FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1331 PENNSYLVANIA AVENUE, NW, SUITE 520N

WASHINGTON, DC 20004-1710

APR 27 2016

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
v.	:	Docket Nos. KENT 2013-566 KENT 2013-989
MAXXIM REBUILD COMPANY, LLC	:	

BEFORE: Jordan, Chairman; Young, Cohen, Nakamura, and Althen, Commissioners

DECISION

BY THE COMMISSION:

These proceedings arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) ("Mine Act"). At issue is whether the Administrative Law Judge correctly affirmed the Secretary of Labor's assertion of jurisdiction by the Mine Safety and Health Administration ("MSHA") over an equipment maintenance facility. For the reasons stated below, we affirm the Judge's decisions.

I.

Factual and Procedural Background

A. Factual Background

Maxxim Rebuild Company, LLC ("Maxxim") operates the Sidney Shop, a maintenance shop that repairs, rebuilds and fabricates mining equipment and parts for mining equipment in Kentucky. While the facility fabricates some additional parts for non-mining related purposes, the majority of the parts are used in mining equipment. The Sidney Shop employs seven individuals, including one who travels to the mines, and includes two work bays in the shop area: one for welding and one for fabrication.

Maxxim owns and operates seven shops in six locations in Kentucky and West Virginia and is a subsidiary of Alpha Natural Resources ("Alpha").[1] Prior to January 2012, the Sidney Shop was located in West Virginia and was not being inspected by MSHA. In January 2012, the facility relocated to a site in Kentucky. The site had previously been operated by Clean Energy, an Alpha affiliate. Clean Energy subsequently closed its operation and abandoned the site. Before Maxxim took over occupancy of the abandoned Kentucky site, the shop area was modified and updated. At that time, engineers for Sidney Coal, also an Alpha company, occupied the upstairs offices in the building at the site.

At the time the citations contested in this case were issued, five of the Maxxim shops were inspected by the Occupational Safety and Health Administration ("OSHA") and two were inspected by MSHA, including the Sidney Shop. The Sidney Shop includes a warehouse, which stores at least one piece of equipment for Alpha. This facility has been inspected twice since Maxxim took over occupancy of the Kentucky site. The first inspection resulted in two violations. The second inspection resulted in three citations that Maxxim contested in the case docketed as No. KENT 2013-566.

In July 2013, the Judge held a hearing and considered post-hearing briefs. In her decision, the Judge found that MSHA has jurisdiction over the facility and that the operator violated the standards in question. 35 FMSHRC 3261 (Oct. 2013) (ALJ).

In February 2014, the Judge issued a decision in a separate case involving Maxxim that presented an identical issue of MSHA jurisdiction (No. KENT 2013-989). 36 FMSHRC 378 (Feb. 2014) (ALJ). The Judge found the reasoning and findings in her decision in No. KENT 2013-566 to be applicable to her decision in the separate case, and again affirmed MSHA jurisdiction.

Maxxim filed petitions for discretionary review in both cases. The Commission granted both petitions and consolidated the two cases for appellate review.

B. The Judge's Decisions

In her decision in the first case, the Judge found that the Sidney Shop is subject to MSHA jurisdiction because the shop is a "mine" as defined in the Mine Act and as applied in Commission precedent. The Judge also found that MSHA acted within its discretion in exercising jurisdiction over the shop. 35 FMSHRC at 3264-65.

In finding that MSHA has jurisdiction over the shop, the Judge concluded that the plain language definition of a "mine" in section 3(h)(1) of the Act, 30 U.S.C. § 802(h)(1), applies to the facility. *Id.* at 3263. The Judge found that the shop is "a dedicated off-site facility of a mine operator where employees maintain, repair and fabricate equipment, used almost exclusively at

[1] Maxxim asserts that it is merely an "affiliate" of Alpha, while the Secretary contends that the facility is a wholly owned subsidiary of Alpha. Alpha's Form 10-K for 2012, filed with the Securities and Exchange Commission, clearly identifies Maxxim as a "subsidiary" of Alpha. S. Ex. 6.

Alpha's coal extraction sites and preparation plants." *Id.* at 3264. 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." *Id.* at 3264-65.

