FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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April 5, 2022

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket No. WEVA 2019-0458
v.	:	
KC TRANSPORT, INC.	:	

BEFORE: Traynor, Chair; Althen and Rajkovich, Commissioners

DECISION

BY: Althen and Rajkovich, Commissioners

This proceeding arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Act" or "Mine Act"). It involves two citations issued to the trucking company, KC Transport, Inc., regarding haul trucks parked for maintenance at the company's facility in Emmett, West Virginia.[1] The only issue before the Commission is whether the Mine Safety and Health Administration ("MSHA") had jurisdiction to issue the citations.

The parties filed cross-motions for summary decision on the jurisdictional issue. The Secretary asserted stand-alone jurisdiction over the trucks. The Judge rejected that argument; however, the Judge found MSHA had jurisdiction over the facility and, therefore, over the trucks while they were at the facility. 42 FMSHRC 221 (Mar. 2020) (ALJ). KC Transport appeals.

For the reasons below, we reverse the Judge's decision, grant KC Transport's motion for summary decision, and vacate the two citations. In doing so, we affirm the finding that MSHA did not have jurisdiction over the cited trucks and reverse the Judge's finding of jurisdiction over the KC Transport facility.

[1] A settlement regarding 18 of the 20 citations in this docket was approved by the Judge below on December 19, 2019. The two remaining citations, Nos. 9222038 and 9222040, both allege violations of 30 C.F.R. § 77.404(c) ("Repairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion."). If MSHA is found to have jurisdiction, the parties stipulated the facts of the violations and reached an agreement concerning gravity, negligence, and appropriate penalty amounts. Jt. Stips. 39-42.

I.

Factual and Procedural Background

A. Summary of Uncontested Facts

KC Transport is an independent trucking company that provides coal, earth, and gravel hauling services to various businesses, including (but not limited to) coal operators such as Ramaco Resources ("Ramaco"). Jt. Stips. 7, 8. KC Transport operates maintenance and storage facilities at five locations, including at Emmett, West Virginia (the "Emmett facility").[2] The Emmett facility is located on Right Hand Fork Road, approximately 1,000 feet from a haulage road that serves Ramaco's Elk Creek Prep Plant and other Ramaco mines. The haulage road is partly public; there is a gate limiting access near the Elk Creek Plant, beyond which Ramaco maintains the road. To reach the Emmett facility, one must pass through the gate, travel up the haulage road, then turn onto the public Right Hand Fork Road. The facility is over a mile from the prep plant, with three mines approximately four to five miles distant and additional mines about six miles remote. Jt. Stips. 9-12, 24-26.

KC Transport operates approximately 35 trucks from the Emmett facility. These trucks include off-road trucks that provide haulage for nearby mines and on-road trucks that provide haulage services completely unrelated to mining. Approximately 60% of services from the facility are for Ramaco. The facility is not on mine property, and Ramaco does not employ personnel or maintain equipment at KC Transport's facility. KC Transport shares the facility's parking area with a logging company. Jt. Stips. 13-15, 17, 20, 30. When the relevant citations were issued, KC Transport had not yet built a maintenance shop at the facility, so KC Transport used shipping containers and service trucks for maintenance needs. Jt. Stip. 6. The area was, essentially, a parking lot with an open storage area.

The relevant events occurred on March 11, 2019. An MSHA Inspector was searching for trucks that he had cited while they were at Ramaco's Elk Creek Prep Plant during a recent inspection. He intended to terminate those citations. When he arrived at the KC Transport facility's parking area, he discovered ongoing maintenance work on two trucks and issued the two new subject citations. Jt. Stips. 2-5. The citations allege that the trucks were not blocked against motion while raised for repair in violation of 30 C.F.R. § 77.404(c).[3] The trucks were parked for maintenance at the KC Transport parking lot when cited. Jt. Stips. 18, 19.

The cited trucks are regularly inspected by MSHA when on-site at a Ramaco property or along Ramaco's haulage road, but MSHA had never inspected the Emmett facility. Jt. Stip. 29.

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[2] The parties' stipulations did not provide any facts regarding the other locations.

[3] Section 77.404(c) provides, "[r]epairs or maintenance shall not be performed on machinery until the power is off and the machinery is blocked against motion, except where machinery motion is necessary to make adjustments."

MSHA never sought to inspect the facility before March 11, 2019, and the inspector did not attempt to inspect any other vehicles at or other parts of the facility that day.[4]

B. Procedural Background

The parties filed cross-motions for summary decision before the Judge on the issue of jurisdiction. Both parties relied upon the definition of "coal or other mine" in Section 3(h)(1) of the Mine Act, 30 U.S.C. § 802(h)(1).[5] The Secretary argued that each truck independently constituted a "mine" under subsection 3(h)(1)(C) and was, therefore, subject to MSHA jurisdiction irrespective of its location. KC Transport countered that the Mine Act only provides jurisdiction over equipment in or appurtenant to a mine as defined in section 3(h)(1)(A) or (B). Therefore, KC Transport claimed the facility was not a mine, and MSHA did not have jurisdiction over the trucks while at the facility.

As a preliminary matter, the Judge noted that the parties disagreed as to the jurisdictional question at issue: the Secretary argued that each *truck* independently constituted a mine, while the operator argued that the *facility* was not a mine and, therefore, MSHA could not issue citations for the trucks parked at it. 42 FMSHRC at 229-30. The Judge rejected both arguments, finding that the Secretary's approach would create "rolling mines" and lead to "absurd results," but that the facility fell "within the definition" of a mine. *Id.* at 231, 237. The Judge ultimately found MSHA jurisdiction over the facility and both trucks, concluding that the trucks were at the KC Transport maintenance facility, which he found to be a "mine." By implication, therefore, he found the trucks were "mines" within subsection 3(h)(1)(C) only when located on a mine or haulage road. He held that maintaining trucks to haul coal was integral to the mining process.

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[4] The parties stipulated that eleven months earlier, on April 3, 2018, MSHA issued two citations to KC Transport at a muddy parking area that KC Transport then had adjacent to where the haulage road intersects Right Hand Fork Road. MSHA later vacated those citations. Sometime between April 2018 and March 2019, KC Transport constructed its new facility 1,000 feet away from the Right Hand Fork Road's haulage road. Jt. Stips. 21-23. MSHA knew of the new location as demonstrated by the inspector going to the facility. However, MSHA did not attempt to inspect the facility or trucks located at it until April 2019. Having traveled to the facility for a different purpose than inspecting, the inspector issued the citations in dispute.

[5] Section 3(h)(1) of the Act defines a "mine" 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.

30 U.S.C. § 802(h)(1).

Therefore, both the facility and the trucks at the facility were "used in" mining under section 3(h)(1)(C) of the Mine Act. *Id.* at 230-32, 237-38.

On appeal, the parties reiterate their arguments. KC Transport claims the Judge erred in finding jurisdiction over the trucks at the facility because only equipment and facilities that are in or appurtenant to working mines (as defined in section 3(h)(1)(A)) are subject to MSHA jurisdiction, and the facility does not engage in coal extraction or preparation within the scope of Subsection (A). The Secretary counters that the Commission must evaluate subsection (C) independently and that the plain language of the definition covers the trucks and facility because they are "used in" mining.[6]

II.

Disposition

This case comes before us in an unusual posture. Before the Judge's decision, MSHA did not assert or attempt to exercise jurisdiction over the KC Transport facility. Nor did it do so after citing the trucks while they were at the facility. On cross-motions for summary judgment on the truck citations, the Judge awarded MSHA unasked-for jurisdiction over the facility. Before us, the Secretary vigorously seeks to retain MSHA's unrequested prize.

