No. 16-3530

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MAXXIM REBUILD COMPANY, LLC,

Petitioner,

v.

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

and

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION ("MSHA"),

Respondents.

ON PETITION FOR REVIEW OF A DECISION OF THE
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

BRIEF FOR RESPONDENT THE SECRETARY OF LABOR, MSHA

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GLOSSARY OF ABBREVIATIONS AND ACRONYMS

Maxxim	Maxxim Rebuild Company, LLC
Commission	Federal Mine Safety and Health Review Commission
JA	Joint Appendix
Judge	Administrative Law Judge
Mine Act or Act	Federal Mine Safety and Health Act of 1977
MSHA	Mine Safety and Health Administration
Am. Br.	Brief for Amici
Pet. Br.	Brief for Maxxim Rebuild
Secretary	Secretary of Labor
GX	Secretary's Exhibit
Tr.	Hearing Transcript

STATEMENT REGARDING ORAL ARGUMENT

The Secretary does not request oral argument as he believes oral argument is not necessary to assist the Court in deciding this case.

STATEMENT OF JURISDICTION

This Court has jurisdiction over proceedings for review of decisions of the Federal Mine Safety and Health Review Commission ("Commission") under Section 106 (a)(1) of the Federal Mine Safety and Health Act ("Mine Act"), 30 U.S.C. § 816 (a)(1). The Commission had jurisdiction over the matter under Sections 105(d) and 113(d) of the Mine Act, 30 U.S.C. §§ 815(d) and 823(d). The Secretary of Labor ("the Secretary") is satisfied with the jurisdictional and standing statements set forth in Maxxim Rebuild Company, LLC's ("Maxxim's") opening brief.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the Commission properly concluded that the Maxxim shop is a "facility" "used in . . . the work of extracting . . . minerals," and hence a "mine," within the meaning of Section 3(h)(1)(C) of the Mine Act.

2. Whether the Commission properly concluded that MSHA acted within its discretion in asserting authority over the Maxxim shop, and that MSHA did not deny Maxxim equal protection.

PERTINENT STATUTES AND REGULATIONS

The pertinent statutes and regulations are set forth in the Addendum to this brief.

STATEMENT OF THE CASE

A. Statutory and Regulatory Framework

The Federal Mine Safety and Health Act of 1977 ("the Mine Act" or "the Act") was enacted to improve and promote safety and health in the Nation's mines. 30 U.S.C. § 801. In enacting the Mine Act, Congress stated that "there is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's . . . mines . . . in order to prevent death and serious physical harm, and in order to prevent occupational diseases originating in such mines." 30 U.S.C. § 801(c); see Donovan v. Dewey, 452 U.S. 594, 602 n.7 (1981). Titles II and III of the Act establish interim mandatory health and safety standards. In addition, Section 101(a) of the Act authorizes the Secretary to promulgate improved mandatory health and safety standards for the protection of life and the prevention of injuries in coal and other mines. 30 U.S.C. § 811(a).

Under Section 103(a) of the Mine Act, inspectors from the Mine Safety and Health Administration ("MSHA"), acting on behalf of the Secretary, regularly inspect mines to ensure compliance with the Act and with standards. 30 U.S.C. § 813(a). If an MSHA inspector discovers a violation of the Act or a standard during

an inspection or an investigation, he must issue a citation or an order pursuant to Section 104(a) or Section 104(b) of the Act to the operator of the mine. 30 U.S.C. §§ 814(a) and 814(b). Sections 110(a) and 110(i) of the Mine Act provide for the proposal and assessment of a civil penalty against the operator of a mine in which a violation of a standard occurs. 30 U.S.C. §§ 820(a) and 820(i) .

A mine operator may contest a citation, order, or proposed civil penalty before the Commission. 30 U.S.C. §§ 815 and 823. The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings before an administrative law judge and appellate review in cases arising under the Mine Act. 30 U.S.C. § 823. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994). An adversely affected party may obtain review of a Commission decision in an appropriate United States Court of Appeals. 30 U.S.C. 816(a), (b).

Section 4 of the Mine Act, 30 U.S.C. § 803, states that each "coal or other mine" the products of which enter commerce, or the operations or products of which affect commerce, shall be subject to the provisions of the Act. Section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), defines a "coal or other mine" in pertinent part as:

> (A) an area of land from which minerals are extracted . . . , (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 . . .

> used in, or to be used in, or resulting from, the work of extracting such minerals . . . , 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 . . . .

B. Factual and Procedural History

Maxxim Rebuild Company, LLC ("Maxxim") is a wholly-owned subsidiary of Alpha Natural Resources Inc. ("Alpha"), one of America's premier coal suppliers. JA 075-079; Government Exhibit ("GX") 6.[1] Alpha, the parent company, describes Maxxim as a mining equipment company whose business consists largely of repairing and reselling equipment and parts used in surface mining and in supporting preparation plant operations. Id.

