

ON APPEAL TO THE COMMISSION

FEDERAL MINE SAFETY AND HEALTH
REVIEW COMMISSION

SECRETARY OF LABOR,)	
MINE SAFETY AND HEALTH)	
ADMINISTRATION (MSHA),)	
)	
Respondent,)	
)	
v.)	Docket No. KENT 2013-566
)	
)	
MAXXIM REBUILD COMPANY, LLC,)	
)	
Petitioner.)	

SECRETARY OF LABOR'S RESPONSE BRIEF

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

CHERYL C. BLAIR-KIJEWSKI
Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Blvd., 22nd Floor
Arlington, Virginia 22209-2296
(202) 693-9333
(202) 693-9361 (Fax)

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STATEMENT OF THE ISSUES PRESENTED

1. Whether the administrative law judge properly found that MSHA has jurisdiction over the Maxxim rebuild, repair, and fabrication shop.
2. Whether the administrative law judge properly found that MSHA acted within its discretion in exercising jurisdiction over the Maxxim shop.

STATEMENT OF THE CASE

A. Statutory Framework

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

Under Section 103(a) of the Mine Act, inspectors from the Mine Safety and Health Administration (“MSHA”), acting on behalf of the Secretary, regularly inspect mines to ensure compliance with the Act and MSHA standards. 30 U.S.C. § 813 (a). If an MSHA inspector discovers a violation of the Act or a standard during an inspection or an investigation, he must issue a citation or an order pursuant to Section 104(a) or Section 104(b) of the Act to the operator of the mine. 30 U.S.C. §§ 814 (a) and 814 (b). Section 110

(a) of the Mine Act provides for the assessment of a civil penalty against the operator of a mine in which a violation occurs. 30 U.S.C. § 820 (a).

An operator may contest a citation, order, or proposed civil penalty before the Commission. 30 U.S.C. §§ 815 and 823. The Commission is an independent adjudicatory agency established under the Mine Act to provide trial-type administrative hearings before an administrative law judge and appellate review in cases arising under the Mine Act. 30 U.S.C. § 823. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 204 (1994); Secretary of Labor on behalf of Wamsley v. Mutual Mining, Inc., 80 F.3d 110, 113-14 (4th Cir. 1996). If the Commission declines to review an administrative law judge's decision, the judge's decision becomes a final and appealable Commission decision. Id.

Section 3(h)(1) of the Mine Act defines a "mine" in pertinent part as "(A) an area of land from which minerals are extracted . . ."; "(B) private ways and roads appurtenant to such area"; and "(C) . . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from, the work of extracting such minerals from their natural deposits . . . or used in, or to be used in, the milling of such minerals, or the work of preparing coal or other minerals" 30 U.S.C. § 802(h) (1).

B. Statement of the Facts

Maxxim Rebuild Company, LLC ("Maxxim") is a wholly-owned subsidiary of Alpha Natural Resources Inc. ("Alpha"), one of America's premier coal suppliers.

Government Exhibit ("GX") 6.¹ Alpha, the parent company, describes Maxxim as a

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

mining equipment company whose business consists largely of repairing and reselling equipment and parts used in conducting surface mining and in supporting preparation plant operations. GX 6.

The Maxxim rebuild, repair, and fabrication shop in Sidney, Kentucky, was opened in 2012. Prior to that time, Maxxim operated a similar but much smaller facility in Matewan, West Virginia. Transcript (“Tr.”) 8, 12. The shop in Sidney was previously operated by Clean Energy Coal Company, also a subsidiary of Alpha. Tr. 12, 32. Clean Energy abandoned its associated underground mining operation in Sidney on August 29, 2012, and Maxxim took over the shop almost immediately. Tr. 33, 41, 72, 94, 95, 97, 98-99. Maxxim then modernized the shop by adding a second bay measuring 50 feet by 100 feet, hoists, and other equipment to enable it to do more work than one mining operation had required. Tr. 34. The shop, located on property owned by Sidney Coal Company, another subsidiary of Alpha, employs seven miners. Six of the miners work only at the shop; the seventh visits mine sites at the mine operators’ request, completing bore holes to accommodate blasting equipment furnished by Maxxim. Tr. 18-19.

