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**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

<b>SECRETARY OF LABOR</b>	)	<b>BEFORE THE COMMISSION</b>
<b>MINE SAFETY AND</b>	)	
<b>HEALTH ADMINISTRATION (MSHA),</b>	)	<b>Docket No. WEVA 2019-0458</b>
	)	
<b>Petitioner,</b>	)	<b>A.C. No. 46-02444-487883</b>
	)	
<b>v.</b>	)	<b>Contractor No. A8938</b>
	)	
<b>K C TRANSPORT, INC.</b>	)	
	)	<b>Mine: Elk Creek Plant</b>
<b>Respondent.</b>	)	
	)	

**K C TRANSPORT, INC.’s**  
**PETITION FOR DISCRETIONARY REVIEW**

K C Transport, Inc. (“K C Transport”), hereby petitions the Federal Mine Safety and Health Review Commission (“Commission”), pursuant to Section 113(d)(2)(A)(ii) of the Federal Mine Safety and Health Act of 1977, as amended (“Mine Act”), 30 U.S.C. § 823(d)(2)(A)(ii), and 29 C.F.R. §2700.70(c), for review of Administrative Law Judge John Kent Lewis’ (“ALJ”) March 3, 2020 Order Denying Respondent’s Motion for Summary Decision and Granting Secretary’s Motion for Summary Decision (“Decision”) as to Citation Nos. 9222038 and 9222040, both for alleged violations of 30 C.F.R. § 77.404(c).

**I. WHY THE COMMISSION SHOULD REVIEW THE ALJ’S DECISION.**

The ALJ’s Decision on Citation Nos. 9222038 and 9222040 (for violations of 30 C.F.R. § 77.404(c)) raises substantial issues of law related to jurisdiction and when an ALJ may deviate from the relief requested by the Secretary and issue a declaratory judgment. The ALJ committed legal error and the ALJ’s errors of law are likely to be repeated in the absence of review by the Commission.

For background, this proceeding involves two citations, each alleging violations of 30 C.F.R. § 77.404(c), issued to K C Transport by MSHA Inspector John M. Smith (“Inspector Smith”) on March 11, 2019 on two trucks parked in a parking lot area used by K.C. Transport. K C Transport’s maintenance facility was located off bonded property near Ramaco Resource LLC’s Elk Creek plant (“Ramaco”). (Decision, p. 2; Stip. No. 3.) In addition to the Elk Creek plant, Ramaco also owns and operates five (5) mining operations in the vicinity of K C Transport’s Emmett facility that are routinely inspected by MSHA; including, three deep mines, one surface mine and one highwall miner. (Stip. No. 14). Each of these facilities provided ample opportunities for MSHA to inspect K C Transport’s trucks without the need to leave the mine and follow the trucks to K C Transport’s maintenance facility.

The K C Transport maintenance facility serves multiple mining and non-mining operations. At the time of the citations, the area was a parking lot with maintenance trailers. K C Transport shared the parking lot with a logging company. The area where the trucks were cited would later (after the citations were issued) become a parking lot for K C Transport’s new 60’ x 70’ maintenance facility (Stip. No. 3.). The area was a mile from the Elk Creek coal preparation plant (“Elk Creek plant”) in Emmett, West Virginia. (Decision, p. 3; Stip. Nos. 2, 3, 4, and Exhibit A to Stipulations) Here, the ALJ declared that MSHA had jurisdiction not just over the two cited trucks, but even over K C Transport’s entire new 60’ x 70’ maintenance facility which did not even exist at the time of the citations. Decision, p. 12.

An initial fundamental problem with the ALJ’s decision is that it significantly expanded the jurisdictional request of the Secretary, without prior notice to Respondent. MSHA’s Motion for Summary Judgment specifically sought only to obtain jurisdiction over the two cited trucks.

The Secretary made no request for jurisdiction over the Emmett maintenance facility, including the unbuilt (at the time) maintenance facility. In this regard, the Secretary argued: “the only issue in dispute concerning the citations is whether the trucks are subject to MSHA coverage.” Secretary’s Motion, p. 1. The Secretary’s motion concluded: “the Secretary respectfully requests that the Court find that the trucks referenced in Citation Nos. 9222038 and 9222040 were subject to Mine Act coverage.” Secretary’s Motion, p. 20. Even the ALJ acknowledged that the Secretary only sought jurisdiction over the trucks. Decision, p. 10.

In response to the Secretary’s limited request, the ALJ first concluded “MSHA cannot simply attach jurisdiction to the trucks and follow them wherever they may drive.” Decision, p. 12. Then, after agreeing with the Respondent on this dispositive point, the ALJ decided to depart from the relief requested by the Secretary and issue an advisory declaratory judgment (notwithstanding that the Secretary did not petition for this), holding that MSHA had the authority to regulate K C Transport’s entire Emmett maintenance facility, a facility which maintains trucks, including those not used in mining activities.

Ironically, under the guise of purportedly *limiting* jurisdiction, the ALJ greatly *expanded* the jurisdiction sought by the Secretary. The ALJ stated that the relief the Secretary sought was far too broad noting: “The Secretary's argument that MSHA has jurisdiction over a truck that was used to haul coal, no matter where that truck is located, expands MSHA's jurisdiction to every road, parking lot, garage, and facility in the country.” Then, while purporting to limit jurisdiction, the ALJ issued an un-petitioned for declaratory judgment, without prior notice to K C Transport, and gave the Secretary far more relief than it requested, holding “the Mine Act clearly defines a

mine in a manner that includes, under the facts of this case, both the maintenance facility and the equipment (or trucks) therein.” Decision, p. 12.