The Maxxim facility in Sidney, Kentucky, was opened in 2012. JA 029; Tr. 8. Prior to 2012, the operation was located in Matewan, West Virginia. JA 030; Tr. 12. The Sidney facility, which initially had one bay, was previously operated by Clean Energy Coal Company, another Alpha mining operation. JA 035; Tr. 32, 34. Clean Energy abandoned its underground mining operation in Sidney on August 29, 2012, and Maxxim took over the Sidney facility almost immediately. JA 052; Tr. 99, 100. Maxxim modernized the facility by adding a second bay --

[1] At the end of 2012, Alpha operated 107 mines and 26 coal preparation facilities in northern and central Appalachia and the Powder River Basin, ranked as the third largest publicly-traded U.S. coal producers, had revenues of $7.0 billion, and employed approximately 12,400 miners. JA 075-079; GX 6. Alpha relies on its preventative maintenance and rebuild programs to ensure that its equipment is modern and well-maintained to help it keep its competitive edge in an "intensely competitive" coal industry market. Id.

both bays measured 50 feet by 100 feet -- hoists, and other equipment to enable it to do more work than one mining operation required. JA 036; Tr. 34. The shop, which is located on property owned by Sidney Coal Company, another subsidiary of Alpha Natural Resources, employs seven miners. Six of the miners work only at the shop; the seventh visits mine sites at the owners' request, completing bore holes to accommodate the equipment Maxxim furnished. JA 032, 037; Tr. 18, 41. The work performed at the Sidney shop consists of structural fabrication, repairs to structurally damaged equipment, repairs to steel damaged equipment, and repairs to fenders. The equipment repaired at the shop includes, but is not limited to, belt heads, highwall miners, loaders, and excavators. JA 33; Tr. 23-24. The shop also supplies parts for both surface and underground mining equipment. JA 033; Tr. 23-24. A large part of the equipment repaired at the shop is equipment used in underground mining or highwall mining. JA 33; Tr. 22-24.

In the year prior to the issuance of the citations in this case, the Sidney shop's work consisted primarily of fabrication of parts and rebuilding of equipment owned and operated by Alpha's subsidiaries. JA 032-033; Tr. 21-22. Approximately 75 percent of the work performed at the shop is performed for Alpha mines. JA 032-033; Tr. 21-22.[2] The shop does not segregate the work

[2] From week to week, the figure ranges from a low of approximately 50 percent to a high of approximately 85 percent. JA 032; Tr. 21-22.

between mining-related work and potentially non-mining related work. Rather, all of the work is comingled and, as a result, Maxxim is unable to distinguish between those tools and areas that are used in mining-related work and those that are used in work that is for non-mining industries. JA 033; Tr. 22.

Joe Martin, Maxxim's Safety Manager, admitted that without the work from Alpha's mines, it would be difficult for Maxxim to survive as a viable entity. JA 058; Tr. 124.[3]

MSHA Inspector Randall Thornsbury conducted a two-day inspection of the Maxxim shop on January 15 and January 17, 2013. JA 040; Tr. 52; GX 4, 5. The inspector was accompanied by Keith Canterbury, Maxxim's Shop Superintendent. JA 041, 044; Tr. 54, 67. On January 15, 2013, the inspector attempted to review the shop's HazCom plan and learned that the plan was unavailable both at the shop and at Maxxim's headquarters.[4] JA 041; Tr. 56. As a result of Maxxim's failure

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Although the Sidney shop did not sell equipment, other Maxxim facilities sold used equipment on the open market. JA 036-037; Tr. 36-38. Approximately 20 percent of the equipment sold at the other locations was used in industries other than mining. JA 036-037; Tr. 36-38.

[3] Engineers for Sidney Coal Company, another of Alpha's affiliates, maintain an office in the upper floor of the Maxxim shop. JA 052, 053, 054; Tr. 100-01, 104, 107.

[4] A HazCom plan contains information regarding a list of chemicals used in the fabrication and rebuilding industries, the actions required to be taken in the event of an accident involving those chemicals, the training requirements for

to produce the required plan at the shop, the inspector issued Citation No. 8260162 for a violation of 30 C.F.R. § 47.31(a).

The inspection party next examined two bathrooms and a changing area at the shop. While exiting the first bathroom, which was in good condition, the party saw a miner leaving the second bathroom. JA 044; Tr. 67. Upon entering that bathroom, the inspector found that there was a thin coating of a black oily film covering the wash basin and toilet. JA 044; Tr. 66. The inspector also found that the floor was very dirty. JA 044; Tr. 66-67. The inspector next examined the changing room and found that its floor was covered with dirt and dried mud. JA 044; Tr. 66-67. The inspector believed that the dirt had been there for several weeks and that the black oily film was not caused by just one person using the facilities, as asserted by Maxxim. JA 044; Tr. 69.[5] Based upon his observations, the inspector issued Citation No. 8260163 for an alleged violation of 30 C.F.R. § 71.402(a).[6]

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individuals -- both employees and visitors to the facility -- exposed to the chemicals, and emergency contact information. JA 041; Tr. 57.

[5] Canterbury admitted that the bathroom was cleaned once each week -- on Fridays. The inspection was conducted on a Tuesday. JA 049; Tr. 87-89.

