

No. 12-9595

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

**THE WACKENHUT CORPORATION,
Petitioner**

v.

**GLORIANNA HANSEN,
o/b/o ELDON A. HANSEN**

and

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondents**

**On Petition for Review of an Order of the Benefits
Review Board, United States Department of Labor**

BRIEF FOR THE FEDERAL RESPONDENT

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ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF PRIOR OR RELATED CASES

This case was previously before the Court upon The Wackenhut Corporation's petition for review of the Benefit Review Board's November 2009 decision remanding the case to the administrative law judge. *The Wackenhut Corp. v. Director, OWCP*, No. 10-9506. The Court dismissed the petition as premature on April 23, 2010. The Director is unaware of any other prior or related cases.

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BRIEF FOR THE FEDERAL RESPONDENT

**STATEMENT OF APPELLATE AND SUBJECT
MATTER JURISDICTION**

This case involves a claim for benefits under the Black Lung Benefits Act (BLBA), 30 U.S.C. §§ 901-944 (2006 & Supp. IV 2010), filed by Eldon A.

Hansen.¹ On September 20, 2011, Administrative Law Judge William S. Colwell issued a decision awarding Hansen benefits and ordering his former employer, The Wackenhut Corporation (Wackenhut), to pay them. Certified Case Record (CCR) 82. Wackenhut mailed its appeal of the ALJ's decision to the United States Department of Labor Benefits Review Board (Board) on October 20, 2011, CCR 75, within the thirty-day period prescribed by 33 U.S.C. § 921(a), as incorporated into the BLBA by 30 U.S.C. § 932(a). *See* 20 C.F.R. § 802.207(b). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a).

On October 24, 2012, the Board affirmed the award in a final decision. CCR 1. Wackenhut petitioned this Court for review on December 26, 2012. The Court has jurisdiction over Wackenhut's petition because section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c), as incorporated by 30 U.S.C. § 932(a), allows an aggrieved party sixty days to seek review of a final

¹ After Hansen's death in 2009, Glorianna Hansen, his widow and administrator of his estate, was added as a party by order of the Benefits Review Board. As the result of amendments to the BLBA in 2010, Mrs. Hansen will automatically be entitled to survivor's benefits if her husband's disability award is upheld. *See generally West Virginia CWP Fund v. Stacy*, 671 F.3d 378, 388 (4th Cir. 2011) (discussing impact of 2010 amendment on survivors who file claims after January 1, 2005).

Board decision in the court of appeals in which the injury occurred.² The injury, within the meaning of section 21(c), arose in Wyoming, within this Court's territorial jurisdiction.

STATEMENT OF THE ISSUE

The BLBA provides for disability and medical benefits to “miners” who are totally disabled by pneumoconiosis. Anyone who works in or around a coal mine is presumed to be a miner. This presumption can be rebutted if the employer proves that the worker did not extract or prepare coal or perform work integral to the extraction or preparation of coal.

Hansen worked for Wackenhut as a security guard at various coal mines for over ten years and is now totally disabled by pneumoconiosis. In addition to his traditional security work, he had other duties including patrolling the mines to check for safety violations and fires; inspecting and refilling fire extinguishers; and inspecting water pumps in the mine pit. The ALJ found that Hansen was a

² The sixtieth day following October 24, 2012, was Sunday, December 23, 2012; the following day, December 24, 2012, was a legal holiday pursuant to an executive order issued on December 21, 2012; and the next following day, December 25, 2012, was also a legal holiday. Therefore, Wackenhut's petition for review to this Court was timely filed on December 26, 2012. Fed. R. App. P. Rule 26(a)(1)(C) (in computing time, “include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.”).

“miner” for purposes of the BLBA because these non-security tasks were integral to the extraction of coal.

The issue presented is whether the ALJ’s finding that Hansen was a miner is supported by substantial evidence and in accordance with law.

STATEMENT OF THE CASE

Hansen filed a claim for BLBA benefits in July 2001 that was contested by his former employer, Wackenhut. Director’s Exhibit No. 1.³ After a hearing, Administrative Law Judge William S. Colwell (the ALJ) found that Hansen was not a “miner” within the meaning of the BLBA and denied the claim. App.72, 79-80. Hansen appealed to the Benefits Review Board, which vacated the ALJ’s order and remanded the case for further consideration. App.83. Dissatisfied with the remand order, Wackenhut petitioned this Court for review on January 26, 2010. The Court dismissed the appeal as interlocutory on April 23, 2010. *The Wackenhut Corp. v. Director, OWCP*, No. 10-9506.

³ The Index of Documents in the Certified Case Record, submitted February 12, 2013, by Board Clerk Thomas O. Shepherd, does not contain separate entries for the hearing exhibits, hearing transcript, or administrative proceedings occurring before the ALJ’s September 2011 award of benefits. The Director therefore has not provided separate references to the Certified Case Record for these documents, which are instead referenced as Appendix (App.), Director’s Exhibit No. (DX), and Claimant’s Exhibit No. (CX). In addition, Wackenhut’s opening brief is referenced as Op. Br.

On remand, the ALJ ruled that Hansen's job duties qualified the claimant as a "miner." CCR 82, 88-89. He then considered the medical evidence and determined that Hansen was totally disabled by pneumoconiosis. CCR 101-02. The ALJ therefore awarded benefits. CCR 102. Wackenhut appealed, but the Board affirmed the ALJ's award. CCR 1, 4-5. This appeal followed.

