PART II

DEFINITIONS

A. MINER

4. CONSTRUCTION/TRANSPORTATION WORKERS

Section 725.202(a)(1) of the regulations, 20 C.F.R. §725.202(a)(1), provides that coal transportation or coal mine construction workers have a rebuttable presumption of coal mine dust exposure during all periods of employment in or around a coal mine or coal preparation facility. The presumption may be rebutted by evidence showing that the individual was not regularly exposed to coal mine dust during his or her employment in or around a coal mine or coal preparation facility, or the individual was not regularly employed in or around a coal mine or coal preparation facility.

Rebuttal of the Section 725.202(a) presumption establishes that not *all* coal mine transportation or construction resulted in exposure to coal mine dust. Rebuttal does not establish that *no portion* of that time qualifies as coal mine employment. For instance, if claimant can show "one or more discrete periods of coal mine construction work that resulted in exposure to dust, then such work must be considered as qualifying coal mine employment, regardless of its relationship to the miner's overall employment." The administrative law judge, therefore, erred in discounting the miner's coal mine construction work because it was not "regular and continuous" and because it was not performed under conditions substantially similar to those in an underground mine. ***Ritchey v. Blair Electric Service Co.***, 6 BLR 1-966 (1984).

Employer must establish that claimant was not regularly exposed to coal mine dust. 20 C.F.R. §735.202(a)(1)(i); ***Ray v. Williamson Shaft Contracting Co.***, 14 BLR 1-105 (1990)(en banc); ***Tressler v. Allen & Garcia Co.***, 8 BLR 1-365 (1985). Because substantial evidence supported the administrative law judge's finding of sufficient dust exposure to qualify as a transportation or construction worker pursuant to Section 725.202, the Board, finding this determination applicable to Section 725.492(c), held that rebuttal of the presumption was precluded by employer's failure to show the absence of regular dust exposure. ***Rickard v. C & K Coal Co.***, 7 BLR 1-372 (1984).

CASE LISTINGS

[Fourth Circuit found claimant's duties driving truck that hauled coal between strip mine and tipple to be covered coal mine employment] ***Roberts v. Weinberger***, 527 F.2d 600 (4th Cir. 1975).

[carpenter working outside mine is miner where such duties bear a reasonable relationship to the overall process of coal mining] ***Warner v. The Youghiogheny and Ohio Coal Co.***, 1 BLR 1-365 (1978).

[field construction superintendent in building coal preparation plant is miner and employer is a coal mine operator] ***Hughes v. Heyl & Patterson, Inc.***, 647 F.2d 452, 3 BLR 2-15 (4th Cir. 1981).

[claimant not miner: hauling coal from company tipple to private consumers not a transportation worker because activities were not integral to the production of coal] ***Cole v. Director, OWCP***, 6 BLR 1-1042 (1983); *see also* ***Foster v. Director, OWCP***, 8 BLR 1-188 (1985); ***Flener v. Director, OWCP***, 6 BLR 1-1274 (1984); ***Whitaker v. Director, OWCP***, 6 BLR 1-983 (1984); ***Duffy v. Director, OWCP***, 6 BLR 1-655 (1983); ***Caldrone v. Director, OWCP***, 6 BLR 1-575 (1983); ***Yoho v. Director, OWCP***, 1 BLR 1-202 (1977).

[one or more discrete periods of coal mine construction work that resulted in exposure to dust must be considered qualifying coal mine employment] ***Conley v. Roberts and Schaefer Co.***, 7 BLR 1-309 (1984); ***Ritchey v. Blair Electric Service Co.***, 6 BLR 1-966 (1984).

[employee of railroad company was miner since he was involved in the extraction/preparation of coal] ***Seltzer v. Director, OWCP***, 7 BLR 1-912 (1985); ***Kee v. Director, OWCP***, 7 BLR 1-909 (1985).

[tugboat operator not miner while transporting coal from tipple-situs if coal is already "in condition for delivery to distributors and consumers"] ***Price v. Peabody Coal Co.***, 7 BLR 1-671 (1985).

[transportation worker who performs work in or around coal mine may be "miner" if activities at situs are integral to coal production process] ***Swinney v. Director, OWCP***, 7 BLR 1-524, 1-528 (1984).

[activities that involve transportation of coal are not integral to coal extraction/preparation once coal is "in condition for delivery to distributors and consumers"] ***Shaw v. Director, OWCP***, 7 BLR 1-652, 1-654 (1985); *see also* ***Southard v. Director, OWCP***, 732 F.2d 66, 69, 6 BLR 2-26 (6th Cir. 1984); ***Trull v. Director, OWCP***, 7 BLR 1-380, 1-615 (1984); ***Cole v. Director, OWCP***, 6 BLR 1-1042 (1983).