[6] The miners swept the floor, cleaned the change room, and bleached and cleaned the bathroom. The condition was abated in approximately one hour. JA 049; Tr. 87-89.

On January 17, 2013, Inspector Thornsbury returned to the shop to complete the inspection he began two days earlier. JA 042; Tr. 58. The inspector inspected the two loaders parked in the yard and found that one of them had an accumulation of combustible material located under the center section, on the torque converter, and under the transmission. JA 042; Tr. 59-60. The inspector believed that the accumulation -- which was made up of oil and dirt -- was likely to catch fire because of its location and the condition of the loader. As a consequence, the inspector issued Citation No. 8260164 for an alleged violation of 30 C.F.R. § 77.1106. JA 043; Tr. 63-64; GX 3.

C. Disposition Below

1. The Judge's Decision

In her decision of October 23, 2013, the judge concluded that the Maxxim shop in Sidney was subject to MSHA jurisdiction as it was plainly a "mine" under the Mine Act and Commission precedent. JA 012, 017. The judge also found that the Secretary did not abuse his discretion by inconsistently exercising jurisdiction over the shop, as asserted by Maxxim. JA 015, 016. In so finding, the judge rejected Maxxim's assertions (a) that the shop is not a "mine" as contemplated by the Act (JA 016); (b) that the activities performed at the shop are too remote from the mining process (JA 013); and (c) that the Secretary terminated jurisdiction over the operation prior to its relocation to Sidney and could not subsequently reassert

it. JA 013-014. Instead, the judge, citing Commission precedent, found that the shop was a "mine" because a "mine" "is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals." JA 015 (citing Jim Walters Resources, 22 FMSHRC 21, 25 (2000) ("JWR"), citing Harless Inc., 16 FMSHRC 683, 687 (1994)). The judge further found the shop to be "a dedicated off-site facility of a mine operator where employees maintain, repair and fabricate equipment, used almost exclusively at Alpha's coal extraction sites and preparation plants." JA 015. The judge therefore concluded that "there is Mine Act jurisdiction in this instance because a "'mine'" includes "'facilities'" and "'equipment'" . . . used in or to be used in" Alpha's mining operations or coal preparation facilities. JA 015-016.

The judge also affirmed the three contested citations in this case. JA 017, 018, 021. In finding that Maxxim violated 30 C.F.R. § 47.32, the judge rejected Maxxim's argument that "the workers were familiar with the chemicals and knew how to safely use them." JA 017. To the contrary, the judge found that Maxxim was "required to have on file, a written program that includes, among other things, a description of the manner and method of training, and a list of chemicals and

their location so that miners and inspectors who come on site know where chemicals are kept and the hazards associated with those chemicals." JA 017.

In addition, the judge found that Maxxim violated 30 C.F.R. § 71.402(a). JA 018. In so finding, the judge credited the testimony of Inspector Thornsbury, who "was confident that the conditions he cited [in the bathroom and changing room] were some of the worst he had observed." JA 018. The judge rejected Maxxim's assertion that the facilities were cleaned weekly by the mine staff but were used by "men who are doing greasy mechanical work and, therefore, the dirt was not excessive." JA 018.

Finally, the judge found that the cited accumulations existed and constituted a violation of 30 C.F.R. § 77.1104. JA 020. She found that "the accumulations were located in such [close] proximity to the engine and the electrical wiring that it did create a fire hazard." JA 020.[7]

2. The Commission's Decision

The Commission issued its decision on April 27, 2016. The Commission unanimously concluded that the Secretary properly asserted MSHA jurisdiction over the Sidney shop. JA 009, 010. In so concluding, the Commission (a) held that the shop is a "facility" "used in the process of extracting and preparing coal," and hence a "mine," even though it does not perform work only for mining

[7] MSHA proposed a total civil penalty of $ 424 for the three violations; the judge assessed that penalty. JA 022.

companies and even though its employees are not generally at mine sites; (b) held that a "mine "is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits . . . ."; (c) distinguished a series of cases in which the Commission and courts held that the Secretary did not properly assert MSHA jurisdiction over various sites; and (d) held that the Secretary acted within his discretion, and did not deny Maxxim equal protection, in asserting MSHA jurisdiction over the Maxxim shop even though he did not assert MSHA jurisdiction over the predecessor to this shop or over five other purportedly similar shops. JA 009-010 (internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

The Commission properly concluded that the Maxxim shop is a "facility" "used in . . . the work of extracting . . . minerals," and hence a "mine," within the meaning of Section 3(h)(1)(C) of the Mine Act. The cases relied on by Maxxim have no bearing on this case because they involved statutory language other than Section 3(h)(1) (C)'s "used in . . . the work of extracting . . . minerals" clause. Maxxim's attempt to distinguish the JWR case is unavailing because it relies on two factors -- that the shop does not perform work exclusive for mining companies, and that the shop is not owned by a mining company -- that cannot limit the statutory language. Maxxim's attempt to invoke the de minimis principle

is unavailing because the shop's mining-related activity constitutes approximately 75 percent of its total activity.