The work performed at the Sidney shop consists of structural fabrication, repairs to structurally damaged equipment, repairs to damaged steel equipment, and repairs to fenders. The equipment repaired at the shop includes belt heads, highwall miners, loaders, and excavators. The shop also supplies parts for both surface and underground mining equipment. Tr. 23-24.

Approximately 75 percent of the work performed at the Sidney shop is performed for Alpha mines. Tr. 21-22.² In the year preceding the inspection that gave rise to the present case, however, the shop's work consisted solely of fabrication of parts and rebuilding of equipment owned and operated by Alpha subsidiaries. Tr. 21-22. The shop does not segregate its work between mining-related and potentially non-mining-related work. Instead, all of the shop's work is comingled and, as a result, Maxxim is unable to distinguish between the equipment and areas that are used for mining-related work and the approximately 20 percent that may be used for non-mining-related work. Tr. 22.

Joe Martin, Maxxim's Safety Manager, testified that without the work Maxxim performs for Alpha mines, it would be difficult for Maxxim to survive as a viable entity. Tr. 123-24.³

MSHA Inspector Randall Thornsbery conducted a two-day inspection of the Sidney shop on January 15 and 17, 2013. GX 4, 5. Inspector Thornsbery was accompanied by Keith Canterbury, Maxxim's Shop Superintendent. On January 15, 2013, Inspector Thornsbery attempted to review the shop's HazCom plan and learned that the plan was not available either at the shop or at Maxxim's headquarters. Tr. 56.⁴ As a result of the

² Although the Sidney shop does not sell equipment, other Maxxim shops sell used equipment on the open market. Tr. 36. Approximately 80 percent of the equipment sold at the other shops is used in mining. Tr. 36-38. Maxxim has six other shops. Tr. 111-12.

³ Engineers for Sidney Coal Company, another of Alpha's affiliates, maintain an office in the upper floor of the Sidney shop. Tr. 100-01, 104, 107.

⁴ A HazCom plan contains information regarding a list of chemicals used in the fabrication and rebuilding industries; the actions required to be taken in the event of an accident involving those chemicals; the training requirements for individuals -- both employees and visitors to the facility -- exposed to the chemicals; and emergency contacts. Tr. 56-57.

operator's failure to produce the required plan at the shop, Inspector Thornsby issued Citation No. 8260162, which alleged a violation of 30 C.F.R. § 47.31(a).

The inspection party next examined two bathrooms and a changing area at the shop. While exiting the first bathroom, which was in good condition, the party saw a miner leaving the second bathroom. Tr. 67. Upon entering that bathroom, Inspector Thornsby found that there was a thin coating of a black oily film covering the wash basin and the toilet. Tr. 66. The inspector also found that the floor was very dirty. Tr. 66-67. The inspector next examined the changing room and found that its floor was covered with dirt and dried mud. Tr. 66-67. The inspector believed that the dirt had been there for several weeks and that the black oily film was not caused by just one person using the facilities, as asserted by the operator. Tr. 69.⁵ Based upon his observations, the inspector issued Citation No. 8260163, which alleged a violation of 30 C.F.R. § 71.402(a).⁶

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

⁵ Canterbury admitted that the bathroom was cleaned once each week, on Fridays. The inspection was conducted on a Tuesday. Tr. 15, 86-88.

⁶ The miners swept the floor, cleaned the change room, and bleached and cleaned the bathroom. The condition was abated in approximately one hour. Tr. 86-88.