This decision by the ALJ constitutes an unannounced declaratory judgment and affects K C Transport’s 60’ x 70’ maintenance facility which did not even exist at the time of the citations, where there was no case or controversy before the Court. The only citations before the court were those involving the two trucks. When the citations were issued, the trucks were serviced from trailers at K C Transport’s Emmett maintenance site. Now, the trucks are serviced by a 60’ x 70’ full service garage that services trucks performing many types of work other than mining.<sup>1</sup> Yet, the ALJ has basically found that MSHA had jurisdiction over this facility that did not even exist at the time of the citations. The ALJ even ordered MSHA that it had an obligation to conduct semi-annual inspections of the facility. Decision, n. 9. This is a clear case of judicial overreach which should be rejected and vacated by the Commission.

This case does not meet the requirements for a declaratory judgment decision. In this regard, the Commission has held that “for any grant of Commission declaratory relief, the complainant must show that there is an actual, not moot, controversy under the Mine Act between the parties, that the issue as to which relief is sought is ripe for adjudication, and that the threat of injury to the complainant is real, not speculative. See generally, *Mid-Continent Resources, Inc.*, 12 FMSHRC 949, 954 (May 1990); 5 *J. Stein, G. Mitchell & B. Mezines, Administrative Law* § 46.03 (1988). In this case, the Secretary filed no Complaint seeking declaratory judgment. The Secretary only asked for jurisdiction to inspect the trucks. Further, there was no actual and ripe controversy as to whether MSHA could regulate the entire Emmett maintenance facility including

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<sup>1</sup> Approximately 40% of the trucking was for businesses other than Ramaco’s five mines. Decision, 4.

the then unbuilt 60' x 70' facility before the Court since MSHA's position was that it only wanted to regulate the trucks in the parking lot.

K C Transport had no notice that MSHA was even requesting a declaratory judgment to expand jurisdiction to the entire 60' x 70' maintenance facility.<sup>2</sup> How could K C Transport predict that the Court would transform the Secretary's stated intention that all it wanted was to regulate was the trucks into an Order that henceforth the entire Emmett maintenance facility should be inspected every six months? This unexpected sleight of hand by the ALJ is fundamentally unfair to K C Transport should be rejected.

If the Commission affirms the ALJ's Decision, this is the first time that an ALJ has declared jurisdiction to exist over a facility that did not yet exist at the time of the Citations. This abuse of discretion takes MSHA jurisdictional disputes to a new level of advisory jurisdiction. The Commission should reject this unwarranted overreach.

Aside from the unwarranted expansion of unrequested jurisdiction, the ALJ committed clear legal error in holding that the citations should be affirmed pursuant to Section 3(h)(1)(C) (30 U.S.C. § 802(h)(1)(C)) of the Mine Act. In this regard, the ALJ specifically limited his decision to 3(h)(1)(C) of the Mine Act: "this Court finds that the maintenance facility was a "mine" under Section 3(h)(1)(C), and because the trucks were used in mining and parked at the facility, they constituted "equipment" under the same section." Decision, p. 11.<sup>3</sup>

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<sup>2</sup> In fact, prior to these two citations, MSHA had specifically disclaimed jurisdictional interest over similar K C Transport maintenance trailers or the parking areas adjacent to them and had vacated citations related to a trailer and parking lot. (Decision, p. 5; Stipulation No. 22). At the same time MSHA vacated the two earlier citations, K C Transport paid citations for any trucks located on the haul road. After those earlier citations, K C Transport moved its maintenance area 1000' away from the haul road and bonded property. Until the two citations at issue, MSHA never cited K C Transport's trucks unless they were on the haul road or at the mines.

<sup>3</sup> Similarly, the Secretary contended:

It is clear that the trucks are not “equipment, machines, tools...used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits” at a mine. This definition must necessarily have some context. Here, the context is provided by the land where minerals are extracted and processed under Subsection A.<sup>4</sup> A broad interpretation of Subsection C was soundly rejected by the Sixth Circuit in *Maxxim Rebuild Co., LLC. v. FMSHRC*, 848 F.3d 737, 444 (6th Cir. 2017) (“Once [MSHA] tries to extend its jurisdiction to *off-site shops* and *off-site equipment*, the language of the statute provides *no stopping point*, leaving the scope of its jurisdiction to the *whims* of the Secretary.”)(emphasis added). K C Transport’s maintenance facility and the area where the trucks were cited was the epitome of an off-site shop and the trucks are the epitome of off-site equipment. For these reasons, the ALJ’s Decision should be reversed.

## II. STATEMENT OF PERTINENT FACTS

K C Transport is an independent trucking company that provides various types of hauling services to its customers; including, coal hauling, earth hauling and gravel hauling services. Decision, p. 4; Stip. Nos. 7, 14. K C Transport provides its hauling services to a wide array of customers, including, but not limited to the Ramaco owned mines near the Emmett facility. *Id.*, Stip. No. 8. To service and maintain its large truck fleet, K C Transport owns and operates maintenance and storage facilities at five (5) locations in two different states. K C Transport

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[I]t is clear that subsection (A) concerning land, and subsection (B) concerning private ways and roads, are not at issue. Specifically, it is the portion of subsection (C) that mentions "structures, facilities, equipment, machines, tools...used in, or to be used in, or resulting, 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," that the Secretary argues provides jurisdiction over the trucks. Decision, p. 13, citing Secretary’s Brief.

