville Block and one of its ready-mix facilities were deemed to be a single employer. ALJ Dec. 22-26. The Secretary asserted before the ALJ that Cranesville was part of that single employer, but the ALJ did not reach that issue.

ALJ Dec. 4; Ex. C-85 at 243-49. Cranesville and Cranesville Block also purchase aggregates from other non-affiliated companies. Ex. C-85 at 171-72, 175-77, 245.

This case involves the activities Cranesville conducted at a Bag Plant in Scotia, New York. The Bag Plant consisted of two buildings, known as Building 1 and Building 2, along with nearby outside areas used to stockpile sand and other aggregates and to perform some mixing operations. ALJ Dec. 3-4; Tr. 128, 130-33, 488-89, 944, 1029-30; Ex. C-4. Each building had storage areas, dryers, conveyors, and related equipment for bagging materials. ALJ Dec. 4; Tr. 671-72, 878-83, 1651, 1794; Exs. C-6, C-78 at 8, C-85 at 178-87, 196-202. Building 2 also had a room, referred to as the maintenance shop, for repairing equipment. ALJ Dec. 4; Tr. 1678-79; Exs. C-6, C-85 at 206.

Across the railroad tracks from the Bag Plant, approximately 600 feet away, is a quarry where Cranesville extracts sand and gravel from the earth. ALJ Dec. 4. Near the quarry, at a series of buildings known as Plant 5, Cranesville crushes, sizes, and washes the excavated material. ALJ Dec. 4.

The materials are then loaded into trucks to be sold or moved to a stockpile for storage. ALJ Dec. 4. The extracting, crushing, sizing, and washing activities are covered by the Mine Act, and MSHA inspected the quarry and Plant 5 (jointly referred to as Plant 5) on a yearly basis. ALJ Dec. 4.

Six or seven employees worked at the Bag Plant under the direction of Charles Dygert, the Bag Plant supervisor. Tr. 921-22, 927. The Bag Plant employees never worked at Plant 5 and were not allowed in the maintenance shop. Tr. 721-22, 928.

The Bag Plant employees bagged materials such as stone, sand, cement, blacktop, salt, premix aggregates, compost, glues, and specialty products such as surface bond. ALJ Dec. 4. The Bag Plant received materials for its operations from Plant 5, other Cranesville-affiliated companies, and non-affiliated companies (including non-affiliated companies as far away as Turkey). ALJ Dec. 4; Ex. C-85 at 171-77, 182.

The Bag Plant employees dried the sand they received, regardless of its source or intended use, because the sand was easier to handle when it was dry. Ex. C-85 at 191. In addition,

sand had to be dry when mixed with cement because otherwise moisture in the sand would react with the cement and cause it to harden. Ex. C-85 at 191. Cranesville dried sand at the Bag Plant once or twice a week. Tr. 936. On those days, a Bag Plant employee operated the dryer for approximately three hours. Tr. 1014-15.

In addition to the Bag Plant employees and Plant 5 employees, a maintenance crew of two or three employees maintained mining equipment in a room in the Bag Plant called the maintenance shop. Tr. 720. Except to deliver or remove materials or equipment or to perform maintenance work on mining or Bag Plant equipment, the Plant 5 employees and maintenance crew did not work in the Bag Plant. Tr. 960-61, 1647-52, 1670-72, 1676, 1700-02. Most of the maintenance work on equipment from Plant 5 was performed there and not at the Bag Plant' maintenance shop. Tr. 1644, 1678-79; Ex. C-69 at 24-26, 28-29. The maintenance crew also worked at other Cranesville and Cranesville Block facilities. Tr. 968-69.

Mr. Dygert received OSHA-training and certification for forklifts, as well as training on other OSHA requirements, but had not received any training on MSHA requirements. Tr. 922-26. Similarly, to comply with MSHA's requirements that miners receive initial and annual refresher training, Cranesville invited the employees from Plant 5, but not the employees from the Bag Plant, to the relevant training sessions.[6] Tr. 1314-15.

During MSHA's inspections of Plant 5, Don Savage, the Plant 5 supervisor, told the MSHA inspectors that the Bag Plant was not part of the mine and therefore not subject to MSHA coverage. ALJ Dec. 12; Tr. 1064, 1076, 1085-86, 1110, 1123; Ex. C-69 at 18-19. The MSHA inspectors accepted these representations and did not inspect the Bag Plant on their yearly visits. ALJ Dec. 12.

In March 2008, OSHA informally resolved a complaint of possible exposure to silica and Portland cement at the Bag Plant

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[6] The MSHA-required training must include such general topics as the "health and safety aspects of the tasks to be assigned," the miners' statutory rights under the Mine Act, and "other health and safety subjects that are relevant to mining operations at the mine." 30 C.F.R. §§ 46.5(b)(4), (5), 46.6(b)(4),(5), 46.8(c).

without conducting an inspection of the facility. Tr. 1369-74; Ex. C-74. In her response to the complaint, Kimberly Mosher, safety director for Cranesville and Cranesville Block, told OSHA that Cranesville would discipline employees who violated "OSHA requirements and our company policy." She did not mention the Mine Act, MSHA, or MSHA requirements. Ex. C-74 at 5.

