Chapter 6
Definition of Coal Miner and Length of Coal Mine Employment

I. Coal miner defined under 20 C.F.R. Part 410 and § 410.490

The term "miner" or "coal miner" is defined under the Part B and "transition claim" regulations as:

> [A]ny individual who is working or has worked as an employee in a coal mine, performing functions in extracting the coal or preparing the coal so extracted.

20 C.F.R. § 410.110(j).

Under 20 C.F.R. Part 410 of the Act, "outside men" such as workers at the tipple and coal mine construction and transportation workers, were not included within the definition of a "miner." However, the 1977 amendments (20 C.F.R. Part 727) specifically extended coverage to such individuals when they work in conditions "substantially similar" to conditions in underground coal mines.

Also, before the 1977 amendments, a self-employed individual was not considered a "miner" within the meaning of the Act. *Montel v. Weinberger*, 46 F.2d 679 (6th Cir. 1976). The same was true of an independent contractor. *Winton v. Director, OWCP*, 2 B.L.R. 1-187 (1979). As will be discussed, the 1977 amendments, however, included these categories of workers in the definition of a "miner."

II. Coal miner defined under 20 C.F.R. Parts 718 and 727

A. Generally

1. For claims filed on or before January 19, 2001

The 1977 amendments state that the purpose of the Act is to provide benefits, in cooperation with the states, to miners who are totally disabled due to coal workers' pneumoconiosis, and to surviving dependents of miners whose death was due to the disease. 30 U.S.C. § 901(a). Thus, a prerequisite to establishing entitlement to benefits is proving the claim is filed by a “coal miner,” or the survivor of a “coal miner” and, in light of the

Act's purpose, the definition of “miner" was significantly broadened. A "miner" is defined at 20 C.F.R. § 725.202(a) as the following:

> [A]ny person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. A coal mine construction or transportation worker shall be considered a miner to the extent such individual is or was exposed to coal mine dust as a result of employment in or around a coal mine or coal preparation facility.

20 C.F.R. §§ 725.101(a)(26) and 725.202(a) (2000).

The regulations at 20 C.F.R. § 725.202(a) (2000) specifically provide that a self-employed individual, or an independent contractor, may be considered a “miner.” In fact, an individual who picked coal from shale dumps for his family during childhood was deemed a "miner" under the Act. *Smith v. Director, OWCP*, 8 B.L.R. 1-258 (1985). However, the legislative intent of the Act provides an individual's exposure to coal dust, which did not occur in or around a coal mining or coal preparation facility, is not covered by the Act. S.Rep.No. 95-209, 95th Cong., 1st Sess. at 20-1 (1977); Conference Rep. at H.Rep.No. 95-864, 95th Cong. 2d Sess. at 15 (1978).

2. For claims filed after January 19, 2001

a. Coke oven workers excluded

The amended regulations retain the language of the original provisions, but they also contain a clarification that coke oven workers are not considered "miners" under the Act. The amended regulation at 20 C.F.R. § 725.101(a)(19) provides:

> Miner or coal miner means any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal. The term also includes an individual who works or has worked in coal mine construction or transportation in or around a coal mine, to the extent such individual was exposed to coal mine dust as a result of such employment (see § 725.202). For purposes of this definition, the term does not include coke oven workers.

20 C.F.R. § 725.101(a)(19).

b. Rebuttable presumption of "miner" status

Moreover, the amended regulation at 20 C.F.R. § 725.202(a) provides a new rebuttable presumption that certain individuals are miners:

> (a) Miner defined. A 'miner' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner. This presumption may be rebutted by proof that:
>
> > (1) The person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
> >
> > (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

20 C.F.R. § 725.202(a).

B. The three-prong test

1. Generally

Based on the language of the Act and its legislative history, Congress intended that the term "miner" include all workers who perform work within the immediate area of a coal mine, and whose duties are part of the *extraction* or *preparation* process. Recognizing this, the Board, in *Whisman v. Director, OWCP*, 8 B.L.R. 1-96 (1985), established a three prong test to determine whether a worker is a "miner" within the meaning of the Act. The worker must prove: (1) the coal is still in the course of being processed and is not yet a finished product in the stream of commerce (**status**); (2) the worker performs a function integral to the coal production process, *i.e.*, extraction or preparation, and not one merely ancillary to the delivery and commercial use of processed coal (**function**); and (3) the work occurs in or around a coal mine or coal preparation facility (**situs**).

2. Merger of "status" and "function" prongs in some circuits

Some circuit courts hold the "status" prong is subsumed in the "function" prong of the analysis and, therefore, an individual is a coal "miner" if s/he satisfies the function and situs prongs of the test:

a. Third Circuit

The Third Circuit held the "status" prong of the analysis was subsumed in the "function" prong in *Stroh v. Director, OWCP*, 810 F.2d 61 (3rd Cir. 1987). The court reiterated its two prong situs and function test for determining whether an individual is a "miner" under the Act in *Elliot Coal Mining Co. v. Director, OWCP*, 17 F.3d 616 (3rd Cir. 1994). Under the facts of *Elliot Coal*, Claimant was not a "miner" as he "worked out of the main office . . . and was required to travel by company truck among five strip mines within a fifteen mile radius." Claimant did not supervise the mining process; rather, he "was present at the mines on only limited occasions and did not perform the functions of a miner."

b. Fourth Circuit

The Fourth Circuit similarly holds the definition of a "miner" only includes the situs and function prongs. *Collins v. Director, OWCP*, 795 F.2d 368 (4th Cir. 1986); *Eplion v. Director, OWCP*, 794 F.2d 935 (4th Cir. 1986).

c. Sixth and Seventh Circuits

The Sixth and Seventh Circuits generally employ the two-prong, function-situs test as well. *Director, OWCP v. Consolidation Coal Co. [Petracca]*, 884 F.2d 926 (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).

d. Eleventh Circuit

The Eleventh Circuit, in *Foreman v. Director, OWCP*, 794 F.2d 569 (11th Cir. 1986), stated that the definition of a miner only includes the situs and function prongs.

3. Status of the coal

The focus of inquiry under the first prong is the "status" of the coal itself. The coal with which Claimant worked must have been in the

extracting, preparing, or processing stage, and cannot be a finished product for use by an ultimate consumer. Thus, in *Foster v. Director, OWCP*, 8 B.L.R. 1-188 (1985), the Board held time spent by Claimant "hauling prepared coal to ultimate consumers did not constitute coal mine employment," and the worker could not be considered a "miner" for this time period. *Id*. at 1-189. Along the same lines, a railroad track repairer was not involved in coal mine employment because he was exposed only to processed coal. *Blevins v. Louisville & Nashville Railroad Co.*, 13 B.L.R. 1-69 (1988). *See also Kane v. Director, OWCP*, 10 B.L.R. 1-148 (1987).