<sup>4</sup> The Secretary agrees that Subsection (A) refers specifically to the “extraction” area. *Secretary v. National Cement Co. of Cal, Inc.*, 573 F.3d 788 (2009). Logically, Subsection C refers to the facilities, equipment, machines and tools at the extraction/preparation point.

maintains one facility in Tazewell, Virginia; one facility in Bluefield, West Virginia; one facility in Man, West Virginia; two facilities in Princeton, West Virginia; and the facility at issue here, in Emmett, West Virginia. Decision, p. 3; Stip. No. 9.

K C Transport elected to construct the Emmett facility to serve as a convenient and centralized location for the maintenance, repair and staging of its truck fleet that provides hauling services to customers located in that area of Logan and Wyoming counties. Stip. Nos. 16. K C Transport solely purchased all the materials for the construction of the Emmett facility and insures the property. Decision, p. 3; Stip. No. 4. Overall, K C Transport operates approximately thirty-five (35) trucks from the Emmett facility consisting of both on and off-road trucks. Decision, p. 6; Stip. No. 30. The off-road trucks provide coal hauling services to the five (5) nearby Ramaco owned mines and to other nearby mines owned by different operators. Decision, p. 4; Stip. Nos. 14, 15. The on-road trucks provide earth and gravel hauling services to other, non-coal mining customers in the area, including AEP. Decision, p. 4; Stip. Nos. 14, 15.

The land where K C Transport's Emmett facility is located it is not permitted or bonded for mining. Decision, p. 5; Stip. No. 17. Ramaco has no personnel or equipment at this location. Decision, p. 4; Stip. No. 13. Nor is it used by Ramaco for mining operations. Stip. No. 18. Further, Ramaco has no plans to operate any mine at or near the location of the where K C Transport's Emmett facility is located. Decision, p. 4; Stip. No. 18. The Emmett facility is across a creek from the haulage road and well up a hollow along Right-Hand Fork Road, which branches off from the main haulage road running by the Elk Creek Plant.<sup>5</sup> Decision, p. 5; Stip. No. 25. It is located more

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<sup>5</sup> See "Elk Creek Operations Area Map" attached to K C Transport's Motion for Summary Judgment Exhibit A attached to the Stipulations. Decision, p. 5. The parties agreed that this map accurately depicts the location of K C Transport's Emmett maintenance area and the nearest mine, which is the Elk Creek Preparation Plant.

than one (1) mile from the Elk Creek Plant (i.e. the nearest coal extraction/preparation facility), approximately four (4) to five (5) miles from the three Ramaco deep mines, approximately six (6) miles from the Ramaco strip mine/highwall miner and is on the other side of a creek, approximately 1000' away from the haulage road. The property is not bonded by the State of West Virginia. Decision, p. 5; Stip. No. 17.

On the day the citations were issued, the materials for K C Transport's planned 60' x 70' metal maintenance building, were on location but were temporarily stored on pallets awaiting construction. Decision, p. 3; Stip. No. 6. However, the adjacent truck parking lot (where the trucks referenced in Citation Nos. 9222038 and 9222040 were located) had already been completed and the area was being actively used by K C Transport and an unaffiliated logging company to park their logging trucks. Decision, p. 3, 4; Stip. Nos. 6, 13. At the time, K C Transport had two shipping containers there and two maintenance trucks which it used to maintain its trucks. Decision, p. 5; Stip. No. 23. Prior to March 11, 2019, MSHA had never previously attempted to enter K C Transport's Emmett facility parking lot. Decision, p. 5; Stip. No. 21. Similarly, MSHA has not cited any trucks at this facility since Citation Nos. 9222038 and 9222040 were issued. *Id.* With the exception of these two citations, MSHA has shown no interest in inspecting this area.

Previously, on April 3, 2018, MSHA issued Citation Nos. 9174394 and 9174395 to K C Transport on a work trailer and a muddy parking area that was located on bonded, permitted property, directly adjacent to where the main haulage road intersects with Right-Hand Fork Road. Decision, p. 5, Stip. No. 22. In April of 2018, K C Transport was utilizing this area for its truck fleet prior to the re-locating the facility off the bonded, permitted mine and up a hollow where there was no mining taking place. *Id.* The area cited in April was adjacent to the haulage road. *Id.*



Notably, MSHA ultimately vacated these citations. *Id.* Despite the vacatur, that incident was a factor which lead to K C Transport's decision to construct a new facility distinctly separated from the haulage road in an attempt to make it clear that the K C Transport maintenance facility was separate from the mine. *Id.*

With respect to the citations at issue, Inspector Smith was conducting inspection activities at the Elk Creek plant and then attempted to locate the trucks to terminate a previously issued citation. Stip. No. 5. To locate the trucks, he traveled more than one mile along the haulage road past the Elk Creek plant, turned off of the haulage road, crossed the creek and traveled up Right-Hand Fork Road through an opened gate to where the Emmett facility is located. Stip. Nos. 5, 24. Upon arrival, Inspector Smith discovered maintenance work being performed on two K C Transport's trucks in the Emmett facility parking lot and issued Citation Nos. 9222038 and 9222040. Decision p. 3; Stip. No. 5.