STATEMENT OF THE FACTS⁴

A. Hansen's Job Duties.

Hansen's testimony and evidence: From 1984 to 1994, Hansen worked at a number of surface coal mines as a security guard and supervisor for Wackenhut. DX 2, 3, 5; App.42. From January 1984 through February 1985, Hansen worked primarily at the Cahello Rojo and Belle Ayr mines. App.29-30; 43-44; *see also* DX 4-5. At the Cahello Rojo mine, Hansen was required to inspect conveyor tubes for dust or methane build-up and fire hazards during every shift. DX 4-5; App.29. These tubes contained conveyor belts that transported newly-mined coal between crushers and from crushers to storage silos. App.29-30. At Belle Ayr, Hansen worked in the train room every day. App.44. There, he would weigh trains

⁴ Because the only disputed issue in this appeal is whether Hansen is a miner, the medical evidence addressing whether Hansen was totally disabled by pneumoconiosis and the ALJ's evaluation of that evidence is not summarized here.

entering and leaving the coal storage silo, and would stop the trains if they were over- or under-weight. App.30-31, 43.

Most Hansen's career with Wackenhut, from February 1985 to June 1994, was spent at the Black Thunder mine. DX 3, 6; App.24, 41, 43. At Black Thunder, Hansen worked from 6 a.m. to 6 p.m. three days a week, and from 6 a.m. until 12 p.m. one day a week, for a 42-hour week. DX 5; App.24-25. At the beginning of his shift, he stood outside the guard shack, which was one hundred yards from a coal crushing machine. DX 3, 5; App.25-26, 31. His job then was to check-out the exiting supervisors and employees and check-in the arriving supervisors and employees, making sure to inform the incoming supervisors of any problems and making sure the incoming employees had the required equipment. DX 3, 5; App.25-26. He also checked-in contractors and vendors and directed emergency procedures at the guard shack. DX 3, 5; App.26. Hansen explained that he spent twenty-five percent of his time at the guard shack and seventy-five percent of his time at the mine site. App.32.

When not at the guard shack, Hansen patrolled the mine site and mine buildings, a ten-acre area, by walking or driving a truck. DX 29 at 7; App.26-28. He checked for safety violations, trespassers, and fires. DX 3. Specifically, he inspected shovels, drills, and power cables for fires, and inspected (and refilled, if necessary) all fire extinguishers on the mine site. DX 3-5; App.33. He also

inspected all the fire trucks on stand-by to ensure they were “plugged in.” App.26-27. And if blasting occurred on the mine site, he “had to notify the [coal mine] pit of wind direction and the wind speed so people could be out of the way of any . . . toxic waste cloud.” App.31-32. He also patrolled the pit – which was the active mining area – looking for fires in the coal. DX 4; App. 27. At times he would go down into the pit with the mine supervisor to check the equipment. App.27. He also made sure that the water pumps in the mine pit were working properly so as not to flood the pit. DX 5. And he directed emergency procedures. DX 3.

Hansen also submitted two letters by former co-workers at the Black Thunder mine. Jeffrey Kuray, a Wackenhut field maintenance planner, reported in 2002 that he had worked at Black Thunder since 1989 and had “observed Hansen in all areas of the mine that [he, himself] as a . . . coal miner and employee of Black Thunder normally frequented.” DX 29 at 7. Mr. Kuray explained that Hansen “did this by transportation supplied by Wackenhut and by walking his ‘rounds.’” Mr. Kuray added that the “contractors work[ed] right along side of us in all areas of the mine.” *Id.*

William Craig, Black Thunder’s health and safety manager during the time Hansen provided security at the mine, reported in 2002 that Hansen was “exposed to mine hazards on a daily basis” and that, because of this, he was required to attend training required by the Mine Safety and Health Administration. DX 29 at

9. Craig also stated that Hansen monitored traffic into and out of the mine, performed security checks, examined and filled fire extinguishers, and that, on holidays, he monitored all areas of the mine for fires. *Id.*

Wackenhut's testimony and evidence: Wackenhut introduced its “Black Thunder Mine Security Officer Training” manual into evidence. DX 28. The section on “patrol duties” states that the security guard was required to check for fire and smoke in all areas, and to, *inter alia*: regulate and control traffic; report fire hazards; “[w]atch for open valves and excessive water coming from water lagoons or tanks [at the water storage area]”; ensure no blockage of the railroad tracks; “[c]heck for. . . [l]eakage of ammonium nitrate from storage silo” in the explosive area and pit; check the pit for downed power lines; and ensure there was no “[e]xcessive water around the equipment, power cables and power station.” *Id.*; *see also* App.45.

Finally, Andrew Eisaman, a Wackenhut branch manager, testified at the 2007 hearing that, although he did not work during Hansen’s employment, employees from that time told him that security guards worked only at the gate. App.52-53.