The Judge rejected Maxxim's claim that the shop is not a "mine" because the activities performed at the site are too remote from the mining process. *Id.* at 3262. Instead, the Judge noted that a "mine," as defined in the Act, "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" (citing *Harless, Inc.*, 16 FMSHRC 683, 687 (Apr. 1994)). *Id.* at 3265.

The Judge also rejected Maxxim's claim that the Secretary abused his discretion by inconsistently exercising jurisdiction over this facility and other Maxxim facilities. *Id.* Accordingly, the Judge affirmed MSHA's jurisdiction over the Sidney Shop and affirmed the three citations at issue.

II.

Disposition

A. The Judge Properly Affirmed MSHA's Assertion of Jurisdiction.

We conclude that the plain language of section 3(h)(1)(C) qualifies the facility as a "mine." Section 3(h)(1)(C) defines "coal or other mine" in relevant part to mean:

> 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 . . . minerals from their natural deposits . . . or used in . . . the work of preparing coal.*

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

The Sidney Shop is a "facility" that is "used in" the process of "extracting" and preparing coal. Specifically, the facility maintains, repairs, and fabricates equipment that is used in the mining process. The record establishes that the facility performs work on belt heads, highwall miners, loaders, excavators and other equipment that is used in coal extraction and coal preparation facilities operated by Maxxim's parent company Alpha. Tr. 23-24. The shop also supplies parts for both surface and underground mining equipment. *Id.* Furthermore, the shop, located on property owned by Sidney Coal, another subsidiary of Alpha, has seven employees. Although six of the employees work only at the shop, the seventh visits mine sites at mine operators' requests, completing bore holes to accommodate blasting equipment furnished by

Maxxim. Tr. 18-19. Thus, the Maxxim facility works on equipment that is integral to the mining process. As a result, the facility is a "mine."

Commission case law strongly supports this conclusion. In *Jim Walter Resources, Inc.*, 22 FMSHRC 21 (Jan. 2000) ("*JWR*"), the Commission held that an offsite supply shop similar to the instant one was a "mine" as defined by the Act. In that case, the supply shop housed safety glasses, hard hats, conveyor belts, and other tools and equipment that were used for mining purposes. In holding that the shop constituted a "mine," the Commission confirmed that the definition of "mine" must be given a broad interpretation.[2]

The Commission further 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 and in the milling or preparation of the minerals." 22 FMSHRC at 25. As with the shop in *JWR*, the Sidney Shop constitutes a "mine," because, despite being located off-site, it fabricates, repairs, and stores equipment that is used in connection with the extraction and preparation of coal.

Maxxim's attempt to distinguish *JWR* from the instant case is unpersuasive. In doing so, Maxxim relies primarily on two allegedly distinguishing factors: (1) that in this case, the shop does not perform work exclusively for mining companies; and (2) that employees of the Sidney Shop are not generally on the sites of the mines to which they deliver supplies and are consequently not exposed to the same hazards as miners who work on site at the mines.

Neither of these assertions alters the fact that the Judge found 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 at mines owned by Alpha subsidiaries. 35 FMSHRC at 3264. This finding is supported by the testimony of Maxxim's highwall supervisor, Keith Canterbury, who testified that "75% of the time [at the facility] . . . is spent on working on equipment that's going to be used in an Alpha Natural Resources coal mine." Tr. 21. Another portion of the Sidney Shop's work is performed for non-Alpha coal mines. As a result, the Judge's finding that a significant part of the Sidney Shop's work is mining-related is amply supported by substantial evidence. On this basis, we reject Maxxim's attempt to distinguish *JWR* from the instant case.

We further reject Maxxim's reliance on other decisions that purportedly support its position that MSHA lacks jurisdiction over the Sidney Shop. Maxxim's claim that the Judge's finding of MSHA jurisdiction is improper under the Sixth Circuit's decision in *Bush & Burchett v. Reich*, 117 F.3d 932 (6th Cir. 1997), is unpersuasive because that case is readily distinguishable. Maxxim cites *Bush & Burchett* for the proposition that roads that are shared with the public are not subject to MSHA jurisdiction. The Sixth Circuit held that a road used to connect a surface mine on one side of a river to a rail load-out facility on the other side was not a

---

[2] The legislative history of the Mine Act emphasizes that "what is considered to be a mine and to be regulated under this Act [shall] be given the broadest possibl[e] interpretation, and . . . doubts [shall] be resolved in favor of inclusion of a facility within the coverage of the Act." S. Rep. No. 95-181 at 14 (1977).