Vital to this analysis is that KC Transport is an independent contractor and that no mining activities or structures within the scope of subsection (A) occur at its facility. Further, MSHA does not assert the KC Transport facility is on a road or private way appurtenant to Ramaco's operation. The Secretary asserts MSHA jurisdiction over trucks and a facility owned by this independent contractor situated on land where no mining is occurring. The Secretary's effort must fail.

A. The Secretary's Arguments

The Secretary principally argues that the definition of a "mine" is plain and that we must apply a *Chevron* analysis.[7] Under step one of the analysis (*Chevron* I), if Congress has spoken in subsection 3(h) to the precise issue in dispute, the matter is ended, and we must accept Congress' directive. According to the Secretary, subsection 3(h)(1)(C) plainly applies to all tools, equipment, machines, etc. actually used in or to be used in mining regardless of whether they are on a mine site, a site appurtenant to the mine site, or elsewhere. The Secretary would permit no

[6] KC Transport contends that the Judge erred in even addressing MSHA's jurisdiction over the facility. Noting that the Secretary had not sought such jurisdiction, the company claims the Judge should not have reached an issue for which there was no live case or controversy. As we are reversing the Judge's finding of jurisdiction over the facility, we need not address this argument in depth. However, we note that it was necessary to discuss the facility's jurisdictional status under KC Transport's rationale. The company asserted that the trucks were not subject to MSHA jurisdiction because the facility was not a mine. Mot. for Sum. Dec. at 1, 6.

[7] *Chevron USA Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

further inquiry. Secondarily, by footnote, the Secretary argues that if we do not apply *Chevron* I, we must conduct an analysis under step two of *Chevron* (*Chevron* II) and defer to the Secretary's construction. S. Resp. Br. at 8 n.3.

1. Plain Meaning

We find no support for the Secretary's proposition that the definition of a "mine" in the Mine Act plainly applies to offsite, non-mining storage and repair facilities or all tools, equipment, and machines located off a mine site that have a use in mining. The Secretary would find tools and equipment to be mines regardless of their location. Thus, as the Judge pointed out, a truck sitting in a diner parking lot would be a "mine." 42 FMSHRC at 231. If a miner used his own hammer at work, it would be a "mine" even when located in his home workshop. The Judge was correct that such a construction of the term "mine" would be absurd. If jurisdiction follows equipment as it travels away from the mine, there is no point at which jurisdiction ceases.

The Secretary invokes this "plain meaning" basis for jurisdiction over the trucks because they were "used in" mining previously and most likely would be used in the future. S. Resp. at 7-11; 42 FMSHRC at 230-32, 237-38. The Secretary argues for jurisdiction over the independent KC Transport facility because it provides offsite parking and repair for trucks used in mining. S. Resp. at 12-15. It is a fixed location away from any mine site, and no mining occurs at the site. The difficulty with the Secretary's argument is that it seizes on the words "used in" within the lengthy definition rather than undertaking any analysis of the definition as a whole or its role in securing miners' safety. Such focus results in an absurd interpretation that certainly is not "plain."

In rejecting the Secretary's assertion under almost similar facts, the U.S. Court of Appeals for the Sixth Circuit recently made the specific finding that MSHA's theory would create "no stopping point." *Maxxim Rebuild Co. LLC v. Federal Mine Safety and Health Review Commission*, 848 F.3d 737, 743 (6th Cir. 2017). In fact, *Maxxim* did not involve merely trucks or other tools; it involved a facility far more closely related to mining than the KC Transport facility. The circuit court did not accept the Secretary's limitless definition of a mine.

In reaching this conclusion, the circuit court essentially followed the same logic as the Judge applied to the trucks (standing alone) in this case. The Secretary's grossly overbroad interpretation creates an absurdity, and avoidance of absurd results in reviewing statutes is a "golden rule of statutory interpretation." 2A Sutherland Construction § 45.12 (7th ed.). The Commission recognizes this principle. *Sims Crane*, 40 FMSHRC 301, 303 (Apr. 2018) ("[S]tatutes and regulations should not be construed to produce an absurd result.")

Beyond the absurdity of such unlimited inspection reach, we cannot square the proposed interpretation that every tool, machine, etc., is a separate and distinct "mine" regardless of location or current usage with a resultant imposition of the Mine Act's mandatory inspection

requirements. Section 103(a) of the Act requires the Secretary to "make inspections of each underground coal or other mine in its entirety at least four times a year."[8] 30 U.S.C. § 813(a). The duty to make such inspections is not optional; the Mine Act mandates such inspections. Yet, we have not been made aware of any MSHA policy, program, or procedures for inspecting warehouses, repair shops, storage areas, and other facilities that are not on or at a mine site.

Separate from the absurdity of MSHA's construction, there is no merit to the Secretary's proposition that the lengthy, multi-tiered definition of a mine "plainly" applies to the offsite parking and repair facility of an independent entity and trucks neither on a mine site nor engaged in mining activity. It is not "plain" that Congress meant the phrase "used in" to be taken in such a literal sense that tools on shelves of independent supply stores would be deemed to be "mines."[9]

Certainly, a tool present in a mine remains within MSHA's jurisdiction even though it is not actively being used at a particular moment. It is there and readily available for use in mining. However, when it is not at the mine, it cannot be engaged in mining and it is not a "mine."

Further, as discussed below, the definition of a "mine" focuses on land areas where mining is occurring, on private ways appurtenant to such lands, and on equipment used to extract and prepare mined material. It is certainly not "plain" that Mine Act jurisdiction applies to tools, equipment, machines, etc., *not* on a mine site that at one time *were used* on the mine site, or that could be brought to the mine site again.

Turning again to the Sixth Circuit's *Maxxim* decision, the circuit court addresses this precise point in construing the definition of "mine" in the Mine Act. The circuit court states:

> But context and perspective are everything. In pulling back the lens, we see several indications that the power of the Mine Safety and Health Administration extends only to such facilities and equipment if they are in or adjacent to—in essence part of—a working mine.

Maxxim, 848 F.3d at 740. Thus, the Secretary's interpretation of subsection 3(h) would make the definition absurd. Further, the complexity of the definition and the many factors we take into account below demonstrate that the definition of a "mine" is not "plain." The Secretary's interpretation does not warrant *Chevron* I regard.

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[8] We explain below that section 103(a) requires "frequent inspections and investigations *in* coal or other mines each year." The use of the word "in" further emphasizes the locational aspect to mines for jurisdictional purposes.

[9] As Judge Learned Hand wisely opined, "there is no surer way to misread any document that to read it literally." *Guiseppi v. Walling*, 144 F.2d 608, 623, 624 (2d Cir. 1944) (J. Hand, concurring).

2. *Chevron* II/*Skidmore* deference

Because MSHA's definition of a "mine" is absurd, we do not owe it deference. We could proceed immediately to our interpretation. Nonetheless, we examine deference under *Chevron* II[10] and *Skidmore*[11] standards.

Under *Chevron* II, the Commission reviews whether the Secretary's interpretation of the Act is reasonable. If so, the Commission must accept it, even if it differs from how the Commission would have interpreted the statute in the absence of the Secretary's interpretation. *Marfork Coal Company, Inc.*, 29 FMSHRC 626, 630 (Aug. 2007). Separately, if the Commission decides an MSHA interpretation does not warrant *Chevron* II deference, the Commission may afford the interpretation a lesser degree of deference under the *Skidmore* standard. *The American Coal Company*, 38 FMSHRC 1972, 1979 n.9 (Aug. 2016). That standard is whether the Secretary's interpretation is persuasive.