B. ALJ’s 2008 Denial of Benefits (App.72).

The ALJ first considered whether Hansen was a “miner” within the meaning of the BLBA by applying the two-prong situs/function test. App.74. The ALJ

found no dispute concerning the situs requirement because Hansen worked in and around various coal mines. App.75. The question was whether Hansen’s work satisfied the function criterion which, in the ALJ’s view, required Hansen to “establish that his work was integral and necessary to the extraction and preparation of coal.” *Id.* Taking his cue from the Sixth Circuit’s decision in *Falcon Coal Co. v. Clemons*, 873 F.2d 916 (6th Cir. 1989), where the court determined that a security guard who either stayed in a guardhouse or rode around the perimeter of the mine site did not satisfy the function requirement, the ALJ concluded that, “[w]hile [Hansen’s] job duties were very important to securing property and contributed to ensuring the safety of employees at the mine site, the duties were not integral or essential to the actual extraction, preparation, or transportation of coal.” App.79-80. Finding that Hansen was not a “miner” under the BLBA, the ALJ denied benefits. App.80.

C. Board’s 2009 Order of Remand (App.83).

At Hansen’s petition for review, the Board vacated the denial and remanded the case for further consideration of whether Hansen’s job duties were integral to the extraction and preparation of coal. The Board’s determination was based in large part on the Director’s assertion that Hansen’s job duties – where he “maintained the fire extinguishers; checked the coal mine area for fire, fire hazards, or methane leaks; checked the readiness of the mine’s fire trucks; monitored the

weight of the train cars to be loaded; and inspected the water pumps in the coal pit to ensure no leaking” – were distinguishable from the duties of the security guard in *Clemons*, who performed only traditional security work.⁵ App.88-89.

The Board also observed that the Sixth Circuit held, that another night watchman was covered by the BLBA in a post-*Clemons* case, *Sammons v. EAS Coal Co.*, No. 82-3030, 1992 WL 348976, at *2 (6th Cir. Nov. 24, 1992) (unpub.). App.89. In addition to his security duties, the claimant in *Sammons* “worked part of each shift as a fire boss, checking the mine for safety and repairing and replacing pipes and pumps.” *Sammons*, 1992 WL 348976, at *2 (quoted in App.89). Because “[s]uch work is vital and essential to the production and extraction of coal, as it keeps the mine operational, safe, and in repair.” *Id.* (quoted in App.89), citing *Clemons*, 873 F.3d at 922-23.

The majority of the Board (2-1) determined that a remand was necessary because “the [ALJ had] failed to properly explain why certain aspects of claimant’s job duties at Black Thunder mine [where Hansen last worked], which appear similar to that of a mine safety inspector, do not qualify claimant as a miner.” App.89. The majority also observed that the ALJ had failed to resolve the conflict

⁵ In the initial ALJ proceeding, the Director had argued that Hansen was not a miner for purposes of the BLBA. After further considering the facts of the case, the Director concluded that Hansen was covered by the Act and argued that to the Board. App.68 n.3, 88 n.6.

between Hansen’s testimony and that of Wackenhut manager Andrew Eisaman concerning Hansen’s exact work duties, and had failed to sufficiently explain why Hansen’s job of weighing, loading and unloading train cars did not constitute covered employment. *Id.* One Board member dissented in part, opining that the Board should reverse rather than remand the coverage issue because Hansen was covered by the BLBA as a matter of law. App. 91.

D. ALJ’s 2011 Award on Remand (CCR 82).

In light of the Board’s observation that certain of Hansen’s job duties were similar to those of a covered mine inspector, the ALJ on remand considered the duties of such inspectors as set forth in the *Dictionary of Occupational Titles* (DOT). CCR 86-87. At Wackenhut’s request, the ALJ also considered the duties of security guards in the DOT. CCR 87. The ALJ determined that DOT’s security guard was “generally less involved,” whereas many of Hansen’s job duties were similar to those of DOT mine inspectors. On this last point, the ALJ observed that: the mine inspector “test[ed] air quality, inspect[ed] mine workings, and observ[ed] mine activities to ensure compliance with the law”; similarly, Hansen “would look for fires in the coal, inspect water pumps to make sure they were operational, and check for dust and methane in ‘conveyor (tubes)’ and coal storage areas[,] . . . check[] equipment for water, air, oil or fuel leaks and [] watch[] for excessive water around power cables and the power station”; and for

six months Hansen “spent some time weighing coal cars and would ensure that coal in overweight cars was removed.” CCR 88. The ALJ also observed that “the DOL mine inspector duties also include[d] instructing mine workers in safety and first aid procedures,” and that Hansen similarly “supervised security guards, patrolled the ten acre mine site by truck,” “went into ‘the pit’ with the mine supervisor to check equipment,” “checked and refilled fire extinguishers, had to be familiar with all evacuation routes, and directed emergency procedures.” *Id.*

The ALJ concluded that there was a “sufficient overlap” of Hansen’s duties with those of the DOT mine inspector, and that the miner’s credible testimony was not undermined by the contrary testimony of Wackenhut’s manager because that employee worked twelve years after Hansen’s employment. CCR 88-89.

Consequently, the ALJ found that Hansen qualified as a miner under the BLBA.

The ALJ also concluded that Wackenhut qualified as a “responsible operator” since the company, while primarily in the business of providing security rather than mining coal, employed Hansen as a “miner” within the meaning of the BLBA. *Id.* See 20 C.F.R. § 725.491(a)(iii), (c).⁶ Finally, after considering the medical evidence the ALJ found that Hansen suffered from a totally disabling

⁶ Wackenhut does not dispute that it is liable as the responsible operator if this court affirms the ALJ’s ruling that Hansen is a “miner.”

respiratory condition arising out of coal mine employment. He accordingly awarded Hansen federal black lung benefits, payable by Wackenhut. CCR 103.