C. The Judge's Decision

In her decision of October 23, 2013, the administrative law judge found that the Sidney shop is subject to MSHA jurisdiction because the shop is clearly a “mine” as that term is defined in the Mine Act and has been applied in Commission precedent. 35 FMSHRC 3261, 3266 (2013). 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 rejected Maxxim’s assertions that (a) the shop is not a “mine” as defined in the Mine Act (35 FMSHRC at 3262); (b) the activities performed at the site are too remote from the mining process (35 FMSHRC at 3262); and (c) MSHA terminated jurisdiction over the shop prior to its relocation from West Virginia to Kentucky and could not subsequently reassert jurisdiction. 35 FMSHRC at 3262-63. Instead, the judge, citing Commission precedent, found that the shop is a “mine” because a “mine” “is not limited to an area of land from which minerals are extracted, but also includes facilities, equipment, machines, tools and other property used in the extraction of minerals from their natural deposits and in the milling or preparation of the minerals.” 35 FMSHRC at 3264 (quoting Jim Walters Resources, 22 FMSHRC 21, 25 (2000) (“JWR”) (citing Harless Inc., 16 FMSHRC 683, 687 (1994)). The judge further 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 Alpha’s coal extraction sites and preparation plants.” 35 FMSHRC 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.” 35 FMSHRC at 3264-65.

The judge affirmed the three citations issued by Inspector Thornsbery. 35 FMSHRC at 3266, 3267, 3270.⁷

ARGUMENT

I

THE JUDGE PROPERLY FOUND THAT MSHA HAS JURISDICTION OVER THE MAXXIM REBUILD, REPAIR, AND FABRICATION SHOP

A. Statutory Interpretation

In interpreting the Mine Act, the Commission must give effect to the plain meaning of the statute if the statute is clear and unambiguous. See Chevron USA, Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-43 (1984) (“Chevron I”); BHP Copper, 21 FMSHRC 758, 764 (1999). If the statute is ambiguous or silent on the point in question, the Secretary’s interpretation, expressed in the Secretary’s issuance and enforcement of a citation and the Secretary’s litigation position before the Commission, is owed deference and is entitled to affirmance as long as it is reasonable. See Chevron, 467 U.S. at 843-44 (“Chevron II”); Bill Simola, Employed by United Taconite LLC, 34 FMSHRC 539, 550-51 (2012); Pattison Sand Co., LLC v. FMSHRC, 688 F.3d 507, 512 (8th Cir. 2012) (Secretary’s litigation position before the Commission is entitled to full Chevron deference because it is “an exercise of delegated lawmaking powers”) (quoting Secretary of Labor v. Excel Mining, LLC, 334 F.3d 1, 6 (D.C. Cir. 2003)); Vulcan Construction Materials, LP v. FMSHRC, 700 F.3d 297, 314-16 (7th Cir. 2012) (dictum) (Secretary’s litigation position is entitled to full Chevron deference if it is embodied in the exercise of the delegated power to issue and enforce a citation). But see North Fork Coal

⁷ MSHA proposed civil penalties totaling \$ 424 for the three violations; the judge affirmed the proposed penalties. 35 FMSHRC at 3271.

Co. v. FMSHRC, 691 F.3d 735, 742-43 (6th Cir. 2012) (Secretary's litigation position is only entitled to Skidmore deference if it is only offered in the course of litigation).

An agency's interpretation of an ambiguous statutory provision pertaining to its own jurisdiction is entitled to full Chevron deference. City of Arlington, Texas v. FCC, -- U.S. --, -- 133 S.Ct. 1863, 1868, -- L.Ed.2d -- (2013).

In this case, the Secretary's assertion of jurisdiction should be affirmed under the Chevron I analysis because it gives effect to the plain meaning of the statute. If the statute is ambiguous, the Secretary's assertion of jurisdiction should be affirmed under the Chevron II analysis because it is reasonable.

B. The Substantial Evidence Test

In reviewing the judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii) (I). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion." Rochester & Pittsburgh Coal Co., 11 FMSHRC 2159, 2163 (1989) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). Under the substantial evidence test, a judge's credibility determinations are entitled to great weight and may not be overturned lightly. Roy Farmer and Others v. Island Creek Coal Co., 14 FMSHRC 1537, 1541 (1992). The substantial evidence test may be met by reasonable inferences drawn from indirect evidence, as long as there is "a logical and rational connection between the evidentiary facts and the ultimate fact inferred." Jim Walter Resources, Inc., 28 FMSHRC 983, 989 (2006); Mid-Continent Resources, Inc., 6 FMSHRC 1132, 1138 (1984). "Substantial evidence is that which 'a reasonable mind might accept as adequate to support a conclusion.'" Lax v. Astrue, 489 F.3d 1080, 1084 (10th Cir. 2007).