In this case, the Secretary's position is a litigation position, rather than a formal position taken after a demonstrated internal review or policy consideration, let alone public notice and comment. Indeed, regarding jurisdiction over the KC Transport facility, it is a position taken on appeal and not expressed before the Judge. Only after the Judge decreed unrequested jurisdiction did the Secretary assert jurisdiction over the facility at the second stage of litigation.

Thus, the Secretary did not develop this position by an objective standard found in MSHA's rules or policy statements. Instead, this is a matter of retaining an unasked-for litigation award. As a late-blooming litigation tactic, the interpretation would receive only weak *Skidmore* deference—namely, deference only to the extent it has the power to persuade. *Knox Creek Coal Corp. v. Secretary of Labor*, 811 F.3d 148, 159-60 (4th Cir. 2016).[12]

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[10] *Chevron*, 467 U.S. at 842-43.

[11] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

[12] We recognize, of course, that in other cases the Secretary has also asserted jurisdiction over off-site facilities. We find no record of a thoughtful policy-driven basis for such claims. Indeed, in the *Maxxim* case, the respondent, Maxxim, was a wholly-owned subsidiary of a mining company. Maxxim operated seven shops. Five were inspected by the Occupational Safety and Health Administration and two, including the subject shop, were inspected by MSHA. The Secretary did not explain any logic or legal reason for such differences. Further, as here, the Secretary did not provide evidence that MSHA had developed any consistent policy for the exercise of jurisdiction over off-site facilities. In this case, MSHA certainly knew of the existence and location of the facility but did not seek to exercise any jurisdiction or perform any statutorily required inspections until after an inspector went to the site and impulsively issued citations for two trucks. Even then, MSHA did not assert jurisdiction over the facility. The actions of MSHA regarding such facilities and off-site equipment demonstrate only a pattern of random, sporadic action rather than implementation of a thoughtful policy.

In any event, given the guides identified and discussed below, the Secretary's proffered interpretation is neither reasonable nor persuasive. We turn to the proper construction of section 3(h). In doing so, we employ the "traditional tools of statutory construction," including an examination of the statute's text, legislative history, and structure, as well as its purpose. *See Chevron*, 467 U.S. at 842-43.

B. MSHA does not have Jurisdiction Over KC Transport's Parking and Repair Facility or Trucks Parked at the Facility.

The purpose of the Mine Act is to protect individuals performing work "*in the Nation's coal or other mines*." *See generally* 30 U.S.C. § 801 (emphasis added). The repeated references to conditions "in" coal or other mines demonstrate that Congress was concerned with the health and safety of miners *as they engage in mining tasks*. Necessarily, therefore, the Mine Act addresses the full range of activities and instrumentalities used *in* those mines. That focus differs substantially from defining a mine to include all tools and equipment, regardless of use and wherever they are located.

KC Transport operates a trucking and repair facility that is neither in a mine nor appurtenant to a mine. KC Transport is an independent entity unrelated to any mining enterprise and supplies trucking services to mining and non-mining customers. Jt. Stip. 39. Applying the proper construction tools, we find no support for finding that KC Transport's facility or trucks are "mines." No support exists in the language of the Mine Act's predecessor statute (the Coal Act), the legislative history of the Mine Act, the text of the Mine Act, important precedential decisions of the United States Circuit Courts of Appeal for the Sixth and Seventh Circuits, or common sense.

1. The Federal Coal Mine Health and Safety Act of 1969 ("Coal Act")

The Coal Act defined a "mine" by reference to activities conducted upon, under, or above a land area that constituted a mining operation. The statute defined a coal mine as:

> an area of land *and* all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations, and other property, real or personal, placed upon, under, or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal . . . and the work of preparing the coal so extracted.

30 U.S.C. § 802(h) (1976) (emphasis added).

This definition contains the conjunctive "and" linking two distinct aspects of a coal mine. The first aspect covered "land" as it related to the extraction of coal. This aspect covered "lands" where extractive mining, milling, or preparation occurs. The conjunctive "and" then brought under the Coal Act real or personal property used in mining on such lands. Most importantly, the Coal Act applied to property "placed upon, under, or above the surface of *such* land." *Id.* (emphasis added). Thus, the coverage reached and applied only to personal or real property

related to extracting coal *in that land.* This definition plainly does not reach beyond the land and property used in or resulting from extracting or preparing coal.

2. Legislative History of the Mine Act

In passing the Mine Act some eight years later, Congress did not express any intent to expand the jurisdiction of MSHA (the newly formed enforcement agency) beyond the scope exercised by its predecessor the Mine Enforcement Safety Administration ("MESA")[13] under the Coal Act. Thus, the Mine Act's legislative history does not demonstrate an intention to expand the geographical scope of MSHA jurisdiction to lands or areas removed from the mine, such as independent contractor maintenance facilities, or to facilities where mining equipment is stored, repaired, or sold.

While Congress modified the Coal Act's definition of "mine" in the Mine Act, Congress explicitly stated that it intended to *clarify* the scope of the definition:

> [T]he definition of 'mine' is *clarified* to include the areas, both underground and on the surface, from which minerals are extracted. . . . Also included in the definition of 'mine' are lands, excavations, shafts, slopes, and other property, including impoundments, retention dams, and tailings ponds. These latter were not specifically enumerated in the definition of mine under the Coal Act. It has always been the Committee's express intention that these facilities be included in the definition of mine and subject to regulation under the Act, and the Committee here expressly enumerates these facilities within the definition of mine in order to *clarify* its intent.

S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 602 (1978) ("*Legis. Hist.*") (emphasis added).

The updated definition simply "enumerated" types of facilities that were already presumed to be subject to MSHA jurisdiction under the Coal Act. The definition did not expand MSHA's jurisdiction in any broad sense. Congress' clarification to include these large structures of impoundments, retention dams, and tailings ponds on a mining site does not support expanding jurisdiction to mining equipment wherever it is located.[14]

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[13] MESA was an agency within the Department of the Interior. The Mine Act created MSHA and moved mine safety enforcement to the new agency within the Department of Labor.

[14] While the legislative history concludes with the statement that "doubts" regarding jurisdiction should "be resolved in favor of inclusion of a facility within the coverage of the Act," MSHA cannot create jurisdiction by wrongly asserting jurisdiction and then arguing that there exists a "doubt" about it. In this case, MSHA either did not think it had jurisdiction over the Emmett facility or at least did not act on such a thought or seek jurisdiction over the facility until after the Judge's decision.

3. The Mine Act Definition of a "Mine" and Related Terms

Section 3(h)(1) of the Mine Act defines a "coal or other mine" in relevant part as:

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

30 U.S.C. § 802(h)(1).

As seen in the plain language, all three subsections include a locational connection to working mines. Subsection (A) covers relevant "area[s] of land from which minerals are extracted," while (B) includes ways and roads "appurtenant to such area." Subsection (C) then catalogs various mining-related places (e.g., lands, underground passageways, retention dams, tailing ponds) and objects that serve a mining-related purpose in such areas (i.e., structures, facilities, equipment, machines, and tools used in mining). *See Maxxim*, 848 F.3d at 740-42.

Each of these definitions relates to work in or at a mine. The definition of "mine" in subsection (C) specifically refers to things "*on the surface or underground*." 30 U.S.C. § 802(h)(1)(C). "[S]urface" and "underground" are terms of art in mining and mining regulation. They are used to differentiate distinct areas of what is generally understood to be a mine site in the normal sense. "Surface" and "underground" do not suggest areas off the mine site. The use of "surface" does not mean the drafters used it to corral in off-site areas.