E. Board's 2012 Affirmance (CCR 1).

On appeal to the Board, Wackenhut argued that the ALJ's findings were not sufficiently explained, that the Sixth Circuit in *Clemons* found that a security guard was not a covered employee under the BLBA, and that the Sixth Circuit's unpublished decision in *Sammons* finding coverage of a security worker was neither on point nor binding on the Tenth Circuit. CCR 4. The Board rejected these arguments and instead found that the ALJ's decision was rational, supported by substantial evidence, and sufficiently explained. *Id.* Notably, the Board observed that the ALJ "acted within his discretion in determining that claimant performed tasks that, like those of a mine inspector, were integral to the extraction or preparation of coal, as they ensured the safety of mining operations." *Id.*

SUMMARY OF THE ARGUMENT

The ALJ's finding that Hansen is a miner for purposes of the BLBA should be affirmed. Anyone at a coal mine whose work includes duties that are integrally related to the extraction or preparation of coal is a miner. The ALJ's finding that Hansen performed a number of job duties in addition to the traditional security function – including checking for coal fires, inspecting water pumps, weighing train cars, and inspecting conveyor tubes – is supported by substantial evidence.

And those duties fall comfortably within the range of activities that other courts have found to be integral to coal extraction and preparation.

Contrary to Wackenhut’s argument, the decision below is entirely consistent with *Falcon Coal Co. v. Clemons*, 873 F.2d 916 (6th Cir. 1989). While that case held that a night watchman at a coal mine was not covered by the BLBA, the watchman in that case performed only traditional security functions. When the Sixth Circuit encountered a night watchman who also spent a portion of his time working as a fire boss, inspecting the mine for safety, and replacing water pumps and pipes, it correctly held that the worker was a miner covered by the BLBA. *Sammons v. EAS Coal Co.*, No. 92-3030, 1992 WL 348976, at *2 (6th Cir. Nov. 24, 1992) (unpub.) The remaining authorities cited by Wackenhut are readily distinguishable. The award should be affirmed.

ARGUMENT

A. Standard of Review.

This case involves questions of both fact and law. With respect to questions of fact, the Court reviews the ALJ’s findings under a substantial-evidence standard. *Energy West Min. Co. v. Oliver*, 555 F.3d 1211, 1217 (10th Cir. 2009). The Court “will not reweigh the evidence considered by the agency, but only inquire into the existence of evidence in the record that a reasonable mind might accept as adequate to support its conclusion.” *Id.* at 1217 (quotation and emphasis omitted).

The weighing of conflicting evidence “is within the sole province of the ALJ.”

Hansen v. Director, OWCP, 984 F.2d 364, 368 (10th Cir. 1993).

This Court exercises *de novo* review over questions of law. *Anderson v. Director, OWCP*, 455 F.3d 1102, 1103 (10th Cir. 2006). As the administrator of the BLBA, the Director’s interpretation of the statute is entitled to deference. *See Lukman v. Director, OWCP*, 896 F.2d 1248, 1250-51 (10th Cir. 1990). The Director’s interpretation of the BLBA, as expressed in its implementing regulations, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as is his interpretation of the BLBA’s implementing regulations in a legal brief. *Mullins Coal Co. v. Director, OWCP*, 484 U.S. 135, 159 (1988) (citation and quotation omitted); *see also Auer v. Robbins*, 519 U.S. 452, 461-62 (1997).

B. The ALJ properly concluded that Hansen’s work qualifies him as a miner under the BLBA.

1. Any worker who performs work integral to the extraction or preparation of coal at a coal mine site is a miner.

The BLBA defines “miner” as, *inter alia*, “any individual who . . . has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal.” 30 U.S.C. § 902(d); 20 C.F.R. § 725.202(a) (mirrors same).⁷

⁷ The term “miner” also includes employees who work in coal mine construction or transportation to the extent they are exposed to coal dust. 30 U.S.C. § 902(d); 20 C.F.R. § 725.202(b).

While this Court has not addressed the issue, its fellow courts of appeals have understood this definition to include two requirements: to be a miner, the individual must 1) work in or around a coal mine or coal preparation plant (the “situs” requirement); and 2) be employed in the extraction or preparation of coal (the “function” requirement).⁸ There is no dispute that Hansen’s work for Wackenhut at Black Thunder, Belle Ayr, Cahello Rojo, and other surface or “strip” mines satisfies the situs requirement. This appeal therefore concerns only the function requirement.

A worker who wields a pick axe to extract coal or operates a coal crusher to prepare it obviously satisfies the function test.⁹ But the definition of “miner” is not limited to such people. Work that is “integral” to the extraction or preparation process is sufficient to satisfy the function test. *Amax Coal Co. v. Fagg*, 865 F.2d at 917-18 (rejecting employer’s argument that “only work which is related to the

⁸ See, e.g., *Hanna v. Director, OWCP*, 860 F.2d 88, 91 (3d Cir. 1988) (applying two-prong situs/function test); *Amigo Smokeless Coal Co. v. Director, OWCP*, 642 F.2d 68, 70 (4th Cir. 1981) (same); *Director, OWCP v. Consolidation Coal Co. [Petracca]*, 884 F.2d 926, 929 (6th Cir. 1989) (same); *Fox v. Director, OWCP*, 889 F.2d 1037, 1039 (11th Cir. 1989) (same).