3. **OSHA's Inspection and Citations, and Cranesville's 4(b)(1) Defense**

In May 2009, OSHA initiated a safety inspection of the Bag Plant in response to an employee complaint. ALJ Dec. 1; Tr. 43, 52-57; Ex. C-1. Based on the compliance officer's initial observations, OSHA also conducted a health inspection of the Bag Plant. Tr. 64-65, 236, 403-07. After completing the inspections, OSHA issued three safety citations and three health citations alleging serious, willful, and repeat violations of numerous safety and health standards. Citations and Notifications of Penalty (Inspection Number 311978811) (Safety Citations); Citations and Notifications of Penalty (Inspection Number 311978936)(Health Citations). Dec. 2.

Cranesville timely contested the citations. ALJ Dec. 2. Prior to the hearing, the Secretary and Cranesville settled all but one of the alleged serious citation items. ALJ Ex. 1. Under the settlement agreement, seventeen violations were affirmed as serious violations and two were affirmed as other-than-serious violations. ALJ Ex. 1. The total penalty for the nineteen violations was $42,300. ALJ Ex. 1. The settlement is contingent on OSHA having authority over the Bag Plant. ALJ Ex. 1; Tr. 5, 517-18.

The non-settled items, which were the subject of the trial, include one serious violation, eight willful violations, and eight repeat violations. The proposed penalties for these violations total $452,000. ALJ Ex. 1; Safety Citation 1, item 15, Safety Citations 2 & 3; Health Citations 2 & 3. The violations are for electrical hazards, unsafe operation of forklifts, unguarded elevated platforms, a non-compliant ladder, lack of personal protective equipment for employees exposed to chemical burn hazards, overexposure to respirable Portland cement, and general

housekeeping problems. Safety Citation 1, item 15, Safety Citations 2 & 3; Health Citations 2 & 3.

None of the alleged OSHA violations concerns working conditions in the maintenance shop.[7] Safety Citations; Health Citations. Following issuance of the citations, Cranesville closed

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[7] Fifteen of the violations concern conditions in the area of Building 2 where bagging operations occur. Safety Citation 1, items 1, 12, 15, 16; Safety Citation 3, items 1, 4; Health Citation, items 1, 2, 3; Health Citation 2, items 1a, 2a, 3a, 3b, 4a, 4b; Health Citation 3, item 1. Four violations concern conditions in Building 2 where the dryer was located, which was separated by a wall from the bagging operations area. Safety Citation 1, item 2; Safety Citation 3, items 2, 3, 5; Tr. 935. Eight violations concern conditions in other areas in, adjacent to, or on top of Building 2, such as the entrance (which is near the bagging equipment), the emergency exit, the yard adjacent to the entrance, and a bag house (also known as a dust collector, Tr. 76). Safety Citation 1, items 4, 10, 11a, 11b, 13; Safety Citation 3, item 1; Health Citation 3, items 2a, 2b.

Ten violations concern conditions in the dock area (also called the shipping/receiving area) of Building 1, with eight of these violations related to a blending operation (called surface bonding operation) to produce a specialty product. Serious Citation 1, items 5, 6, 8, 9; Serious Citation 2, item 2; Health Citation 1, items 1, 2, 4; Health Citation, items 1b, 2b. Two violations concern an illegible nameplate on a forklift and an untrained forklift operator. Safety Citation 1, item 7; Safety Citation 2, item 1. An additional violation concerns conditions in the "processing area of the Scotia facility," which presumably refers to an area in Building 2 or the dock area of Building 1. Safety Citation 1, item 14; *see* ALJ Dec. 5 (describing scope of inspection); Tr. 238-40, 406-07, 410-11, 488-89 (same).

the bag plant, claiming that it was too expensive to operate. ALJ Dec. 6; Tr. 922, 1029.

Cranesville contended that OSHA lacked authority over the cited working conditions because the Bag Plant operated as a repair facility for mining equipment and the drying of the sand was a "milling" activity within the meaning of the MOU. ALJ Dec. 3, 6-12. Thus, according to Cranesville, under § 4(b)(1) of the OSH Act, 29 U.S.C. § 653(b)(1), MSHA had preempted OSHA's authority over the cited working conditions. ALJ Dec. 3, 6-12.

Each party presented an expert witness to testify on when drying a mineral constitutes milling. Dec. 5-6. Both experts agreed that sand leaving Plant 5, including sand that was delivered to the Bag Plant, was a "finished product." Tr. 1494-95, 1545, 1816-18. Nonetheless, they disagreed on whether Cranesville's drying of the sand constituted milling.