Maxxim's claim that MSHA abused its discretion in asserting authority over the shop should be rejected because the factors on which Maxxim now relies were not presented to MSHA when it decided to do so. Maxxim's claim that MSHA denied it equal protection should be rejected because Maxxim has not shown that the similarly situated shops on which it relies were similarly situated in all material respects, and has not shown the MSHA's action could not have had a rational basis or was motivated by improper motivations.

ARGUMENT

I

THE COMMISSION PROPERLY CONCLUDED THAT THE MAXXIM SHOP IS A "FACILITY" "USED IN . . . THE WORK OF EXTRACTING . . . MINERALS," AND HENCE A "MINE," WITHIN THE MEANING OF SECTION 3(h)(1)(C) OF THE MINE ACT

A. Standard of Review

The Court reviews the Commission's legal conclusions de novo, and reviews the Commission's factual findings to determine whether they are supported by substantial evidence. Cumberland River Coal Co. v. FMSHRC, 712 F.3d 311, 317 (6th Cir. 2013) (citing Pendley v. FMSHRC, 601 F.3d 417, 422-23 (6th Cir. 2010)). Under the substantial evidence standard of review, the inquiry is "'whether there is such relevant evidence as a reasonable mind might accept as

adequate to support the conclusion.'" Cumberland River, 712 F.3d at 317 (quoting Pendley, 601 F.3d at 422-23). The Court will accept reasonable inferences the factfinder drew from the evidence even if it might have drawn different inferences reviewing the evidence de novo. Frenchtown Acquisition Co. v. NLRB, 683 F.3d 298, 304 (6th Cir. 2012); Exum v. NLRB, 546 F.3d 719, 724 (6th Cir. 2008).

In reviewing an agency's interpretation of a statute it is charged with administering, the Court applies the two-step process set forth by the Supreme Court in Chevron U.S.A. Inc. v. NRDC, 467 U.S. 827 (1984). North Fork Coal Corp. v. FMSHRC, 691 F.3d 735, 739 (6th Cir. 2012); Chao v. OSHRC, 540 F.3d 519, 524 (6th Cir. 2008). If the statute is unambiguous, both the Court and the agency must give effect to the unambiguously expressed intent of Congress. North Fork, 691 F.3d at 739 (discussing Chevron step one); Chao, 540 F.3d at 524 (same). If the statute is ambiguous, the Court must accept the agency's interpretation as long as it is permissible. North Fork, 691 F.3d at 739 (discussing Chevron step two); Chao, 540 F.3d at 524 (same). In this Circuit, a Secretarial interpretation that is not the product of notice-and-comment rulemaking or some similarly formal exercise of statutorily-delegated authority is entitled only to Skidmore deference -- that is, it must be accepted as long as it has the "power to persuade." North Fork, 691 F.3d at 742-43 (discussing Skidmore v. Swift & Co., 323 U.S. 134 (1944)); Chao, 540 F.3d at 526-27 (same). Even under a Skidmore

analysis, however, the Secretary's interpretation of the Mine Act or the OSH Act is entitled to deference even if it is embodied only in the Secretary's litigating position -- and in applying the Skidmore standard, this Court gives weight to the Secretary's "'historical familiarity and policymaking expertise.'" North Fork, 691 F.3d at 741-42 (quoting Martin v. OSHRC, 49 U.S. 144, 153 (1991)); Chao, 540 F.3d at 526-27 (same).[8]

B. The Mine Act's Definition of a "Mine"

Section 4 of the Mine Act, 30 U.S.C. § 803, states that each "coal or other mine," the products of which enter commerce, or the operations or products of which affect commerce, shall be subject to the provisions of the Act. Section 3(h)(1) of the Act, 30 U.S.C. §802(h)(1), states in pertinent part as follows:

> "[C]oal or other mine" means (A) an area of land from which minerals are extracted . . . , (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 . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . ,

[8] Maxxim, citing the Seventh Circuit's decision in Northern Illinois Steel Supply Co. v. Secretary of Labor, 294 F.3d 844, 846-47 (7th Cir. 2002), asserts that the Secretary's interpretation in this case is entitled to no deference because it "involves MSHA's determination of its own jurisdiction[.]" Pet. Br. at 12. In City of Arlington, Texas v. FCC, __ U.S. __ , 133 S.Ct. 1853, 1868-73, __ L.Ed.2d (2013), however, the Supreme Court held that an agency's interpretation of an ambiguous statutory provision pertaining to its own authority is owed the same degree of deference as its interpretations of other statutory provisions.

> 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. . . .[9]

This Court has recognized that the Act "provide[s] a 'sweeping definition' of the word 'mine,' encompassing much more than the usual meaning attributed to it." Bush & Burchett, Inc. v. Reich, 117 F.3d 932, 936 (6th Cir. 1997) (quoting Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1551 (D.C. Cir. 1984)). Indeed, the courts have repeatedly recognized that Congress intended that "'what is to be considered a mine and to be regulated under [the] Act be given the broadest possibl[e] interpretation.'" Carolina Stalite Co., 734 F.2d at 1554-55 (quoting S. Rep. No. 461, 95th Cong., 1st Sess. 37 (1977), U.S. Code Cong. & Admin. News 1977, 3401, 3414 (emphasis added by Court); Harman Mining Corp. v. FMSHRC, 671 F.2d 794, 796-97 (4th Cir. 1981); Marshall v. Stoudt's Ferry Preparation Co., 602 F.3d 589, 592 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980). See also Cyprus Industrial Minerals Co. v. FMSHRC, 664 F.2d 1116, 1118 (9th Cir. 1981) (recognizing that Section 3(h)(1) should be interpreted "very broadly").