While the two cited trucks are routinely inspected by MSHA when performing hauling services to the nearby Ramaco mines and the Elk Creek plant, they were never inspected at this K C Transport maintenance facility location before or after the citations. Decision, p. 5; Stip. No. 21. K C Transport contends that the trucks are not within MSHA jurisdiction and not subject to inspection while parked at the Emmett facility because the facility is not a "coal or other mine" as defined in Subsection C the Mine Act.

### **III. ASSIGNMENTS OF ERROR**

K C Transport asserts the following substantial errors of law, policy, discretion and/or sufficiency of the evidence in this case:

- A. The ALJ erred as a matter of law in issuing a declaratory judgment that the entire K C Transport Emmett maintenance facility was subject to jurisdiction when the Secretary only requested a finding of jurisdiction over the two cited trucks.
- B. The ALJ erred as a matter of law in finding that the two cited trucks were subject to MSHA jurisdiction pursuant to Section 3(h)(1)(C) of the Mine Act.

#### IV. ARGUMENTS CONCERNING ASSIGNMENTS OF ERROR.

- A. The ALJ erred as a matter of law in issuing a declaratory judgment that the entire K C Transport Emmett maintenance facility was subject to jurisdiction when the Secretary only requested a finding of jurisdiction related to the two cited trucks.**

In this case, the ALJ Denied Respondent’s Motion for Summary Judgment and granted the Secretary’s Motion for Summary Judgment. Decision, p. 1. The ALJ set the stage for legal error at the beginning of the Decision when he stated broadly that “Respondent is challenging Mine Act jurisdiction over the Emmett facility and the trucks parked therein.” Decision, p.1. Of course, Respondent did not contest any violation at its maintenance trailers of the unbuilt Emmett maintenance facility, because none was issued there. Respondent only contested the citations issued on two trucks sitting in a parking lot being used by K C Transport.<sup>6</sup>

The Secretary should not receive more relief than what it sought through the citations and its Motion for Summary Judgment. The ALJ impermissibly used a limited contest for the two citations at issue to broadly declare that MSHA had jurisdiction over the entire Emmett maintenance facility, including the portion which did not exist at the time of the citations.

By going beyond the Secretary’s requested relief, the ALJ effectively issued an “advisory opinion/declaratory judgment” notwithstanding that such relief was not requested and

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<sup>6</sup> The ALJ misinterpreted the import of Respondent’s analysis related to the facility. Respondent’s analysis and argument related to its facility was offered for the sole purpose of contesting the truck-related citations before the Court and for no other reason. Legal arguments to defend against specific violations are not an invitation to alter the case or controversy before the Court.

notwithstanding that K C Transport had no prior notice that the ALJ would broaden the scope of the dispute so broadly. This was legal error.

In *Pocahontas Coal Company, LLC*, 38 FMSHRC 176, 180–81 (2016), the Commission declined to review POV notices and described the limited ways that a dispute gets before the Commission:

Several provisions of the Mine Act grant subject matter jurisdiction to the Commission by establishing specific enforcement and contest proceedings and other forms of action over which the Commission presides: e.g., section 105(d), 30 U.S.C. § 815(d), provides for the contest of *citations or orders*, or the *contest of civil penalties* proposed for such violations; section 105(b)(2), 30 U.S.C. § 815(b)(2), provides for *applications for temporary relief from orders* issued pursuant to section 104; section 107(e), 30 U.S.C. § 817(e), provides for *contests of imminent danger orders* of withdrawal; section 105(c), 30 U.S.C. § 815(c), provides for *complaints of discrimination*; and section 111, 30 U.S.C. § 821, provides for complaints for compensation. *Id.*

None of these methods allow the Court to freelance and broadly declare jurisdiction over K C Transport’s entire Emmett Maintenance facility. The citations at issue were on two trucks sitting in a parking lot. There was no citation issued for the maintenance trailers or K C Transport’s 60’x 70’ facility. As noted, MSHA did not even ask for this relief. See Decision, p. 5; Stipulation No. 22. Thus, the ALJ had no case or controversy from which he could order that MSHA had jurisdiction over the entire facility. There was no justiciable dispute.

In *Mid-Continent Resources*, 12 FMSHRC 949, 955 (1990), the Commission held:

federal courts, in applying the federal Declaratory Judgment Act, 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, which implements that Act, may grant declaratory relief only in the context of actual “cases and controversies.” This requirement is imposed by Article III, Section 2 of the federal Constitution and by the Declaratory Judgment Act itself. See generally 10A *Wright & Miller* § 2757; 6A *Moore’s Pars.* 57-11--57-13. Among other things, the Article III “case or controversy” requirement weighs against use of the declaratory process to issue advisory opinions or to resolve abstract or hypothetical problems. *E.g.*, *Maryland Casualty Co. v. Pacific Coal & Iron Co.*, 312 U.S. 270, 272-73, 85 L.Ed. 826, 828-29 (1941).

In *Mid-Continent*, MSHA cited the operator for a violation of the alleged “walk-around” rights of a miner. Prior to the administrative hearing, the Secretary determined the miner was not a designated miner’s representative and moved to dismiss the proceeding. *Mid-Continent* opposed and asked for a declaratory judgment. The ALJ denied the request on the grounds there was no pending “case of controversy.” *Id.* at 953, 955. There are very good reasons why Courts do not act until there is a controversy before them. Primarily it is based on Article III, Section 2 of the federal Constitution.<sup>7</sup>

The final problem with the ALJ’s decision is that there was no “requesting party” seeking a declaratory judgment. The law is clear that before a declaratory judgment may issue in an appropriate case, a party must first request it. *e.g., Pocahontas Coal Company, supra* (Commissioner Althen, concurring), note 4.