“The possibility of drawing two inconsistent conclusions from the evidence does not prevent [a fact finder’s] findings from being supported by substantial evidence[,]” and a reviewing body may not “displace the [fact finder’s] choice between two fairly conflicting views, even though [that body] would justifiably have a different choice had the matter been before it do novo.” Id.

C. The Judge Properly Affirmed the Secretary’s Assertion of Jurisdiction

Section 3(h)(1)(C) of the Mine Act sets forth an “expansive” definition of “coal or other mine” that includes all

. . . structures, facilities, equipment, machines, tools, or other property . . . used in, or to be used in, or resulting from the work of extracting . . . minerals from their natural deposits . . . or used in, or to be used in, the milling of . . . minerals or the work of preparing coal or other minerals

30 U.S.C. § 802(h)(1)(C); Secretary of Labor v. Stoudt’s Ferry Preparation Co., 602 F.2d 589, 592 (3d Cir. 1979), cert. denied, 444 U.S. 1015 (1980). In drafting the Mine Act, Congress used a “sweeping” set of definitions to achieve broad statutory coverage. Stoudt’s Ferry, 602 F.2d at 592; Secretary of Labor v. Carolina Stalite Co., 734 F.2d 1547, 1554 (D.C. Cir. 1984); Harman Mining Co. v. FMSHRC, 671 F.2d 794, 797 (4th Cir. 1981).⁸ In this case, the evidence establishes that the Maxxim rebuild, repair, and fabrication shop in Sidney, Kentucky, performs work on equipment -- for example, belt heads, highwall miners, loaders, and excavators -- that is used in coal extraction and coal preparation facilities operated by Maxxim’s parent company, Alpha. The judge properly found that the Sidney shop constitutes a “mine” within the meaning of Section 3(h)(1)(C) of the Mine Act because it constitutes facilities and equipment “used in or to be used in” Alpha’s extraction mining

⁸ See also S. Rep. No. 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).

and coal preparation activities. 35 FMSHRC at 3264-65. See JWR, 22 FMSHRC at 25, 27 (a central supply shop for several extraction sites and preparation plants was clearly subject to MSHA jurisdiction because Section 3(h)(1)(C)'s definition of "mine" encompassed facilities and equipment "used in or to be used in" JWR's extraction mining and coal preparation activities); U.S. Steel Mining Co., 10 FMSHRC 146, 148-49 (1988) (a central repair and maintenance shop for two extraction sites and a cleaning plant was subject to MSHA jurisdiction because it repaired and maintained equipment "used in or to be used in" U.S. Steel's extraction mining and coal cleaning activities within the meaning of Section 3(h)(1)(C)).

Maxxim argues at length that the judge's finding of MSHA jurisdiction is improper both under the test articulated by the Commission in Oliver M. Elam, 4 FMSHRC 5 (1982) ("Elam"), and under the analyses applied by courts in subsequent cases. Pet. Br. at 13-16.⁹ The short answer is that Elam and the subsequent court cases have nothing to do with this case. In Elam and the court cases, the issue was whether the operation in question was engaged "in the work of preparing coal" within the meaning of Section 3(h)(1)(C). See Elam, 4 FMSHRC at 7. In this case, the issue is whether the operation in question constitutes facilities and equipment "used in or to be used in" extraction mining and coal preparation within the meaning of Section 3(h)(1)(C). As the Commission emphasized in JWR, Elam and its progeny "are inapplicable" in determining whether an operation is a

⁹ Elam, RNS Servs., Inc. v. Sec. of Labor, 115 F.3d 182, 184 (3d Cir. 1997), and Pennsylvania Elec. Co. v. FMSHRC, 969 F.2d 1501, 1503 (3d Cir. 1992), all apply a "functional test" in determining MSHA jurisdiction over coal preparation activities. Under the functional test, the jurisdictional analysis turns on the "nature of the functions that occur" at the site in question.