In this case, the Secretary's position is that the Maxxim shop is a "mine" within the meaning of Section 3(h)(1)(C) of the Mine Act because it is a "facility" "used in . . . the work of extracting . . . minerals." The Secretary's position should be

[9] The Act defines the "work of preparing the coal" as "the breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of . . . coal . . . and such other work of preparing such coal as is usually done by the operator of the coal mine[.]" 30 U.S.C. § 802(i).

affirmed because, as the Commission held (JA 008-009), it reflects the plain meaning of the statute. If the statute does not have a plain meaning, the Secretary's position should be affirmed because it is persuasive.

C. The Present Case

In this case, the evidence establishes that the Maxxim rebuild, repair and fabrication shop in Sidney, Kentucky, performs work on equipment -- for example, belt heads, highwall miners, loaders, and excavators -- that is used in coal extraction and coal preparation facilities operated by Maxxim's parent company, Alpha. Both the judge and the Commission properly concluded that the Sidney shop constitutes a "mine" within the meaning of Section 3(h)(1)(C) of the Mine Act because it constitutes a "facility" "used in" Alpha's extraction mining and coal preparation activities. JA 008-010; JA 015, 016. See JWR, 22 FMSHRC at 24, 27 (a central supply shop for several extraction sites and preparation plants was clearly subject to Mine Act coverage because Section 3(h)(1)(C)'s definition of "mine" encompassed facilities and equipment "used in or to be used in" JWR's extraction mining and coal preparation activities); U.S. Steel Mining Co., 10 FMSHRC 146, 148-49 (1988) (a central repair and maintenance shop for two extraction sites and a cleaning plant was subject to Mine Act coverage because it repaired and maintained equipment "used in or

to be used in" U.S. Steel's extraction mining and coal cleaning activities within the meaning of Section 3(h)(1)(C)).

Maxxim argues at length that the Commission's finding of Mine Act coverage is improper under the test articulated by the Commission in Oliver Elam, Jr. Co., 4 FMSHRC 5 (1982) , and under the analyses applied by courts, the Commission, and Commission judges in subsequent cases. Pet. Br. at 20-25.[10] The short answer is that in terms of statutory language -- which is the determining element in this case -- Elam and the other cited cases have no bearing on this case. In Elam and the other cases, the issue was whether the operator in question was engaged "in the work of preparing coal" within the meaning of Section 3(h)(1)(C). See Elam, 4 FMSHRC at 7. In this case, the contested issue is whether the operation in question constitutes a facility "used in . . . the work of extracting . . . minerals" within the meaning of Section

[10] Elam, Herman v. Associated Electric Coop., Inc., 172 F.3d 1078, 1081-83 (8th Cir. 1999), RNS Services, Inc. v. Secretary of Labor, 115 F.3d 182, 184 (3d Cir. 1997), United Energy Services, Inc. v. MSHA, 35 F.3d 971, 974-75 (4th Cir. 1994), Pennsylvania Electric Co. v. FMSHRC, 969 F.2d 1501, 1503 (3d Cir. 1992), Kinder Morgan LP, 23 FMSHRC 1288, 1292-98 (2001), aff'd, 78 Fed. Appx. 462 (6th Cir. 2003) (unpublished), and Air Products & Chemicals, Inc., 15 FMSHRC 2428, 2430-31 (1993), aff'd, 37 F.3d 1485 (3d Cir. 1994) (unpublished), all apply a "functional test" in determining MSHA authority over coal preparation activities. Under the functional test, the coverage analysis turns on the "nature of the functions that occur" at the site in question. The test asks whether the functions are undertaken either to make coal suitable for a particular use or to meet market specifications. If they are, the operator is engaged "in the work of preparing coal"; if they are not, it is not. Elam, 4 FMSHRC at 8.

3(h)(1)(C). As the Commission emphasized in JWR and reemphasized in this case, Elam and its progeny "are inapplicable" in determining whether an operation is a "mine" within the meaning of Section 3(h)(1)(C)'s "used in . . . the work of extracting . . . minerals" clause. 22 FMSHRC at 26; JA 009.