Other definitions in the Mine Act are similarly locational. An "operator" is defined as "any owner, lessee, or other person who operates, controls, or supervises *a coal or other mine* or any independent contractor performing services or construction *at such mine*." 30 U.S.C. § 802(d) (emphasis added). An agent means "any person charged with responsibility for the operation of all or a part of *a coal or other mine* or the supervision of the miners *in a coal or other mine*." 30 U.S.C. § 802(e). A miner is an "individual working *in a coal or other mine*." 30 U.S.C. § 802(g). Section 103(a) (related to inspections) provides, "[a]uthorized representatives of the Secretary or the Secretary of Health and Human Services shall make frequent inspections and investigations *in coal or other mines*." 30 U.S.C. § 813(a) (emphasis added). MSHA must thoroughly inspect operations conducting mining, milling, and preparation activities and all instruments and instrumentalities used in such operations. It is not required to leave the mine site and track down tools, equipment, machines, trucks, and other instruments when they are on a site unrelated to mining. Certainly, the record in *Maxxim*, *supra*,

demonstrates that MSHA does not fulfill its inspection obligations by inspecting only two of seven identical facilities owned and operated by subsidiaries of the same mining company.

In statutes, words are known by the company they keep. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps (the doctrine of *noscitur a sociis*)"). Just as in the federal courts, the Commission applies this rule to avoid ascribing to one word or phrase a meaning so broad that it is inconsistent with its accompanying words, thus giving "unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co*., 367 U.S. 303, 307 (1961).

In context, the definition of a "mine" states—consistent with the surrounding language, intent of the drafters, and purpose of the Mine Act—that MSHA jurisdiction extends to lands used in mining and appurtenant roads, and equipment and structures thereupon. The statute's goal is to protect miners from hazards found in mines or on appurtenant private ways. The Mine Act does not follow equipment after its removal to facilities where mining does not occur, nor does it apply to equipment before it has entered or after it has left a mine site because operators could use the equipment for mining in the future.

Subsection (B)'s coverage of appurtenant ways is clearly connected to lands covered by Subsection (A). The small extension of jurisdiction specifically to cover "appurtenant" roads is consistent with the larger protective purpose of the Act. Those areas may expose individuals to mining-related hazards. For the reasons above, it is clear that neither the purpose nor the language of the Act indicate a further geographical extension of jurisdiction under subsection (C). Coverage over appurtenant ways and roads under subsection (B) does not somehow imply coverage over lands distant from a mine site, owned by an independent company, and used for parking and repairing its vehicles.[15]

4. As an "Independent Contractor," KC Transport is an "Operator" Only When "Performing Services at a Mine."

"Operators" fall into two categories, as noted above. An entity that *does not* own, lease, operate, control, or supervise a coal or other mine is an "operator" only when that entity, acting as an independent contractor, *physically* performs services *at a mine*. 30 U.S.C. § 802(d).

[15] The Secretary cites *State of AK Dep't of Transp.*, 36 FMSHRC 2642, 2647-48 (Oct. 2014). There, the Commission considered an argument that equipment used along a public road to extract sand and gravel could not be a "mine" because it was not a "private way or road appurtenant" to an area of extraction. The Commission quickly dismissed that argument, finding the activity on that road constituted both extraction (mining) and milling. Therefore, the activity fell squarely under subsection (A) as land upon which mining and milling occurred. In turn, the activities fell under subsection (C) because the equipment's use was on land where mining was occurring. The case provides no support for the proposition that MSHA has jurisdiction over lands that are not appurtenant to a mine site and where no mining activities occur.

When KC Transport's trucks are at its parking area off the mine site, the trucks are not performing services at a mine, and KC Transport is not an "operator" for the Act's purposes. There is no reason to believe Congress envisioned MSHA following independent contractors back to their home locations, or anywhere else, away from the actual mine after their services.

Congress expressly addressed independent contractors to ensure that all employees working in a mine "are miners within the definition of the [Act]." S. Rep. No. 95-181 at 14; *Legis. Hist.* at 602. In other words, persons exposed to the same hazards as miners deserve the same protections granted to miners, regardless of their employer. *United Energy Syncs. Inc. v. MSHA*, 35 F.3d 971, 974-76 (4th Cir. 1994). Conversely, persons not working in a mine but who provide non-mining services off a mine site do *not* face mining hazards. Such workers do not require the Mine Act's extra protection and may otherwise be appropriately protected by the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*; *Old Dominion Power Co. v. Donovan*, 772 F2d 92, 95 (4th Cir. 1985). These jurisdictional concepts regarding independent contractors providing services at mines find expression in the Congressional intent and statutory purpose.

The Secretary concedes that KC Transport is an independent contractor that provides coal haulage services at Ramaco mines and the Elk Creek Plant as part of its business activities. Jt. Stips. 7, 10, 11. It offers services to other non-mining entities, as well. Jt. Stips. 7, 15. As an independent contractor, KC Transport is an operator subject to MSHA jurisdiction while performing work at a mine site.

Here, the inspector cited trucks that were not performing services at a mine. They had *left* the mine site where the trucks were "used in mining" and returned to the separately and independently-owned Emmett facility for parking and repair. Jt. Stips. 15-17. When the citations were issued, KC Transport was not performing services in a mine. Jt. Stip. 19. Thus, it was not an operator under section 3(d), further confirming that the Secretary did not have jurisdiction to issue the relevant citations.[16]

KC Transport used its Emmett facility for its independent contract trucking business that served both coal and non-coal customers. There is no evidence that Ramaco or any other coal operator used the facility for any mining functions or activities that might cause it to be considered a mining facility. *See Harman Mining Corp. v FMSHRC*, 671 F.2d 794 (4th Cir. 1981).

[16] We note that MSHA stated on the citations that the violations occurred at the Elk Creek Plant, despite the fact that the citations were issued in an area that was *not* on Ramaco property. *See* Citation Nos. 9222038 and 9222040. We view this as indicating MSHA's belief—which is borne out both in its standard inspection regimen and its citation form—that its exercise of jurisdiction over a contractor is necessarily contingent upon the contractor's activities occurring at a site within Mine Act jurisdiction.

5. Important Federal Circuit Court decisions in *Ziegler Coal* and *Maxxim Rebuild Co.* Demonstrate that KC Transport's Facility is not a "Mine."

Federal circuit courts have accepted these underlying jurisdictional precepts for more than 30 years. In *Dep't of Labor v. Ziegler Coal Co*., 853 F.2d 529, 533-34 (7th Cir. 1988), the Seventh Circuit noted the "geographical component" of the situs of a facility:

> The statutory definition of a coal mine plainly contemplates that the facilities used in the work of extracting coal must be located *on or below the area of land where the coal is extracted*, milled, or prepared. Section 802(h) speaks in terms of "an area of land" and facilities "placed upon . . . the surface of such land" used "in the work of extracting in such area [coal] . . . from its natural deposits."

Id. (emphasis added).

Ziegler involved a repair shop located approximately one and one-half miles away from the nearest Ziegler mine. *Id.* at 531. The court recognized that the Mine Act's legislative history contains a generous construction of the term "coal mine" but specifically noted that "this does not justify *disregarding* the statutory language which speaks in terms of the area in which coal is being extracted." *Id.* at 534 (emphasis added). The shop dealt only with equipment used in mining, but the court recognized that it was "one-step removed from those facilities used to perform work directly on the extracted coal." *Id.* at 536. The court went on to recognize "that a repair shop might be essential to an efficient mining operation, but this alone is insufficient to satisfy [section] 802(i)." *Id.*

Even more importantly, the U.S. Court of Appeals for the Sixth Circuit directly addressed circumstances nearly identical to this case in the previously cited *Maxxim* case. The Commission had applied a prior Commission case, *Jim Walter Res., Inc.*, 22 FMSHRC 21 (Jan. 2000), to affirm a finding that MSHA had jurisdiction over a maintenance shop that repaired, rebuilt, and fabricated mining equipment and parts for mining equipment. *Maxxim Rebuild Co. v. FMSHRC*, 38 FMSHRC 605 (Apr. 2016).