"mine" because the road was open to public use even though it was constructed for the benefit of the mine and the mine operator was a primary user of the road. 117 F.3d at 937. Maxxim contends that, in this situation, its other customers, which are not "mines" within the purview of MSHA, are utilizing the Maxxim facilities, and that the same logic should apply here. The *Bush & Burchett* decision, however, did not turn on the meaning of section 3(h)(1)(C)'s "used in or to be used in" the work of extracting minerals clause. Rather, the decision rested on the meaning of section 3(h)(l)(B)'s statement that "mine" includes "private ways and roads appurtenant to [an extraction] area." *See id.* at 936-39.

Likewise, Maxxim's argument that MSHA jurisdiction is improper under the test articulated by the Commission in *Oliver M. Elam*, 4 FMSHRC 5 (1982), is unpersuasive because *Elam* is distinguishable from the present case under section 3(h)(1)(C). Maxxim argues that under *Elam*, the Commission must find that the "nature of the operation" is the same as that of "[an] . . . operator of [a] . . . coal mine," in order to find that the facility is engaged in the "work of preparing coal" within the meaning of section 3(h)(l)(C). 4 FMSHRC at 7. Maxxim then argues that the nature of the operations at the Sidney Shop does not remotely resemble mining operations.

However, Maxxim misses the point. *Elam* involved a commercial dock on the Ohio River where coal and other products were loaded onto barges. Unlike with *Elam*, the issue in the present case is whether the operation in question constitutes a facility "used in or to be used in" the coal extraction process. As we emphasized in *JWR*, *Elam* and its progeny "are inapplicable" in coal extraction cases. *JWR*, 22 FMSHRC at 26.

The same distinction holds true for Maxxim's claim that jurisdiction is improper under the Third Circuit's decision in *Lancashire Coal Co. v. Secretary of Labor*, 968 F.2d 388 (3d Cir. 1992). In *Lancashire*, the issue was whether the reclamation of structures (in that case, silos) resulting from "the work of preparing coal" triggered jurisdiction within the meaning of section 3(h)(1)(C). In finding no jurisdiction, the Court found dispositive the absence of the words "resulting from" before the words "the work of preparing coal." *Id.* at 392. As stated above however, the issue here is whether the Sidney Shop is a "mine" within the meaning of section 3(h)(1)(C)'s "used in or to be used in" clause in the context of the coal extraction process – as opposed to within the meaning of the "resulting from" clause.

Finally, Maxxim argues that the Mine Act and its standards do not fit this facility because of the nature of the work completed at the site. This argument, however, is unavailing because it overlooks the policy choice made by Congress, as reflected in the language of the Act. Maxxim references particular MSHA requirements in attempting to show that they are inappropriate for the repair shop, and that Occupational Safety and Health Act standards are more appropriate. Given that the language of section 3(h)(l)(C) clearly places the shop under MSHA jurisdiction, Congress has expressed its preference, and that preference is dispositive. *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 the Congress," as expressed in the plain language of the statute). Accordingly, we conclude that the plain language of the Act qualifies the facility as a "mine."

B. MSHA Acted Within its Discretion in Exercising Jurisdiction Over the Facility.

Maxxim additionally claims that MSHA's enforcement history has been inconsistent in two ways: (1) MSHA reasserted jurisdiction over the Sidney Shop only after it ceased to assert jurisdiction over its predecessor shop in West Virginia and (2) MSHA asserted jurisdiction over the Sidney Shop while not asserting jurisdiction over five other Maxxim shops.