Maxxim also argues that the Commission's finding of Mine Act coverage is improper under the Third Circuit's decision in Lancashire Coal Co. v. Secretary of Labor, 968 F.2d 388 (3d Cir. 1992), and the administrative law judge's decision in Hobet Mining Co., 26 FMSHRC 890 (2004) (ALJ). Pet. Br. at 22.[11] Again, the short answer is that, in terms of statutory language, those cases have no bearing on this case. In those cases, the issue was whether the operation in question was an operation "resulting from" extraction mining (Hobet) and coal preparation (Lancashire) within the meaning of Section 3(h)(1)(C). See Hobet, 26 FMSHRC at 900-01; Lancashire, 968 F.2d at 390-91. In this case, the issue is whether the operation in question constitutes a facility "used in . . . the work of extracting . . . minerals" within the meaning of Section 3(h)(1)(C). Maxxim frames the issue as though MSHA were asserting coverage over the underground coal mine that operated at the Sidney site, but then was sealed and abandoned. Pet. Br. at 22, 27, 32. That mine and the associated shop, however, are irrelevant to the shop that is currently operating

[11] Both Lancashire Coal and Hobet Mining involved reclamation activities at abandoned mines -- activities that are not involved in this case.

at the site. MSHA is not asserting coverage over that mine or that shop; it is asserting coverage over the shop that is currently operating at the site.

Maxxim strays even farther from the issue in this case when it argues that the Commission's finding of Mine Act coverage is improper under this Court's decision in Bush & Burchett v. Reich, 117 F.3d 932 (6th Cir. 1997), and the administrative law judge's decision in Powder River Coal, 29 FMSHRC 650 (2007) (ALJ). Pet. Br. 21, 23, 26-28. Those decisions did not turn primarily either on the meaning of Section 3(h)(1)(C)'s "used in . . . the work of extracting . . . minerals" clause, or on the meaning of Section 3(h)(1)(C)'s "resulting from" clause; they turned primarily on the meaning of Section 3(h)(1)(B)'s statement that "mine" includes "private ways and roads appurtenant to [an extraction] area." See Bush & Burchett, 117 F.3d at 936-38; Powder River, 29 FMSHRC at 900-01. Although the Court in Bush & Burchett went on to also analyze whether the road in question was covered by Section 3(h)(1)(C), it did so under Section 3(h)(1)(C)'s "work of preparing coal" clause -- not under Section 3(h)(1)(C)'s "used in . . . the work of extracting . . . minerals" clause. 117 F.3d at 938-39.

Turning to the statutory language that is at issue in this case, Maxxim argues that the Commission's finding of Mine Act coverage is improper because this case is distinguishable from JRW. Pet. Br. at 18-30. In doing so,

Maxxim relies primarily on two facts: (1) that in this case, the shop does not perform work exclusively for mining companies; and (2) that in this case, the shop is not owned by a mining company. Pet. Br. at 26-27, 28. Both the judge and the Commission, however, properly found that neither of those facts alters the reality that a significant part of the Sidney shop's work -- at a minimum, 75 percent -- is performed on equipment that is used in coal extraction and coal preparation activities. JA 015. Maxxim's attempt to distinguish this case from JWR (Pet. Br. at 28-30) should be rejected because it reads into Section 3(h)(1)(C) two limitations -- exclusiveness and ownership -- that Congress did not include in Section 3(h)(1)(C). See Thunder Basin Coal Co. v. FMSHRC, 56 F.3d 1275, 1280 (10th Cir. 1995) (refusing to "'read a limitation into the statute that ha[d] no basis in the statutory language'") (quoting Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447, 451 (10th Cir. 1990)); Hercules Inc. v. EPA, 938 F.3d 276, 280 (D.C. Cir. 1991) (rejecting a reading because it "read[] into the statute a drastic limitation that nowhere appear[ed] in the words Congress chose").

The Secretary recognizes, as Maxxim and the amici contend (Pet. Br. at 15; Am Br. at 17-23), that this Court and others have suggested that Mine Act coverage is subject to a de minimis limitation. See, e.g., Bush & Burchett, 117 F.3d at 937 (stating that, "[w]ithout some limitation," Mine Act coverage "could

conceivably extend to unfathomable lengths"); Northern Illinois Steel Supply Co. v. Secretary of Labor, 294 F.3d 844, 848 (7th Cir. 2002) (declining to find Mine Act coverage where an independent contractor's contact with the mine was "infrequent" and its activity at the mine was "minimal); Old Dominion Power Co. v. Donovan, 772 F.2d 92, 97 (4th Cir. 1985) (declining to find Mine Act coverage where an independent contractor's contacts with the mine were "rare and remote" and its activities at the mine were, respectively, "once a month" and "occasional"); National Industrial Sand Ass'n v. Marshall, 601 F.2d 689, 701 (3d Cir. 1979) (stating that "there may be a point" at which a contractor's contact with the mine is "so infrequent" that Mine Act coverage cannot be found). See also Otis Elevator Co. v. Secretary of Labor, 921 F.2d 1285, 1290 n.3 (D.C. Cir. 1990) (declining to decide whether "there is any point" at which a contractor's contact with the mine is de minimis because it was undisputed that the contractor "performed limited but necessary services" at the mine). Under no formulation of the de minimis principle, however, can Maxxim's mining-related activity -- which constitutes approximately 75 percent of its total activity (JA 032-33; Tr. at 20-21) -- be said to be de minimis.

