PART II

DEFINITIONS

A. MINER

3. STATUS/FUNCTION/SITUS AND SITUS/FUNCTION TESTS

The Board in ***Whisman v. Director, OWCP***, 8 BLR 1-96 (1985), set forth a three-prong test of status, function and situs for determining whether the duties performed by claimant satisfy the statutory definition of "miner." *See also* ***Richmond v. Director, OWCP***, 813 F.2d 1228 (4th Cir. 1987). Courts in the Third, Fourth, Sixth, Seventh and Eleventh Circuits, however, have generally followed a two-prolonged (situs-function) test. *See* ***Hanna v. Director, OWCP***, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988); ***Stroh v. Director, OWCP***, 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987)("status of coal" inquiry included as part of the "function" test); ***Collins v. Director, OWCP***, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); ***Amigo Smokeless Coal Co. v. Director, OWCP***, 642 F.2d 68, 70 (4th Cir. 1981); ***Director, OWCP v. Consolidation Coal Co.***, [***Petracca***], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989); ***Mitchell v. Director, OWCP***, 855 F.2d 485 (7th Cir. 1988); ***Director, OWCP v. Ziegler Coal Co.***, [***Wheeler***], 853 F.2d 529 (7th Cir. 1988); ***Baker v. U.S. Steel Corp.***, 867 F.2d 1297, 12 BLR 2-213 (11th Cir. 1989); ***Foreman v. Director, OWCP***, 794 F.2d 569, 570, 9 BLR 2-90, 2-92 (11th Cir. 1986).

Each of the three-prongs of the ***Whisman*** test will be discussed separately.

a. Status of the Coal

Under the Status Prong of the ***Whisman*** test, claimant must establish that the coal with which he worked was still in the course of being processed, and not yet a finished product in the stream of commerce. ***Whisman****, supra* at 1-97; *see also* ***Cole v. Director, OWCP***, 6 BLR 1-1042 (1983). It should be noted that under the two-part test, the function element includes the status test.

CASE LISTINGS

[coal being processed,not in the stream of commerce] ***Southard v. Director, OWCP***, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984).

[self-employment hauling coal from the tipple to customers not coal mine employment] ***Roberts v. Director, OWCP***, 6 BLR 1-849 (1984).

[condition of coal at claimant's involvement is a question of fact for trier-of-fact] ***Shaw v. Director, OWCP***, 7 BLR 1-652 (1985).

[repairing of coal hopper cars used in transporting coal to ultimate consumers not coal mine employment] ***Hensley v. Director, OWCP***, 7 BLR 1-76 (1984); *accord,* ***Southard v. Director, OWCP***, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); ***Richardson v. Denver & Rio Grande Western Railroad Co.***, 7 BLR 1-700 (1985).

[tugboat operator transporting coal from the tipple to ultimate consumer not miner] ***Price v. Peabody Coal Co.***, 7 BLR 1-671 (1985).

[employment around coal mine, performed prior to coal's injection into stream of commerce, constitutes coal mine employment and is not ancillary to delivery and commercial use of processed coal] ***Seltzer v. Director, OWCP***, 8 BLR 1-251 (1985).

[claimant hauling already processed coal to ultimate consumers not miner] ***Foster v. Director, OWCP***, 8 BLR 1-188 (1985).

DIGESTS

Claimant's duties loading already processed coal from a tipple to river barges were not coal mine employment as they did not satisfy the function requirement. ***Luther v.***

Director, OWCP, 8 BLR 1-42 (1985); *see also* ***Vickery v. Director, OWCP***, 8 BLR 1-430 (1986).

The Sixth Circuit held that transportation of coal that takes place at a mine site is coal mine employment notwithstanding that the coal is being loaded for delivery to the ultimate consumer. ***Rose v. Benefits Review Board***, No. 84-3548 (6th Cir., Aug. 26, 1985)(unpublished).