The facts in *Maxxim* were considerably more robust than the facts presented in this case. The shop operator (Maxxim) was a wholly-owned subsidiary of a mining company (Alpha Natural Resources) rather than a wholly independent business. The shop's location was on property owned by Sidney Coal Company, a sister company to Maxxim and a mining subsidiary of Alpha Natural Resources. *Id.* at 607. Maxxim's employees regularly went to the mining operation to complete boreholes to accommodate blasting equipment furnished by Maxxim. *Id*. The Commission found the work by Maxxim made the shop a "mine" though not located on an actual mining site.

The Sixth Circuit unanimously reversed the Commission.[17] In doing so, the circuit court emphasized the need for context and perspective. Looking at the case from the standpoint of protecting miners from mining hazards, the circuit court found jurisdiction extended to facilities and equipment *if* they are in or adjacent to—in essence, part of—a working mine. Again, this finding applied to a wholly-owned subsidiary of a mining company with a related company for which Maxxim supplied services engaged in active mining.

Quoting the Mine Act definitions cited above, as well as the definitions in Title IV of the Mine Act, the circuit court found these provisions teach:

> [A] lesson taught many times before. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme [ ] because the same terminology is used elsewhere in a context that makes its meaning clear or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."

Id. at 742 (citation omitted).

Going further, the circuit court considered the irrational practical implications of finding jurisdiction, including the common sense points raised below. Thus, the Sixth Circuit squarely held that MSHA did not have jurisdiction over the Maxxim facility, a repair shop more closely related to actual mining activities than the Emmett facility of KC Transport.

Finally, the circuit court noted that the Commission relied upon its finding of jurisdiction in *Jim Walter Resources, supra.* The court found that *Jim Walter* was decided incorrectly, stating:

> Far better, it seems to us, to stand by the text and context of § 802(h)(1), which limit the agency's jurisdiction to locations and equipment that are part of or adjacent to extraction, milling, and preparation sites.

Id. at 744.

[17] We do not hold that we are required to find the Seventh Circuit's decision in *Ziegler* or the Sixth Circuit's decision in *Maxxim* binding upon us for a case arising in the Fourth Circuit. Nevertheless, we recognize both as superior authorities. *See Westmoreland Coal Co.*, 11 FMSHRC 960, 964 (June 1989); *Ray, emp. by Leo Journagan Constr. Co. Inc.*, 20 FMSHRC 1014, 1025 (Sept 1998). As discussed herein, we find that both circuit courts' reasoning is consistent with the plain text, larger statutory context, and purpose of the Mine Act. We are in full accord with these decisions. For that reason, we write in agreement with, and rely upon, both decisions.

We are in accord with and fully accept the circuit court's analysis. Not only as a matter of authority, but because it aligns with the positions identified above following from the Coal Act, the Mine Act's legislative history, definitions in the Mine Act, and KC Transport's independent contractor status, as well as common sense as discussed below. We recognize that our decision today departs from the *Jim Walter* approach and certain prior Commission cases.[18] Our holding is that an independent repair, maintenance, or parking facility not located on or appurtenant to a mine site and not engaged in any extraction, milling, preparation, or other activities within the scope of subsection 3(h)(1)(A) is not a mine within the meaning of section 3(h) of the Mine Act. We further hold that tools, equipment, and the like not on a mine site or any appurtenance thereto and not engaged in any extraction, milling, preparation or other activities within the scope of subsection 3(h)(A) are not mines within the scope of subsection 3(h) of the Mine Act. Today's decision is consistent with the history, language, statutory framework, legislative intent, and two well-considered federal circuit court of appeals decisions.

6. Common Sense

Finally, we are well-advised to follow the Sixth Circuit's path and take an overall view of the business in which KC Transport is engaged and the illogical consequences of accepting the Secretary's construction of the Mine Act. KC Transport is an independent commercial trucking firm. It provides trucking services to different types of customers and stays in business by carrying different materials. In short, it is engaged in commercial trucking like thousands of other commercial trucking firms. When its trucks are in a mine providing services, they must conform to MSHA standards. Therefore, any assertion that denying jurisdiction over trucks at the KC Transport facility means that they could enter a mine and engage in extraction related work, without complying with MSHA's requirements, is without merit.[19]

The jurisdictional standard we describe is consistent with a common sense understanding of the Mine Act's purpose, namely protecting miners from *hazards associated with mining*. *See* 30 U.S.C. § 801. Common sense dictates that jurisdiction should not attach in situations, such as here, where no such risks particular to a mine exist at an independent parking area and garage removed from a mine site. No stipulation suggests that repair work at the Emmett facility is

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[18] *W.J. Bokus Indus. Inc.*, 16 FMSHRC 704, 708 (Apr. 1994); *US Steel Mining Co. Inc.*, 10 FMSHRC 146 (Feb. 1988).

[19] Our dissenting colleague asserts the majority approach would compromise safety by impeding the inspector's ability to issue citations. MSHA knew of the facility but never asserted a right to inspect the facility. Even then, MSHA only sought jurisdiction over the trucks. Indeed, MSHA went there to vacate citations issued on the trucks while *on the mine site*. If an inspector finds a pre-shift violation while examining a contractor's truck on the mine site, he may and will cite it, and similarly, an inspector can and should cite any equipment defect he sees on the mine site. *See, e.g., Ames Construction Inc.*, 33 FMSHRC 1607, 1611 (July 2011), *aff'd* 676 F.3d 1109 (D.C. Cir. 2012) (where independent contractor was performing services at a mine and was therefore an operator under the Act, contractor can be found strictly liable for a violation of a mandatory standard occurring at the mine). At no point is a truck allowed on the mine with a mine safety violation. Thus, the same vigorous safety enforcement applies.

different, in any respect, from the same type of work performed on tens of thousands of trucks throughout the nation at other facilities or, indeed, on any other KC Transport truck that hauls material other than coal. The record shows no difference in activities at the Emmett facility between contractor trucks hauling coal and contractor trucks moving non-coal materials.

As explained in *Maxxim*, *supra*, Congress tailored the Mine Act to protect against dangers that arise from handling coal and other minerals, not generic risks associated with making or repairing equipment. 848 F.3d at 743; *see also United Energy Svcs. Inc. v. MSHA*, 35 F3d 971, 975 (4th Cir. 1994) (emphasizing that employees deserve the same protections as miners if they are subject to the same risks). Jurisdiction over an independent and *offsite* truck repair facility, not exposing employees to any hazards associated with the mining process, does not serve the Mine Act's purpose.[20]

A manufacturing plant is not a mine because it manufactures equipment for use in mining and an electrical utility plant is not a mine only because it uses coal. *Id.* at 743; *Herman v. Assoc. Elec. Coop.*, 172 F.3d 1078, 1082-83 (8th Cir. 1999); *see also Bush & Burchett Inc v. Reich*, 117 F.3d 932 (6th Cir. 1997). If jurisdiction follows each piece of equipment, regardless of its travel away from the mine, then, as the Sixth Circuit said, there would be no stopping point. *Id.* at 744. Such an unbounded jurisdictional approach clearly leads to absurd results. A supervisor's pickup truck used at the mine for mining purposes would be subject to MSHA regulations—but not in the supervisor's garage at home.