Finally, Maxxim opines that it would be preferable to place the Sidney shop under OSHA regulation rather than MSHA regulation. Pet. Br. at 18-25. If Section 3(h)(1)(C) plainly places the shop under MSHA regulation, however,

Congress has expressed its preference, and that preference is dispositive. See Chevron, 467 U.S. at 842-43 ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); Wolf Run Mining Co. v. FMSHRC, 659 F.3d 1197, 1203 n. 10 (D.C. Cir. 2011) (otherwise legitimate safety concerns cannot override "a policy choice made by Congress," as expressed in the plain language of the statute). And if Section 3(h)(1)(C)'s application to the shop is ambiguous, the resolution of that ambiguity represents a policy choice that is committed to the Secretary to make. See Chevron, 467 U.S. at 843-45, 865-66 (if the statute is ambiguous and the agency's position represents a policy choice, a challenge to the wisdom of that policy must fail); Secretary of Labor v. National Cement Co. of California, Inc., 573 F.3d 788, 793 (D.C. Cir. 2011) (according deference to the Secretary's interpretation of Section 3(h)(1)(B) of the Mine Act because it involved a policy choice); Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 11 (D.C. Cir. 2003) (according deference to the Secretary's interpretation of Section 202(f) of the Mine Act because it involved a policy choice). In either event, Maxxim's preference for OSHA regulation rather than MSHA regulation represents a choice that is not Maxxim's to make.

II

THE COMMISSION PROPERLY CONCLUDED THAT MSHA ACTED WITHIN ITS DISCRETION IN ASSERTING AUTHORITY OVER THE MAXXIM SHOP, AND THAT MSHA DID NOT DENY MAXXIM EQUAL PROTECTION

A. Standard of Review

Maxxim claims that MSHA acted in an arbitrary and capricious manner in asserting authority over the Maxxim shop. Pet Br. at 31-37. Maxxim also claims that MSHA denied Maxxim equal protection. Pet. Br. at 38-39. The Commission rejected both of Maxxim's claims. JA 010. As already discussed, the Court reviews the Commission's legal conclusions de novo, and reviews the Commission's factual findings to determine whether they are supported by substantial evidence.

B. Maxxim's Abuse of Discretion Claim

In the context of this case, "abuse of discretion" review is equivalent to "arbitrary and capricious" and "reasonableness" review. See Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 n. 23, 378 (1989). In such a case, a reviewing court must determine whether the agency's action was "based on a consideration of the relevant factors and whether there has been a clear error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). Although the review is "searching and careful, the ultimate standard of review is a

narrow one," and the court "is not empowered to substitute its judgment for that of the agency." Id.; Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983); Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974). An agency is not required to demonstrate "to a court's satisfaction" that its decision was the best option available; it is sufficient that the agency's action "is permissible under the statute" and that "there are good reasons for it." FCC v. Fox Television, 129 S.Ct. 1800, 1810 (2009). The arbitrary and capricious standard of review is "[h]ighly deferential" and "presumes the validity of agency action." City of Portland, Oregon v. EPA, 507 F.3d 706, 713 (D.C. Cir. 2007) (citations and internal quotation marks omitted.)

In reviewing an agency's action, a court must restrict its review to the information that was "before the agency at the time its decision was made." IMS, P.C. v. Alverez, 129 F.3d 618, 623 (D.C. Cir 1997). See also Klein v. Department of Energy, 753 F.3d 576, 580 (6th Cir. 2014) (review of the lawfulness of an agency's decision "turns on the record before the agency at the time of its decision, not on later evidence developed outside the administrative record"). An agency therefore cannot be found to have acted improperly on the basis of information that was not reasonably available to it when it acted. See Walter O. Boswell Memorial Hospital v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984) ("If a court is to review an

agency's action fairly, it should have before it neither more nor less information than did the agency when it made its decision.") The Commission has applied this principle in reviewing an MSHA District Manager's decision regarding the suitability of a mine's proposed ventilation and roof control plans. Prairie State Generating Co., LLC, 35 FMSHRC 1985, 1996 (2013) ("[I]t was not an abuse of discretion for the [District Manager] to rely on the information he had in front of him, and because the disputed evidence was not introduced to him during his evaluation period or 'taken back to him for re-consideration,' it was not relevant to [his] determination, which was made prior to the hearing.") (quoting the judge's decision, 32 FMSHRC 602, 612 (2010) (ALJ), aff'd, Prairie State Generating Co. v. Secretary of Labor, 792 F.3d 82, 93-94 (D.C. Cir. 2015) (stating in dictum that, "at least ordinarily, the information relevant to the Secretary's decision will be that which was before the agency during the plan-development process") (citing cases).

Maxxim claims that MSHA acted improperly in asserting authority over the shop in Sidney, Kentucky, after it ceased to assert authority over the shop in Matewan, West Virginia. Pet. Br. at 31-32. There is no evidence, however, that Maxxim ever discussed the relationship between the Sidney shop and the Matewan shop with MSHA. Indeed, the judge properly found that Maxxim "did not speak with MSHA about jurisdiction." JA 014. MSHA cannot be said to have acted

improperly by failing to base its decision whether to assert authority over the Sidney shop on information that was never put before it.[12]

Similarly, Maxxim claims that MSHA acted improperly in asserting authority over the Sidney shop when it does not assert authority over all of the five other Maxxim shops. Pet. Br. at 32-33. Again, however, there is no evidence that Maxxim ever discussed a comparison between the Sidney shop and the five other shops with MSHA, and the judge found that Maxxim "did not speak with MSHA about jurisdiction." JA 014. And again, MSHA cannot be said to have acted improperly in failing to base its decision whether to assert authority over the Sidney shop on information that was never put before it.