The Fourth Circuit upheld the Board's holding that a claimant who hauls slate away from the tipple is not a miner reasoning that the tipple marks the demarcation point between the mining and marketing of coal. The Court held that when coal leaves the tipple, extraction and preparation are complete and it is entering the stream of commerce. An individual who comes in contact with coal at this interval or later is, therefore, not within the class covered by the Act. ***Collins v. Director, OWCP***, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); ***Roberts v. Weinberger***, 527 F.2d 600 (4th Cir. 1975); ***Norfolk & Western Railway Co. v. Roberson***, 918 F.2d 1144, 14 BLR 2-106 (4th Cir. 1990), *cert denied*, 111 S.Ct. 2012 (1991), *aff'g* 13 BLR 1-6 (1989).

The Fourth Circuit held that transportation work that occurs after the coal is processed and prepared for market is not coal mine employment. The Court rejected the argument that additional washing of the coal constituted coal preparation as the coal was washed to reduce dust exposure in the vicinity of the coal loading facility, not for processing the coal into its marketable form. ***Eplion v. Director, OWCP***, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986).

Claimant's work loading coal to be used by employer's paper plant does not satisfy the statutory and regulatory definition of coal preparation because claimant's tasks relate to the consumption and utilization of coal already in the stream of commerce. ***Foreman v. Director, OWCP***, 8 BLR 1-79 (1985), *aff'd*, 794 F.2d 569, 9 BLR 2-90 (11th Cir. 1986); ***Trull v. Director, OWCP***, 7 BLR 1-380 (1984); ***Vasquez v. Director, OWCP***, 6 BLR 1-373 (1983).

Claimant's work as a coal hauler did not qualify as coal mine employment because there was no evidence that claimant handled unprocessed coal. ***Kane v. Director, OWCP***, 10 BLR 1-148 (1987).

Coal mine inspector is a miner under the Act because he meets the "situs-function" requirements. ***Bartley v. Director, OWCP***, 12 BLR 1-89 (1988)(Tait, J., concurring); ***Moore v. Duquesne Light Co.***, 4 BLR 1-40.2 (1981); *but see* ***Kopp v. Director, OWCP***, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989)(infers that federal coal mine inspectors are *not* covered by the Act).

A miner who purchases and bags unprocessed coal for later resale is covered under the Act. ***Dowd v. Director, OWCP***, 846 F.2d 193 (3d Cir. 1988).

Picking coal from strippings for home use satisfies the definition of a miner. ***Shendock v. Director, OWCP***, 861 F.2d 408, 12 BLR 2-48 (3d Cir. 1988); *see also* ***Hutnick v. Director, OWCP***, 7 BLR 1-326 (1984); ***Backert v. Director, OWCP***, 6 BLR 1-640 (1983).

The Board held that claimant's railroad employment did not constitute qualifying coal mine employment under the Act, affirming the administrative law judge's finding that claimant's employment failed the status of the coal test since claimant repaired tracks that were used to transport coal that had already been processed. The Board declined to address employer's arguments on cross-appeal that Congress did not intend to include railroad companies liable for benefits. ***Blevins v. Louisville & Nashville Railroad Co.***, 13 BLR 1-69 (1988).

The Board affirmed the administrative law judge's finding that in light of employer's new technology, the carbonaceous material from employer's culm bank has extractable anthracite coal in it. The Board affirmed the finding that the culm material processed by employer is coal based in part on the finding that employer operated a preparation plant to prepare the culm material for energy use, and that the preparation plant's operation was subject to safety regulations and operational safeguards mandated by MSHA, thus, its activities are subject to regulation under 30 U.S.C. §802(1). The Board specifically upheld as proper the finding that employer sells "anthracite waste material," a material "akin" to coal. Therefore, it was permissible for the administrative law judge to conclude, pursuant to ***Marshall v. Stoudt's Ferry Preparation Co.***, 602 F.2d 589 (3d Cir. 1979), *cert. denied*, 444 U.S. 1010 (1980), that "the carbonaceous material, which has coal in it, albeit a small amount, was rendered marketable by the Waste Management preparation facility, and therefore, covered under the Act and regulations." ***Schegan v. Waste Management and Processors, Inc.***, 18 BLR 1-41 (1994).

5/95