BRB No. 98-1253 BLA

KENNETH HUNSAKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HUNSAKER COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
ROCKWOOD INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
and	)	
	)	
KENNETH HUNSAKER/HUNSAKER TRUCKING/VIRGINIA TRUCKING	)	
	)	
and	)	
	)	
TRAVELER'S INSURANCE COMPANY	)	
	)	
Employers/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
	)	
Party-in-Interest	)	

Appeal of the Decision and Order of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Vinyard & Moise), Abingdon, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer, Hunsaker Coal Company.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer, Hunsaker Coal Company, appeals the Decision and Order (96-BLA-0995) of Administrative Law Judge Mollie W. Neal awarding benefits 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).[1] The administrative law judge found that between the years of 1948 and 1985, claimant worked for a total of eighteen and one-quarter years of coal mine employment. Decision and Order at 4. The administrative law judge further found that claimant's work as a self-employed truck driver between the years of 1985 and 1989 did not constitute covered coal mine employment under the Act as such work was not an integral part of coal production. Decision and Order at 7. Considering the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3) and (4), and that such a finding established a material change in conditions pursuant to 20 C.F.R. §725.309. Decision and Order at 8-20. The administrative law judge further concluded that

[1]Claimant was denied benefits on two previously filed claims. Director's Exhibit 53. Claimant filed the instant claim on April 7, 1994. Director's Exhibit 1. After denial by the district director, Director's Exhibit 46, claimant requested a hearing, Director's Exhibit 48. Subsequently, the claim was remanded to the Office of Workers' Compensation, for development of responsible operator evidence. Director's Exhibit 60. The district director found that claimant's self-employment as a truck driver during the years from 1985-1989 did not constitute covered coal mine employment and employer was designated responsible operator. Director's Exhibit 64. Subsequently, a hearing was held and, on May 28, 1998, the administrative law judge issued the Decision and Order awarding benefits.

claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203 and that claimant was entitled to the irrebutable presumption found at 20 C.F.R. §718.304 based on a finding of complicated pneumoconiosis. Decision and Order at 21. Accordingly, benefits were awarded. The administrative law found that benefits were payable by employer, Hunsaker Coal Corporation.

On appeal, employer does not challenge claimant's entitlement to benefits, but instead challenges its designation as responsible operator. Employer asserts that the administrative law judge erred in finding claimant's 1995 deposition and hearing testimony not credible and unsupported and that the administrative law further erred in relying exclusively upon claimant's 1992 deposition. Employer further asserts that the administrative law judge erred in concluding that claimant's employment between the years 1985 and 1988 did not constitute coal mine employment under the Act, and thus that Cane Patch Coal Company (Cane Patch) should have been designated responsible operator. Finally, employer asserts that the Black Lung Disability Trust Fund should be liable for the payment of all benefits inasmuch as the Director, Office of Workers' Compensation Programs (the Director), failed to identify all potential responsible operators. The Director has filed a Motion to Remand.[2] The Director agrees with employer that claimant's work between the years 1985 and 1988 constituted coal mine employment as defined by the Act.[3] The Director further asserts, however, that such a finding would not necessarily relieve employer of liability if the administrative law judge determines that no other employer meets the statutory requirements of a responsible operator. Claimant responds and urges affirmance of the award of benefits. Claimant further asserts his belief that his employment between the years of 1985 and 1989 constituted coal mine employment under the Act.[4]

The Board's scope of review is defined by statute. If the administrative law

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[2]We accept the Motion to Remand as the Director's response brief and proceed to review this appeal on the merits.

[3]In making this assertion, the Director concedes that he urged the opposite finding below, *i.e.*, that claimant's work as a self-employed trucker did not constitute covered coal mine employment. The Director now concedes, however, that his earlier position is "untenable." Director's Brief at 4 n.2.

[4]We affirm, as unchallenged by any of the parties, the administrative law judge's findings regarding the merits of entitlement as well as the ultimate award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Accordingly, we confine our analysis to the issue of liability.

judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

Claimant, the Director and employer all agree that claimant's work as a self-employed trucker between the years of 1985 and 1989 constituted coal mine employment under the Act. The administrative law judge found that employer was the last coal mine operator for whom claimant worked for at least one year. Decision and Order at 4, 22- 23. Accordingly, the administrative law judge concluded that employer was the responsible operator and liable for payment of benefits. *See* 20 C.F.R. §725.493(a)(1). The administrative law judge further found that claimant's work as a self-employed truck driver[5] between the years of 1985 and 1989 did not constitute covered coal mine employment under the Act. Decision and Order at 7. The administrative law judge found that claimant's employment as a truck driver consisted of operating loaders, loading the trucks and driving the trucks occasionally. The administrative law judge concluded that such employment was ancillary to coal transportation and did not constitute coal mine employment under the Act inasmuch as the coal was already in the stream of commerce. Decision and Order at 7.