The Secretary's expert, L. Harvey Kirk, contrasted Cranesville's drying, which was performed to make the product easier to handle and prevent hydration of cement with which the sand would be mixed, with drying to upgrade a product and make

it more valuable, such as occurs in an aluminum plant. Tr. 1481-84. In addition, Mr. Kirk distinguished between drying that was followed by subsequent milling operations and drying that was incidental to a manufacturing function such as bagging. Tr. 1482-84, 1493, 1533-35. In fact, Mr. Kirk explained, the Bag Plant's operations, including its drying process, were indistinguishable from another facility's that MSHA had previously determined were not under MSHA's authority. Tr. 1537-42. Mr. Kirk's report also noted that the Bag Plant's operations were similar to those of a ready-mix plant, an operation over which OSHA exercises authority under the MOU. Ex. C-76 at 5-6.

Cranesville's expert, David Lauriski, opined that "tak[ing] the moisture off the product" was "upgrading" the product because it was "preparing the product for its ultimate delivery" and "to enter commerce." Tr. 1792; *see also* Tr. 1838-39 (removing water added value to sand because the sand had to be dry to be used in cement). He also testified that Cranesville's drying process was similar to other drying operations that were part of a mining process, and therefore part of a mine. Tr. 1792, 1798-99.

Mr. Kirk and Mr. Lauriski agreed that MSHA had authority over the maintenance shop. Tr. 1547-48, 1839-40. Mr. Kirk explained, however, that OSHA had authority over other parts of the plant, and that the agencies in the past had shared authority over facilities in which maintenance activities had been performed. Tr. 1547-48. In Mr. Lauriski's view, MSHA's authority over the maintenance shop meant that MSHA had authority over the entire Building 2 because MSHA's standards are adequate to address the hazards in other parts of the building and therefore convenience of administration supported having only one enforcement agency assigned to the building. Tr. 1868-73.

4. **The ALJ's Decision**

The ALJ vacated the six citations on the ground that MSHA had authority over the Bag Plant and therefore preempted OSHA's exercise of authority. ALJ Dec. 3, 9-13. In the ALJ's view, "the drying process done in the Bag Plant" constituted milling under the MOU because it rendered the sand "more suitable for its end use." ALJ Dec. 11. The ALJ rejected the

Secretary's view that the drying process was too limited, in the context of the Bag Plant's overall activities, to constitute milling. ALJ Dec. 11. The ALJ found that the drying was a "regular and significant part" of the Bag Plant's operations, and 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." Dec. 11. Therefore, the "limited drying process that occurred in Building 2 is sufficient to bring the Bag Plant under MSHA's authority." ALJ Dec. 11. The ALJ also reasoned that the repair work performed in Building 2 was sufficient to bring the Bag Plant "within the purview of the Mine Act" because maintenance personnel worked both at Plant 5 and the Bag Plant. ALJ Dec. 11-12.

The ALJ determined that Cranesville's prior assertions that the Mine Act did not cover the Bag Plant did not support the Secretary's determination that the OSH Act applied. ALJ Dec. 12-13. The ALJ reasoned: "the mine operator is not entitled to set the jurisdictional limits of its property," and an agency's failure to

exercise its enforcement authority "is not relevant to the issue of preemption" under § 4(b)(1) of the OSH Act. ALJ Dec. 12-13.

The ALJ concluded: "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." ALJ Dec. 13 (quoting S. Rep. No. 181, 95th Cong. 1st Sess. 14 (1977)). Based on this determination, the ALJ vacated all six citations. ALJ Dec. 13.

The Secretary sought Commission review of the ALJ's decision, and the Commission directed the case for review. Comm'n Dec. 2.

5. **The Commission's Decision**

The two commissioners could not agree on whether the Bag Plant was covered by the Mine Act and therefore agreed to vacate the direction for review and allow the ALJ's decision to become the Commission's final order. Comm'n Dec. 1-2. Each commissioner wrote an opinion explaining her views.

Chairman Attwood noted that the Mine Act expressly delegated authority to the Secretary to determine what constitutes milling under the Mine Act. Comm'n Dec. 8. She determined that read as a whole the MOU supported the Secretary's determination that the drying performed at the bag plant was not milling. Comm'n Dec. 12-16. She also determined that the performance of maintenance work in one room of a building was insufficient to render the entire building a mine within the meaning of the Mine Act. Comm'n Dec. 16. She accordingly concluded that the Secretary had reasonably "draw[n] the line between Cranesville's mining and milling operations on the one hand, and its manufacturing operations on the other." Comm'n Dec. 16. Therefore, she determined that Cranesville failed to meet its burden to show that OSHA's authority was preempted by MSHA's exercise of authority. Comm'n Dec. 16-17.