⁹ “Coal preparation” is defined 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.” 20 C.F.R. § 725.101(a)(13). “Extraction” is not defined in the regulations, but has been similarly interpreted to include “all work which is part of the modern commonly-applied process of extracting . . . coal.” *Amax Coal Co. v. Fagg*, 865 F.2d 916, 919 (7th Cir. 1989).

actual physical extraction or preparation of coal may be considered mining work”).¹⁰ The Supreme Court has applied a similarly broad construction to the Longshore Act’s “function” test to include not only loading and unloading ships, but also any activities integral to loading or unloading. *See, e.g., Chesapeake and Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 46 (1989).¹¹

Nor does the function test limit the BLBA’s coverage to employees who work *solely* on tasks integral to coal extraction or preparation. A “working day” for purposes of the BLBA is “any day or *part of a day* for which a miner received pay for work as a miner[.]” 20 C.F.R. § 725.101(a)(32) (emphasis added). Thus,

¹⁰ *See also Elliot Coal Mining Co., Inc. v. Director, OWCP [Kovalchick]*, 17 F.3d 616, 640 (3d Cir. 1994) (“The function part of the test requires that the claimant’s job be integral to the extraction or preparation of coal . . . [e]ven work which does not meet a strict ‘but for’ test, *i.e.* but for the work no coal could be extracted or prepared, may be covered[.]”) (citations and quotations omitted); *Norfolk and Western Railway Co. v. Director, OWCP [Shrader]*, 5 F.3d 777, 780 (4th Cir. 1993) (“We are of opinion that the delivery of empty cars to a preparation facility is integral to the process of loading coal at the preparation facility and therefore is part of coal preparation.”); *Fox*, 889 F.2d at 1040 (“Coal preparation activities which are an integral part of the coal production process are covered under the Act whereas the use a consumer makes of the coal it acquires is not covered.”).

¹¹ The Longshore and Harbor Workers’ Compensation Act, 33 U.S.C. §§ 901-950, is a federal workers’ compensation program whose administrative procedures are incorporated into the BLBA pursuant to 30 U.S.C. § 932(a) and is also administered by the Director. Like the BLBA, the Longshore Act covers workers who satisfy “situs” and “function” tests (though the latter is generally referred to as “status” rather than “function”). Workers “engaged in maritime employment,” which includes loading or unloading ships and various other maritime activities, satisfy the status test. 33 U.S.C. §§ 903(a), 902(3).

if even one of the tasks an employee performs in a given workday is integral to coal extraction or preparation, he or she is employed as a miner. *See Sexton v. Mathews*, 538 F.2d 88, 89 (4th Cir. 1976); *cf. Schwalb*, 493 U.S. at 47 (“It is irrelevant that an employee’s contribution to the loading process is not continuous or that repair or maintenance is not always needed.”).

2. The ALJ permissibly found that Hansen was a miner.

The award in this case is perfectly consistent with the statute, regulations, and prevailing caselaw. The ALJ found that Hansen’s job duties included, *inter alia*, checking for fires in the coal area; inspecting water pumps to prevent flooding of the mine pit; keeping fire extinguishers filled; overseeing emergency procedures; checking for dust and methane in conveyor tubes; and, for at least six months, weighing train cars both before and after they were loaded with coal. CCR 88-89. These findings are supported by substantial evidence in the record, in particular the testimonial and documentary evidence submitted by Hansen. *See supra* at 5-8.

In its opening brief, Wackenhut does not dispute the ALJ’s description of Hansen’s job duties. Nor does the company facially challenge the rule that the function requirement is satisfied by work “integral” to extraction and preparation. *See Op. Br.* 11-13 (discussing covered work as “vital,” “essential” and “integral”). Rather, it attacks the ALJ’s conclusion that Hansen’s duties were integral to the

extraction of coal at the mines where he worked. In making this attack, Wackenhut faces two substantial obstacles. It overcomes neither.

First, Wackenhut fails to acknowledge that Hansen's work is presumed to be integral to coal extraction and preparation by virtue of 20 C.F.R. § 725.202(a). That section provides that "[t]here shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner." Since there is no doubt that Hansen worked in and around Black Thunder and other coal mines, he is entitled to this presumption. The question before the ALJ was not whether Hansen proved that he regularly performed duties that were integral to coal extraction or processing, but whether Wackenhut proved that he did not. The ALJ's implicit finding that Wackenhut's evidence on the subject was inadequate to rebut that presumption is hardly an abuse of the ALJ's broad fact-finding discretion. CCR 87-89.

The second and more daunting challenge Wackenhut faces is the fact that the BLBA's coverage provision has been broadly construed. While this Court has no decisions concerning coverage, numerous other circuits have weighed in and found individuals to be "miners" when the work performed was far afield of a traditional understanding of what a miner is. These decisions not only give some insight into the range of job duties that are "integral" to coal extraction and preparation, but also illustrate that the "function" inquiry focuses on what the

workers actually did rather than on their job titles or the type of operation that employed them. *See generally Hanna*, 860 F.2d at 92 (holding that coverage “under the Act is determined by evaluation of what [the worker] did, and not by who employed him”).