“mine” within the meaning of Section 3(h)(1)(C)’s “used in or to be used in” clause. 22 FMSHRC at 26.

Maxxim also argues that the judge’s finding of MSHA jurisdiction is improper under the Third Circuit’s decision in Lancashire Coal Co. v. Secretary of Labor, 968 F.2d 388 (3rd Cir. 1992), and the administrative law judge’s decision in Hobet Mining Co., 26 FMSHRC 890 (2004) (ALJ). Pet. Br. at 11-12.¹⁰ Again, the short answer is that those cases have nothing to do with this case. In those cases, the issue was whether the operation in question was an operation “resulting from” extraction mining (Hobet) and coal preparation (Lancashire) within the meaning of Section 3(h)(1)(C). See Hobet, 26 FMSHRC at 900-01; Lancashire, 968 F.2d at 390-91. In this case, the issue is whether the operation in question constitutes facilities and equipment “used in or to be used in” extraction mining and coal preparation within the meaning of Section 3(h)(1)(C). Maxxim frames the issue as though MSHA were asserting jurisdiction over the underground coal mine that operated at the Sidney site but then was sealed and abandoned. Pet. Br. at 12. That mine and the associated shop, however, are irrelevant to the shop that is currently operating at the site. MSHA is not asserting jurisdiction over that mine or that shop; it is asserting jurisdiction over the shop that is currently operating at the site.

Maxxim strays even farther from the issue in this case when it argues that the 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), and the administrative law judge’s decision in Powder River Coal, 29 FMSHRC 650 (2007) (ALJ). Pet. Br. at 12-13. Those decisions did not turn either on the meaning of Section 3(h)(1)(C)’s “used in or to be used in” clause

¹⁰ Both Lancashire Coal and Hobet Mining involved reclamation activities at abandoned mines -- activities that are not involved in this case.

or on the meaning of Section 3(h)(1)(C)'s "resulting from" clause; they turned on the meaning of Section 3(h)(1)(B)'s statement that "mine" includes "private ways and roads appurtenant to [an extraction] area." See Bush & Burchett, 117 F.3d at 936-39; Powder River, 29 FMSHRC at 900-01.

Turning at last to what is the issue in this case, Maxxim argues that the judge's finding of MSIIA jurisdiction is improper because this case is distinguishable from JWR. Pet. Br. at 16-18. In doing so, Maxxim relies primarily on two facts: (1) that in this case, the shop does not perform work exclusively for mining companies; and (2) that in this case, the shop is not owned by a mining company. The ALJ properly recognized, however, that neither of those facts alters the reality that a significant part of the Sidney shop's work -- at a minimum, 75 percent -- is performed on equipment that is used in coal extraction and coal preparation activities. 35 FMSHRC at 3264. Maxxim's attempt to distinguish this case from JWR should be rejected because it reads into Section 3(h)(1)(C) two limitations -- exclusiveness and ownership -- that Congress did not include in Section 3(h)(1)(C). See Thunder Basin Coal Co. v. FMSHRC, 56 F.3d 1275, 1280 (10th Cir. 1995) (refusing to "read a limitation into the statute that ha[d] no basis in the statutory language") (quoting Utah Power & Light Co. v. Secretary of Labor, 897 F.2d 447, 451 (10th Cir. 1990)); Hercules Inc. v. EPA, 938 F.3d 276, 280 (D.C. Cir. 1991) (rejecting a reading because it "read[] into the statute a drastic limitation that nowhere appear[ed] in the words Congress chose").