There is some evidence to support the claim that the Sidney Shop is similarly situated to the predecessor West Virginia shop.[3] The Commission, however, has long rejected estoppel defenses against the federal government and has held that an inconsistent enforcement history by MSHA inspectors "does not prevent MSHA from proceeding under an application of the standard that it concludes is correct." *Mach Mining, LLC,* 34 FMSHRC 1769, 1774 (Aug. 2012), citing *Nolichuckey Sand Co.*, 22 FMSHRC 1057, 1063-64 (Sept. 2000); *see also Warren Steen Constr., Inc.*, 14 FMSHRC 1125, 1131 (July 1992) ("prior instances of inconsistent action by MSHA do not constitute a viable defense to liability"). Rather, operators are "expected to know the law and may not rely on the conduct of [inspectors] contrary to law." *Emery Mining Corp. v. SOL*, 744 F.2d 1411, 1416 (10th Cir. 1984).

Moreover, the Commission held in *Shamokin Filler Co.*, 34 FMSHRC 1897 (Aug. 2012), *aff'd*, 772 F.3d 330 (3d Cir. 2014), *cert. denied*, 135 S.Ct. 1549 (2015), that MSHA's conduct or communications related to a decision not to assert jurisdiction over specific facilities are irrelevant to whether a different facility is subject to jurisdiction. This is because "[i]t is unlikely that any two facilities would be identical and warrant the same conclusion on jurisdiction." *Id.* at 1907. Therefore, the fact that MSHA chose not to inspect Maxxim's facility in the past does not preclude MSHA from doing so in the future.

As to its other contention, Maxxim failed to submit evidence establishing that the Sidney Shop is similar to the other five Maxxim shops. Maxxim simply asserts that the Sidney shop and the five other shops are "similarly situated." *See* Maxxim Br. at 6, 25. That assertion, however, is unsupported by the record.[4] As a result, Maxxim has failed to prove that MSHA's

---

[3] Maxxim supervisor Keith Canterbury testified on cross-examination that "75% of the jobs [he does at the Sidney Shop is] substantially similar to the work [he did] when [he] worked for [the West Virginia Shop]." Tr. 45. However, he also testified that the Sidney Shop is different, i.e., larger and better equipped, from the West Virginia Shop. *See* Maxxim Br. at 3, citing Tr. 34-35 (testimony that facility was "extensively remodeled," which included the renovation of a warehouse into another working bay, making a total of two bays present on site, and that "hoists" and an "electrical infrastructure" were added, along with the addition of a "crane structure").

[4] Maxxim's failure to establish that the other five shops are similar to the Sidney Shop also undermines its equal protection claim because Maxxim cannot meet its burden of showing that there is no rational relationship between the purpose of the Act and the decision to treat the Sidney Shop differently from the other shops. *See Williamson v. Lee Optical*, 348 U.S. 483 (1955) (placing on the challenging party the burden of proving that there is no rational

enforcement history with regard to the Sidney Shop and the other facilities was inconsistent, let alone so divergent as to approach the degree required to show abuse of discretion. Accordingly, we conclude that MSHA acted within its discretion in exercising jurisdiction over the facility.

III.

Conclusion

Based on the reasons above, we affirm the Judge's decisions finding that MSHA has jurisdiction over Maxxim's Sidney Shop.

Mary Lu Jordan, Chairman

Michael G. Young, Commissioner

Robert F. Cohen, Jr., Commissioner

Patrick K. Nakamura, Commissioner

William I. Althen, Commissioner

---

relationship between the agency's regulation and a legitimate governmental interest); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 79-80 (1911).

Distribution:

R. Henry Moore, Esq.
Jackson Kelly, PLLC
Three Gateway Center, Suite 1340
401 Liberty Avenue
Pittsburgh, PA 15222

W. Christian Schumann, Esq.
Office of the Solicitor
U.S. Department of Labor
201 12th St., South, Suite 401
Arlington, VA 22202-5450

Melanie Garris
Office of Civil Penalty Compliance
MSHA
U.S. Dept. Of Labor
201 12th Street South, Suite 401
Arlington, VA 22202-5450

Administrative Law Judge Margaret A. Miller
Office of Administrative Law Judges
Federal Mine Safety & Health Review Commission
721 19TH St., Suite 443
Denver, CO 80202-5268