4. Function of the miner

The "function" prong of the Board's test requires the individual's work contribute to the extraction and preparation of coal. This requirement is satisfied if the individual's activities are an integral or necessary part of the overall coal extraction process. *Canonico v. Director, OWCP*, 7 B.L.R. 1-547 (1984); *Bower v. Amigo Smokeless Coal Co.*, 2 B.L.R. 1-729 (1979). The phrase "coal extraction" is self-descriptive--encompassing the process of removing coal from its deposits in the earth, including necessary support functions, such as motorman and brakeman. The phrase "coal preparation" is defined under the amended regulations at 20 C.F.R. § 725.101(a)(13)[1] as the "breaking, crushing, sizing, cleaning, washing, drying, mixing, storing and loading of bituminous coal, lignite or anthracite, and such other work of preparing coal as is usually done by the operator of a coal mine." Coal is beyond the "preparation" stage contemplated by the regulations when it is processed and prepared for the market. *Director, OWCP v. Consolidation Coal Co.*, 923 F.2d 38 (4th Cir. 1991).

a. Integral to the process

An individual need not be engaged in the actual extracting or preparing of coal to meet the "function" prong, so long as the work s/he performs is integral to the coal production process. *Ray v. Williamson Shaft Contracting Co.*, 14 B.L.R. 1-105 (1990) (*en banc*); *Tobin v. Director, OWCP*, 8 B.L.R. 1-115, 1-117 (1985). The focus of inquiry is whether the function is integral to extraction or preparation of coal as opposed to being merely ancillary to the delivery and commercial use of processed coal.

b. Construction workers

Construction workers are considered "miners" only to the extent they are exposed to coal mine dust as a result of employment in or around a coal

1 Formerly 20 C.F.R. § 725.101(a)(25)(2000).

mine or coal preparation facility. 20 C.F.R. § 725.202(b).[2] However, such individuals are entitled to a rebuttable presumption that they were exposed to coal mine dust during all periods of such employment.[3]

The presumption may be rebutted by evidence demonstrating either of the following: (1) the individual was not regularly exposed to coal mine dust during his employment in or around a coal mine or coal preparation facility; or (2) the individual was not regularly employed in or around a coal mine or coal preparation facility. 20 C.F.R. § 725.202(b).[4]

The Seventh Circuit provided an instructive analysis of whether a construction worker was a "miner" in *R&H Steel Buildings, Inc. v. Director, OWCP*, 146 F.3d 514 (7th Cir. 1998). Under the facts of the case, Claimant worked for Employer in coal mine construction. One of the issues before the court was whether Claimant was a "miner" within the definition of the Act during the time he worked in construction.

In its analysis, the court stated whether construction work is covered by the Act depends, in part, on whether the worker is exposed to coal dust:

> At R&H, (Claimant) worked at a number of coal mine construction projects. The work involved surface projects and did not involve mining. The dispute in this case is over the exact periods of time during which he was exposed to coal dust while working on the projects, for as we have seen, in order to be classified a miner he had to be exposed to coal dust during one year of his employment.

On this basis, the court reviewed Claimant's testimony as well as testimony of Employer's officers to conclude that Claimant worked at several different mine sites during his employment with R&H. The court further found Claimant was exposed to coal dust for twelve months while working for R&H and, therefore, he was a "miner" within the meaning of the Act. As a result, R&H, as the last operator to employ Claimant for one year, was the responsible operator.

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2 Formerly 20 C.F.R. § 725.202(a)(2000).

3 In *George v. Williamson Shaft Construction Co.*, 8 B.L.R. 1-91 (1985), the Board held "coal mine dust" and "coal dust" are identical terms within the meaning of the Act, and "the employer would have to rebut the presumption of exposure to coal dust by establishing that the [worker] was not regularly exposed to airborne particulate matter occurring as a result of the extraction or preparation of coal in or around a coal mine." *Id*. at 1-194. *See also Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865 (3rd Cir. 1986).

4 Formerly 20 C.F.R. § 725.202(a) (2000).

c. Electrician

In *Ritchey v. Blair Electric Service Co.*, 6 B.L.R. 1-966 (1984), an Administrative Law Judge properly found any work performed by the individual as an electrician in a coal preparation facility constituted coal mine construction work. However, the Administrative Law Judge also concluded the presumption at 20 C.F.R. § 725.202(a) was rebutted by evidence that Claimant was not regularly exposed to coal dust, and the electrician work was not a regular part of Claimant's employment.

In *Glem v. McKinney*, 33 F.3d 340 (4th Cir. 1994), an electrical construction worker qualified as a "miner" under the Act. In so holding, however, the court reasoned the two-prong (situs-function) test set forth in *Director, OWCP v. Consolidation Coal Co.*, 923 F.2d 38, 41-42 (4th Cir. 1991) does not apply to construction workers because such workers would "rarely, if ever, qualify as miners under the Act." The court concluded the two-prong test was more applicable to transportation workers because transportation "fits neatly into the concepts of extracting and preparing coal and thus easily lends itself to analysis under the two-step test."

d. Bulldozer operator

In *Amax Coal Co. v. Fagg*, 865 F.2d 916 (7th Cir. 1989), a worker who bulldozed soil at the same time new coal was being mined in a nearby pit was classified as a "miner" because his work was part of the modern process of extracting and preparing coal.

e. Consumer coal handler-ore mine power plant

In *Foreman v. Director, OWCP*, 794 F.2d 569 (11th Cir. 1986), Claimant's work as a coal handler for a consumer of coal, an ore mine power plant, was not integral to the preparation of the coal; therefore, Claimant was not a miner within the meaning of the Act.

f. Mine inspector

In *Moore v. Duquesne Light Co.*, 4 B.L.R. 1-40 (1981), a federal mine inspector was a "miner" within the meaning of the Act since his work concerned health and safety, which is integral to the operation of a coal mine thereby satisfying the function test. *But see Southard v. Director, OWCP*, 732 F.2d 66, 70 (6th Cir. 1984); *Dowd v. Director, OWCP*, 846 F.2d 193 (3rd Cir. 1988); *Falcon Coal Co. v. Clemons*, 873 F.2d 916 (6th Cir. 1989) (if a worker's tasks are merely convenient, but not vital or essential, to the production or extraction of coal, the worker is generally not

classified as a "miner").

However, by unpublished decision in *D.R. v. Jewell Ridge Mining Corp.*, BRB 08-0661 BLA (May 27, 2009) (unpub.), a case arising in the Fourth Circuit, the Board held:

> . . . where a claimant worked as a mine inspector for the state of Virginia, since Virginia cannot be a responsible operator, the length of claimant's tenure with the state should be subtracted from the length of coal mine employment to be credited to him by the administrative law judge.