Finally, Maxxim opines that it would be preferable to place the Sidney shop under OSHA jurisdiction rather than MSHA jurisdiction. Pet. Br. at 8-11, 18-19. If Section 3(h)(1)(C) plainly places the shop under MSHA jurisdiction, however, Congress has expressed

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

II

THE JUDGE PROPERLY FOUND THAT MSHA ACTED WITHIN ITS DISCRETION IN EXERCISING JURISDICTION OVER THE MAXXIM SHOP

A. Applicable Principles

“Abuse of discretion” review is equivalent to “arbitrary and capricious” and “reasonableness” review. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 n. 23, 378 (1989). A court applying the abuse of discretion standard must therefore determine whether the agency’s action was “based on a consideration of the relevant factors and

whether there has been a clear error of judgment.” Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). Although the review is “searching and careful, the ultimate standard of review is a narrow one,” and the court “is not empowered to substitute its judgment for that of the agency.” Id.; Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983); Bowman Transp., Inc. v. Arkansas-Best Freight System, Inc., 419 U.S. 281, 286 (1974). An agency is not required to demonstrate “to a court’s satisfaction” that its decision was the best option available; it is sufficient that the agency’s action “is permissible under the statute” and that “there are good reasons for it.” FCC v. Fox Television, 129 S.Ct. 1800, 1810 (2009). The arbitrary and capricious standard of review is “[h]ighly deferential” and “presumes the validity of agency action.” City of Portland, Oregon v. EPA, 507 F.3d 706, 713 (D.C. Cir. 2007) (citations and internal quotation marks omitted.)

Under abuse of discretion review, a court must restrict its review to the information that was “before the agency at the time its decision was made.” IMS, P.C. v. Alvarez, 129 F.3d 618, 623 (D.C. Cir. 1997). An agency therefore cannot be found to have abused its discretion on the basis of information that was not reasonably available to it when it exercised its discretion. See Walter O. Boswell Memorial Hospital v. Heckler, 749 F.2d 788, 792 (D.C. Cir. 1984) (“If a court is to review an agency’s action fairly, it should have before it neither more nor less information than did the agency when it made its decision.”) The Commission has applied this principle in reviewing an MSHA District Manager’s decision regarding the suitability of a mine’s proposed ventilation and roof control plans. Prairie State Generating Co., LLC, 35 FMSHRC 1985, 1996 (2013) (“[I]t was not an abuse of discretion for the [District Manager] to rely on the information he had in front of him, and

because the disputed evidence was not introduced to him during his evaluation period or ‘taken back to him for re-consideration,’ it was not relevant to [his] determination, which was made prior to the hearing.”) (quoting the administrative judge’s decision, 32 FMSHRC 602, 612 (2010) (ALJ), appeal pending, D.C. Cir. No. 13-1315.

When a party claims that an agency has deprived it of equal protection -- that is, that the agency has treated it differently than other entities -- the burden is on the complaining party to establish that the other entities are similar to it “in all material respects.” Loesel v. City of Frankenmuth, 692 F.3d 452, 462-63 (6th Cir. 2012), cert. denied, 133 S.Ct. 878, 184 L.Ed.2d 660 and 133 S.Ct. 904, 184 L.Ed. 2d 660 (2013); Jicarilla Apache Nation v. Rio Arriba County, 440 F.3d 1202, 1212-13 (10th Cir. 2006).

B. The Present Case

Maxxim claims that MSHA abused its discretion in asserting jurisdiction over the shop in Sidney, Kentucky, after it ceased to assert jurisdiction over the shop in Matewan, West Virginia. Pet. Br. at 21-25. There is no evidence, however, that Maxxim ever discussed the relationship between the Sidney shop and the Matewan shop with MSHA. Indeed, the judge properly found that Maxxim “did not speak with MSHA about jurisdiction.” 35 FMSHRC at 3263. MSHA cannot be said to have abused its discretion by failing to base its decision whether to assert jurisdiction over the Sidney shop on information that was never put before it.¹¹

¹¹ Maxxim’s failure to discuss MSHA jurisdiction over the Sidney shop with MSHA is particularly significant because the Sidney shop is in a different MSHA District than the Matewan shop (District 6 rather than District 12) and because the Sidney shop is different -- larger and better equipped -- than the Matewan shop. See Pet. Br. at 3 (citing Tr. at 34-35).