The jurisdictional principles announced here apply equally to the attempt to exercise jurisdiction over the KC Transport facility and the trucks parked there.[21] The KC Transport facility is only one of the hundreds of facilities that manufacture, store, or repair the vast amount of equipment used in mines. Thus, we share the opinion and observations of the Sixth Circuit in *Maxxim* regarding attaching MSHA jurisdiction to *any* facility or *any* piece of equipment with *some* connection to mining, regardless of whether that connection exposes employees to relevant mining hazards.

[20] By no means is safety ignored in this situation. Where Mine Act jurisdiction does not apply, other jurisdictional oversight does, such as the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq.*, or additional state safety or transportation enforcement agencies. Nothing in the record casts doubt upon their enforcement capabilities.

[21] In reversing the Judge's finding of jurisdiction over the facility, we note the Judge's correct rejection of the Secretary's "rolling mines" theory of jurisdiction over the trucks as stand-alone pieces of equipment at a parking/repair facility. 42 FMSHRC at 231.

IV.

Conclusion

For the preceding reasons, we find that the Secretary did not have jurisdiction to issue Citation Nos. 9222038 and 9222040 involving trucks parked at KC Transport's Emmett Facility. Accordingly, we reverse the Judge's decision, grant KC Transport's Motion for Summary Decision, and vacate the citations.

William I. Althen, Commissioner

Marco M. Rajkovich, Jr., Commissioner

Chair Traynor, dissenting:

The question on review is whether an inspector from the Secretary of Labor's Mine Safety and Health Administration ("MSHA") had jurisdiction to issue citations to KC Transport, Inc., when he observed its employees violate a mandatory safety standard while repairing coal haul trucks at KC Transport's parking lot. As I will demonstrate, Congress has directly spoken to the issue; the Mine Act plainly states that "equipment . . . used in, or to be used in" mining processes are subject to the provisions of the Mine Act. 30 U.S.C. § 802(h)(1)(C).

A. Factual Summary

On March 11, 2019, MSHA Inspector John M. Smith traveled down a public road in Logan County, West Virginia and arrived at a manned-gate controlled by Ramaco Resources. The gate marked the point where the public road became Ramaco's private mine haul road. Only authorized personnel are permitted access to the mine road, which connects five coal mines (three deep mines, one strip mine and a highwall mine) with the Elk Creek Preparation Plant. The road, mines, and preparation plant are all owned and operated by Ramaco and subject to the provisions of the Mine Act.

Inspector Smith first traveled to the Elk Creek Plant. From the plant, Inspector Smith traveled about a mile down the haul road to KC Transport's parking lot. KC Transport is an independent contractor that provides haulage services at these Ramaco mine properties.[1] KC Transport's off-road trucks regularly haul coal from the five mines, over the haul road and to the Elk Creek Plant. The off-road trucks were not licensed to travel on-road at the time of the inspection and, therefore, were operated exclusively at Ramaco's mine complex. On this day, Inspector Smith was following-up on citations that had been previously issued to KC Transport's trucks during a MSHA inspection of a Ramaco mine.

KC Transport parks and maintains its trucks at a sand and gravel parking lot built on land controlled by Ramaco. The lot is separated from the haul road by an approximately 1000-foot side road. At the time of the inspection, KC Transport was in the process of constructing a maintenance facility next to the parking lot and was using two shipping containers and two service trucks to conduct repairs.[2] KC Transport shares the lot with a logging company.

In addition to the off-road trucks, KC Transport also operates on-road trucks out of this facility providing services for other customers. This was the first time that MSHA issued a

[1] KC Transport operates truck maintenance and storage facilities at five different locations. The Emmett, West Virginia facility at issue contained approximately 35 trucks, including both off-road trucks and on-road trucks.

[2] On the day Inspector Smith issued these citations he did not attempt to inspect the shipping containers, service trucks or any other trucks located at KC Transport's facility.

citation for conduct that occurred at this newly-constructed parking lot.[3] However, MSHA regularly inspects the same exact trucks when operated at Ramaco's mines and on its roads.

On March 11, 2019, during his visit to the parking lot, Inspector Smith observed two Mack haul trucks undergoing repairs. The trucks were not blocked against motion as required by the mandatory safety standard at 30 C.F.R. § 77.404(c). Accordingly, Inspector Smith issued two citations to KC Transport. Inspector Smith also issued an imminent danger order pursuant to section 107(a) of the Mine Act because a person was standing underneath the raised unblocked bed of one truck, a serious hazard that could result in a fatal injury. The issuance of the imminent danger order authorized the inspector to withdraw the individual from danger. The order is not at issue in this case.

The parties filed cross motions for summary decision with the Judge. KC Transport agreed to accept the two citations as issued if the Judge found that MSHA had properly asserted jurisdiction. Commission Procedural Rule 67, 29 C.F.R. § 2700.67, authorizes a Judge to grant summary decision if the entire record shows there is no genuine issue of material fact and the moving party is entitled to summary decision as a matter of law. KC Transport argued that MSHA lacked jurisdiction to issue the citations because the repairs were being performed at a facility that was not a "mine." The Secretary argued that MSHA has jurisdiction to enforce safety standards governing equipment "used in" mining.

The Judge granted the Secretary's motion for summary judgement, finding MSHA jurisdiction over the trucks as well as the parking lot facility.

B. Analysis

On review, KC Transport argues that section 3(h)(1)(C) of the Mine Act only covers equipment connected to "mines" as specified in sections 3(h)(1)(A) and (B). The Secretary maintains that section 3(h)(1)(C) covers equipment that is "used in" mining irrespective of its location. The Commission reviews a Judge's decision to grant summary decision *de novo*. *M-Class Mining, LLC*, 41 FMSHRC 579, 582 (Sept. 2019) (citations omitted).

The Mine Act provides that "[e]ach coal or other mine, the products of which enter commerce, or the operations or products of which affect commerce, and each operator of such mine, and every miner in such mine shall be subject to the provisions of this Act." 30 U.S.C. § 803. Section 3(h)(1) of the Mine Act defines a "coal or other mine" in relevant part as:

> (A) An area of land from which minerals are extracted in nonliquid form or, if in liquid form, are extracted with workers underground, (B) private ways and roads appurtenant to such area, and (C) lands, excavations, underground passageways, shafts, slopes, tunnels and

[3] In April 2018, MSHA visited a different KC Transport parking lot. MSHA issued citations that were later vacated. After those citations were issued, KC Transport constructed the subject sand and gravel parking lot, in an area that was further from the mine haul road than its previous lot.

> workings, structures, facilities, equipment, machines, tools, or other property including impoundments, retention dams, and tailings ponds, on the surface or underground, used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . 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.

30 U.S.C. § 802(h)(1).

Under the plain language of the Mine Act, the Mack coal haul trucks are "equipment . . . used in, or to be used in" "extracting" and "preparing coal" and thus I would find that the citations were properly issued. *Chevron U.S.A. Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (Under step one of *Chevron*, we ask "whether Congress has directly spoken to the precise question at issue. 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.").

In the legislative history of the Act, Congress made it clear "that what is considered to be a mine and to be regulated under this Act be given the *broadest possibl[e] interpretation*." S. Rep. No. 95-181, at 14 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Legislative History of the Federal Mine Safety and Health Act of 1977, at 602 (1978) ("Legis. Hist") (emphasis added).[4] Congress further stated that "doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act." *Id*. Accordingly, the Commission has consistently construed section 3(h)(1) broadly in favor of Mine Act coverage and recognized that "jurisdictional doubts [shall] be resolved in favor of coverage by the Mine Act." *Calmat Company of Arizona,* 27 FMSHRC 617, 624 (Sept. 2005) (holding that the cited haul trucks "were clearly related to mining operations and within MSHA's jurisdiction.").