For instance, the Fourth Circuit held that a laboratory worker who collected coal samples at various mines and preparation plants to determine coal composition for purposes of pricing was covered by the BLBA. *Amigo Smokeless Coal Co. v. Director, OWCP*, 642 F.2d 68, 70, 71 (4th Cir. 1981) (observing that the “evidence tended to show that knowledge of the chemical composition and energy content of the coal was a necessary step in [the coal company]’s preparation of the coal for sale”). And the same circuit covered a railroad employee who delivered empty railroad cars to coal preparation facilities to be loaded with prepared coal. *Norfolk and Western Railway Co. v. Director, OWCP [Shrader]*, 5 F.3d 777, 780 (4th Cir. 1993). As the court explained: “The delivery of empty cars to a preparation facility is integral to the process of loading coal at the preparation facility and therefore is part of coal preparation.” *Id.* Similarly, the Third Circuit covered a tug boat employee who steadied water barges to enable coal to be loaded onto the barges from various preparation facilities. *Hanna*, 860 F.2d at 93 (“Hanna’s part in the removal of the coal from the tipple [i.e., the preparation plant] was a step, if only the very last step, in the preparation of the coal.”).

Similarly, the Seventh Circuit found that an office worker who spent part of her time at coal mines supervising the switching of coal grates and railroad cars and determining how and to whom coal was shipped was sufficiently involved in coal preparation to be covered by the BLBA. *Adelsberger v. Mathews*, 543 F.2d 82, 84-85 (7th Cir. 1976). That court also held covered a railroad employee who washed railroad cars that were soon to be loaded with prepared coal from a mine's preparation plant. *Mitchell v. Director, OWCP*, 855 F.2d 485, 490 (7th Cir. 1988). And in *Amax Coal Co. v. Fagg*, 865 F.2d 916, 919-20 (7th Cir. 1989), it held that an employee who used a bulldozer to level off the dirt removed during previous strip mining so that the land could be "reclaimed" and reseeded for eventual use in farming was a "miner" covered by the BLBA.

While none of these activities at issue in these cases involved traditional coal mining work, the Third, Fourth, and Seventh Circuits correctly ruled that all the claimants were miners covered by the BLBA.¹² These BLBA coverage decisions are consistent with the Supreme Court's interpretation of the Longshore Act's

¹² A number of BLBA coverage decisions involve employees who repaired mine equipment at machine shops. See, e.g., *Baker v. United States Steel Corp.*, 867 F.2d 1297, 1298-99 (11th Cir. 1989); *Director, OWCP v. Ziegler Coal Co. [Wheeler]*, 853 F.2d 529, 537 n.11 (7th Cir. 1988); *Director, OWCP v. Consolidation Coal Co. [Petracca]*, 884 F.2d 926, 930 (6th Cir. 1989). While there has been litigation whether the shops where those claimants performed the repairs satisfied the BLBA's situs requirement, the function requirement has never been at issue because there has never been any dispute that the repair of mine equipment is integral to coal extraction and preparation.

function test. In *Schwalb*, the Court found that railway janitorial employees performed work integral to loading where they cleaned coal from underneath conveyor belts used to transport coal from a railroad hopper car to a ship. The Court explained that such workers, although not traditional longshore workers, were covered because their work was integral to loading cargo on the ship:

Coverage is not limited to employees who are denominated ‘longshoremens’ or who physically handle the cargo. . . . Someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment. When machinery breaks down or becomes clogged or fouled because of the lack of cleaning, the loading process stops until the difficulty is cured.

493 U.S. at 47. Thus, the Supreme Court, in determining whether work is “integral” to the statutory requirement, cast a wide net.

Hansen’s work in the train room at the Belle Ayr mine (weighing trains before they entered or left the coal silo to ensure that they were not over- or under-weight) is very similar to the train-preparation work found to be integral to coal processing by the Fourth and Seventh Circuits in *Shrader* and *Adelsberger*.

Inspecting conveyor tubes transporting newly-mined coal to the crushers and silo at the Cahello Rojo mine is analogous to the conveyor-belt maintenance work that the Supreme Court found to be “integral” to loading ships in *Schwalb*. And Hansen’s work patrolling the Black Thunder mine for coal fires and inspecting the mine pit’s water pumps is at least as essential to the extraction and processing of

coal as the land-reclamation found to be covered in *Fagg* or the laboratory work at issue in *Amigo Smokeless Coal*. Hansen’s work throughout his career with Wackenhut included many duties that fall comfortably within the BLBA’s definition of mining, as interpreted by the circuit courts.

3. The ALJ’s decision is consistent with *Falcon Coal Co. v. Clemons*.

Against these obstacles, Wackenhut relies on *Falcon Coal Co. v. Clemons*, 873 F.2d 916 (6th Cir. 1989). Op. Br. 10-14. While that decision held that a night watchman’s duties were not “integral” to coal extraction or preparation, its analysis actually undermines Wackenhut’s position. *Clemons* does not stand for the proposition that any worker with the job title “night watchman” or “security guard” is barred from BLBA coverage.