Applying the declaratory judgment rules to this matter, it was wholly inappropriate for the ALJ to grant relief (declaration of jurisdiction over the entire Emmett facility) beyond the scope of the actual citations before the Court and well beyond what the Secretary requested. Such judicial overreach should be rejected.

**B. The ALJ erred as a matter of law in finding that the two cited trucks were subject to MSHA jurisdiction pursuant to Section 3(h)(1)(C) of the Mine Act.**

The ALJ began his discussion of jurisdiction by asserting that jurisdictional issues are “difficult” and “complex,” Decision, p. 8, but rapidly transitioned his conclusion that this case was not difficult or complex at all. Really, the only complex parts of the ALJ’s Decision were his

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<sup>7</sup> While the Court in *Mid-Continent* did note that “declaratory relief” is sometimes available if the requesting party establishes “a substantial likelihood of recurrence of the claimed enforcement harm or the imminence of repeated injury.” *Id.* at 956; in this case, the likelihood of a reoccurrence is small since MSHA has indicated that it does not intend to inspect the facility, only the trucks in the parking lot and has vacated earlier similar citations.

efforts to explain away the Secretary's position, distinguish *Maxxim Rebuild Co., LLC. v. FMSHRC*, 848 F.3d 737, 444 (6th Cir. 2017) from this case and issue an unrequested declaratory judgment in order to find jurisdiction.<sup>8</sup>

The ALJ and the Secretary rely solely on Subsection (C) of Section 3(h)(1) of the Mine Act to reach the conclusion that the two trucks are subject to jurisdiction under the Mine Act. The Secretary argued that the two cited trucks, as mobile equipment, are a "coal or other mine." *See, Secretary's Motion*, pp. 12-14, emphasizing the terms "equipment, machines" in Subsection (C). Secretary's Brief, p. 12. The Secretary asserted that "[t]his definition...includes things like equipment, machines and tools that are used in the mining process." Secretary's Brief, p. 13. The Secretary concluded that the "trucks...are equipment that were used in the extraction and preparation of coal." Secretary's Brief, 14.

The Secretary and the ALJ clearly misinterpreted Subsection (C) of Section 3(h)(1) because Subsection (C) necessarily refers to equipment and machines at the mine, not outside of the mine. Otherwise, there is no limit to the Secretary's jurisdiction. Recognizing the Secretary's error, the ALJ took a different approach. He rejected the Secretary's contention that the trucks, as equipment, are a "mine," calling it absurd. Decision, p. 11. The ALJ then went even further than the Secretary and declared K C Transport's maintenance facility itself (presumably including the independent trucking company garage, the logging trucks, the gravel trucks, the earth moving trucks and the mechanics for these non-mining endeavors) a "mine" under Section 3(h)(1)(C)

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<sup>8</sup> The Court stated: A difficult aspect of this case is that the parties do not seem to be on the same page as to what issue is before the Court, with the Secretary arguing *for jurisdiction over the trucks* and the Respondent *arguing against jurisdiction over the maintenance facility*. Decision, p. 8 (emphasis added). Missing from this is one of the parties arguing *for jurisdiction over the maintenance facility*, because neither party did. Lacking an advocate for such a position the ALJ became one.

reasoning that “the trucks were used in mining and parked at the facility, they constituted "equipment" under the same section.” *Id.* Interestingly, the ALJ specifically rejected the Secretary’s construct, for which it sought *Chevron* deference (that any vehicle “used in the mining process” is a “rolling mine.”) *Id.* Then the ALJ created his own interpretation, not supported by *Chevron*, which is equally tenuous as it includes all manner of non-mining activities which just happen to occur somewhere near a mine. How is one approach “absurd” and the other not? The ALJ essentially determined that an independent trucking company’s garage is a “mine.”

The ALJ’s rejection of the Secretary’s approach necessarily means that the ALJ must apply the statute as it is written. In other words, the ALJ cannot reject the interpretation of the Secretary in *Chevron* and then create and resolve a new ambiguity. The ALJ has only two choices: Defer to the Secretary under *Chevron* or apply the Statute as written. The ALJ rejected the former option, leaving only the latter option. In applying the statute as written, the ALJ must be guided by what the statute says and not what the ALJ thinks it means. Here, the ALJ erred in his interpretation of Section 3(h)(1)(C) of the Mine Act.

Section 4 of the Mine Act states that its provisions, and the corresponding regulations promulgated by the Secretary, apply to each “**coal or other mine** ...[.]” 30 U.S.C. § 803. (emphasis added). Conversely, the Mine Act does not apply to an area that is not a “coal or other mine.” K C Transport’s maintenance facility is not a mine. It is a facility owned and operated by an independent trucking company to provide maintenance for haulage services to both mining and non-mining activities.<sup>9</sup>

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<sup>9</sup> If this maintenance garage is a mine, what is the Mine I.D. number assigned to it? Does it need a separate number? The ALJ’s Decision certainly lacks this information.