In fact, the Commission has repeatedly held that pursuant to section 3(h)(1)(C), "equipment" that is "used in, or to be used in" mining is subject to the provisions of the Mine Act, *even* when located at a place that is not a "mine" pursuant to sections 3(h)(1)(A) and (B).[5] *See W.J. Bokus Industries, Inc*., 16 FMSHRC 704, 708 (Apr. 1994); *see also State of AK Dep't of Transp.*, 36 FMSHRC 2642, 2647-48 (Oct. 2014) (holding that equipment used to extract material is subject to the provisions of the Mine Act and noting that lack of jurisdiction over a public road under subsection (B) does not foreclose jurisdiction over operations on that road

[4] Indeed, in *Marshall v. Stoudt's Ferry Preparation Co*., 602 F.2d 589, 591-92 (3d Cir. 1979), *cert. denied*, 444 US 1015 (1980), the court stated that "the statute makes clear that the concept that was to be conveyed by the word ["mine"] is much more encompassing than the usual meaning attributed to it—the word means what the statute says it means."

[5] The Commission generally considers whether the equipment "used in" coal preparation or extraction is "essential to" or "integral to" the process. *See Maxxim Rebuild Co., LLC*, 38 FMSHRC 605, 607 (Apr. 2016).

under (A) or (C)). That is because under section 3(h)(1)(C) whether a particular piece of equipment is subject to the provisions of the Mine Act is primarily resolved by examining the equipment's function (not its location or ownership).[6]

In *W.J. Bokus*, the Commission held that "[u]nder section 3(h)(1), the Secretary *need only establish* that the items in issue *were used or to be used in mining*." 16 FMSHRC at 708 (emphasis added). Bokus Industries operated a sand and gravel mine on a portion of its property. An asphalt plant was also located on the property. Bokus had an arrangement by which it leased the asphalt plant to another company. Bokus also leased a garage, located adjacent to the asphalt plant, to the asphalt company. Under the terms of the lease, both Bokus Industries and the asphalt company could jointly use the garage. On review, the Commission held that it was not necessary to determine whether the garage was a "mine," because the evidence established that the cited pieces of equipment in the garage "were used or to be used in mining." *Id*. at 708. In so holding, the Commission relied upon the function of the cited equipment.[7]

In *Jim Walter Res, Inc*., 22 FMSHRC 21 (Jan. 2000), the Commission reaffirmed that "whether a mine operator's equipment is covered by the Mine Act *is not determined by its location but rather by its function*—that is, whether it is used in extracting or preparing coal." *Id*. at 27 n.11 (emphasis added). The Commission held that the supply shop at issue and its contents were subject to the provisions of the Mine Act because the "facilit[y]" was a "mine" and because it held "equipment . . . used in or to be used in" mining. *Id*. at 25.

My colleagues rely on the anomalous Sixth Circuit opinion in *Maxxim Rebuild*, 848 F.3d 737 (6th Cir. 2017), for their finding that these haul trucks were not subject to MSHA jurisdiction at the time the citations were issued.[8] My colleagues are wrong. Even under the narrow interpretation of section 3(h)(1) articulated in *Maxxim*, the citations and the Judge's decision should be affirmed.[9]

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[6] And not by reference to the folk notion of two Commissioners in the majority who declare that the technical definition of a "mine" in the Act cannot possibly encompass trucks parked immediately adjacent to mine property.

[7] *See also Justis Supply & Machine Shop*, 22 FMSHRC 1292, 1296 (Nov. 2000) (finding MSHA jurisdiction over a dragline assembly site where the record demonstrates that the dragline was intended for use at a nearby mine).

[8] My colleagues rely upon *U.S. Dept of Labor v. Ziegler Coal Co.*, 853 F.2d 529 (7th Cir. 1988), in which the court reviews a decision of the Benefits Review Board. Slip op. at 13. Because *Ziegler* neither concerns a decision of the Federal Mine Safety and Health Review Commission, nor MSHA jurisdiction, it is not relevant to our inquiry.

[9] The Sixth Circuit's decision in *Maxxim* is not binding on a case arising in the Fourth Circuit. As *Maxxim* is inconsistent with the plain language of section 3(h)(1) of the Mine Act, as well as its legislative history and Commission precedent, I believe it was wrongly decided.

Maxxim concerned a repair shop that mostly serviced mining equipment for Alpha Natural Resources—a large coal producer and Maxxim's parent company. *Id*. at 739. The shop also included a warehouse which stored at least one piece of equipment for Alpha. The Commission affirmed that MSHA properly asserted jurisdiction over the shop.[10] The Sixth Circuit reversed, holding that section 3(h)(1) of the Mine Act limited the agency's jurisdiction "to locations and equipment that are part of or adjacent to extraction, milling, and preparation sites." *Id*. at 744. The Sixth Circuit stated that the Mine Act does not govern "'machines, tools, or other property" wherever they may be found or made. *Id*. at 740. Instead, "equipment" covered by subsection (C) "*must be connected* to a working mine." *Id*. at 741 (emphasis added). The Sixth Circuit stated that section 3(h)(1) (A), (B), and (C) "are place connected, and place driven." The court ultimately held that the shop at issue "was not attached to or adjacent to a working mine," instead it was "one-step removed from" a "mine" and that "it makes no difference that Alpha's mines may one day use the shop's fabricated or repaired equipment" to extract coal. *Id*. at 742-43.

The facts of the case currently before the Commission are readily distinguishable from the facts in *Maxxim*. First, let's consider the location. The parking lot is not "one-step removed" from a mine site. Instead, it sits on a large tract of land that contains five working mines and a coal prep plant. Furthermore, it is *adjacent to an active mine haul road* (about 1000 feet away) which connects five mines and a preparation plant. Each of these entities, including the mine haul road, are a "mine." 30 U.S.C. § 803(h)(1)(B) ("private ways and roads appurtenant to such area"). Moreover, one cannot access the parking lot without first traveling through a manned gate controlled by the mine operator.

Second, and more importantly, let's consider direct evidence of the trucks' function. The two trucks are each "connected to a working mine" because the parties stipulated that each was "regularly used to haul coal from the five Ramaco mines to the Elk Creek prep plant" and are regularly inspected by MSHA. Jt. Stips. 18, 29. These stipulations are dispositive evidence of the trucks' function. In addition, the trucks were parked and undergoing maintenance work previously mandated by MSHA at the time these citations were issued. The repairs were necessary so that the trucks could continue hauling coal for Ramaco. These particular trucks were not licensed to travel over public roads at the time the citations were issued and thus could only be operated on Ramaco's property. Jt. Stip. 27. Accordingly, both trucks were obviously connected to a working mine. Even under *Maxxim*, the Secretary rightfully asserted Mine Act jurisdiction.

However, as demonstrated *infra*, even under the Sixth Circuit's narrow interpretation of section 3(h)(1), the Judge's decision in this case should be affirmed.

[10] The Commission concluded that under the plain language of section 3(h)(1)(C) the shop was subject to MSHA jurisdiction because it was a "facility" that was "used in" the process of "extracting" and preparing coal; the Maxxim facility worked on equipment that was integral to the mining process. 38 FMSHRC 605, 607 (Apr. 2016). Substantial evidence supported the Judge's conclusion that a significant part of the work performed at the shop was mining related. *Id*. at 608.