Slip op. at 7.

g. Inventory work

In *Settlemoir v. Old Ben Coal Co.*, 9 B.L.R. 1-109 (1986), the Board held levels of inventory inherently affect the level of coal production such that Claimant's inventory work satisfied the function test.

h. Transportation workers

- Between extraction site and preparation site, a "miner"

Coal transportation workers have presented a special problem for the Board. Transportation workers are "miners" under the regulations if their work is "integral to the extraction or preparation of coal." 20 C.F.R. § 725.202(b). Traditionally, the Board and circuit courts hold a coal mine includes any area between the site of extraction and the site of preparation, which is known as the "tipple." Hauling coal from the mine to the tipple, or another preparation facility, constitutes coal mine employment. On the other hand, hauling processed coal to consumers does not constitute qualifying work as a "miner." *Norfolk & Western Railway Co. v. Director, OWCP*, 5 F.3d 777 (4th Cir. 1993) (upholding *Roberson* to state that delivery of empty coal cars is part of coal preparation); *Norfolk & Western Railway Co. v. Roberson*, 918 F.2d 1144, 14 B.L.R. 2-106 (4th Cir. 1990); *Buckley v. Director, OWCP*, 6 B.L.R. 1-1192 (1984); *Roberts v. Director, OWCP*, 6 B.L.R. 1-849 (1984); *Winton v. Director, OWCP*, 2 B.L.R. 1-187 (1979); *Roberts v. Weinberger*, 527 F.2d 600 (4th Cir. 1975).

- Purpose to deliver to consumers, not a "miner"

The Board previously held, where an individual involved in coal transportation spends time loading at the tipple before transporting the coal to private consumers, the time s/he spent at the tipple constituted coal mine employment. *Flenor v. Director, OWCP*, 6 B.L.R. 1-1274 (1984); *Buckley v. Director, OWCP*, 6 B.L.R. 1-1192 (1984); *Ritchey v. Blair Electric Service Co.*, 6 B.L.R. 1-966 (1984). The Fourth Circuit took the same position. *Amigo Smokeless Coal v. Director, OWCP*, 642 F.2d 68 (4th Cir. 1981); *Sexton v. Matthews*, 558 F.2d 88 (4th Cir. 1976). The circuit court reasoned that loading is part of the definition of coal preparation and, as a result, the portion of time the individual spent loading at the tipple constituted coal mine employment.

The Board then changed its approach, specifically overruling *Buckley*. Rather than applying the approach used in *Sexton*, which the Board stated "bifurcates the function of the transportation worker into covered and non-covered periods," the Board adopted the approach enunciated by the Sixth Circuit in *Southard v. Director, OWCP*, 732 F.2d 66 (6th Cir. 1984). As stated by the Board, rather than "mechanically applying statutory and regulatory definitions to each of the transportation worker's tasks in a vacuum, this second approach analyzes whether the particular activities assist in functions that are actually part of coal production and, therefore, covered by the Act, or whether the activities are ancillary instead to the commercial delivery and use of the processed coal." *Swinney v. Director, OWCP*, 7 B.L.R. 1-524 (1984).

Thus, a claimant must establish more than the fact that an activity, such as loading, occurred at the situs. The worker also must show the loading was integral to the extraction or preparation of coal. In *Swinney*, the coal hauler's primary purpose was to deliver coal to his customers, not to perform a function integral to the production of coal. Because the loading was ancillary to his transportation of coal to customers, the time he spent at the tipple did not constitute coal mine employment. *See also Clifford v. Director, OWCP*, 7 B.L.R. 1-817 (1985).

However, in *Bowman v. Director, OWCP*, 7 B.L.R. 1-718 (1985), the Board held Claimant was a coal miner. Here, Clamant loaded coal into his truck from the mine pit, and he

used a special fork to screen out unwanted particles before the loading occurred. *See also Mitchell v. Director, OWCP*, 855 F.2d 485 (7th Cir. 1988) (a worker who cleaned railroad cars so that they could be loaded with new coal at the preparation plant was a "miner" as he performed work related to the preparation of coal for delivery to the public); *Hanna v. Director, OWCP*, 860 F.2d 88 (3rd Cir. 1988) (loading coal from a processing tipple onto barges was a necessary part of preparing coal for transporting it to consumers, and did not qualify Claimant as a "miner"); *Stroh v. Director, OWCP*, 810 F.2d 61 (3rd Cir. 1987) (self-employed trucker who loaded coal at mine sites and hauled raw coal to processing plant is a "miner" under the Act); *Seltzer v. Director, OWCP*, 7 B.L.R. 1-912 (1985); *Kee v. Director, OWCP*, 7 B.L.R. 1-909 (1985).

i. Administrative employee

By unpublished decision in *Smith v. James River Coal Co.*, BRB No. 09-0859 BLA (Sept. 30, 2010)(unpub.), a case arising in the Sixth Circuit, the Administrative Law Judge properly held Claimant did not qualify as a "miner" under the Act. Based on deposition testimony of Claimant and his former supervisor, it was determined Claimant worked as a mine engineer, licensed foreman, and administrative assistant for approximately 15 years at various surface mines. Claimant stated, in his position, he obtained permits, surveyed property, served as a foreman on an as-needed basis, and "spent approximately fifty percent of his time on site." Claimant further testified, as an assistant foreman, he performed "core drilling and time studies", where "65% to 85% of his work was outside" with "some" underground mining.

Claimant's supervisor confirmed Claimant assisted in obtaining permits, met with state mining officials to "walk" the permits, designed silt dams, assisted in reclamation, and consulted with lawyers regarding property leases. However, the supervisor also testified "claimant's job did not require him to visit active coal mines and . . . his offices were no closer than a thousand yards to a tipple or mine." The supervisor stated he "would see claimant almost every day, sometimes spending all day with him in an air conditioned office." Although Claimant was required to be present at "core drilling" once a week, the supervisor stated that Claimant was "never involved in the actual drilling process."

The Administrative Law Judge properly credited the foreman's testimony to find Claimant did not work around an active mine and, as administrative assistant, he was not involved in any coal production activity. The Administrative Law Judge was persuaded by the supervisor's testimony

that Claimant did not work as a foreman, and Claimant's presence at the "coal drilling sites alone does not qualify him as a miner." The Administrative Law Judge properly concluded Claimant's job duties were incidental, or merely convenient, to the extraction, preparation, and transportation of raw coal such that Claimant did not qualify as a "miner" under the Act.

j. Security guard

By unpublished decision in *Hansen v. The Wackenhut Corp.*, BRB No. 09-0179 BLA (Nov. 27, 2009) (unpub.), the Board held a security officer working for a security company at a coal mining site may qualify as a "miner" under the Act. The Administrative Law Judge concluded the "situs" requirement for coverage was satisfied as Claimant "worked in or around a coal mine or coal preparation facility." The Board affirmed this finding as unchallenged on appeal.