The terms “coal or other mine” are defined in Section 3(h)(1) of the Mine Act, in relevant part (as limited by the ALJ) as:

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

Thus, MSHA jurisdiction extends only to those areas that satisfy the statutory criteria. Although Congress intended the definition of what constitutes a “coal or other mine” for purposes of Mine Act jurisdiction to be broad, it is not limitless. In fact, courts have commented on the ease of jurisdictional overreach under such a broadly worded statutory provision without appropriate judicial oversight. See *Maxxim Rebuild Co.*, 848 F.3d at 444 (“Once [MSHA] tries to extend its jurisdiction to *off-site shops* and *off-site equipment*, the language of the statute provides *no stopping point*, leaving the scope of its jurisdiction to the *whims* of the Secretary.”)(emphasis added); see also *Bush & Burchett, Inc. v. Reich*, 117 F.3d 932, 937 (6th Cir. 1997) (“Without some limitation on the meaning of [Section 3(h)(1)] MSHA jurisdiction could conceivably extend to *unfathomable lengths* ... a result Congress clearly did not intend.”)(emphasis added).

In this case, the ALJ has applied this definition and deemed an independent trucking company a mine even though the trucking company purposefully set up its operation away from the bonded and permitted area so that it could conduct its trucking business without being deemed a mine. Both courts and administrative adjudicative bodies have found several instances where

MSHA lacked jurisdiction over similar facilities and equipment, despite the Mine Act's broad coverage. See e.g. *Maxxim Rebuild*, *supra*; *Herman v. Associated Electric Cooperative, Inc.*, 172 F.3d 1078 (8th Cir. 1999); *Bush & Burchett, Inc.*, 117 F.3d at 937; *Lancashire Coal Co. v. MSHA*, 968 F.2d 388 (3rd Cir. 1992); *U.S. Dep't of Labor v. Ziegler Coal Co.*, 853 F.2d 529 (7th Cir. 1988); *Oliver M. Elam, Jr. Co.*, 4 FMSHRC 5 (Jan. 1982); *Powder River Coal, LLC*, 29 FMSHRC 650 (July 2007)(ALJ Manning); *Hobet Mining Co.*, 26 FMSHRC 890 (Nov. 2004)(ALJ Feldman).

In *Maxxim Rebuild*, the Court analyzed Subsection (C) of 30 U.S.C. § 802(h)(1) and recognized the problems with extending jurisdiction to mining equipment repair facilities. The Court required a determination of location of the proposed enforcement in relation to an active mine. The Court of Appeals in *Maxxim Rebuild* made it clear that Subsection (C) does not authorize MSHA to follow equipment used in mining anywhere it might be located and issue a citation. The caution of *Maxxim Rebuild* is even more appropriate when dealing with an independent trucking company which repairs trucks for both mining and non-mining activities and shares a parking lot with a logging company.

MSHA only has jurisdiction under the Mine Act over facilities and equipment that are in or actually at the location of a working mine. See *Id.*, 848 F.3d at 740. In *Maxxim Rebuild*, MSHA issued citations at a mining equipment repair shop *owned by a subsidiary of a large coal company*, Maxxim Rebuild Company, LLC, and located adjacent to a sealed and abandoned mine also owned by the same parent company, Alpha Natural Resources ("Alpha").<sup>10</sup> *Id.* at 739. (emphasis added). Approximately **75% of the work performed at the shop** was on equipment to be used by Alpha at

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<sup>10</sup> Maxxim Rebuild Company, LLC, the operator of the Sidney shop, was a wholly owned subsidiary of Alpha Natural Resources. *Id.*, 848 F.3d at 739.



its mining operations. *Id.* (emphasis added).<sup>11</sup> Additionally, Alpha owned the property where the repair shop was located and maintained an office on the top floor of the shop. *Id.* Here, an independent trucking Company, unaffiliated with Ramaco, owned the trucks and shop. The shop was located off the permitted property of any Ramaco mine. The shop in *Maxxim Rebuild* was one of six similar independent repair shops operated by Maxxim and was the only shop that MSHA had asserted jurisdiction over. *Id.* at 744. Here, K C Transport has several repair shops, but MSHA has never sought to exercise jurisdiction over any of them, including the Emmitt facility.

Maxxim challenged MSHA's authority to issue the citations for lack of jurisdiction over the repair shop. *Id.* The Secretary argued that the Mine Act granted MSHA jurisdiction over "any facility that makes or repairs equipment that is **used in coal extraction or preparation activities.**" *Id.* at 740 (emphasis added). An administrative law judge ("ALJ") agreed with the Secretary's interpretation and ruled that the shop was "a coal or other mine" within MSHA jurisdiction and the Commission affirmed the ALJ's ruling. *Id.* at 739. Maxxim petitioned the Sixth Circuit Court of Appeals for review of the Commission's decision. *Id.* The Sixth Circuit reversed the Commission and held that the shop was not a "coal or other mine," as defined by the Mine Act. The court reasoned that the term "coal or other mine" in the Mine Act is "locational" and relates to things "in or connected to a mine." *Id.* at 740. While acknowledging the breadth of the Mine Act's definition of "coal or other mine," the court posited that the definition extends only to those things that are in or connected to a working mine and does not cover "*machines, tools, or other property wherever they may be found or made.*" *Id.* (emphasis added).

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<sup>11</sup> Here, only 60% of the work performed by the shop supported Ramaco's five different nearby mines.