Maxxim protests that it "presented evidence" of the similarity between the Sidney shop and the five other shops. Pet. Br. at 33-34 (citing JA 055-057; Tr. 112-20). Maxxim misses the point. The question is not whether Maxxim presented such evidence to the judge; the question is whether Maxxim presented

[12] Maxxim's failure to discuss MSHA authority over the Sidney shop with MSHA is particularly significant because the Sidney shop is in a different MSHA District than the Matewan shop (District 6 rather than District 12) and because the Sidney shop is different -- larger and better equipped -- than the Matewan shop. See JA 036; Tr. 34-35.

such evidence to MSHA. A review of the testimony cited by Maxxim underscores that Maxxim did not present such evidence to MSHA.[13]

C. Maxxim's Equal Protection Claim

A party claiming that it has unconstitutionally been treated differently than other similarly situated entities -- that is, a party making a "class of one" equal protection claim -- must met two requirements. Loesel v. City of Frankenmuth, 692 F.3d 452, 461-65 (6th Cir. 2012); Rondigo, LLC v. Township of Richmond, 641 F.3d 673, 681-83 (6th Cir. 2011). First, such a party must show that it and the other entities were similarly situated in all relevant and material respects. Loesel, 692 F.3d at 462-63; Rondigo, 641 F.3d at 682. Second, such a party must show that the government's action lacked a rational basis -- a showing that may be made "either by negativing every conceivable basis which might support the government action or by demonstrating that the challenged government action was motivated

[13] In any event, as the Commission properly found (JA 010), the evidence Maxxim presented to the judge failed to establish that the Sidney shop is similar to the five other shops. Cf. Shamokin Filler Co., 34 FMSHRC 1897, 1907-08 (2012) (upholding the judge's exclusion of evidence regarding MSHA decision-making with respect to other facilities on the grounds that "[i]t is unlikely that any two facilities would be identical and warrant the same conclusion on jurisdiction," and that such evidence might "be of limited probative value [and] have unduly delayed the trial"), aff'd, Shamokin Filler Co. v. FMSHRC, 772 F.3d 330, 338 (3d Cir. 2014) (upholding the exclusion of such evidence on the ground that, although agency inconsistency "might be relevant," the evidence had "limited probative value" and "the potential . . . to unnecessarily delay the hearing"), cert. denied, 135 S.Ct. 1549 (2015). The evidence Maxxim presented to the judge established no more than that the other shops perform work in an unspecified manner and an unspecified amount on mining equipment. JA 055-57; Tr. 111-20.

by animus or ill-will." Loesel, 692 F.3d at 465 (citation and internal quotation marks omitted). Accord Rondigo, 641 F.3d at 682. A party making a "class of one" equal protection claim "must overcome a 'heavy burden' to prevail[.]" Loesel, 692 F.3d at 462 (citation omitted).

Maxxim fails to meet either of the requirements for establishing a "class of one" equal protection claim. As to the first requirement, the testimony cited by Maxxim, which is vague and general, shows at most only that the five other shops perform work in an unspecified manner and an unspecified amount on mining equipment. Pet. Br. at 33-34 (citing JA 055-057; Tr. 112-20). As to the second requirement, Maxxim does not even attempt to negative every basis that might support MSHA's action or to demonstrate that MSHA's action was motivated by animus or ill will. Accordingly, the Commission properly concluded that Maxxim failed to establish that MSHA denied it equal protection. JA 010-011.

CONCLUSION

For all of the reasons stated above, this Court should affirm the decision of the Commission.

Respectfully submitted,

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ADDENDUM

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Federal Mine Safety and Health Act of 1977

Section 3(h)(1) of the Mine Act, 30 U.S.C. §802(h)(1), states in pertinent part as follows:

> "[C]oal or other mine" means (A) an area of land from which minerals are extracted . . . , (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 . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . ,
> 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.

Section 4 of the Mine Act, 30 U.S.C. § 803, states that each "coal or other mine," the products of which enter commerce, or the operations or products of which affect commerce, shall be subject to the provisions of the Act.

CERTIFICATE OF COMPLIANCE
UNDER FED. R. APP. P. 32(a)(7)(C)

I certify that this brief has been prepared using Times New Roman, fourteen point, proportional typeface in the Microsoft Word processing system.

Exclusive of the table of contents, table of authorities and this certificate of compliance, the brief contains 7,012 words.

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CERTIFICATE OF SERVICE

This will certify that I, Cheryl C. Blair-Kijewski, electronically filed the foregoing motion into the Court's record of this action on October **, 2016, by using the Court's CM/ECF Electronic Filing System, which will send notice to:

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