In *Clemons*, the court had before it a night watchman at a surface mine who “worked inside a guardhouse provided for him, but claimed to spend some time outside on the strip mine or driving his truck around the site.” 873 F.2d at 919. At the outset, the court observed that, while traditional security work could not be said to involve actual extraction or preparation, the claimant could be eligible for benefits if he also performed other incidental work that was “integral” to extraction or preparation rather than just convenient. *Id.* at 922. The court then considered various Board decisions on the issue, as well as the Fourth Circuit’s unpublished decision in *Director, OWCP v. West Virginia Workers’ Compensation Coal-*

Workers Pneumoconiosis Fund [Lambert], No. 86-1222, 1998 WL 21181, at *3 (4th Cir. Mar. 8, 1988), where the court denied coverage because all the night watchman did was “sit[] in a line-shack and watch[] non-operating equipment.” The Sixth Circuit concluded that the claimant’s work, while convenient and helpful, was not integral to extraction or preparation, and that the coal company “might just as well have installed alarms or other security devices instead of hiring a security guard, because the type of security system used does not affect extraction methods at the mine.” 873 F.2d at 923.

Just two years later, the Sixth Circuit had the opportunity to consider whether a night watchman who did more than just traditional security work was covered by the BLBA. In *Sammons v. EAS Coal Co.*, No. 92-3032, 1992 WL 348976 (6th Cir. Nov. 24, 1992), the watchman, in addition to performing traditional security work, also “worked part of each shift as a fire boss, checking the mine for safety and repairing and replacing pipes and pumps.” *Id.*, at *2. The court found these facts distinguishable from those in *Clemons* because the claimant’s work as a fire boss, unlike that of the claimant in *Clemons*, “was vital and essential to the production and extraction of coal, as it keeps the mine operational, safe, and in repair.” *Id.*

Wackenhut describes *Sammons* as being “in apparent contradiction to *Clemons*.” Op. Br. 13. But the cases are entirely consistent. In both, the Sixth

Circuit looked at what work the claimants actually did rather than their job titles. In both, the court asked whether the claimant performed tasks that kept the mine safe, operational, and in repair. *Sammons*, 1992 WL 348976, at *2; *Clemons*, 873 F.2d at 922-23. While *Clemons* did not, *Sammons* did. So did Hansen.¹³

Wackenhut attempts to distinguish *Sammons* on the ground that *Sammons* repaired the pumps and pipes, whereas Hansen only inspected the pumps and pipes and alerted other workers if he discovered a leak. This argument, however, is faulty: if the person who repairs pipes and pumps is performing “integral” work, then the person who is on the mine site and calls in the alarm about the pipes and pumps is no less important. *See Amigo Smokeless Coal Co. v. Director, OWCP*, 642 F.2d 68, 71 (4th Cir. 1981) (observing that, “[i]f testing the coal in the laboratory is also part of the preparation of the coal, then transporting the coal from the excavation site to the laboratory is . . . evidently work of preparing coal”).¹⁴

¹³ Wackenhut argues that this *Clemons* should control because both *Clemons* and Hansen “worked at a surface coal mine, patrolled the surface mine site occasionally in a pickup truck, and was a longtime heavy cigarette smoker.” Op. Br. at 12. Since 1972, the BLBA has covered both underground and surface mines. *See* 30 U.S.C. § 902(d). And the fact that one of Hansen’s duties was to patrol the mine site in a pickup truck has no bearing on whether he had other duties that were integral to coal extraction or preparation. Finally, while Hansen’s smoking history may be relevant to his physical condition and to the cause of his respiratory disability, it is irrelevant to the question of whether he is a miner, as attested to by Wackenhut’s failure to provide any support for its argument.

¹⁴ In any event, it is not clear from the record whether Hansen only identified problems with the pipes and pumps or if he performed more active repair or

4. None of Wackenhut's remaining authorities undermines Hansen's award.

Wackenhut also cites, with little or no analysis, several decisions by the courts of appeals finding that various workers are not covered by the BLBA. Op. Br. 11-13, 16-17. This shotgun approach is unsuccessful because none of the cited cases are on point. They are addressed briefly below.

Many of these decisions involve employees who worked with coal *after* it had been extracted, prepared, and entered the stream of commerce. See *Director, OWCP v. Consolidation Coal Co.[Krushansky]*, 923 F.2d 38 (4th Cir. 1991) (dock worker transferred fully-prepared coal); *Richmond v. Director, OWCP*, No. 86-3072, 1987 WL 36657 (4th Cir. Mar. 5, 1987) (“Richmond’s work involved the movement of the waste coal in the process of making briquettes. At this point, the coal has in essence left the extraction and preparation stage and entered into a separate manufacturing process.”). Because these activities occurred *after* coal was extracted and prepared, the courts logically held that such work was not integral to extraction and preparation. See generally *Fagg*, 865 F.2d at 919 (“In arriving at a test for what is or is not the work of a miner, courts have distinguished between work accomplished before and after the finished coal product enters the

maintenance work if there was a problem. Given that it was Wackenhut’s burden to rebut the presumption that Hansen was a miner, 20 C.F.R. § 725.202(a), Wackenhut’s failure to clarify this fact is to the company’s detriment, not Hansen’s.

stream of commerce.”) (citing cases). In contrast, Hansen performed his job duties while coal was still being extracted and processed.

