[BLR cite: *Schegan v. Waste Management and Processors, Inc.*,]
BRB No. 93-0349 BLA

JOHN SCHEGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WASTE MANAGEMENT AND PROCESSORS, INCORPORATED	)	
	)	
and	)	
	)	
STATE WORKERS' INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
STOUDT'S FERRY PREPARATION COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan and Dempsey, P.C.), Scranton, Pennsylvania, for employer/carrier-petitioners.

Leonard G. Schumack, Shenandoah, Pennsylvania, for employer-respondent.

Gary K. Stearman (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (91-BLA-2168) of Administrative Law Judge Paul H. Teitler naming Waste Management and Processors, Incorporated (Waste Management, employer) as the putative responsible operator on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). Claimant originally filed a claim for benefits on September 8, 1983, which was denied by the district director on May 17, 1984. Director's Exhibit 148. No further action was taken with regard to this claim. Claimant filed a second claim for benefits on June 7, 1988, Director's Exhibit 1, which was denied by the district director on October 21, 1988. Director's Exhibit 27. On November 15, 1988, the district director notified R & R Energy Corporation (R & R) of its potential liability, Director's Exhibit 30, but after "further investigation" the district director relieved R & R of any liability.

Director's Exhibit 32. The district director next notified both Waste Management and Stoudt's Ferry Preparation Company (Stoudt's Ferry), on November 28, 1988, of their potential liability in this claim. Director's Exhibit 33, 34. On January 4, 1989, claimant submitted additional evidence requesting reconsideration of the denial of his claim. Director's Exhibit 36. The district director again denied benefits by letter dated December 1, 1989. Director's Exhibit 119. Claimant made another request for reconsideration on May 24, 1990. Director's Exhibit 120. On June 11, 1990, Pagnotti Enterprises was apprised of its potential liability in this claim. All of the three named responsible operators filed notices of controversion.[1] The district director again reconsidered the claim, issuing a denial on January 28, 1991. Director's Exhibit 140. Claimant requested a formal hearing on February 25, 1991, Director's Exhibit 144, and the case was transferred to the Office of the Administrative Law Judges on May 28, 1991. Director's Exhibit 149. Prior to the hearing, claimant moved to have the administrative law judge issue an order bifurcating the hearing to separately address the issue of identifying and designating the putative responsible operator. The administrative law judge granted this motion, Transcript of Hearing held March 25, 1992, at 3-7, and held a formal hearing on May 20, 1992. At that hearing, the administrative law judge, without objection from any party, dismissed Pagnotti Enterprises. Transcript of Hearing held May 20, 1992 at 5. After receiving evidence and testimony from all interested parties, the administrative law judge closed the record, and issued his Decision and Order on October 6, 1992. The administrative law judge found that both Waste Management and Stoudt's Ferry operated coal preparation facilities which fell within the definition of a coal mine and that claimant's employment as a mechanic was qualifying coal mine employment. Decision and Order at 19. The administrative law judge ultimately determined that Waste Management was the putative responsible operator, since its employment of claimant occurred last, and thus, dismissed Stoudt's Ferry as responsible operator. On appeal, employer/carrier asserts that the administrative law judge's finding that Waste Management is the properly named responsible operator is clearly in error, and thus, cannot be affirmed. The Director, Office of Workers' Compensation Programs (Director), responds urging affirmance of the administrative law judge's Decision and Order. Stoudt's Ferry responds only to contest the Director's request that in the event the Board reverses the administrative law judge's designation of Waste Management as the responsible operator, the Board should affirm the administrative law judge's alternative finding that Stoudt's Ferry qualifies as a responsible operator. Claimant has declined to respond, but submitted a letter concurring with the position of Waste Management.

The Board's scope of review is limited. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] Specifically, Stoudt's Ferry controverted its liability by letter dated July 10, 1990, Director's Exhibit 131; Pagnotti Enterprises controverted on July 2, 1990, Director's Exhibit 127; and Waste Management controverted on September 28, 1990, Director's Exhibit 134, and again on March 22, 1991. Director's Exhibit 144.

Employer/carrier initially asserts that the administrative law judge erred in finding that the material processed by Waste Management is coal. Specifically, employer/carrier avers that the administrative law judge ignored the uncontradicted testimony presented by Brian Rich that: Waste Management was exempt from a reclamation fee based upon a Department of Interior ruling, made at the company's request, because the produce handled is not considered coal, Transcript at 21; and that in order to obtain financing for the business operation, as well as in order to qualify for investment tax credits and accelerated depreciation under the law, Waste Management had to prove the BTU characteristics of the rock banks, and that the material combusted was waste rather than coal.[2] Transcript 65-67. Employer, thus, argues that it processes rock not coal, and therefore does not operate a coal mine. Analogous to this contention is employer's assertion that the administrative law judge erred in finding that Waste Management's business operations were within the definition of responsible operator as found in the Act and regulations.