Commissioner MacDougall determined that the plain meaning of the Mine Act compelled the conclusion that MSHA had jurisdiction over the entire bag plant because Cranesville performed maintenance work on mining equipment in Building 2.

Comm'n Dec. 22-23. She also determined that the Secretary failed to establish the reasonableness of his interpretation of milling because the interpretation contravened the MOU's definition of milling as including drying and he failed to "follow the statutory mandate to consider 'convenience of administration' in making [his] interpretation." Comm'n Dec. 23-31. She noted her view that the Secretary had the burden to establish OSHA's jurisdiction, Comm'n Dec. 31 n.17, and concluded that OSHA's authority was preempted by MSHA's exercise of authority. Comm'n Dec. 32.

SUMMARY OF ARGUMENT

The Secretary reasonably determined that MSHA did not have authority under the Mine Act. Cranesville's operations at the Bag Plant were primarily related to the manufacture of finished products, not milling. The drying performed at the Bag Plant was integral to the manufacturing process and was technologically and geographically unrelated to mineral milling. Cranesville did not dry the sand to produce a primary consumer derivative; it dried the sand in its role as a bagger of sand and

manufacturer of specialty products—two manufacturing rather than milling functions. The drying operations and mine-related maintenance activities were only a small portion of the Bag Plant's activities; the other activities were manufacturing activities, and the cited working conditions address hazards associated with these other non-mining activities. The express terms of the MOU allowed the Secretary to treat the drying as non-milling under these circumstances. Because manufacturing activities predominated at the Bag Plant, the Secretary reasonably exercised his discretion to assign enforcement authority over the Bag Plant to OSHA.

Similarly, the infrequent use of the maintenance room in Building 2 to maintain mining equipment was insufficient to extend MSHA's authority over the remaining portions of the Bag Plant. Such use merely allowed the Secretary to determine that the maintenance room was used for mining purposes and that therefore MSHA had authority over the maintenance room. This determination, however, does not justify a determination that

MSHA had authority over other parts of Building 2 that were not used for mining purposes.

The ALJ erred in rejecting the Secretary's interpretation of "mine" and consequent allocation of authority to his two agencies. He failed to evaluate the Secretary's determination for reasonableness, and he misconstrued the Mine Act and MOU. These authorities negate, rather than support, the ALJ's assumption that the occurrence of any activity that could be regulated by MSHA establishes MSHA's authority over that activity and the entire facility at which the activity occurs. The Court should therefore reverse the Commission's final order and remand with instructions to affirm the citation items that the parties conditionally settled and to decide the merits of the remaining citation items.

ARGUMENT

THE SECRETARY REASONABLY DETERMINED THAT THE BAG PLANT WAS NOT A MINE; THEREFORE SECTION 4(b)(1) OF THE OSH ACT DID NOT PRECLUDE OSHA'S AUTHORITY

A. Standard of Review

This Court reviews the Commission's final order vacating the citations to determine whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219, 226 (2d Cir. 2002). To apply this standard, the Court must resolve an issue of statutory interpretation, viz, whether Cranesville's Bag Plant is a "mine" as that term is used in the Mine Act.

To resolve an issue of statutory interpretation, the Court must first determine, using the traditional tools of statutory construction, whether Congress has expressed its intent on the interpretive question. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). If the traditional tools of statutory construction do not determine Congress' intent, the Court defers to the Secretary's reasonable interpretation of the Mine Act. *Id.; see also City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1871 (2013) ("*Chevron* applies to cases in which an agency adopts a construction of a jurisdictional provision of a statute it administers. […] No exception exists to the normal deferential standard of review for jurisdictional or

legal question[s] concerning the coverage of an Act."), *citing NLRB v. City Disposal Systems, Inc.,* 465 U.S. 822, 830, n. 7, 104 S.Ct. 1505, 79 L.Ed.2d 839 (1984) (internal quotation marks and brackets omitted).

The Secretary's interpretation of the Mine Act as applied to Cranesville's Bag Plant is "embodied in a citation," a "form expressly provided for by Congress" for articulating his interpretation that the Mine Act does or does not apply to the working conditions of particular facilities. *Martin v. OSHRC (CF&I Steel Co.)*, 499 U.S. 144, 157 (1991) (*CF&I*); *see Secretary of Labor v. National Cement Co. of Calif.*, 494 F.3d 1066, 1073-77 (D.C. Cir. 2007) (applying *Chevron* and *CFI* to Secretary's litigation position before the Mine Commission). As a result, his litigating position before the Commission advancing that interpretation is "as much as an exercise of delegated lawmaking powers as is the Secretary's promulgation of workplace health and safety standard."[8] *CF&I Steel Co.*, 499 U.S. at 157; *National*

[8] In *Russell P. Le Frois Builder*, 291 F.3d at 227-28, this Court held that the Secretary's litigating position before the Commission was not entitled to deference under *Chevron* but rather was

Cement Co. of California, 494 F.3d at 1073; *see also Community Health Center v. Wilson-Coker*, 311 F.3d 132, 138 (2d Cir. 2002) (explaining that court accords mandatory deference to informally expressed interpretations when it "can properly infer that Congress intended the agency to 'enjoy primary interpretational authority'") (quoting *United States v. Mead Corp.*, 533 U.S. 218, 230 n.11 (2001)); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1442 (D.C. Cir. 1984) (noting the "highly technical" nature of classifying establishments as mines or manufacturing and Secretary's discretion to make those classifications on a case-by-case basis).