However, turning to the "function" requirement, *i.e.* whether Claimant performed duties essential to the extraction and preparation of coal, the Administrative Law Judge found this requirement was not met, and stated:

> While the job duties were very important to securing property and contributed to ensuring the safety of the employees at the mine site, the duties were not integral or essential to the actual extraction, preparation, or transportation of coal.

In so holding, the Administrative Law Judge adopted the Director's position in the claim.

On appeal, the Director changed his position, and argued before the Board that Claimant's duties satisfied both the "situs" and "function" prongs to qualify him as a "miner" under the Act. Notably, the Director cited an unpublished Sixth Circuit decision, *Sammons v. EAS Coal Co.*, 1992 WL 348976 (6th Cir. Nov. 24, 1992)(unpub.), wherein the court "made a distinction between those security guards who do traditional security work, . . . and those who perform duties that are necessary to ensure the safe operation of the mine." The Director likened Claimant's job duties to whose of the "mine inspector," and argued:

> An individual employed by a coal mine operator to monitor the health and safety environment at its coal mines is involved in an activity founded not only on a concern for the health and safety of coal mines but also on a concern for maximizing the industrial process. Increased industrial production is a necessary by-product of a coal mine's safe environment. Because of this, a

> mine inspector employed by a coal mine operator is engaged in a function that is necessarily related to the extraction or preparation of coal. In the instant case, [c]laimant performed many of the duties of a mine inspector; consequently, those duties satisfy the function test.

Slip op. at 7 (quoting from the Director's Brief at p. 4).

The Board agreed with the Director's position on appeal. As a result, the Administrative Law Judge's decision was vacated in part, and the claim was remanded for further consideration of whether Claimant's job duties satisfied the "function" requirement to qualify him as a "miner" under the Act.

5. Situs of the work performed

The situs prong of the test requires that the individual work in or around a coal mine. Twenty C.F.R. § 725.101(a)(23) defines the term "coal mine" as the following:

> [A]n area of land and all structures, facilities, machinery, tools, equipment, shafts, slopes, tunnels, excavations and other property, real or personal, place upon, under or above the surface of such land by any person, used in, or to be used in, or resulting from, the work of extracting in such area bituminous coal, lignite or anthracite from its natural deposits in the earth by any means or method, and in the work of preparing the coal so extracted, and includes custom coal preparation facilities.

20 C.F.R. § 725.101(12).[5]

The function of the land, not the individual, is determinative of whether the situs of the work was in or around a coal mine. Therefore, the focus of inquiry is whether the intended use of the area of land on which the worker is employed is for the extraction or preparation of coal. *McKee v. Director, OWCP*, 2 B.L.R. 1-804 (1980); *Bower v. Amigo Smokeless Coal Co.*, 2 B.L.R. 1-729 (1979).

Congress extended coverage to facilities, which are *not* located on the actual property of the mine or preparation plant, if the facilities are directly involved in the process of coal mining. There is no requirement of contiguity, but the facility or area must be located in the vicinity of the mine it serves, and the worker must be directly involved in one or more of the

5 Formerly 20 C.F.R. § 725.101(a)(23) (2000).

covered occupations. Thus, an individual's work in a foundry not physically located next to the mine, or on mine property adjacent to a coal facility, fails the situs test. *Duffy v. Director, OWCP,* 6 B.L.R. 1-665 (1983). Similarly, an individual's work repairing mining equipment in a central shop located "about one mile" from the nearest mine fails the situs test. *Seibert v. Consolidation Coal Co.*, 7 B.L.R. 1- 42 (1984). *But see Baker v. U.S. Steel Corp.*, 12 B.L.R. 2-213 (11th Cir. 1989) (the court rejected a formal distance rule in favor of case-by-case analysis in which the actual distance from the mine would be a factor for consideration). *Director, OWCP v. Consolidation Coal Co. [Petracca]*, 884 F.2d 926 (6th Cir. 1989) (central machine shop considered "area around coal mine" because it was located in physical proximity to the mine site, and those persons working in the shop had significant and regular exposure to coal dust).

An individual must spend a "significant portion" of his time at a coal mine site to meet the situs test. Thus, in *Musick v. Norfolk and Western Railway Co.*, 6 B.L.R. 1-862 (1984), the Board held six to eight weekends per year was not a significant portion of Claimant's work time, and he was, therefore, neither a coal miner nor a coal transportation worker for the period during which he performed such work.

C. "Coal dust" versus "coal mine dust"

1. For claims filed on or before January 19, 2001

a. Benefits Review Board and Third Circuit

The Board does not draw a distinction between "coal dust" and the broader category of "coal mine dust," but concludes that both phrases refer to airborne particles resulting from the extraction or preparation of coal in or around a coal mine. *Garrett v. Cowin & Co.*, 16 B.L.R. 1-77 (1990); *Pershina v. Consolidation Coal Co.*, 14 B.L.R. 1-55 (1990)(en banc); *George v. Williamson Shaft Contracting Co.*, 8 B.L.R. 1-91 (1985) (definition of coal mine dust may include dust that arises from coal mine construction work). The Third Circuit held the terms "coal dust" and "coal mine dust" are interchangeable, but the court did not define the scope of "coal mine dust." *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865 (3rd Cir. 1986).

b. Tenth and Eleventh Circuits

The Tenth and Eleventh Circuits, on the other hand, departed from the Board's viewpoint to hold the phrases "coal mine dust" and "coal dust" are interchangeable, and these terms must be narrowly construed. In *William Brothers, Inc. v. Pate*, 833 F.2d 261 (11th Cir. 1987), the Eleventh

Circuit held the term "coal mine dust" does not include any dust found at a coal mine site; rather "coal mine dust" is dust generated from the extraction and preparation of coal. *Id*. at 266. The court further held Claimant was not a "miner" within the meaning of the Act since, as a surface coal mine construction worker on a mine site that was not yet operable, he had not been exposed to "coal mine dust." *Id*. at 266. *See also Bridger Coal Co. v. Director, OWCP*, 927 F.2d 1150 (10th Cir. 1991) (exposure to "coal mine dust" does not include exposure to mine dust that does not contain coal).

2. For claims filed after January 19, 2001

In its amended regulations, the Department changed the language at 20 C.F.R. § 725.101(a)(19), which contains the definition of a "miner," to provide coverage for individuals exposed to "coal mine dust" as opposed to merely "coal dust." 20 C.F.R. § 725.101(a)(19). In its comments, the Department stated, "This change makes the regulation consistent with the Department's long-held position that the occupational dust exposure at issue under the BLBA is a total exposure arising from coal mining, and not only exposure to coal dust itself." 65 Fed. Reg. 79,958 (Dec. 20, 2000).