[2] In support of its contention, employer points out that it processes culm bank material which consists of refuse from two previous coal processing efforts and is only seventy percent or significantly less combustible than coal (coal includes anything more than eighty percent combustible) Transcript at 16-17; and burns at 1500 degrees (compared to coal's burning at 850 degrees), Transcript at 19.

First, we note that inasmuch as this case arises within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit, the administrative law judge properly considered the decision of *Marshall v. Stoudt's Ferry Preparation Co.*, 602 F.2d 589 (3d Cir. 1979), *cert. denied*, 100 S.Ct. 665 (1980), in determining whether employer's business operation is a coal mine as defined by the Act. In *Marshall*, the employer obtained dredged river refuse and separated it into sand, gravel, and a "burnable material," described as "usable anthracite refuse." After determining that "Congress included a broad definition of "mine" in §102(b) of the Act,"[3] the Third Circuit held "that the work of preparing coal or other minerals is included within the Act . . ." 602 F.2d at 592. Consequently, the Third Circuit held that separating from the refuse "a burnable product 'akin' to coal, which is then sold as low grade fuel," brought the employer within the Act's coverage as an operator.[4]

In discussing the evidence regarding the operation of Waste Management, the administrative law judge found that "[t]he carbonaceous material [from the culm bank] has extractable anthracite coal in it, with Waste Management's new technology" and that "the Company [Waste Management] is operating a preparation plant to prepare this material for energy use." Decision and Order at 17. Additionally, the administrative law judge found that "[t]he preparation plant's operation is subject to safety regulations and operational safeguards mandated by MSHA, and its activities are subject to regulation under 30 U.S.C. §802(1)." *Id.* The evidence of record supports these findings.

First, the record indicates that a "Legal Identity Report" was filed with the Department of Labor's Mine Safety and Health Administration (MSHA) on May 15, 1986, bearing the signature of John W. Rich, Jr., President of Waste Management. GX 1. Question number eleven of that document requests identification of the "Commodity (type of product & operation-surface, underground or facility)" that the company is involved with, to which Waste Management replied "Surface-Anthracite Coal." *See* GX 1, Transcript at 75, 132-133. In his testimony, Brian Rich, who was at that time the Vice-President and Secretary of Waste Management, indicated that on all reports sent to MSHA, Waste Management included a disclaimer stating that: it is not a coal operator, it does not mine, and that "it processes anthracite waste material, properly known as CARB (concentrated anthracite refuse bank)."[5] WX

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[3] The Third Circuit specifically noted in its opinion that:

> Commenting on the sweeping definition, the Senate in committee, stated that "what is considered to be a mine and to be regulated under the Act" was to be given the broadest possible interpretation and that doubts were to be resolved in favor of inclusion of a facility with the coverage of the Act. *See* S.Rep. No. 181, 95 Cong., 1st Sess. 1, 14, *reprinted in* [1977] U.S. Code Cong. & Admin. News, pp. 3401-3414. *Marshall*, 602 F.2d 589, 592 (3d Cir. 1979), *cert. denied*, 100 S.Ct. 665 (1980).

The Court reiterated its intention in *Dowd v. Director, OWCP*, 846 F.2d 193, 195 (3d Cir. 1988).

[4] The Third Circuit specifically acknowledged the fact that "[t]he BTU output of the burnable material is far lower that of anthracite or bituminous coal or lignite, and the market price is about one-third of anthracite." *Marshall*, *supra* at 590.

[5] Mr. Rich also testified that "there is some trapped, laminated carbon in the rock, itself, and that's what--that's how we generate the energy." Transcript at 20.

3; *see also* Transcript at 124. Mr. Rich further testified that Waste Management's charter is to supply fuel for the co-generation facilities, Transcript at 42, and that "we conveyed and charged the co-generation plant with about 600,000 tons of this rock material, receiving seven to ten dollars a ton." Transcript at 35. In light of this evidence, we hold that the administrative law judge properly found that employer sells "anthracite waste material," a material "akin" to coal, and that therefore, it was permissible for the administrative law judge to conclude, pursuant to *Marshall*, 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." Decision and Order at 19.