The Sixth Circuit in *Maxxim* made clear that the issue of whether equipment was or could be used in coal extraction and/or preparation activities is largely irrelevant to the analysis. The location of the Emmett facility clearly demonstrates that it is not a part of any particular mine and the ALJ did not identify any of the five mines where it was located. As clearly depicted in Respondent's Exhibit A to Stipulations, the Emmett facility is set off from permitted, bonded mine property in a hollow where no mining activity occurs. The facility is located more than one mile from the Elk Creek plant and between four and six miles from any other active underground or surface mine. There is a haulage road on the other side of a creek, approximately 1000' feet away at its nearest point, from the facility. Ramaco does not use the area where the facility is located for any purpose and has no plans to conduct any mining activity near the facility in the future. K C Transport shares the parking area with a logging company, whose trucks MSHA never seeks to inspect.

Here, K C Transport's Emmett maintenance facility, like the shop at issue in *Maxxim Rebuild*, is not "in or connected to" a mine. It is near a mine, much like a local service station at the foot of the hollow. While the cited trucks were used at some time in the process of hauling coal from active mines to the Elk Creek plant, the trucks were not being used for that purpose at the time the citations were issued. Rather, they were being maintained at K C Transport's maintenance area which was located away from the permitted and bonded mine area. At that time, the trucks were co-mingled with other trucks which K C Transport uses to haul coal for other operators, as well as dirt and gravel for other customers away from Ramaco's several mines. To be clear, K C Transport does not contend that MSHA has no jurisdiction over its trucks when hauling coal on permitted and bonded mine property. Rather, K C Transport contends that MSHA

has no jurisdiction over its trucks while they are being maintained, repaired and parked at K C Transport's Emmett facility.

K C Transport's Emmett facility had never been inspected prior to March 11, 2019 and K C Transport immediately challenged MSHA's jurisdiction here. Notably, MSHA has not inspected this area since the citations were issued. K C Transport even challenged MSHA's jurisdiction over another area where it parked its trucks prior to the construction of the Emmett parking lot and MSHA ultimately vacated those citations. Therefore, under the circumstances of this case, Subsection (C) of 30 U.S.C. § 802(h)(1) does not confer jurisdiction on K C Transport's maintenance area.

As noted supra, Subsection (C) of 30 U.S.C. § 802(h)(1) is not freestanding. It derives its context from the location of these activities at a mine under Subsection (A), which relates to the "extraction" area. See, *Secretary v. National Cement Co. of Cal, Inc.*, 573 F.3d 788 (2009). Logically, Subsection (C) refers to the facilities, equipment, machines and tools at the extraction/preparation point. In *Maxxim Rebuild*, the Sixth Circuit similarly held:

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.* (emphasis added). *Id.*, 848 F.3d at 744.

The *Maxxim Rebuild* Court also noted:

The definition [Section 802(h)(1)(C)] is broad, sure enough. It's as if the author went to a mine and wrote down everything he saw in, around, under, above, and next to *the mine*. ***Even then, the definition still extends only to everything that one would see in or around a working mine.*** It does not cover mining "equipment" or for that matter mining "machines, tools, or other property" wherever they may be found or made. *Id.* (emphasis added).

Clearly, the context of the location of the equipment is crucial and the context of Subdivision (C) necessarily relates back to Subsection (A) as it must, to avoid being limitless.<sup>12</sup>

In support of his Decision, the ALJ cites to several cases including *Jim Walter Resources*, 22 FMSHRC 21 (January 31, 2000). Principally, the cases are used to support the ALJ's contention that the definition of "structures, facilities, [and] equipment" should be interpreted as broadly as possible. See, Decision, pp. 12, 13, 14 (examples of the points adopted by the ALJ from these cases include: 1) "When analyzing the definition of "mine" under the Act, one must not be "governed by ordinary English usage;" 2) "The definition of a 'coal or other mine' in section 3(h) of the Mine Act is broad, sweeping and expansive," 3) "it is the Committee's intention that what is considered to be a mine and to be regulated under this Act be given the broadest possibl[e] interpretation;" and 4) "Close jurisdictional questions are to 'be resolved in favor of inclusion of a facility within the coverage of the Act.") (citations omitted). Of course, repeating such talismanic admonitions does not help the reviewing Court determine if the facility is a "mine."

The ALJ also provides examples of structures and facilities which have been deemed to be mines. *E.g.* a preparation plant. *Marshall v. Stoudt 's Ferry Preparation Co.*, 602 F.2d 589 (3rd Cir. 1979); a car-dropping facility at a preparation plant. *Harman Min. Corp. v. FMSHRC*, 671 F.2d 794 (4th Cir. 1981); a private road leading to a plant. *National Cement Co. of Ca. Inc.*, 573 F.3d 788 (D.C. Cir. 2009); a central supply shop. *MSHA v. Jim Walter Resources, Inc.*, 22

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<sup>12</sup>30 U.S.C. § 802(h)(2) provides further evidence that Subsection (C) (structures, facilities, machinery, tools and equipment) is contextually related to Subsection (A) (land where minerals are extracted). In this regard, Section 802(h)(2) provides:

For purposes of subchapters II, III, and IV, "coal mine" means 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*. (emphasis added).

FMSHRC 21 (Jan. 2000); a garage used by miners adjacent to an asphalt plant. *MSHA v. W.J. Bokus Industries, Inc.*, 16 FMSHRC 704 (April 1994); a drag line assembly site. *MSHA v. Justis Supply & Machine Shop*, 22 FMSHRC 1292 (Nov. 2000); and, a mobile gravel pit. *MSHA v. State of Alaska, Dept. of Transp.*, 36 FMSHRC 2642 (Oct. 2014). Of course, these facilities were “in or connected to a mine” and were operated *by the mine* so they are different. Also, some of these cases rely on *Jim Walter Resources*, 22 FMSHRC 21 (January 31, 2000).