III. Length of coal mine employment

There are two types of calculations in determining the length of a miner's employment. The length of employment calculation employed in this chapter serves to determine (1) how long the miner worked for purposes of application of certain "entitlement" presumptions pursuant to 20 C.F.R. § 718.301 (*i.e.* 20 C.F.R. §§ 718.203 and 718.305), and (2) whether a miner worked for an operator for a cumulative period of one year for purposes of responsible operator designation.[6]

Calculation of the length of coal mine employment in this Chapter may be based on "any reasonable method," such as affidavits of co-workers, testimony of the miner, payroll stubs, W-2 forms, or Social Security records.

A. The 125-day rule should not be used

1. The 125-day rule, generally

The 125-day rule was established to assist the fact-finder in determining *actual exposure* to coal dust while working for an operator such that the operator is properly named as potentially liable for the payment of benefits. *It is not used* to determine the length of coal mine employment for

[6] The other calculation related to designation of the proper responsible operator involves use of the 125-day rule, and is set forth in more detail in Chapter 7.

purposes of presumptions (*i.e.* 20 C.F.R. §§ 718.203 and 718.305), or weighing medical opinions. However, language used in the regulations caused considerable confusion:

> If the evidence establishes that the miner worked in or around coal mines at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in the coal mine employment for purposes of the Act.

20 C.F.R. § 725.101(a)(32)(i). The 125-day rule only addresses whether a miner has spent a sufficient number of *actual working days* at a mine site in order to name a particular operator as liable for the payment of benefits. It bears repeating that the 125-day rule is not utilized to calculate length of coal mine employment for purposes of the presumptions (20 C.F.R. § 718.301), or weighing medical opinions.

2. The 125-day rule is used for responsible operator designation

The Benefits Review Board and a majority of the circuit courts hold there is a bifurcated process for determining the proper responsible operator. Namely, once the fact-finder determines a miner was on the operator's payroll for a period of one calendar year, or partial periods totaling one year, then the fact-finder looks to see whether the miner spent an actual 125 working days at the operator's mine site. This requirement is designed to ensure the miner was subjected to "regular" exposure to coal dust while in the employ of the operator.

Therefore, unless (1) a claim was filed on or before January 19, 2001, and (2) the claim falls within the jurisdiction of the Seventh or Eighth Circuits, the fact-finder cannot use the "125-day rule" (*see* Exhibit 610) to determine whether the miner has worked for a cumulative period of one year in the mines for purposes of 20 C.F.R. § 718.301 (the entitlement presumptions). *See Landes v. Director, OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993); *Yauk v. Director, OWCP*, 912 F.2d 192, 195 (8th Cir. 1989).[7] *See* Chapter 7 for a further discussion of the 125-day rule.

7 In its comments to the amended regulations, the Department noted its disagreement with holdings in *Landes* and *Yauk*, where the circuit courts concluded that 125 days of employment with an operator translates into one year of employment for that employee for purposes of the entitlement presumptions. *See* 65 Fed. Reg. 79960 (Dec. 20, 2000).

3. The 125-day rule is not used for purposes of presumptions or weighing medical opinions

The Board holds, although intermittent periods of coal mine employment may accumulate to establish one year of coal mine employment, *Boyd v. Island Creek Coal Co.*, 8 B.L.R. 1-458 (1986), it rejected the argument that a year of coal mine employment is anything other than one full cumulative year of employment. *Dawson v. Old Ben Coal Co.*, 11 B.L.R. 1-58 (1988)(en banc) (125-day rule is inapplicable); *Gration v. Westmoreland Coal Co.*, 7 B.L.R. 1-90 (1984); *Soulsby v. Consolidation Coal Co.*, 3 B.L.R. 1-565 (1981). *See also Director, OWCP v. Gardner*, 882 F.2d 67 (3rd Cir. 1989).

In *Fletcher v. Director, OWCP*, 2 B.L.R. 1-911 (1980), Claimant argued the 125-day rule should be used in determining length of coal mine employment for the purposes of qualifying for the 20 C.F.R. § 727.203 presumption. The Board rejected Claimant's argument, and held the 125-day rule applies exclusively to identifying a responsible operator; the 125-day rule cannot be used to determine the length of coal mine employment for other purposes.

The Board reiterated this holding in *Croucher v. Director, OWCP*, 20 B.L.R. 1-67 (1996)(en banc), wherein it rejected Claimant's argument that his length of coal mine employment must be determined using the 125-day rule. The Board held the 125-day rule relates to identification of the proper responsible operator, not the actual length of a miner's employment as is required under pre-amendment regulations at 20 C.F.R. § 725.493 (2000). The Board noted:

> [T]he 125 day provision set out at Section 725.493(b) may be applicable once the threshold requirement that the miner be employed for at least one year, or partial periods totaling one year, is satisfied. (citation omitted). Once that requirement is satisfied, employer is provided an opportunity to establish that the miner's employment was not regular by proving that the miner has not worked for employer for a period of at least 125 working days. Thus, the Board has held that a mere showing of 125 days of coal mine employment does not, in and of itself, establish one year of coal mine employment under 20 C.F.R. § 725.493. (citation omitted).

In so concluding, the Board noted its disagreement with the Seventh and Eighth Circuits in *Landes* and *Yauk* to state the application of the 125-day rule to determine the miner's length of coal mine employment for purposes

of 20 C.F.R. § 718.301 results in miners receiving "credit for coal mine employment during periods of time where there is no evidence to support any coal mine employment whatsoever."

In *ARMCO, Inc. v. Martin*, 277 F.3d 468 (4th Cir. 2002), the Fourth Circuit applied the pre-amendment provisions at 20 C.F.R. § 725.493(a)(1) (2000) to hold the 125-day rule only may be used to determine the proper responsible operator; it cannot be used to determine Claimant's length of coal mine employment for purposes of the entitlement presumptions at 20 C.F.R. § 718.301.[8] In this vein, the court noted 20 C.F.R. § 725.493(b) (2000) provides a two-step inquiry in determining whether the named operator is properly responsible for the payment of benefits:

> Under the first step, a court must determine whether a miner worked for an operator for 'a period of one year, or partial periods totaling one year.' 20 C.F.R. § 725.493(b) (2000). If the court determines that this one-year requirement has been met, it must then undertake the second inquiry of whether a miner's employment during that one year was 'regular,' *i.e.* whether, during the one year, the miner 'was regularly employed in or around a coal mine.'

Id. at 474.