The record also includes testimony by Brian Rich regarding Waste Management's operations. Mr. Rich testified that: employer initially removes the material from the culm bank, discarding any wood fragments and some of the larger rocks; then screens and sizes the rock, separating the remaining rock by size; and then crushes the larger materials into a quarter inch by zero particle. Transcript at 43-49. Employer, lastly, takes the processed material to a co-generation plant for combustion. *Id.* James Schoffstall, supervisor for coal mine health and safety in the Shamokin field office, testified that he was familiar with the operations performed by Waste Management, having conducted "probably" fifteen visits to their work site. Transcript at 71. Mr. Schoffstall's testimony regarding Waste Management's operations at the work site, essentially parallels that of Brian Rich.[6] The testimony of both Mr. Schoffstall and employer/carrier's own witness, Brian Rich, therefore, indicates that employer "processes" the material, and that therefore, the activities performed by Waste Management fall within the statutory and regulatory definitions of "preparing coal" and a custom coal preparation facility. 30 U.S.C. 802(h)(2); 20 C.F.R. 725.101(a)(25); *Marshall*, *supra; Dowd v. Director, OWCP*, 846 F.2d 193 (3d Cir. 1988), at 195. The administrative law judge, therefore, permissibly concluded that Waste Management "is operating a preparation plant to prepare this material for energy use." Decision and Order at 17.

Employer/carrier next contends that "[c]uriously, the Administrative Law Judge ignores the Petitioner's citation to *Davis v. U.S.*, 758 F.2d 474 (1985) [*sic*], and *Kanawha Dredging Materials Company v. U.S.*, 88-1 U.S. TC (CCH) 16463 1987 WL 49371(d) W. Va. (1987)." Employer/carrier's Brief at 20. Employer/carrier cites *Davis*, in *Lavicky v. Burnett*, 758 F.2d 468 (10th Cir.

[6] Specifically, Mr. Schoffstall testified that he has observed Waste Management feeding the bank culm into the plant, processing it, removing the oversize pieces, crushing them to size, and processing a usable product to be sent to a co-generation plant. Transcript at 77, 80-81. Mr. Schoffstall also stated that "to some degree it [the culm bank] has to contain some kind of carbon." Transcript at 79.

1985),[7] and *Kanawha Dredging*, arguing that these cases, when coupled with the uncontradicted testimony that the material in the culm banks is not coal, clearly establishes that the work conducted by Waste Management is not a coal mine operation as defined by the Act. Employer's contentions have no merit.

[7] In *Lavicky v. Burnett*, 758 F.2d 468 (10th Cir. 1985), the United States Court of Appeals for the Tenth Circuit cited *Davis v. United States*, 423 F.2d 974 (5th Cir. 1970), *cert. denied*, 91 S.Ct. 74 (1970), for the proposition "that a valid search incident to arrest requires that the search and arrest be contemporaneous." *Lavicky* at 475.

Initially, we note that inasmuch as *Davis* and *Lavicky* arise respectively within the Fifth and Tenth Circuits, they are not binding precedent in this Third Circuit case. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989). Additionally, both *Davis* and *Lavicky* specifically involve warrantless searches in the context of criminal law, notably searches incident to arrest, and therefore, are not germane to the issues presented in the instant case. Furthermore, to the extent that *Davis* and *Lavicky* may be relevant to the instant case, notably any argument that warrantless searches in the form of MSHA inspections of Waste Management's operations are illegal, they are without merit since the Third Circuit has specifically upheld the validity of MSHA spot inspections of operations.[8] *Marshall, supra.* Moreover, contrary to employer/carrier's contention, the administrative law judge did not ignore the *Davis* and *Kanawha Dredging* cases. The administrative law judge correctly held that "[t]hese cases pertain to warrantless seizures" and properly concluded that Waste Management is subject to "MSHA inspections." Decision and Order at 17, 18.

Employer/carrier further asserts that the administrative law judge erred in his assessment of the impact that Waste Management's exemption from the Federal Excise Tax and the Black Lung Disability Trust Fund Tax has in the proper demonstration of who the putative responsible operator may be. Employer/carrier specifically asserts that the Department of Labor has no authority to find Waste Management a putative responsible operator when the Internal Revenue Service (IRS) has found that Waste Management does not fall within the parameters of an operation subject to the Black Lung Disability Trust Fund Tax.

The Board has held that while determinations made by other agencies serve as relevant evidence to a Department of Labor adjudication, such determinations are not binding. *See Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744 (1985); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). The administrative law judge is required, in accordance with the Administrative Procedure Act (APA), to independently evaluate all of the evidence of record and autonomously resolve all relevant issues of fact and law. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see also Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

[8] The Third Circuit specifically held that the "Mine Safety's Act's enforcement scheme justifies warrantless inspections and its restrictions on search discretion satisfy the reasonableness standard." *Marshall, supra*, at 593.