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entitled to the more limited deference accorded agency interpretations under *Skidmore v. Swift & Co.*, 323 U.S. 218 (1944). But the interpretive issue in that case concerned the Commission's authority to reopen a citation that had become final because of the employer's failure to timely contest it, and therefore the Secretary's interpretation was not embodied in a citation. *See* 29 U.S.C. § 659(a) (providing that citation becomes final and unreviewable if not timely contested). In any event, for the reasons explained below, the factors establishing the reasonableness of the Secretary's interpretation under *Chevron* also show that it is entitled to deference under *Skidmore*. *See Community Health Center*, 311 F.3d at 137-38 (declining to determine the level of deference owed but nonetheless according deference).

B. Applying a Functional Analysis, the Secretary Reasonably Determined That the Bag Plant Operations Were Primarily Related to Manufacturing, Not Mineral Milling

The Secretary's authority under the Mine Act extends to "structures, facilities, equipment, machines, tools, or other property … used in" extracting and milling (collectively mining) mineral activities. 30 U.S.C. § 802(h)(1). The Mine Act does not define milling, but instead expressly delegates authority to the Secretary to "mak[e] a determination of what constitutes mineral milling for the purposes of this chapter, . . . give[ing] 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.* In carrying out this statutory mandate, the Secretary applies a functional analysis to determine whether the processes at an establishment are integral to milling extracted minerals, and therefore covered by MSHA, or manufacturing finished products, and therefore covered by OSHA. *Carolina Stalite Co.*, 734 F.2d at 1551.

The Secretary reasonably determined that the operations performed at the bag plant were primarily related to manufacturing, not milling. The MOU defines milling as "treating the crude crust of the earth to produce therefrom the primary consumer derivatives." MOU Appendix A (definition of milling.) The bag plant operations did not involve the separation of primary consumer derivatives from crude crust, but rather the mixing and bagging of materials, including sand, that were already fully milled, marketable products. Bag plant employees bagged sand delivered sand from Plant 5, as well as a variety of other minerals and construction materials obtained from sources unrelated to Cranesville including cement, Portland cement, blacktop, salt, and pre-mix aggregates. The employees also mixed sand with other aggregates to create cement pre-mix and specialty surface bond products, which were then bagged. All of these activities were integral to the manufacture of the finished product.

The bag plant operations were functionally and geographically distinct from the mineral extraction and processing operations performed at other areas of the worksite. Cranesville

performed milling operations at Plant 5— where it crushed, sized and washed the crude materials excavated from the quarry. The sand produced at Plant 5 was a "primary consumer derivative" and did not require further processing to render it marketable. The sand from Plant 5 delivered to the Bag Plant was indistinguishable from the sand delivered to Cranesville's other customers; i.e., it was a finished product. *E.g.*, Tr. 1494-95, 1545, 1816-18. Thus, the bag plant was not part of a unified mineral processing operation, but functioned as a separate manufacturing facility using milled material from Plant 5 and other sources.

Once a milled material such as sand is sent to a plant for further use, MSHA's authority ordinarily ends and OSHA's begins. *See* MOU Appendix A (OSHA's authority over numerous plants on mine property begins after arrival of sand or other materials at plant's stockpile). Thus, once the milled sand was delivered to the Bag Plant's stockpile, MSHA's authority over the milling process ended and OSHA's authority over the manufacturing process began. *See id.*

Cranesville argued that because one of the activities at the bag plant was drying sand, the entire bag plant operation should be classified as milling. The MOU lists drying as a one of eighteen different processes that MSHA may regulate as milling. MOU Appendix A. However, nothing in the Mine Act or the case law required the Secretary to classify the bag plant based solely on the performance of an Appendix A activity without regard to the overall nature of the processes conducted at the facility. *E.g., Herman v. Associated Elec. Cooperative, Inc.*, 172 F.3d 1078, 1082 (8th Cir. 1999) ("not all businesses that perform tasks listed under 'the work of preparing coal' . . . can be considered mines"); *United Energy Servs., Inc. v. Federal Mine Safety & Health Admin.*, 35 F.3d 971, 975 (4th Cir. 1994) (Mine Act "sets forth a functional analysis, not one turning on the identity of the consumer"); *Oliver M. Elam, Jr. Co.*, 4 FMSHRC 5, 7 (FMSHRC 1982) ("inherent in the determination of whether an 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").