[transportation worker's duties must be integral to coal production process and a significant portion of his working day must be at the situs; Reform Act does not define "miner" to exclude employees of railroad companies that do not also operate coal mines. ***Clifford v. Director, OWCP***, 7 BLR 1-817 (1985); *see also* ***Ray v. Williamson Shaft Contracting Co.***, 14 BLR 1-105 (1990)(en banc).

[claimant's testimony properly credited regarding exposure to coal dust on coal mine construction projects only where mining started or continued] ***Tressler v. Allen & Garcia Co.***, 8 BLR 1-365 (1985).

[status depended on whether washing, included in definition of coal preparation, was part of coal preparation or merely part of coking preparation where job was to transport coal to company's washer at coke plant] ***Moore v. The Mead Corp.***, 8 BLR 1-421 (1985).

[remand for reconsideration of whether work transporting coal at the tipple met the "function" requirements or merely facilitated coking, where no determination as to whether two activities were functionally integral to the extraction and preparation of coal] ***Hutson v. Director, OWCP***, 8 BLR 1-328 (1985).

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

DIGESTS

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).

A construction worker involved in a surface mine construction project that was not yet operable and was not in the vicinity of an operable mine was not a "miner" under the Act. ***Williams Brothers, Inc. v. Pate***, 833 F.2d 261, 10 BLR 2-333 (11th Cir. 1987).

The Board affirmed the administrative law judge's finding that claimant's railroad employment did not constitute qualifying coal mine employment under the Act. The administrative law judge found 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 Fourth Circuit affirmed the Board's holding that claimant's transportation duties hauling raw coal by rail from a mine site to a preparation plant for processing constituted coal mine employment, qualified claimant's status as a "miner" under the Act. The employer, a common carrier by rail, was determined the appropriate responsible operator since it had employed a "miner" as defined by the Act. In so holding, the Board had rejected employer's numerous legislative and policy-based arguments that the independent railroad industry is excluded from the Act's coverage for purposes of liability. The Board also rejected contentions by the American Railroad Association that covered coal mine employment required the responsible operator to have an economic interest in the coal being mined. ***Roberson v. Norfolk and Western Railway Co.***, 13 BLR 1-6 (1989), *aff'd sub nom.* ***Norfolk & Western Railway Co. v. Roberson***, 918 F.2d 1144 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991).

In a case involving a coal mine construction worker, the Board held that proof of coal mine construction or maintenance work under 20 C.F.R. §725.202 includes proof that the coal mine construction or maintenance work was integral to the coal production process. The Board concluded that, in determining whether a coal mine construction worker falls within the definition of a miner under Section 725.202, it must first be established that the worker meets the Three-part situs/function/status test under ***Whisman v. Director, OWCP***, 8 BLR 1-96 (1985) -- the two-part situs/function test for cases arising within circuits where such precedent is controlling, as in this case arising within the Fourth Circuit, *see* ***Collins v. Director, OWCP***, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986). Meeting the applicable three- or two-part test establishes invocation of the rebuttable dust exposure presumption under Section 725.202(a), and the burden shifts to employer to establish rebuttal of the presumption under Section 725.202(a)(1)(i), (ii). The Board noted that this approach is consistent with pertinent case law and Congressional intent in expanding coverage of the Act to transportation and construction workers, to the extent such workers are exposed to dust, under the Reform Act of 1977. The Board reversed the finding of the administrative law judge that employer had rebutted the dust exposure presumption under Section 725.202(a)(1)(i), holding that the evidence was inadequate, as a matter of law, to establish that the miner was not regularly exposed to coal mine dust. ***Ray v. Williamson Shaft & Contracting Co.***, 14 BLR 1-105 (1990)(en banc).

For workers involved in the transportation of coal, coal mine construction, or maintenance work, the worker must establish the appropriate two- or three-pronged test before being entitled to invocation of the presumption found at 20 C.F.R. §725.202(a). ***Ray v. Williamson Shaft Contracting Co.***, 14 BLR 1-105 (1990)(en banc); ***Garrett v. Cowin & Company, Inc.***, 16 BLR 1-77 (1990).

To rebut the Section 725.202(a) presumption, the party opposing entitlement must

establish that the maintenance, transportation, or construction worker was not regularly exposed to coal mine dust, or that such worker was not regularly employed in or around a mine or mine site. ***Ray v. Williamson Shaft Contracting Co.***, 14 BLR 1-105 (1990)(en banc); ***Garrett v. Cowin & Company, Inc.***, 16 BLR 1-77 (1990); ***Tressler v. Allen & Garcia Co.***, 8 BLR 1-365 (1985); ***Conley v. Roberts and Schaefer Co.***, 7 BLR 1-309 (1984); ***Ritchey v. Blair Electric Service Co.***, 6 BLR 1-966 (1984).

5/95