In particular, the court found the "regulations provide that responsible operator liability does not arise unless an operator employed a miner for one calendar year during which the miner regularly worked for that operator, defining 'regularly worked' to be a minimum of 125 days." In support of its position, the court cited to Board and circuit court decisions reaching the same result: *Croucher v. Director, OWCP*, 20 B.L.R. 1-68, 1-72 to 1-73 (1998)(en banc); *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871, 876 (10th Cir. 1996); and *Director, OWCP v. Gardner*, 882 F.2d 67, 71 (3rd Cir. 1989). The court explained:

> This two-step inquiry means that 'the one-year employment requirement sets a floor for the operator's connection with the miner,' below which the operator cannot be held responsible for the payment of benefits. The 125 day limit relates to the minimum amount of time the miner may have been exposed to

[8] Although the amended regulatory provisions were not applicable, the court stated that the new regulations clarified the earlier regulatory provisions, and the court's holding was consistent with the amended provisions. *Id.* at 475.

coal dust while in the employment by the operator. (citation omitted).

Id. at 475. In so holding, the court rejected the position taken by the Seventh and Eighth Circuits in *Landes v. Director, OWCP*, 997 F.2d 1192, 1195 (7th Cir. 1993) and *Yauk v. Director, OWCP*, 912 F.2d 192, 195 (8th Cir. 1989), which held a miner who works for 125 days will be credited with one year of coal mine employment for purposes of the presumptions. *See* 20 C.F.R. § 718.301.

B. For claims filed on or before January 19, 2001

When determining the length of a miner's employment for purposes of entitlement presumptions (20 C.F.R. § 718.301) and weighing medical opinions, "any reasonable method" may be used. The Board often has noted the Act fails to provide any specific guidelines for the computation of a Claimant's length of coal mine work. *Schmidt v. Amax Coal Co.*, 7 B.L.R. 1-489 (1984); *Hall v. Director, OWCP*, 2 B.L.R. 1-998 (1980). However, the regulations at 20 C.F.R. § 718.301 include a section, which addresses the issue of establishing length of coal mine employment. Twenty C.F.R. § 718.301(a) provides regular employment may be established on the basis of any evidence presented, including the testimony of Claimant or other witnesses, and shall not be contingent upon a finding of a specific number of days of employment within a given period. 20 C.F.R. § 718.301(a).

1. Burden of production/persuasion on Claimant

Claimant bears the burden of establishing the length of his or her coal mine employment. *Shelesky v. Director, OWCP*, 7 B.L.R. 1-34 (1984); *Niccoli v. Director, OWCP*, 6 B.L.R. 1-910 (1984); *Rennie v. U.S. Steel Corp.*, 1 B.L.R. 1-859 (1978). The Administrative Law Judge must make a specific, complete finding on this issue. *Boyd v. Director, OWCP*, 11 B.L.R. 1-39 (1988). As an example, in *Gibson v. Director, OWCP*, 1 B.L.R. 1-1015 (1978), a finding of 15 years coal mine employment is sufficient to trigger certain presumptions, whereas a finding of "approximately 15 years" is not specific and complete. On the other hand, a finding of "well over the statutory 15 years" has been upheld. *Dolzanie v. Director, OWCP*, 6 B.L.R. 1-865 (1984).

2. Any reasonable method of computation acceptable

In *Muncy v. Elkay Mining Co.*, 25 B.L.R. 1-21 (2011), the Board addressed analysis of a miner's claim under the 15-year presumption revived by Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148 (2010). With regard to the Administrative

Law Judge's calculation of the length of employment, the Board noted the length of employment was calculated based on "an employment history form, employment records from Claimant's former employers, and Social Security Administration (SSA) earnings records." Claimant argued the Administrative Law Judge erred because he "should have applied a formula set forth at 20 C.F.R. § 725.101(a)(32)(iii)" (*i.e.* the Administrative Law Judge should have used Exhibit 609, discussed *infra*) to calculate the length of the miner's employment, which would have produced a greater length of employment. The Board rejected Claimant's argument and stated:

> In determining the length of coal mine employment, the administrative law judge may apply any reasonable method of calculation. (citation omitted). Contrary to claimant's contention, the administrative law judge was not required to use the calculation method set forth in Section 725.101(a)(32)(iii). The regulation provides only that an administrative law judge 'may' use such method.

Id. at 1-26.

The Board will uphold an Administrative Law Judge's calculation of years of coal mine work based on a reasonable method of computation, which is supported by substantial evidence. *Clayton v. Pyro Mining Co.*, 7 B.L.R. 1-551 (1984); *Schmidt v. Amax Coal Co.*, 7 B.L.R. 1-489 (1984). Where an Administrative Law Judge fails to (1) recite the evidence on which s/he relies in reaching a determination, or (2) provide a rationale for crediting certain evidence over other evidence, the Board is unable to determine whether the Administrative Law Judge's conclusion is arbitrary or well-reasoned. Under these circumstances, a remand is necessary. *Bowman v. Director, OWCP*, 7 B.L.R. 1-718 (1985); *Shapell v. Director, OWCP*, 7 B.L.R. 1-304 (1984); *Fee v. Director, OWCP*, 6 B.L.R. 1-1100 (1984).

C. For claims filed after January 19, 2001

1. The regulatory requirements

The Department amended the regulations to delete 20 C.F.R. § 725.301(b) (2000), which provided "a year of employment means a period of one year, or partial periods totaling one year . . .." Under the amended regulations, 20 C.F.R § 725.301 provides the following:

> The presumptions set forth in Secs. 718.302, 718.303, 718.305 and 718.306 apply only if a miner worked in one or more coal mines for the number of years required to invoke the

> presumption. The length of a miner's coal mine work history must be computed as provided by 20 C.F.R. § 725.101(a)(32).

20 C.F.R. § 725.301. Twenty C.F.R. § 725.101(a)(32), in turn, reads as follows:

> Year means a period of one calendar year (365 days, or 366 days if one day is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.' A 'working day' means any day or part of a day for which the miner received pay for work as a miner, but shall not include any day for which the miner received pay while on approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

20 C.F.R. § 725.101(a)(32).

2. Bureau of Labor Statistics table- Exhibit 609, "Wage Base History"

The regulatory provisions at 20 C.F.R. § 725.101(a)(32) make reference to a table developed by the *Bureau of Labor Statistics*. The Department uses two tables, which are identified as Exhibits 609 and 610 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual*. Exhibit 609, titled "Wage Base History," is set forth in this chapter. It contains average annual wages for miners by year. This table is updated periodically, and is set forth as follows:

Wage Base History

Year	***Wage Base***
1937-50	$ 3,000.00
1951-54	3,600.00
1955-58	4,200.00
1959-65	4,800.00
1966-67	6,600.00
1968-71	7,800.00
1972	9,000.00
1973	10,800.00
1974	13,200.00
1975	14,100.00

1976	15,300.00
1977	16,500.00
1978	17,700.00
1979	22,900.00
	Established by P.L. 95-216 (Dec. 20, 1977)
1980	25,900.00
	Established by P.L. 95-216 (Dec. 20, 1977)
1981	29,700.00
	Established by P.L. 95-216 (Dec. 20, 1977)
1982	32,400.00[9]
1983	35,700.00
1984	37,800.00
1985	39,600.00
1986	42,000.00
1987	43,800.00
1988	45,000.00
1989	48,000.00
1990	51,300.00
1991	53,400.00
1992	56,600.00
1993	57,600.00
1994	60,600.00
1995	61,200.00
1996	62,700.00
1997	65,400.00
1998	68,400.00
1999	72,600.00
2000	76,200.00
2001	80,400.00
2002	84,900.00
2003	87,000.00
2004	87,900.00
2005	90,000.00
2006	94,200.00
2007	97,500.00
2008	102,000.00
2009	106,800.00
2010	106,800.00
2011	106,800.00

If a fact-finder cites to Exhibit 609 in the decision, then a copy of the formal version of the Exhibit should be attached. *See e.g. The Daniels Co. v.*

[9] Automatically increased after 1981 to take account of increases in the average annual wages.