The MOU addresses this precise issue "in particularly apt language." *Carolina Stalite*, 734 F.2d at 1553, n. 10. Paragraph B states that "[n]otwithstanding the clarification of authority provided by 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." (MOU ¶ B.3). Paragraph B further states, , "[t]he term milling may be narrowed to exclude . . . processes listed in Appendix A where such processes are unrelated technologically, or geographically, to mineral milling." (MOU ¶ B.4). The relevant factors in the analysis include; all the processes conducted at the facility and their relation to each other, the number of employees in each process, the expertise and enforcement capability of each agency with respect to the safety and health hazards associated with the processes , and the convenience of administration. (MOU ¶ B.5, ¶ B.6)

Considering these factors, the Secretary reasonably determined that Cranesville's drying activities at the Bag Plant did not constitute milling. As discussed above, the milled sand the

Bag Plant received did not require further processing to render it a marketable commodity. Cranesville dried sand at the Bag Plant to make the sand easier to handle, and so it could be mixed with cement to produce specialty products such as surface bond and other cement mixes; i.e., to make the cement mix, not the sand, a marketable commodity. Ex. C-85 at 191.

In drying the sand for these purposes, the Bag Plant did not treat the sand it received from the Plant 5 any differently than it treated sand from any other sources, Tr. 946; Ex. C-85 at 191. Moreover, any other plant that wanted to bag sand or to mix sand with cement would have dried the sand just as the Bag Plant did, regardless of any relationship it might have had with a mine that provided the sand. Tr. 1533-35, 1537-42; Ex. C-85 at 191. In other words, the Bag Plant dried the milled sand it received from Plant 5 not as a mine operator treating excavated materials to produce a "primary consumer derivative," but in its capacity as a bagger of sand and manufacturer of specialty products, including cement mix. Tr. 926-27, 946-48, 1533-35, 1537-42, 1653; Ex. C-85

at 182, 191. Therefore, the drying performed at the Bag Plant was unrelated to mineral milling, as defined in the MOU.

Other relevant factors outlined in the MOU support the Secretary's determination. Drying was the only Appendix A activity performed at the Bag Plant, and was a small part of the overall operation. Only one of the six or seven Bag Plant employees operated the dryer and for only approximately three hours once or twice a week. ALJ Dec. 4; Tr. 936, 1014-1015. Thus, Bag Plant employees spent the vast majority of their time on non-mining activities. *See* ALJ Dec. 4 (noting variety of materials bagged at the Bag Plant); Comm'n Dec. 15 n.17 (concurring opinion of Chairman Attwood calculating proportion of time spent drying sand. And OSHA, rather than MSHA, possessed the expertise and enforcement capability to address the Bag Plant's hazards, which were common to manufacturing facilities generally and did not include a single hazard unique to mining. *See supra* pp. 16-17 (describing citation items).

Two additional factors support the Secretary's coverage determination in this case. First, Cranesville did not consider the

Bag Plant employees to be miners. Prior to the inspection, Cranesville repeatedly told MSHA that the Bag Plant was not covered by the Mine Act, Dec. 12; Tr. 1064, 1076, 1085-86, 1110, 1123; Ex. C-69 at 18-19. More than one year before the inspection, Cranesville recognized OSHA's authority over the Bag Plant when, in response to OSHA's investigation of a complaint, it told OSHA that it would continue to enforce OSHA requirements and did not mention MSHA, Ex. C-74 at 5. Cranesville similarly informed its employees that the Bag Plant was not a mine when it trained Mr. Dygert in OSHA requirements but not MSHA requirements and *excluded* the Bag Plant employees from required Mine Act training it provided to Plant 5 employees and other miners. Tr. 922-26, 1314-15; 30 C.F.R. §§ 46.5, .6, .8.

Second, the Secretary's determination is consistent with his prior determinations. As his expert, Mr. Kirk, explained, Cranesville's activities at the Bag Plant were virtually identical to the activities of another plant the Secretary had determined should be regulated by OSHA and not MSHA. Tr. 1537-42. In addition, Mr. Kirk explained that, of the types of operations

addressed in the MOU, the Bag Plant's activities were most like a ready-mix facility, which the MOU assigns to OSHA even when it is on mine property. Ex. C-76 at 5-6.

In sum, the Secretary reasonably determined that the Bag Plant operations did not constitute milling under the Mine Act. Accordingly, MSHA lacked statutory authority to apply its safety and health standards to the cited working conditions at the Bag Plant, and MSHA did not preempt OSHA.

C. The Secretary Reasonably Determined that MSHA's Authority Over the Maintenance Shop Did Not Confer Authority Over Other Areas of the Bag Plant.