Wackenhut also cites decisions rejecting BLBA claims by a blacksmith, *Hon v. Director, OWCP*, 699 F.2d 441, 444-45 (8th Cir. 1983); a clay miner who removed coal merely to reach the clay, *Wisor v. Director, OWCP*, 748 F.2d 176, 179 (3d Cir. 1984); and a trucker who hauled slate, which “is not coal but a byproduct of coal mining,” from a mine tippie, *Collins v. Director, OWCP*, 795 F.2d 368, 370-72 (4th Cir. 1986). None aid its argument. *Hon* gives no facts concerning where the blacksmith was located or what work was done, making any comparison with Hansen’s work situation impossible; the clay miner’s claim was denied because the clay mine where he worked did not satisfy the BLBA’s *situs* test; and the trucker’s hauling of slate from the tippie had no effect on the extraction or preparation of *coal*.

The next group of decisions Wackenhut cites involves workers who made deliveries *to* various coal mines but did nothing to directly aid in the extraction or preparation of coal. See *Hagy v. Director, OWCP*, No. 88-3809, 1988 WL 86660, at *2 (4th Cir. Aug. 16, 1988) (affirming ALJ’s ruling that claimant, who delivered bags of limestone dust to a coal mine, was not a miner, but observing that “the question is close”); *Frost v. Director, OWCP*, No. 85-4034, 1987 WL 37851, at *6 (6th Cir. June 26, 1987) (affirming ALJ’s ruling that claimant, who delivered

lunches to miners, was not a miner as defined by the BLBA; explaining that food delivery, while “convenient,” was simply “too far removed from the extraction or preparation process to be considered qualifying coal mine employment”). Unlike Hagy and Frost, Hansen was no mere deliveryman, and his work was necessary to ensure that the mines where he worked extracted and processed coal smoothly and safely. CCR 88-89.

Wackenhut correctly points out that the Fourth Circuit ruled that federal mine inspectors are not miners for purposes of the BLBA in *Kopp v. Director, OWCP*, 877 F.2d 307 (4th Cir. 1989). Op. Br. 17. This, suggests petitioner, undermines the ALJ’s decision because the ALJ analogized Hansen’s duties to a mine inspector’s. *Id.* But Wackenhut neglects to provide that decision’s rationale. The court in *Kopp* concluded that “a federal inspector’s exclusive remedy for on-the-job coal dust exposure was through the Federal Employees’ Compensation Act, 5 U.S.C. § 8116(c), because his employer, the United States, has not consented to be sued for benefits under the BLBA. *See Kopp* at 309 n.1 (citing *Eastern Associated Coal Corp. v. Director, OWCP*, 791 F.2d 1129, 1131 (4th Cir. 1986)). Wackenhut cites no case for the proposition that the *duties* federal mine inspectors typically perform are not integral to coal extraction and preparation.

Finally *Elliot Coal Mining Co. Inc. v. Director, OWCP [Kovalchick]*, 17 F.3d 616 (3d Cir. 1994), cited in Op. Br. 17, does little to advance Wackenhut’s

cause because of the decision's lack of clarity. *Kovalchick* involved an employee of a company that sublet mines to independent contractors. *Id.* at 621-22. The employee's actual duties were disputed by the parties and are not fully clarified by the opinion. For example, the employee stated that he inspected the mine sites to ensure that the contractors were following applicable regulations, while the contractors testified that no such inspections occurred. 17 F.3d at 641. Consequently, while the court found the employee not to be a miner, it is difficult to extract a rule of decision from *Kovalchick* on this issue.¹⁵ In any event, the decision is readily distinguishable. The employee in *Kovalchick* "was present at the mines on only limited occasions[,]” in sharp contrast to Hansen, who spent almost all of his working time at various coal mines.

In sum, Wackenhut has simply failed to identify any reversible error in the ALJ's award. Hansen's work throughout his career with Wackenhut included many duties that fall comfortably within the BLBA's definition of mining, as interpreted by the courts of appeals. The award is consistent with the statute and its implementing regulations, and it should be affirmed.

¹⁵ The primary issue in *Kovalchick* was not whether the employee in question was a miner, but whether the employer was a mine operator. 17 F.3d at 629-40.

CONCLUSION

In view of the foregoing, the Court should affirm the ALJ's award of benefits.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

The Director believes that that oral argument is not necessary in this case because “the facts and legal arguments are adequately presented in the briefs and record,” Fed. R. App.P. 34(a)(2)(C).

CERTIFICATE OF COMPLIANCE CONCERNING
PRIVACY REDACTIONS

Pursuant to 10th Cir. R. 25.5, I certify on June 12, 2013, that all required privacy redactions have been made.

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CERTIFICATE OF COMPLIANCE CONCERNING HARD COPIES

Pursuant to the ECF User Manual, I certify on June 12, 2013, that the hard copies to be submitted to the court and parties to the case are exact copies of the version submitted electronically today.

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CERTIFICATE OF COMPLIANCE CONCERNING VIRUSES

Pursuant to the ECF User Manual, I certify on June 12, 2013, that the electronic submission was scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify on June 12, 2013, that this brief is proportionally spaced, using Times New Roman 14-point typeface, and contains 8,562 words, as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2013, copies of the Director's brief were served electronically using the Court's CM/ECF system on the Court and the following:

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