Director, OWCP [Mitchell], 479 F.3d 321 (4th Cir. 2007) (the court required that a copy of Exhibit 610 be attached where the fact-finder relied on it to determine whether the miner spent 125 working days at a mine site).

D. Documentation supporting length of coal mine employment

1. Social Security earnings records

Social Security earnings records are often part of the record, and generally constitute probative evidence of the length of coal mine employment. However, this source of evidence has its limitations. The first records were kept for 1937, and wages were reported only twice during that year. Further, since 1951, the Social Security Administration only reported earnings up to a certain level, as reflected below. Thus, lack of reported earnings in the fourth quarter of a year does not necessarily mean that Claimant performed no coal mine work during that quarter. Procurement of the Social Security records is not the obligation of the District Director. If the earnings statement does not appear in the record, Claimant must obtain the records if s/he intends to rely on them. *Schmidt v. Amax Coal Co.*, 7 B.L.R. 1-489 (1984).

The regulations at 20 C.F.R. § 404.1047 set forth the annual wage limitation established by the Social Security Administration:

> Payments made by an employer to you as an employee in a calendar year that are more than the annual wage limitations are not wages. The annual wage limitation is:
>
> (a) $3,600 for 1951 through 1954;
> (b) $4,200 for 1955 through 1958;
> (c) $4,800 for 1959 through 1965;
> (d) $6,600 for 1966 through 1967;
> (e) $7,800 for 1968 through 1971;
> (f) $9,000 for 1972;
> (g) $10,800 for 1973;
> (h) $13,200 for 1974;
> (i) $14,100 for 1975;
> (j) $15,300 for 1976;
> (k) $16,500 for 1977;
> (l) $17,700 for 1978;
> (m) $22,900 for 1979;
> (n) $25,900 for 1980;
> (o) $29,700 for 1981; and
> (p) after 1981 an amount equal to the contribution and benefits base figured under § 404.1048 for

that year.

20 C.F.R. § 404.1047.

It is also important to note, starting with the calendar year of 1978, the Social Security Administration only counts those quarters in which Claimant earned $250.00, not $50.00. 20 C.F.R. § 404.143(a). Moreover, Social Security records are only as good as the reporting. Keep in mind many coal companies in the early years would pay in cash, or in company script, without withholding money for Social Security.

Based on the method of computation established by the Social Security Administration, the Board holds counting quarters in which the miner earned $50.00 or more, while not counting the quarters in which he earned less, is a reasonable method of computation. *Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984); *Combs v. Director, OWCP*, 2 B.L.R. 1-904 (1980); *Reboy v. Director, OWCP*, 2 B.L.R. 1-582 (1979). *See also* 20 C.F.R. § 404.140(b). In *Croucher v. Director, OWCP*, 20 B.L.R. 1-67 (1996)(en banc), the Board upheld an Administrative Law Judge's method of calculating the length of Claimant's coal mine employment based on the miner's Social Security records. Notably, the Administrative Law Judge counted only those quarters, wherein the miner earned in excess of $50.00 per quarter from 1937 through 1946. Further, it was proper for the Administrative Law Judge to credit the testimony of Claimant's wife to determine the amount of coal mine employment prior to 1937.

However, the $50.00 rule is not mandatory. Notably, the Board upheld, as reasonable and supported by substantial evidence, an Administrative Law Judge's approximation of the actual time a Claimant spent working full-time by crediting some quarters as only one or two months even though over $50.00 was recorded. *Harrell v. Pittsburgh and Midway Coal Co.*, 6 B.L.R. 1-961 (1984). In *Clayton v. Pyro Mining Co.*, 7 B.L.R. 1-551 (1984), the Administrative Law Judge found the Social Security records reflected minimal earnings for several quarters, and the records did not represent a full quarter of employment.

2. Affidavits

Affidavits concerning Claimant's length of coal mine work constitute relevant evidence, which the Administrative Law Judge may consider within his or her discretion, *Clayton v. Pyro Mining Co.*, 7 B.L.R. 1-551 (1984), despite the hearsay character of the evidence. *Williams v. Black Diamond Coal Mining Co.*, 6 B.L.R. 1-188 (1983).

3. Coal mine employment form completed by the miner

The record in a black lung case usually contains a history of coal mine employment form (Form CM-913) completed by Claimant at the time s/he files an application for benefits. This document does not need to be corroborated to be found credible and, standing alone, may support a length of coal mine employment finding. *Harkey v. Alabama By-Products Corp.*, 7 B.L.R. 1-26 (1984).

4. Claimant's testimony

A finding concerning the miner's length of coal mine employment may be based exclusively on Claimant's testimony, where it is not contradicted and is credible. *Bizarri v. Consolidation Coal Co.*, 7 B.L.R. 1-343 (1984); *Coval v. Pike Coal Co*., 7 B.L.R. 1-272 (1984); *Gilliam v. G & O Coal Co.*, 7 B.L.R. 1-59 (1984). Similarly, where the Social Security earnings record is incomplete, it is reasonable to credit Claimant's uncontradicted testimony in establishing length of coal mine employment. *Niccoli v. Director, OWCP*, 6 B.L.R. 1-910 (1984). However, an Administrative Law Judge may credit Social Security records over Claimant's testimony, where the testimony is unreliable. *Tackett v. Director, OWCP*, 6 B.L.R. 1-839 (1984).

5. Other evidence

Evidence concerning Claimant's work status may also be found on other documentation in the record. Birth certificates of the miner's children, which list Claimant's occupation as a "miner," are relevant to a determination of his status at that time. *Smith v. Director, OWCP*, 7 B.L.R. 1-370 (1984). Statements on marriage certificates, census records, hospital records, death certificates, or military discharge records are similarly relevant. Letters from Claimant's coal mine employers listing his or her period(s) of employment are also probative.