The Secretary has always acknowledged that MSHA had authority over the maintenance shop in the Bag Plant that was used to repair mining equipment. *E.g.*, Tr. 1547-48; *see U.S. Steel Mining Co.*, 10 FMSHRC 146, 1988 O.S.H. Dec. ¶ 28141, 1988 WL 30901 (Federal Mine Safety and Health Review Commission affirming MSHA's authority over shops maintaining mining equipment). The Secretary explained, however, that MSHA's authority did not extend to locations in the Bag Plant that were not used to perform maintenance work on mining equipment, and

that MSHA and OSHA had shared authority over buildings in which maintenance activities on mining equipment were performed. Tr. 1547-48.

Mine Act authority extends, in relevant part here, to "structures, facilities, equipment, . . . and other property … used in" mining activities. 30 U.S.C. § 802(h)(1). The Bag Plant was a structure "used in" mining activities insofar as mining equipment was maintained in one room. However, the Bag Plant was also used in non-mining activities in that manufacturing, as discussed above, was performed in other areas. The language of the Act, standing alone, does not address how MSHA authority is to be allocated where a single building is used both in mining and non-mining activities. Read in the most literalistic way, section 802(h)(1) could mean that MSHA authority extends to the entire building if any part of it is used in mining. Or, the section might reasonably be read to mean that a building is covered by MSHA *to the extent* that it is used in mining.

The Secretary believes that the latter reading best comports with the overall statutory scheme. There is no discernible reason

to extend MSHA authority to areas of a building where no mining activity is performed, and therefore no miners are present. Where a building is used for both mining and manufacturing activities, MSHA enforces the Mine Act in those parts of the building used for mining purposes and OSHA enforces the OSH Act in the parts of the building used for manufacturing purposes. Tr. 1547-48.

A contrary reading of the definition of mine could undermine the purposes of the Mine Act and extend Mine Act coverage in ways Congress likely did not contemplate. Congress adopted a broad definition of mine to ensure that the Mine Act covered "*all mining activity*." *Carolina Stalite*, 734 F.2d at 1554 (quoting S. Rep. No. 461, 95th Cong. 1st Sess. 37 (1977); court's emphasis). Requiring MSHA to assert authority over an entire building when only part of the building is used for mining activities would divert resources that would otherwise be available to protect employees engaged in mining activities, and would apply mining-related requirements to operations that are not related to mining. Such a construction could also result in MSHA authority over structures Congress could not have intended to

classify as mines. For example, the entirety of a ten-story office building would qualify as a mine if one basement room was used to store mining equipment. "It is clear[, however,] that every company whose business brings it into contact with minerals is not to be classified as a mine." *Carolina Stalite*, 734 F.2d at 1551; *see also Bush & Burchette, Inc. v. Reich*, 117 F.3d 932, 937 (6th Cir. 1997) (recognizing need for common sense limitation on Mine Act definition to avoid extending MSHA authority to unreasonable lengths).

The only mining activity at the Bag Plant was maintenance of mining equipment performed in a single room. The maintenance employees were separate from the employees who performed the bagging and mixing operations, and had their own supervisors. The maintenance crew worked not only in the Bag Plant's maintenance shop, but also at Plant 5, and other Cranesville facilities. Accordingly, the Secretary reasonably determined that MSHA's authority extended to the maintenance shop and that other areas of the Bag Plant not used in mining should be subject to OSHA.

D. The ALJ Erred in Rejecting the Secretary's Allocation of Authority Over the Bag Plant.

The ALJ determined that the Bag Plant constituted a mine within the exclusive authority of MSHA for two reasons. The limited drying process that occurred in Building 2 was sufficient to bring the plant under MSHA's authority. And the maintenance of mining equipment performed in the maintenance shop was an independent basis for MSHA coverage. As we demonstrate, the judge's determination is legally and factually erroneous.

As the outset, the judge failed to evaluate the Secretary's interpretive view for reasonableness, as is required for questions of statutory interpretation. *Le Frois Builder*, 291 F.3d at 226; *National Cement*, 494 F.3d at 1073.; *Carolina Stalite*, 734 F.2d at 1551-53. Instead, the ALJ appears to have reached his own conclusion that the performance of an Appendix A activity such as drying is milling *per se* under the Mine Act. However, the judge misread the agreement in believing that the processes listed in Appendix A must inflexibly be considered milling under all circumstances. In particular, the judge overlooked the language in Paragraph B explaining that the Secretary may treat an

Appendix A process as non-milling where it is unrelated technologically or geographically to mineral milling. See discussion above at pp. 33-66; *Carolina Stalite*, 734 F.2d at 1552 n.9 (noting "highly technical" nature of determination that a process constitutes milling rather than manufacturing). Here, the Secretary reasonably determined that the drying performed at the Bag Plant was integral to manufacturing, and was technologically and geographically unrelated to milling.