In the instant case, the administrative law judge noted that employer/carrier's witness, Brian Rich, read "from IRS letter ruling 8816039," and stated "that IRS Agent Steve Rudzinski had visited the plant [Waste Management] and determined [that] they were exempt from the Excise Tax and Waste [Management] was also exempt from the Trust Fund Tonnage Tax. TR-27, 28." Decision and Order at 5. The administrative law judge additionally noted that a "memo from Marty Cerullo, Esquire, counsel to Waste Management, was introduced as WX-2, confirming IRS Agent Rudzinski's ruling relative to the excise and trust fund tax exclusion, at his most recent visit. TX-32." Decision and Order at 5. The administrative law judge reiterated in his Decision and Order that employer/carrier "rel[ies] on IRS letter ruling 8816039" and that since they were exempt from the excise tax and the trust fund, "they cannot be mine operators." Decision and Order at 16. Upon consideration of the relevant evidence, the administrative law judge determined that "the IRS letter ruling has no legal application other than that to the taxpayer to whom it is addressed," and that therefore, the ruling "has no affect [*sic*] on the congressional statutory regulations or regulation of a coal preparation plant."[9] Decision and Order at 18. We, therefore, hold that the administrative law judge permissibly found that "the IRS ruling relative [*sic*] and/or Mr. Rudzinsky's opinion not determinative on the issue of whether Waste Management is subject to the Act," Decision and Order at 19.[10] *Wenanski, supra; Miles, supra.*

Lastly, employer/carrier asserts that the administrative law judge erred in finding that claimant's position with Waste Management exposed him to any significant degree of coal dust. In support of this contention, employer/carrier notes that the Director's witness, James Schoffstall, could not offer any opinion as to the content of the culm bank, and that even claimant, himself, did not offer any opinion unequivocally stating that he was exposed to coal dust. Additionally, employer contends that because no one unequivocally testified that the dust was coal dust, it rebutted the presumption. In determining whether an employer is a responsible operator under 20 C.F.R. §725.492, there is a rebuttable presumption that during the course of an individual's employment with employer, such individual was regularly and continuously exposed to coal dust during the course of such employment, which may be rebutted if employer can *affirmatively* establish the absence of significant periods of dust exposure, *i.e.*, the frequency of such exposure must be so slight as to preclude its contribution to the development of a dust-related disease. *See* 20 C.F.R. §725.492(c); *Rickard v. C & K Coal Co.*, 7 BLR 1-372 (1984); *Harriger v. B & G Construction Co.*, 4 BLR 1-542 (1982), *aff'd* 760 F.2d 255 (3d Cir. 1985). Inasmuch as the administrative law

[9] The administrative law judge further added that "Mr. Rudzinski's opinion relative to non-payment [of the excise tax] is neither in writing or a final decision." Decision and Order at 18.

[10] We note that the administrative law judge was similarly not bound by the Department of Interior decision cited by employer/carrier in this case. *See Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744 (1985); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

judge determined that claimant's last coal mine employment was with Waste Management, where he "supervised and repaired" equipment in a garage about five hundred feet from a culm bank and one mile from the processing plant, Decision and Order at 19, and claimant has testified that he was exposed to the culm dust, Transcript at 104, we hold that claimant's position with Waste Management did, in fact, expose him to coal dust. *See generally Garrett v. Cowin & Co., Inc.*, 16 BLR 1-77 (1990); *George v. Williamson Shaft Contracting Co.*, 8 BLR 1-91 (1985). We, therefore, hold that claimant's position with Waste Management as a repairman is sufficient to meet both the "situs" and "function" tests set out in *Hanna v. Director, OWCP*, 860 F.2d 452, 12 BLR 2-15 (3d Cir. 1988), and *Stroh v. Director, OWCP*, 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987). *See* 20 C.F.R. §725.101(a)(26); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990), *Tobin v. Director, OWCP*, 8 BLR 1-115 (1985).

We further note that employer has failed to establish that the dust to which claimant was exposed was not "coal dust." Additionally, employer has not provided any evidence "showing that the employee was not exposed to coal dust for significant periods" during his employment with Waste Management. *See* 20 C.F.R. §725.492(c). We, therefore, affirm the administrative law judge's finding that claimant's work with Waste Management "was qualifying in coal mine employment," Decision and Order at 19, and consequently, affirm the administrative law judge's Decision and Order finding that Waste Management and Processors, Incorporated "should be designated the putative responsible operator of record," Decision and Order at 20.[11] *See* 20 C.F.R. §725.492(c).

Accordingly, the administrative law judge's Decision and Order naming Waste Management and Processors, Incorporated as the putative responsible operator is affirmed.[12]

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[11] In light of our affirmance of the administrative law judge's finding that Waste Management is the putative responsible operator, we need not address the administrative law judge's findings regarding the responsible operator status of Stoudt's Ferry.

[12] We note that while the responsible operator issue has been resolved, the issue of entitlement must still be addressed.

REGINA C. McGRANERY
Administrative Appeals Judge