E. Periods included in computing length of coal mine employment

1. Vacation time

a. For claims filed on or before January 19, 2001; vacation included

A paid vacation is a form of compensation for actual labor performed; therefore, the vacation period should be included as part of Claimant's coal

mine employment. *Elswick v. New River Co.,* 2 B.L.R. 1-1109 (1980).

b. For claims filed after January 19, 2001

The Department amended the regulations to delete 20 C.F.R. § 718.301(b) (2000), which provided that "a year of employment means a period of one year, or partial periods totaling one year . . .." Under the new regulations, 20 C.F.R. § 725.301 provides:

> The presumptions set forth in Secs. 718.302, 718.303, 718.305 and 718.306 apply only if a miner worked in one or more coal mines for the number of years required to invoke the presumption. The length of a miner's coal mine work history must be computed as provided by 20 C.F.R. § 725.101(a)(32).

20 C.F.R. § 718.301. The amended regulations at 20 C.F.R. § 725.101(a)(32), in turn, read as follows:

> Year means a period of one calendar year (365 days, or 366 days if one day is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.' A 'working day' means any day or part of a day for which the miner received pay for work as a miner, but shall not include any day for which the miner received pay while on approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

20 C.F.R. § 725.101(a)(32).

In its comments to the changes, the Department stated the following pertaining to vacation and sick leave:

> The Department now has amended the language of § 725.101(a)(32) to clarify that periods of approved absences count only towards the miner's 'year' of employment, and not to the actual 125 'working days' during which the miner must have worked and received pay as a miner. Thus, in order to have one year of coal mine employment, the regulations contemplates an employment relationship totaling 365 days, within which 125

> days were spent working and being exposed to coal mine dust, as opposed to being on vacation or sick leave.

65 Fed. Reg. 79,959 (Dec. 20, 2000).

2. Injury or sick time

a. For claims filed on or before January 19, 2001; injury and sick time included

The time a miner is carried on a payroll due to "injury time" may be counted in determining length of coal mine employment. The Board holds, as a matter of fairness, this time should be counted because the miner could not work due to an employment-related injury. *Soulsby v. Consolidation Coal Co.*, 3 B.L.R. 1-565 (1981), *rev'd on other grounds*, 679 F.2d 888 (4th Cir. 1982)(per curiam). *See also Verdi v. Price River Coal Co.*, 6 B.L.R. 1-1067 (1984).

In *Thomas v. BethEnergy Mines, Inc.*, 21 B.L.R. 1-10 (1997) (on recon.), the Board held the time during which the miner was on sick leave for a back injury counted towards his length of coal mine employment with the responsible operator. Similarly, the Tenth Circuit counted sick leave towards Claimant length of coal mine employment. In *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871 n. 8 (10th Cir. 1996), the court held the Administrative Law Judge properly calculated Claimant's length of coal mine employment to include the time during which "he remained employed by Northern during his sick leave until he was laid off."

b. For claims filed after January 19, 2001; sick leave included

The Department amended the regulations to delete 20 C.F.R. § 718.301(b) (2000), which provided "a year of employment means a period of one year, or partial periods totaling one year . . .." Under the new regulations, 20 C.F.R. § 718.301 provides:

> The presumptions set forth in §§ 718.302, 718.303, 718.305 and 718.306 apply only if a miner worked in one or more coal mines for the number of years required to invoke the presumption. The length of a miner's coal mine work history must be computed as provided by 20 C.F.R. § 725.101(a)(32).

20 C.F.R. § 718.301. The provisions at 20 C.F.R. § 725.101(a)(32), in turn, read as follows:

> Year means a period of one calendar year (365 days, or 366 days if one day is February 29), or partial periods totaling one year, during which the miner worked in or around a coal mine or mines for at least 125 'working days.' A 'working day' means any day or part of a day for which the miner received pay for work as a miner, but shall not include any day for which the miner received pay while on approved absence, such as vacation or sick leave. In determining whether a miner worked for one year, any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year.

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In its comments to the changes, the Department stated the following pertaining to vacation and sick leave:

> The Department now has amended the language of § 725.101(a)(32) to clarify that periods of approved absences count only towards the miner's 'year' of employment, and not to the actual 125 'working days' during which the miner must have worked and received pay as a miner. Thus, in order to have one year of coal mine employment, the regulations contemplates an employment relationship totaling 365 days, within which 125days were spent working and being exposed to coal mine dust, as opposed to being on vacation or sick leave.

65 Fed. Reg. 79,959 (Dec. 20, 2000).

3. Seasonal employment

It is reasonable for an Administrative Law Judge to credit a miner only with the actual time he spent working as a coal miner, even though the practice of the mine in which he worked was to close during the summer months. *Hunt v. Director, OWCP*, 7 B.L.R. 1-709 (1985). Claimant argued the summer months also should be included because he was, in fact, listed on the company's records as an employee. And, the Board held the following in *Thomas v. BethEnergy Mines, Inc.*, 21 B.L.R. 1-10 (1997) (on recon.):

> [W]e now hold that the Administrative Law Judge properly rejected Big Mountain's argument that the language in Section 725.493(b) requiring the miner to have worked for at least 125 working days in order to establish regular employment was

> mandatory. We affirm the Administrative Law Judge's finding that the provisions in Section 725.493(b) were included to provide guidance in factually disputed cases on the question of how to calculate a year of employment for purposes of Section 725.493, and were not intended to deny liability where it is uncontested that a miner was carried on the payroll as an employee for a period in excess of one year.

F. Periods not included in computing length of coal mine employment

1. Seniority time

In *Van Nest*, *supra*, the Board excluded from computation of coal mine employment the period during which the miner was carried on the payroll due to "seniority-time."

2. Voluntary strike time

Time spent by a miner in a voluntary strike does not constitute coal mine employment under the Act. *Tackett v. Cargo Mining Co.*, 12 B.L.R. 1-11, (1988)(*en banc*), *aff'd sub. nom.*, *Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531 and 7578 (6th Cir. May 11, 1989)(unpub.).

3. Laid off

In *Northern Coal Co. v. Director, OWCP*, 100 F.3d 871 (10th Cir. 1996), the Administrative Law Judge properly calculated Claimant's length of coal mine employment to include that time during which “he remained employed by Northern during his sick leave until he was laid off."

4. Time spent as a state mine inspector

By unpublished decision in *D.R. v. Jewell Ridge Mining Corp.*, BRB No. 08-0661 BLA (May 27, 2009) (unpub.), a case arising in the Fourth Circuit, the Board held:

> . . . where a claimant worked as a mine inspector for the state of Virginia, since Virginia cannot be a responsible operator, the length of claimant’s tenure with the state should be subtracted from the length of coal mine employment to be credited to him by the administrative law judge.

Slip op. at 7.