Even before the judge, Maxxim failed to provide evidence to establish that the Sidney shop is similar to the Matewan shop. See Pet. Br. at 2-4, 21. The Commission should disregard

Similarly, Maxxim claims that MSHA abused its discretion in asserting jurisdiction over the Sidney shop when it does not assert jurisdiction over all of the five other Maxxim shops. Pet. Br. at 25-26. Again, however, there is no evidence that Maxxim ever discussed a comparison between the Sidney shop and the five other shops with MSHA, and the judge found that Maxxim “did not speak with MSHA about jurisdiction.” 35 FMSHRC at 3263. And again, MSHA cannot be said to have abused its discretion in failing to base its decision whether to assert jurisdiction over the Sidney shop on information that was never put before it.¹²

Finally, Maxxim claims that MSHA’s decision to assert jurisdiction over the Sidney shop deprives it of equal protection because MSHA does not assert jurisdiction over all of the five other Maxxim shops. Pet. Br. at 26. Maxxim’s claim is unpersuasive, however, because Maxxim fails to establish that the other five shops are similar to the Sidney shop “in all material respects.” Loesel, 692 F.3d at 462-63; Jicarilla Apache Nation, 440 F.3d at 12212-13. Maxxim’s claim is also inconsistent with the Commission’s holding in Shamokin Filler Co., 34 FMSHRC 1897, 1907 (2012), appeal pending, 3d Cir. No. 12-4457, that evidence regarding MSHA’s decisions regarding jurisdiction at other bagging plants was “not relevant” to whether MSHA had jurisdiction over the plant in question because it is “unlikely that any two facilities would be identical and warrant the same conclusion on jurisdiction.”

Maxxim’s assertion on appeal that the two shops are “similarly situated” and involve “the same circumstances” (Pet. Br. at 22, 23) because that assertion is unsupported by evidence.

¹² Even before the judge, Maxxim failed to provide evidence to establish that the Sidney shop is similar to the five other shops. See Pet. Br. at 1-2, 25. The Commission should disregard Maxxim’s assertion on appeal that the Sidney shop and the five other shops are “similarly situated” (Pet. Br. at 25) because that assertion is unsupported by evidence.

In sum, “the question of jurisdiction is ‘governed by statute, rather than by which of two [purportedly conflicting MSHA positions] is correct.’” Shamokin Filler, 34 FMSHRC at 1907 (quoting Alexander Brothers, Inc., 4 FMSHRC 541, 543 (1982)). The judge properly found that, under the statute, MSHA has jurisdiction over the Sidney shop.

CONCLUSION

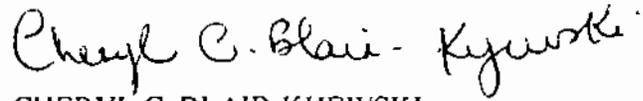
For the foregoing reasons, the Commission should affirm the judge’s decision in its entirety.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

HEIDI W. STRASSLER
Associate Solicitor

W. CHRISTIAN SCHUMANN
Counsel, Appellate Litigation

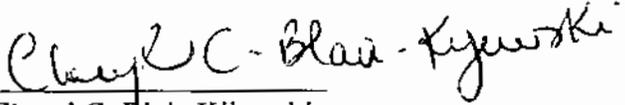

CHERYL C. BLAIR-KIJEWSKI
Attorney

U.S. Department of Labor
Office of the Solicitor
1100 Wilson Blvd, 22nd Floor
Arlington, Virginia 22209-2296
Telephone: (202) 693-5520
Fax: (202) 693-9327

CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2014, a copy of the foregoing response brief was served by facsimile and first-class U.S. mail on:

R. Henry Moore, Esq.
Arthur M. Wolfson, Esq.
Patrick W. Dennison, Esq.
Jessica M. Jurasko, Esq.
Jackson Kelly PLLC
Three Gateway Center, Suite 1500
401 Liberty Avenue
Pittsburgh, PA 15222
Fax: 412-434-8062


Cheryl C. Blair-Kijewski
Cheryl C. Blair-Kijewski