It is important that the reasoning of *Jim Walter Resources*, 22 FMSHRC 21 (January 31, 2000) has been called into question in *Maxxim*, where the Sixth Circuit held:

[T]he Secretary leans heavily on another decision of the Commission: *Secretary of Labor, Mine Safety & Health Administration v. Jim Walter Resources, Inc.*, 22 F.M.S.H.R.C. 21 (2000). *Jim Walter* held that an ***off-site supply shop***, which stored hard hats, safety glasses, nails, conveyor belts, belt structures, oil filters, and other supplies exclusively for the use of the shop’s parent company, was a “coal or other mine.” We disagree. For the same reasons we reject the Commission’s decision here, we reject *Jim Walters* as well. *Id.* 848 F.3d at 744. (emphasis added).

The Court understandably reasoned:

Once the agency tries to extend its jurisdiction to ***off-site shops and off-site equipment***, the language of the statute provides no stopping point, leaving the scope of its jurisdiction to the whims of the Secretary. *Id.*

The ALJ also relies of a series of ALJ decisions with no precedential value and which involve different facts. *E.g.*, an explosive storage magazine, *MSHA v. Austin Powder*, 37 FMSHRC 1337, 1349 (June 8, 2015) (ALJ); a truck at a restaurant inside a mine gate. *MSHA v. Youngquist Brothers Rock, Inc.*, 36 FMSHRC 2492 (Sept. 19, 2014) (ALJ); a loader operating on a public road at a mine. *MSHA v. Jeppesen Gravel*, (Nov. 18, 2010) (ALJ); a truck located at the mine. *MSHA v. Northern Illinois Service Co.*, 36 FMSHRC 2811 (Nov. 10, 2014); and, a truck at the mine

office. *MSHA v. Rain for Rent*, 40 FMSHRC 1267, 1271 (Aug. 22, 2018).<sup>13</sup>

The cases upon which the ALJ relied share common denominators which are not present here. First, these cases involve equipment actually “in or connected to the mine.” Second, in all those cases, MSHA was asking the court to find jurisdiction over a particular facility or piece of equipment. The ALJ did so *sua sponte* as to K C Transport’s facility here. Third, with the exception of *Rain for Rent*, many of these cases pre-dated *Maxxim*.<sup>14</sup>

Here, the K C Transport facility was not adjacent to Ramaco Resources five extraction or preparation sites. It was “located more than a mile from the Elk Creek Plant, approximately 4-5 miles from three (3) deep mines operated by Ramaco Resources, LLC and six (6) miles from a strip mines and highwall mines operated by Ramaco Resources. It was also 1000 feet from the haul road.

Like the Secretary, the ALJ inexplicably cites to the Commission’s interpretation of Section 3(h)(1) in *MSHA v. Maxxim Rebuild Co.*, 38 FMSHRC 605 (April 2016). However, the Commission’s holding in that case (relied on by the Secretary and the ALJ here) was flatly rejected by the Sixth Circuit Court of Appeals in *Maxxim*

MSHA is precluded from exercising jurisdiction over the Emmett Facility by the plain language of Section 3(h)(1)(C) because this area was not in or connected to an

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<sup>13</sup> Interestingly, in a footnote, the ALJ cites to *MSHA v. Drillex, Inc.*, where the ALJ found that “enforcement jurisdiction over the respondent is limited to any trucks actually found on quarry or mine properties, and that in the instant case, he inspected the truck after it was driven onto the mine site in question.” 9 FMSHRC 1972, 1975 (Nov. 24, 1987). The fact that the Inspector waited until the truck was at the mine would support K C Transport’s position. Perhaps that is why it is relegated to a footnote.

<sup>14</sup> In *Rain for Rent*, the cited truck in that case was located at a parking lot which is connected to the main mine office. *Id.*, 40 FMSHRC at 1271. At the office, the mine operator “directed mine operations” and it was “adjacent to the plant’s active extraction site.” *Id.* Here, the cited trucks were not located in the parking lot of the main mine office. Rather, the trucks were located over a mile from the nearest coal extraction/preparation site.

extraction/preparation point as defined in Subdivision (A). K C Transport urges the Commission to find that the trucks were not a “mine” and were not at a “mine” when the citations were written. For this reason, the citations should be vacated.

**V. CONCLUSION**

For the reasons set forth herein, K C Transport respectfully requests that the Commission grant this Petition and reverse the ALJ’s Decision as to Citation Nos. 9222038 and 9222040, and find that MSHA did not have jurisdiction over the trucks where cited and that the ALJ went too far in approving jurisdiction over a facility which was not built at the time of the Citations.

K C TRANSPORT, INC.

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR	)	BEFORE THE COMMISSION
MINE SAFETY AND	)	
HEALTH ADMINISTRATION (MSHA),	)	Docket No. WEVA 2019-0458
	)	
Petitioner,	)	A.C. No. 46-02444-487883
	)	
v.	)	Contractor No. A8938
	)	
K C TRANSPORT, INC.	)	
	)	Mine: Elk Creek Plant
Respondent.	)	
	)	

CERTIFICATE OF SERVICE

I, James P. McHugh, hereby certify that a true and exact copy of the foregoing “*K C Transport, Inc.’s Petition for Discretionary Review*” was served by electronic mail on the 2<sup>nd</sup> day of April 2020, to the following:

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