In summary, substantial evidence supports the Judge's finding that the coal haul trucks are "equipment" "used in" mining as defined at 30 U.S.C. § 802(h)(1). Furthermore, the Secretary demonstrated that the trucks are essential and integral to mining operations. The location of the parking lot, adjacent to the mine haul road, provides additional evidence of the trucks' function. [11] The Judge's finding of jurisdiction should be affirmed. Insofar as the Judge believed he had to address the jurisdiction over the facility to affirm jurisdiction over the trucks, he was in error.[12]

C. The Result of the Majority's Ruling

The majority's decision will result in decreased enforcement of safety standards governing the maintenance and operation of mining equipment at off-site facilities or on-site separate facilities. As a result, those workplaces will become more dangerous.

Powered haulage accounts for a large percentage of the fatal injuries in mining. In 2017, 50% of fatal injuries at mines involved powered haulage.[13] Haul trucks in particular present a variety of safety hazards. Two of the fatal injuries in 2017 occurred when a 340-ton haul truck collided with a passenger van at a mine site.[14]

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[11] Considering the location of the equipment as circumstantial evidence of function, while also requiring direct evidence of the equipment's function, helps to address KC Transport's concerns regarding overbroad MSHA jurisdiction. For example, certain implications can logically be drawn if a truck is parked at its manufacturer's warehouse versus being parked at a mine operator's on-site repair shop.

[12] The Judge primarily conducted a functional analysis, finding that the trucks perform "an integral part of the mining and preparation process" by transporting coal from the mines to the prep plant, and "the maintenance of the trucks at the facility is [also] essential to the coal hauling and preparation process." 42 FMSHRC at 237-38. However, the Judge also states that "the location of the trucks and the maintenance facility matter." *Id*. at 237. Essentially, in so doing, he was stating that location can serve as evidence that the equipment is "used in" the extraction or preparation of coal.

[13] Jennica Bellanca, Mining Project: Characterization of Haul Truck Health and Safety Issues, The National Institute for Occupational Safety and Health (NIOSH), www.cdc.gov/niosh/mining/researchprogram/projects/index.html.

[14] MSHA, Fatality Alert #11 & #12 - October 31, 2017, Mine Safety and Health Administration, www.msha.gov/data-reports/fatality-reports/2017/fatality-11-12-october-31-2017/fatality-alert.

More recently, from October 1 to December 13, 2021, five of the ten total fatal injuries at mines involved powered haulage.[15] In an attempt to better address those hazards, MSHA recently issued a notice of proposed rule-making to require mine operators to develop and implement powered haulage safety programs. *Safety Program for Surface Mobile Equipment*, 86 Fed. Reg. 50496 (Sept. 9, 2021). Apparently, as a result of the majority's decision, KC Transport will not be required to comply with this particular MSHA rule while maintaining trucks at its parking lot.

Of course, injuries can also occur during the maintenance of haul trucks. Recently, a mechanic was fatally injured when a haul truck bed collapsed on him while he was working on the truck.[16] The citation and imminent danger order issued to KC Transport on March 11, 2019, cite eerily similar facts. Inspector Smith observed a miner standing underneath the truck bed while it was in a raised position, without having been blocked to prevent motion. According to my colleagues' ruling, MSHA inspectors are not permitted to issue an order to stop work if they observe a similar dangerous occurrence in the future.

However, the complete implications of their ruling remain unclear. In fact, it gives rise to a number of questions. For instance, suppose an MSHA inspector stops a truck at a Ramaco mine. The inspector discovers that the KC Transport driver conducted an inadequate pre-shift examination earlier in the day.[17] If the pre-shift examination occurred at the parking lot, can MSHA issue a citation? Suppose the truck is later involved in a fatal accident at a mine. Are MSHA's accident investigators permitted to consider whether improper maintenance at the parking lot was a contributing factor? Or perhaps an MSHA inspector observes a haul truck driving on the mine road with an obvious equipment defect. The inspector follows the truck to the parking lot. Does the truck's presence at the lot prevent the MSHA inspector from issuing a citation for a defect that he observed at the mine road?

These questions and confusion demonstrate the absurdity of my colleagues' interpretation. Impeding MSHA's ability to prevent and investigate accidents that involve coal haul trucks frustrates Congress's goals in passing the Mine Act. 30 U.S.C. § 801(c) ("[H]ere is an urgent need to provide more effective means and measures for improving the working conditions and practices in the Nation's coal or other mines in order to prevent death and serious physical harm"). Haul truck accidents lead to fatal injuries.

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[15] MSHA: 'Work with us' as powered haulage, other concerns persist, Safety and Health Magazine, www.safetyandhealthmagazine.com/articles/22065-msha-work-with-us-as-powered-haulage-other-concerns-persist.

[16] MSHA, October 19, 2021 Fatality - Fatality Alert, Mine Safety and Health Administration, www.msha.gov/data-reports/fatality-reports/2021/october-19-2021-fatality/fatality-alert.

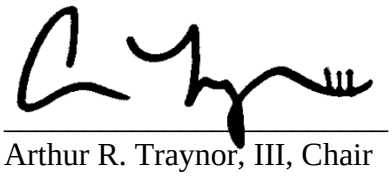
[17] The mandatory safety standard at 30 C.F.R. § 77.1606(a) states that "[m]obile loading and haulage equipment shall be inspected by a competent person before such equipment is placed in operation," and that safety defects shall be "recorded and reported."

Instead of permitting MSHA to ensure that mining equipment complies with minimum mandatory safety standards, my colleagues issue a decision that designates an area an "MSHA free zone." I am concerned that their decision will become a how-to-guide, used by the most cynical mine operators to avoid regulations.

My colleagues contend that the trucks at the parking lot are subject to the provisions of the Occupational Safety and Health Act, 29 U.S.C. § 651, and thus safety will not be compromised. They fail to acknowledge that the Occupational Safety and Health Administration ("OSHA") does not have the budget or the man-power to inspect even a fraction of the workplaces currently in its jurisdiction.

OSHA ended fiscal year 2021 with only 750 inspectors, the lowest number of inspectors in the 51-year history of the agency.[18] With similar staffing levels it would take 165 years for OSHA inspectors to visit every workplace in its jurisdiction once.[19] In contrast, the Mine Act requires MSHA to inspect each surface mine at least two times a year and each underground mine at least four times a year. 30 U.S.C. § 813(a). MSHA inspectors will continue to regularly visit Ramaco's mining complex, however, OSHA inspectors will rarely, if ever, be on the premises.[20]

Accordingly, miner safety would be best promoted if equipment "used in" mining was inspected by MSHA inspectors, as Congress intended. Thus, I dissent.



Arthur R. Traynor, III, Chair

[18] Bruce Rolfson, Federal Workplace Safety Inspector Numbers Fall Under Biden, Bloomberg Law, https://news.bloomberglaw.com/safety/federal-workplace-safety-inspector-numbers-tumble-under-biden.

[19] David Michaels and Jordan Braab, The Occupational Safety and Health Administration at 50: Protecting Workers in a Changing Economy, National Library of Medicine, www.ncbi.nlm.nih.gov/pmc/articles/PMC7144438/.

[20] The Mine Act also provides miners with other enhanced protections that are absent from the Occupational Safety and Health Act, including the right to temporary reinstatement to their position if fired for engaging in protected safety related activity. 30 U.S.C. § 815(c)(2).

Furthermore, MSHA inspectors have been granted greater access to inspect properties as compared to their OSHA counterparts. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (warrantless inspection under the OSH Act violates the 4th amendment); *Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (warrantless Mine Act inspections are "constitutionally permissible").

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