On a related point, the ALJ also wrongly concluded that the extent to which drying took place at the Bag Plant was not relevant because 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." ALJ Dec. 11. However, because Cranesville also performed non-milling activities at the Bag Plant, the Secretary was permitted to consider the limited extent to which drying was performed at the Bag Plant as part of his evaluation of the overall character of the operations there. *See* 30 U.S.C. § 802(h)(1) (requiring Secretary to consider convenience of administration to determine what constitutes mineral milling);

MOU ¶ B.5 (noting that factors to be considered under § 802(h)(1) include the processes conducted at the facility and their relationship to each other); *see Carolina Stalite*, 734 F.2d at 1553 (noting Secretary's discretion under § 802(h)(1) to define "milling" where company performs both milling and manufacturing processes).

The judge also noted that Congress intended doubts to be "resolved in favor of inclusion of a facility within [Mine Act] coverage. ALJ Dec. 13 (quoting S. Rep. No. 181, 95th Cong. 1st Sess. 14). However, the ALJ failed to consider the reasons why Congress wanted the Secretary to resolve doubts in favor of MSHA coverage: to avoid the potential for confusion and inefficiency that results from having both OSHA and MSHA regulate the same physical establishment and to ensure that miners receive the protection from mining hazards that MSHA is better equipped to provide. *See* 30 U.S.C. § 802(h)(1). Neither of these concerns is implicated here, because prior to the inspection Cranesville, MSHA, and OSHA all agreed that the Bag Plant should be regulated by OSHA, the Bag Plant employees are not

properly viewed as miners, and none of the Bag Plant employees were exposed to mining hazards. *Supra* pp. 35-37.

In any event, even in close cases, the Mine Act and MOU grant to the Secretary, and not to the ALJ or the Commission, the authority to define the term milling based on the relation of all processes at the facility to each other and the expertise of each agency with respect to the safety and health hazards at issue. 30 U.S.C. § 802(h)(1); MOU ¶¶ B.2, B.4, B.5. The Secretary determined that a balancing of these discretionary factors supported the determination that the drying performed at the Bag Plant was not mineral milling within the authority of MSHA.[9] The ALJ erred in failing to accord the Secretary's coverage

[9] Cranesville's repeated assertions to MSHA inspectors that the Bag Plant was not part of the Mine are relevant in evaluating the Secretary's determination. The ALJ discounted these statements as simply an attempt to divert MSHA inspectors. ALJ Dec. 12-13. However the record does not rule out the inference that Cranesville in fact viewed its operations at the Bag House as subject to OSHA, not MSHA. It informally responded to a complaint of possible silica exposure at the Bag Plant by assuring OSHA that it would enforce OSHA requirements. See *supra* pp. 14-15. Cranesville's understanding of the nature of its Bag House operations as non-mining, while not dispositive, provides some support for the Secretary's coverage determination.

determination the deference it is entitled to under the law. *Carolina Stalite*, 734 F.2d at 1551-53.

Finally, the ALJ erred in concluding that because the maintenance employees performed mining-related work in the maintenance shop MSHA had authority over the Bag Plant as a whole. ALJ Dec. 11-12. As discussed, *supra* at pp. 38-41, where a single building is used both for mining and non-mining activities, the Secretary has reasonably construed the Mine Act to permit him to extend MSHA authority to the discrete areas where the mining-related activities are performed, and allow OSHA to assume authority over the nonmining-related areas. The judge did not evaluate the reasonableness of the Secretary's construction of the statute, and his conclusion must therefore be set aside.

CONCLUSION

For the foregoing reasons, the Court should reverse the Commission's final order and remand with instructions to affirm the items covered by the parties' settlement agreement and to determine the merits of the citation items not covered by the parties' settlement agreement.

Respectfully submitted.

M. PATRICIA SMITH
Solicitor of Labor

ANN ROSENTHAL
Associate Solicitor of Labor for
Occupational Safety and Health

CHARLES F. JAMES
Counsel for Appellate Litigation

/s/ Ronald J. Gottlieb
RONALD J. GOTTLIEB
Attorney
U.S. Department of Labor
200 Constitution Ave., N.W.
Washington, D.C. 20210

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)(B)

This brief is produced using Microsoft Word, 14-point typeface, and complies with the type-volume limitation prescribed in FED.R.APP.P. 32(a)(7)(B), because it contains 7,467 words, excluding the material referenced in Rule 32 (a)(7)(B)(iii).

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/s/ Ronald J. Gottlieb
RONALD J. GOTTLIEB
Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5494

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of September, 2016, a copy of this brief was filed electronically via the Court's CM/ECF Electronic Filing System, providing service to counsel for Cranesville Aggregate Companies, Inc. d/b/a Scotia Bag Plant, below:

Walter G. Breakell, Esq.
Breakell Law Firm P.C.
10 Airline Drive, Suite 205
Albany, NY 12205

/s/ Ronald J. Gottlieb
RONALD J. GOTTLIEB
Attorney
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
(202) 693-5494

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