In *Director, OWCP v. Consolidation Coal Co.* [*Krushansky*], 923 F.2d 38, 14 BLR 2-139 (4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, enunciated a two-prong situs function test stating that in order to be considered a miner as defined by the Act, an individual must have worked in or around a coal mine and have been employed in the extraction or preparation of coal. 30 U.S.C. §§932(b), (c), 902(d); *see Amigo Smokeless Coal Co. v. Director, OWCP* [*Bower*], 642 F.2d 68, 2 BLR 2-68 (4th Cir. 1981). Generally speaking, the tipple traditionally marks the demarcation point between the mining and marketing of coal; when the coal leaves the tipple, extraction and preparation are complete, and it is entering into the stream of commerce. *Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); *see also Norfolk & Western Railway Co. v. Shrader,* 5 F.3d 777, 18 BLR 2-35 (4th Cir. 1993); *Norfolk & Western Railway Co. v. Roberson,* 918 F.2d 1144, 14 BLR 2-106 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 2012 (1991).

[5]Claimant's self-employment during this period was with companies variously titled, "Kenneth Hunsaker," "Hunsaker Trucking" and "Virginia Trucking."

In the instant case, the record demonstrates, as both the Director and employer assert, that, as a truck driver, claimant took unprocessed coal from Kentucky and sold the coal to tipple operators in Virginia, who processed the coal. Director's Exhibit 45. Accordingly, as a truck driver, it appears that claimant transported unprocessed coal that had not entered the stream of commerce. Accordingly, we vacate the administrative law judge's determination and remand the claim for further consideration as to whether claimant's employment as a truck driver constituted coal mine employment under the Act.

If, on remand, the administrative law judge determines that claimant's employment as a truck driver constitutes coal mine employment under the Act, then the administrative law judge must address other relevant issues. The record demonstrates that, while employed as a truck driver, claimant hauled coal for Cane Patch. Director's Exhibit 50. On remand, the administrative law judge, must address the nature of claimant's work for Cane Patch, *i.e.*, whether claimant's work constituted that of an employee or that of an independent contractor. *See* 20 C.F.R. §725.491(c)(2)(ii); *Crabtree v. Bethelehem Steel Corporation*, 7 BLR 1-354 (1984)(Smith, J., concurring). Principal factors to be considered are whether employer had the right to control claimant's activities; what was the method of payment involved; whether furnishings were provided; and whether employer had the right to dismiss claimant from the job. *Crabtree*, *supra*. Accordingly, if reached, the administrative law judge must determine whether claimant's work for Cane Patch constituted that of an employee.[6] If the administrative law judge determines that

[6]We acknowledge that the administrative law judge concluded that claimant's testimony regarding his employment with Cane Patch was not "credible." Decision and Order at 6. This finding, however, was rendered pursuant to the administrative law judge's conclusion that claimant's work as a truck driver did not constitute coal mine employment. In view of our contrary holding, *i.e.*, that claimant's employment as a trucker could constitute covered coal mine employment, *see* discussion, *supra*, we conclude that, if reached on remand, the administrative law judge must specifically address the nature of claimant's employment with Cane Patch, inasmuch as resolution of the nature of that relationship is fundamental to the disposition of this case. In this context, the administrative may, if needed, reopen the record, for the submission of relevant evidence. 20 C.F.R. §725.456(e); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 and 13 BLR 1-57 (1989)(en banc recon.)(McGranery, J., concurring); *Toler v. Associated Coal Co.*, 12 BLR 1-49 (1989); *Borgeson v. Kaiser Steel Coal Co.*, 12 BLR 1-169 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1988); *Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986).

claimant's relationship with Cane Patch constituted that of an employee/employer relationship, and further determines that Cane Patch satisfies the statutory requirements of a responsible operator, *see* 20 C.F.R.§§725.492, 725.493, then responsibility for payment of benefits in this case lies with the Black Lung Disability Trust Fund inasmuch as the Director has failed to proceed against all potential responsible operators. *See Director, OWCP v. Trace Fork Coal Co.* [*Matney*], 67 F.3d 503, 19 BLR 2-290 (4th Cir. 1995); *Crabtree, supra*; *see also Mitchem v. Bailey Energy, Inc.*, *et. al*, 21 BLR 1-172 (1999)(*en banc* decision)(Hall, Nelson, JJs., dissenting).

If, alternatively, the administrative law judge determines that claimant's work as a truck driver constituted coal mine employment, but that claimant's work for Cane Patch constituted that of an independent contractor, the administrative law judge must make a factual inquiry into any and all of claimant's trucking companies, *e.g.,* "Kenneth Hunsaker," "Hunsaker Trucking" and/or "Virginia Trucking" in order to determine whether any or all of these companies are able to satisfy the statutory definition of a responsible operator. *See* 20 C.F.R. §§725.492, 725.493. If, under this scenario, the administrative law judge determines that these companies fail to satisfy the statutory requirements of a responsible operator, liability for benefits properly rests with employer, Hunsaker Coal Company, inasmuch as it remains the last employer with whom claimant was employed for at least one year. 20 C.F.R. §725.493(a).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed as to the award of benefits, but findings regarding liability are vacated and the case is remanded in order to determine liability for the payment of benefits.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge