

BRB No. 00-0489 BLA

ESMOND EARL CURRY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CSX TRANSPORTATION,)	
INCORPORATED)	
)	DATE ISSUED: _____
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Petitioner)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Rodney L. Baker, II (Huddleston, Bolen, Beatty, Porter & Copen), Huntington, West Virginia, for employer.

Rita Roppolo (Judith E. Kramer, Acting 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order on Remand (1997-BLA-1499) of Administrative Law Judge Richard A. Morgan 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). This case is before the Board for the second time. In his initial Decision and Order, the administrative law judge found claimant¹ entitled to benefits, dismissed employer as the responsible operator and imposed liability for the payment of benefits on the Black Lung Disability Trust Fund (the Trust Fund). On appeal, the Board affirmed the award of benefits, but remanded the case for the administrative law judge to consider the specifics of claimant's hearing testimony in conjunction with the facts and language in *Norfolk & Western Railway Co. v. Roberson*, 918 F.2d 1144, 14 BLR 2-106 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2012 (1991), to determine whether claimant's employment at CSX Transportation (CSX) is properly considered that of a "miner" within the meaning of the Act and regulations. The Board also directed that if the Trust Fund is held liable on remand, then claimant's attorney's fee petition must be reconsidered in light of the Board's holding in *Schaffer v. Director, OWCP*, 21 BLR 1-97 (1998). *Esmond Earl Curry v. CSX Transportation, Inc.*, BRB No. 98-1264 BLA (Sept. 14, 1999).

On remand, the administrative law judge again found that employer was not the responsible operator because claimant was not a coal miner during his employment at CSX and that the Trust Fund is liable for the payment of benefits on the claim. On appeal, the Director contends that the administrative law judge erred in finding that claimant's work for CSX did not qualify as coal mine employment under the Act and in finding the Trust Fund liable for the payment of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

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

In order to establish that a claimant is a miner within the meaning of the Act and regulations, it must be established that the miner worked with coal that was still in the course of being processed, and not yet a finished product in the stream of commerce (status of the coal test); that the miner performed a function integral to the extraction or preparation of coal and not merely ancillary to the delivery and commercial use of processed coal (function test);

¹Claimant is Esmond Earl Curry, whose initial claim for benefits was filed on March 28, 1995 and denied by the district director on July 17, 1995. Director's Exhibit 34. Claimant filed the instant claim for benefits on July 23, 1996. Director's Exhibit 1.

and that the miner's work occurred in or around a coal mine or a coal preparation facility (situs test). See *Whisman v. Director, OWCP*, 8 BLR 1-96 (1985); see also *Slone v. Director, OWCP*, 12 BLR 1-92 (1988). The United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this claim arises, in defining a miner under the Act, has applied a two-prong "function-situs" test which incorporates the status of the coal test and the function inquiry. See *Collins v. Director, OWCP*, 795 F.2d 368, 9 BLR 2-58 (4th Cir. 1986); *Eplion v. Director, OWCP*, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986).

Initially, the Director contends that the administrative law judge erred in determining that claimant did not meet the "situs" requirement because he did not spend a significant amount of time working at the tipple. Director's Brief at 6-9. In support of his contention, the Director argues that claimant went to a mine every day and that his time at the tipple sites was "significant" because he provided empty cars to the tipple which, were necessary for the preparation of the coal. Director's Brief at 8-9. In his Decision and Order On Remand, the administrative law judge considered claimant's deposition and hearing testimony regarding the amount of time that he spent traveling back and forth to the mines, the amount of time preparing the trains for the delivery of empty cars to the mines, and the amount of time that claimant spent loading coal into the cars at the tipple. Decision and Order on Remand at 5-6. After detailing claimant's job duties, the administrative law judge compared claimant's duties to those of the miner in *Roberson* and concluded that:

Unlike the transportation worker in *Roberson*, the Claimant spent his time cutting empty railroad cars from the locomotive on the main railroad line rather than on the "side" or "supply" tracks which I found constituted a "coal mine" site. The Claimant himself emphasized that the cutting was performed on the main line up to two miles from the mines. As in *Roberson*, the Claimant's work in disassembling and reassembling the empty railroad cars for subsequent delivery to the mines was quite time consuming, i.e., up to three hours. After the empty cars were cut from the locomotive on the main line they were taken to side or supply tracks leading to tipples. The evidence does not establish that this latter period was significant; I find, based upon the evidence concerning the times it took to accomplish his other tasks set forth above, it was comparatively one of the shortest of the miner's tasks and not "significant."

Decision and Order on Remand at 6.² The administrative law judge then noted that, due to an

²In his deposition, claimant testified that at various mines he would "place the empties and the mine employees would let the cars gravitate under the tipple..." and that "the train or locomotive would then pick up the loaded cars and pull them out to Peach Creek." Curry Deposition at 45-46. Claimant also testified that, at West Gilbert mine, he would "put the

irregular work schedule and illnesses, claimant spent virtually no time on or around a coal mine or coal preparation facility for almost half of his thirty years of working for employer and that the great majority of claimant's "road work" consisted of traveling to the mines with empties and returning from the mines with processed coal, and cutting empty cars on the main line. Decision and Order on Remand at 6-7. The administrative law judge also noted that claimant's exposure to coal mine dust from the processed coal while riding on the caboose of the train after leaving the mine did not occur on or around coal mine property. Decision and Order on Remand at 7. Based upon an appropriate consideration of all of the testimony regarding claimant's work duties, in light of *Roberson*, the administrative law judge acted within his discretion in finding that claimant's work for CSX did not constitute the work of a miner since he did not spend a significant portion of time during his work day in or around a coal mine. See *Roberson, supra*; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

The Director also contends that the administrative law judge erred by refusing to consider claimant's "flood-loading" as time spent around the tipple.³ Director's Brief at 9. At the hearing, claimant testified that the tipple would be running when "you run a flood-loading job, but they had a place up here for you to sit. And, they had it blocked off as much as they could get it." Hearing Transcript 59. Inasmuch as claimant's testimony suggests that he was positioned in an area that was away from the tipple, the administrative law judge rationally found that during the later years of his employment, "while flood loading, the only exposure the claimant had was while riding the caboose, not on any coal mine property." Decision and Order on Remand at 7; *Lafferty, supra*. Consequently, we reject the Director's contentions and affirm the administrative law judge's findings that claimant did not satisfy the "situs" portion of the two-part coal miner test, that claimant was not a coal miner during his employment at CSX, and that the Trust Fund is liable for the payment of benefits.

cars on the empty track and then the mine employees would run the cars under the tipple..." and that he would "pick up the full cars that had already been loaded below the tipple...." *Id* at 32-33.

³Claimant described "flood-loading" as follows: "You'd shove down one track, you'd make a cut, but you'd tie your brakes up first so the cars would not move, then you would switch over to another track and come down and load those cars." Hearing Transcript at 54-55.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge